



ORIGINAL

FILED

2016 MAY 23 PM 1:18

Tracie K. Lindeman
Clerk of Supreme Court
May 25 2016 01:17 p.m.
Filed
DISTRICT COURT

Case No. CV 20112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

NOTICE OF APPEAL

vs.

JASON KING, P.E., Nevada State Engineer,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondent.

Notice is hereby given that the State Engineer of Nevada, Office of the State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, Division of Water Resources ("Nevada State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General Justina A. Caviglia, hereby appeals to the Nevada Supreme Court from the Order Overruling State Engineer's Ruling 6287 entered by this Court on April 22, 2016. Notice of Entry of Order was served on April 27, 2016. A copy of said Notice of Entry of Amended Order is attached hereto as Exhibit 1.

///

///

///

///

///

///

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 20th day of May, 2016.

ADAM PAUL LAXALT
Attorney General

By:

JUSTINA A. CAVIGLIA
Deputy Attorney General
Nevada Bar No. 9999
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1222
Fax: (775) 684-1108
Email: jcaviglia@ag.nv.gov
*Counsel for Respondent,
Nevada State Engineer*

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 20th day of May, 2015, I served a true and correct copy of the foregoing NOTICE OF APPEAL, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Paul G. Taggart, Esq.
Rachel L. Wise, Esq.
TAGGART & TAGGART
108 North Minnesota Street
Carson City, Nevada 89703

Dorene A. Wright
Dorene A. Wright

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Notice of Entry of Order Overruling State Engineer's Ruling 6287 filed April 29, 2016	18

EXHIBIT 1

EXHIBIT 1

108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 - Telephone
(775)883-9900 - Facsimile

Case No. CV 20112

Dept. No. 2

FILED

2016 APR 29 AM 10:38

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR.

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES.

Respondent.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on April 22, 2016, the above-entitled court entered an *Order Overruling State Engineer's Ruling 6287*, a copy of which is attached hereto as "Exhibit 1."

///

///

///

///

///


///

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any persons.

DATED this 27th day of April 2016.

TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

By: 

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
Attorneys for Petitioner

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

1 CERTIFICATE OF SERVICE

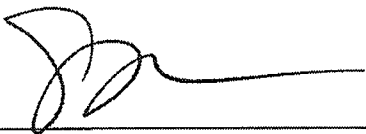
2 Pursuant to NRC 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART
3 & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the
4 foregoing, as follows:

5 ☒ [X]

6 By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with
7 postage prepaid, an envelope containing the above-identified document, at Carson City,
8 Nevada, in the ordinary course of business, addressed as follows:

9 Justina Caviglia
10 Nevada Attorney General's Office
11 100 North Carson Street
12 Carson City, Nevada 89701

13 DATED this 27th day of April 2016.

14 

15 Employee of TAGGART & TAGGART, LTD.
16
17
18
19
20
21
22
23
24
25
26
27
28

Case Title: *St. Clair v. King*

Case No.: CV 20112

INDEX OF EXHIBITS

Exhibit No.

Description

1

Order Overruling State Engineer's Ruling 6287

EXHIBIT 1

EXHIBIT 1

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondent.

**ORDER OVERRULING STATE
ENGINEER'S RULING 6287**

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 - Telephone
(775) 882-9900 - Facsimile

THIS MATTER came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "St. Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed an Opening Brief on December 8, 2014. Respondent, JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State Engineer") filed an Answering Brief on January 22, 2015. St. Clair filed a Reply Brief on February 27, 2015.

Oral argument was heard by this Court on January 5, 2016 in the First Judicial District Courthouse by stipulation of the parties. Petitioner is represented by Paul G. Taggart, Esq. and Rachel L. Wise, Esq. of Taggart and Taggart, Ltd. Respondent is represented by Attorney General Adam Laxalt and Deputy Attorney General Justina Caviglia.

1 This Court, having reviewed the record on appeal,¹ and having considered the arguments of the
2 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this
3 matter, hereby **OVERRULES** Ruling 6287 in part; based upon the following findings of fact, conclusions
4 of law and judgment.

5 FACTS AND PROCEDURAL HISTORY

6 St. Clair owns real property located in Humboldt County, Nevada, (Assessor's Parcel Number
7 ("APN") 03-491-17), which was purchased in August, 2013. On November 8, 2013, St. Clair filed two
8 documents with the State Engineer. The first was a Proof of Appropriation, V-010493, claiming a vested
9 right to an underground water source for irrigation of 160 acres of land. The second was Application
10 No. 83246T to change the point of diversion of the vested water claim. To support the vested claim, St.
11 Clair presented evidence of the application of the water to beneficial use prior to March 25, 1939, the
12 operative date for the State Engineer to consider for vested claims to groundwater.

13 In Ruling 6287, the State Engineer found that St. Clair had pre-statutory rights to the
14 underground percolating water which were vested prior to March 25, 1939.² The State Engineer stated
15 that "[t]ogether, these facts evidence that underground waters [V-010493] were appropriated by the
16 drilled well and used beneficially . . . prior to March 25, 1939."³ The following facts support the State
17 Engineer's decision:

18 (1) A land patent was acquired by Mr. Crossley pursuant to the Homestead Act of 1862 for the
19 St. Clair property;

20 (2) A well was constructed with technology which ceased to be utilized in the mid-1930's;

21 (3) Aerial photographs exist for the property for the years 1968, 1975, 1986, 1999, 2006, and
22 2013;⁴

23 (4) Lack of any evidence of the failure to pay taxes and assessment fees for the right to use the
24 water right;

25 (5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa

26
27 ¹ See Respondent's Summary of Record on Appeal ("SE ROA"); see also Petitioner's Appendix; see also Petitioner's Request
for Judicial Notice in Support of Petitioner's Reply Brief ("Request for Judicial Notice").

28 ² SE ROA 0006.

³ SE ROA 004-006.

⁴ These documents were not included in the State Engineer's ROA and were not subject to review by this Court.

1 with groundwater using drilled wells;

2 (6) A report created by Stanka Consulting, LTD., stating that on February 19th, 1924, George
3 Crossley signed the Testimony of Claimant as part of the final paperwork required to complete the
4 Homestead Act land acquisition which described the water right;⁵

5 (7) A patent from President Calvin Coolidge dated April 21st, 1924 describing the water right
6 granted to St. Clair;⁶

7 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933⁷ was found
8 on the property; and

9 (9) A chain of title from St. Clair's predecessors-in-interest that does not include any
10 conveyances by tax or foreclosure sales.⁸

11 The State Engineer's determination that St. Clair's water rights were valid pre-1939 vested
12 rights was not appealed. However, the State Engineer then declared that 502.4 acre-feet annually
13 ("afa") of a vested water right was abandoned by the holder of the right.⁹ Notably, this declaration of
14 abandonment was the first time in Nevada's history that the State Engineer declared a vested
15 groundwater right abandoned.¹⁰ In doing so the State Engineer placed the burden of proof on St. Clair
16 to demonstrate a lack of intent to abandon Vested Claim 010493. Specifically, the State Engineer stated
17 that, "[a]t minimum, then, proof of continuous use of the water right should be required to support a
18 finding of *lack* of intent to abandon."¹¹ Also, the State Engineer repeatedly referred to evidence of non-
19 use of the underground water as constituting evidence of St. Clair's intent to abandon their water
20 rights.¹²

21 St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287
22 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that
23 the intent to abandon a water right must be shown by more than mere non-use evidence.¹³ St. Clair also

24 ⁵ SE ROA 0037.

25 ⁶ SE ROA 0045.

26 ⁷ SE ROA 0102.

⁸ SE ROA 0038-0066.

⁹ SE ROA 008 - 009.

¹⁰ Petitioner's Reply Brief, Exhibit I.

27 ¹¹ *Id.* (emphasis in the original) (citing *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)).

¹² SE ROA 007- 009.

28 ¹³ *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1072 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the*

1 argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent
2 to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to
3 support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to
4 abandon the water rights without conducting a formal adjudication.

5 DISCUSSION

6 The State Engineer's holding that "Applicants' admission the water has not been used
7 continuously coupled with the admission they are without knowledge of when it was, or was not used . . .
8 find that Proof of Appropriation V-010493 has been abandoned" is overturned because it is arbitrary,
9 capricious, contrary to law and not supported by substantial evidence.¹⁴ The State Engineer's
10 misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment of
11 a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair to
12 demonstrate lack of intent to abandon the water right.

13 I. STANDARD OF REVIEW

14 A party aggrieved by an order or decision of the State Engineer is entitled to have the order or
15 decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is "in the
16 nature of an appeal," and review is generally confined to the administrative record.¹⁵ The role of the
17 reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discretion,
18 or if it was otherwise affected by prejudicial legal error.¹⁶ A decision is arbitrary and capricious if it is
19 "baseless" or evidences "a sudden turn of mind without apparent motive...."¹⁷ With regard to factual
20 findings, the court must determine whether substantial evidence exists in the record to support the State
21 Engineer's decision.¹⁸ Substantial evidence is "that which a 'reasonable mind might accept as adequate to
22 support a conclusion.'"¹⁹ With regard to purely legal questions, such as statutory construction, the standard

23 *State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264
24 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

25 ¹⁴ SE ROA 005.

¹⁵ NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

26 ¹⁶ *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dist. v.*
State, Dep't Taxation, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992) ("[a]s a general rule, a decision of an administrative
27 agency will not be disturbed unless it is arbitrary and capricious").

¹⁷ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

¹⁸ *Id.*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert v. Ray*, 95 Nev. at 786, 603 P.2d at 264.

28 ¹⁹ *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Employee Sec. Dep't v. Hilton Hotels*
Corp., 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

of review is de novo.²⁰

II. ST. CLAIR'S REQUEST FOR JUDICIAL NOTICE.

As a preliminary matter, on February 27, 2015, St. Clair filed Petitioners' Appendix. Petitioners' Appendix included twenty-six (26) previous rulings by the State Engineer between 1984 and 2012 which demonstrate the State Engineer's prior application of the law of abandonment to water rights. The rulings are public documents capable of review maintained by the State Engineer at his office and online. On June 3, 2015, St. Clair submitted a Request for Judicial Notice in Support of Petitioners' Reply Brief ("Request for Judicial Notice") to this Court. The Request for Judicial Notice contained three exhibits:

(1) the State Engineer's July 24, 2002 *Appellee Nevada State Engineer's Answering Brief* in the Ninth Circuit Court of Appeals, Case Nos.: 01-15665; 01-15814; 01-15816; of the case *United States of America, and Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Company, et. al.* ("*Alpine Decree*"); the Nevada State Engineer appeared as a Real-Party-in-Interest/Appellee in the *Alpine Decree* and filed the above-referenced Answering brief in the matter that resulted in the decision that is published at 291 F.3d 1062;

(2) the State Engineer's Ruling on Remand 5464-K, issued as a result of the Ninth Circuit District Court's Decision at 291 F.3d 1062; and

(3) the Nevada State Engineer's Answering Brief filed in the Ninth Circuit District Court of Appeals, Case No.: 06-15738, filed on or around November 22, 2006, relating to the *Alpine Decree*.

This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorable Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance of impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition to Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judicial Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility of Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included in the Request for Judicial Notice exist or are public documents.

The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court further finds that all documents submitted are public documents capable of accurate and ready determination by

²⁰ *In re Nevada State Eng'r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

1 resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that all
2 documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are entered
3 onto the record of this Court for this case pursuant to NRS 47.130-150.

4 **III. EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.**

5 Nevada follows a bright line rule of law to guide courts and the State Engineer in determining and
6 analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owner
7 *with the intent* to "forsake and desert it."²¹ Intent is the necessary element the State Engineer is required to
8 prove in abandonment cases.²² This is the standard the State Engineer has previously relied upon.²³ In fact,
9 the State Engineer has explained that "Nevada case law discourages and abhors the taking of water rights
10 away from people," and that is why abandonment must be proven by clear and convincing evidence.²⁴

11 Abandonment requires a union of facts and intent to determine whether the owner of the water
12 right intended abandonment.²⁵ As intent to abandon is a subjective element, the courts utilize all
13 surrounding circumstances to determine the intent.²⁶ Because subjective intent to abandon is a necessary
14 element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer's
15 burden because nonuse does not necessarily mean an intent to forsake.²⁷ Thus, if a vested water right
16 holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occur.
17 For this reason, the State Engineer has previously ruled that "bare ground by itself does not constitute
18 abandonment."²⁸ Also, the Ninth Circuit has upheld the position that bare ground must be coupled with a
19 use inconsistent with irrigation to show intent to abandon.²⁹ The standard of proof for demonstrating
20 abandonment is clear and convincing evidence, and the burden of proof is on the party advocating
21 abandonment, which in this case is the State Engineer.³⁰

22 The Ninth Circuit has consistently upheld and endorsed Nevada's rule of law for abandonment in

23 ²¹ *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.

24 ²² *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek*,
77 Nev. at 354, 364 P.2d at 1075; and *Revert*, 95 Nev. at 786, 603 P.2d at 266.

25 ²³ See Petitioner's Appendix at 00001-0000135.

26 ²⁴ Petitioner's Appendix at 000030-000037.

27 ²⁵ *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 ²⁶ *Alpine*, 291 F.3d at 1072.

29 ²⁷ Petitioner's Appendix 0000131-0000135; See also Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-
000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

30 ²⁸ Petitioner's Appendix 000051-000054.

31 ²⁹ *Orr Ditch*, 256 F.3d at 946.

32 ³⁰ *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

1 the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated "from all
2 surrounding circumstances," and not only non-use evidence.³¹ The surrounding circumstances test,
3 although not exhaustive, has definitively produced one bright line rule regarding abandonment of water
4 rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonment.
5 This Court reiterates the canon that a water right may not be abandoned absent the showing of "subjective
6 intent on the part of the holder of a water right to give up that right."³²

7 This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and as
8 such, indirect and circumstantial evidence may be used to show intent of abandonment.³³ The most
9 consistent element in Nevada water law that applies to abandonment cases is the determination that non-
10 use of the water is not enough to constitute abandonment.³⁴ The Ninth Circuit Appeals Court, when
11 analyzing Nevada case law, has continually recognized that Nevada's abandonment rules indicate that
12 non-use alone is not enough to constitute abandonment.³⁵ Nevada requires non-use evidence to be coupled
13 with other evidence to determine the subjective intent of the water user.³⁶ This well-developed rule was
14 originally taken from Nevada's mining law.³⁷ The Ninth Circuit, while applying Nevada state law, has
15 held that the following factors should be considered to determine whether a water owner had the intent to
16 abandon a water right: (1) substantial periods of non-use, (2) evidence of improvements inconsistent with
17 irrigation, and (3) payment of taxes and assessments.³⁸

18 Here, St. Clair is currently using water from another water right on the land which is the place of
19 use for Vested Claim 010493, and that evidence proves that there are no improvements inconsistent with
20 irrigation on the property. Also, there is no evidence that St. Clair or their predecessors in interest failed to
21 pay taxes and assessments. St. Clair filed a Report of Conveyance which demonstrated a clear chain of
22 title for the vested claim, and that chain of title did not rely on any tax sales or foreclosures based on
23 failure to pay assessments.

24 _____
³¹ *Alpine* 291 F.3d at 1072.

25 ³² *Orr Ditch*, 256 F.3d at 944-45.

26 ³³ *Id.*

27 ³⁴ *In re Manse Spring*, 60 Nev. at 288, 108 P.2d at 317; *Orr Ditch*, 256 F.3d at 941, *Alpine*, 291 F.3d at 1072, *Franktown Creek*,
77 Nev. at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.

28 ³⁵ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

³⁶ *Id.*

³⁷ *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

³⁸ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

Further, St. Clair filed a Change Application for the place and manner and use, and clearly has present-day intent to use the water right. As such, St. Clair demonstrated a lack of the subjective intent of the subjective water right owner to abandon the water right.³⁹ Previously, the State Engineer has held that this type of evidence (i.e. filing of a Change Application and a Report of Conveyance) is evidence that a party does not intend to abandon their water right, and can be enough to demonstrate the lack of the subjective intent of abandonment.⁴⁰ The State Engineer has declined to declare a water right abandoned if an applicant filed a change application, stating that filing an application is "evidence that the Applicant does not intend to abandon its water right..."⁴¹ This Court concludes that by this action alone, St. Clair demonstrated he did not intend to abandon his water rights.

Also, the State Engineer deemed that action over and above mere nonuse (i.e. failure to maintain corporate status, relinquishment of grazing rights or right-of-way, lack of communication with State Engineer's office) was necessary to show abandonment.⁴² None of these facts are present in this case.

The State Engineer's determination of abandonment regarding Proof of Appropriation V-010493 was based only on evidence of non-use. The State Engineer references only evidence that shows nonuse, such as the condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and the failure of St. Clair to submit evidence of continuous use. Further, there was no field investigation conducted by the State Engineer to show when the water right was last used, or when the pump was removed from the well. In total, the only evidence before the Court was that of non-use. The State Engineer's reliance solely on non-use evidence was improper. Therefore, the State Engineer's conclusion that St. Clair's water right was abandoned is not supported by substantial evidence, and was therefore, arbitrary, capricious, and is overruled.

IV. THE STATE ENGINEER UNLAWFULLY IMPAIRED ST. CLAIR'S WATER RIGHT BY APPLYING A RULE THAT IS STRICTER THAN THE WATER STATUTES.

Vested water rights are "regarded and protected as property."⁴³ The term vested water rights is

³⁹ *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F.3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.

⁴⁰ Petitioner's Appendix at 000084-000090, 000128-0000130; See also Petitioner's Appendix.

⁴¹ Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.

⁴² See Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.

⁴³ *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

1 often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment of
2 Nevada's statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed to
3 have been perfected before the current statutory water law, the State Engineer does not have powers to
4 alter vested water rights.⁴⁴ Thus, the State Engineer cannot apply a rule to a vested water right unless that
5 rule existed at common law. The State Engineer has recognized this limitation in the past, holding that
6 applying a rebuttable presumption standard would further undercut the stability and security of pre-1913
7 vested water rights.⁴⁵

8 Here, the State Engineer applied a more restrictive law of abandonment than existed prior to the
9 adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be shown
10 to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to St.
11 Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide a
12 water right owner with a notice of forfeiture before the water right can be forfeited.⁴⁶ A water right owner
13 can then cure the forfeiture.⁴⁷ Yet here, the State Engineer did not give St. Clair any notice of forfeiture,
14 nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair was
15 more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a less
16 restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right was
17 abandoned was arbitrary and capricious, and as such is overruled.

18 V. THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO ST.
19 CLAIR TO PROVE LACK OF INTENT TO ABANDON.

20 This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects the
21 assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of proof
22 to a party defending a water right from abandonment.⁴⁸ In the *Alpine* case, the Ninth Circuit upheld the
23 ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference of
24 intent to abandon, it does not create a rebuttable presumption."⁴⁹ Nevada maintains the rule that there is no
25

26 ⁴⁴ *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

27 ⁴⁵ Petitioner's Appendix 000021-000025.

28 ⁴⁶ *Town of Eureka*, 108 Nev. At 168.

⁴⁷ *Id.*

⁴⁸ *Orr Ditch*, 256 F.3d at 945-946.

⁴⁹ *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

1 rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme and
2 long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on only
3 non-use evidence when considering the intent element of abandonment.⁵⁰

4 The State Engineer correctly identified the standard that "[n]on-use for a period of time *may*
5 inferentially be *some* evidence of intent to abandon a water right,"⁵¹ and the State Engineer correctly stated
6 that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."⁵²
7 However, in the very next sentence, the State Engineer mischaracterized the leading case law on point
8 when he stated that "proof of continuous use of the water right should be required to support a finding of
9 *lack* of intent to abandon."⁵³ The State Engineer hinged his abandonment determination of this
10 misstatement of law.

11 The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstance
12 of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and
13 state government regarding change applications for a change in place, manner and use of water rights in
14 the Newlands Project prior to 1983.⁵⁴ The *continuous use* language the State Engineer relied on is in the
15 Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."⁵⁵ In that section, the
16 Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only
17 *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no
18 bearing on the current instance because this case does not involve the circumstance that existed in the
19 Newlands Project, or an intrafarm transfer.

20 The State Engineer's actions in the current action clearly demonstrate an attempt by the State
21 Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burden-
22 shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies on
23 the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The State

24 ⁵⁰ *Id.* See also *In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316.; *United States v. Alpine Land and Reservoir Co.*, 27 F.Supp.2d
25 1230, 1239-1241 (D.Nev. 1998) (a protestant alleging forfeiture or abandonment "bears the burden of proving clear and
convincing evidence" to establish that fact); see also *Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 951
(1992).

26 ⁵¹ SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

27 ⁵² SE ROA at 0008; *Orr Ditch*, 256 F.3d at 945.

28 ⁵³ At 5; *v. Alpine*, 291 F.3d at 1077.

⁵⁴ *Alpine*, 291 F.3d at 1073-74.

⁵⁵ *Id.*

1 Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of the
2 burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

3 **VI. THE STATE ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRARY**
4 **AND CAPRICIOUS BECAUSE HE APPLIED THE WRONG RULE OF LAW.**

5 This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudden
6 turn of mind without apparent motive demonstrates the State Engineer's decision is arbitrary and
7 capricious.⁵⁶ Previously, the State Engineer continually upheld the standards for abandonment that were
8 established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpine*
9 *Decree* proceeding that was relied upon by the Court and which recognized the principles of
10 abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents a
11 specialized circumstance.⁵⁷ The State Engineer later demonstrated a keen understanding of the application
12 of the *Alpine Decree* to intrafarm transfers.⁵⁸ Yet, in the current instance, the State Engineer completely
13 changed course without evidence or facts in the record to explain his action.

14 Therefore, Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that
15 cannot remedy his sudden and improper application of well-settled Nevada water law. This Court has
16 already discussed the lack of evidence of intent to abandon produced by the State Engineer in Ruling
17 6387. However, the State Engineer's sudden departure from his application of the *Alpine* and *Orr Ditch*
18 *Decree* was also arbitrary and capricious.

19 **CONCLUSIONS OF LAW**

20 This Court, having reviewed the record on appeal,⁵⁹ and having considered the arguments of the
21 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this
22 matter, hereby ORDERS as follows:

23 1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has a
24 vested water right under V-010493;

25 2. Ruling 6287 is OVERRULED in part to the extent it declares V-010493 abandoned; and
26

27 ⁵⁶ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

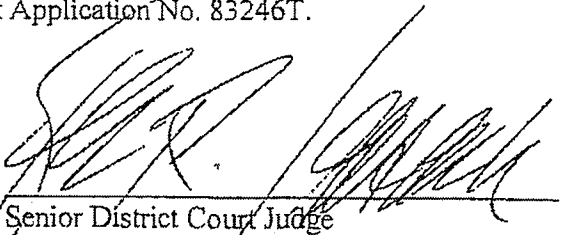
28 ⁵⁷ See *Request for Judicial Notice* at 3.

⁵⁸ *Id.*

⁵⁹ See SE ROA; see also *Petitioner's Appendix*; see also *Petitioner's Request for Judicial Notice*.

3. The State Engineer is directed to grant Application No. 83246T.

IT IS SO ORDERED.

April 11, 2016 
Senior District Court Judge

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89701
(775) 882-0900 - Telephone
(775) 882-7900 - Facsimile

1 Rodney St. Clair, Petitioner vs. Jason King, P.E. et al, Respondent
2 Sixth Judicial District Court of Nevada, Case No. CV 20,112
3

4 **DECLARATION OF SERVICE**
5

6 I am a citizen of the United States, over the age of 18 years, and not a party to or interested
7 in this action. I am an employee of the Humboldt County Clerk's Office, and my business address
8 is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following
9 document(s): **ORDER OVERRULING STATE ENGINEER'S RULING 6287**

10 X By placing in a sealed envelope, with postage fully prepaid, in the United States Post
11 Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's
12 practice whereby the mail, after being placed in a designated area, is given the appropriate postage
13 and is deposited in the designated area for pick up by the United States Postal Service.
14

15 _____ By personal delivery of a true copy to the person(s) set forth below by placement in the
16 designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative
17 of said person(s) set forth below.

18 Taggart & Taggart, Ltd
19 108 North Minnesota St.
20 Carson City, Nevada 89703

Attorney General's Office
Attn.: Justina Caviglia
100 N. Carson St.
Carson City, Nevada 89701

21 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
22 is true and correct.

23 Executed on April 22, 2016, at Winnemucca, Nevada.

24 
25 DEPUTY CLERK
26
27
28



ORIGINAL

FILED

2016 MAY 23 PM 1:19

Spuro
TAMI NAE SPERO
DIST. COURT CLERK

Case No. CV 20112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondent.

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

Jason King, P.E., in his official capacity as the Nevada State Engineer, the Nevada Department of Conservation and Natural Resources, Division of Water Resources.

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Steven R. Kosach.

3. Identify each appellant and the name and address of counsel for each appellant:

a. The appellant is Jason King, P.E., in his official capacity as the Nevada State Engineer, Nevada Department of Conservation and Natural Resources, Division of Water Resources.

b. The attorneys for Jason King, P.E., in his official capacity as the Nevada State Engineer, Nevada Department of Conservation and Natural Resources, Division of Water Resources:

///

Adam Paul Laxalt, Attorney General
Justina A. Caviglia, Deputy Attorney General
Nevada Bar No. 9999
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1225
Fax: (775) 684-1108

4. Identify each respondent and the name and address of appellate counsel, if known, for each:

Paul G. Taggart, Esq.
Nevada Bar No. 6136
Rachel L. Wise, Esq.
Nevada Bar No. 12303
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703

Mr. Taggart and Ms. Wise are attorneys of record for Rodney St. Clair. Upon information and belief, Mr. Taggart and Ms. Wise will represent Rodney St. Clair in the appeal.

5. Indicate whether any attorney identified above in response to questions 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

The attorneys identified above in response to questions 3 and 4 are licensed to practice law in Nevada.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:
Appellant was represented by the Office of the Attorney General before the district court.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:
Appellant is represented by the Office of the Attorney General on appeal.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Appellant did not seek in forma pauperis status and was not granted leave to proceed in forma pauperis.

///

///

- 1 9. Indicate the date the proceedings commenced in the district court (e.g., date complaint,
2 indictment, information, or petition was filed):

3 A petition for judicial review of State Engineer Ruling 6287 was filed on August 22,
4 2014.

- 5 10. Provide a brief description of the nature of the action and result in the district court, including
6 the type of judgment or order being appealed and the relief granted by the district court:

7 Petitioner filed proof of appropriation V-010493 and application 83246T to change the
8 point of diversion of V-010493 with the State Engineer. The State Engineer issued
9 Ruling 6287 granting Petitioner's proof of appropriation V-010493 for a vested
10 groundwater right. However, the State Engineer further found that vested groundwater
11 right V-010493 had been abandoned. Based upon the abandonment of V-010493, the
12 State Engineer denied application 83246T. Petitioner filed a petition for judicial review
13 of the State Engineer's Ruling 6287. The district court issued a decision affirming
14 Ruling 6287, in part, where the State Engineer granted proof of appropriation V-010493
15 for a vested right to underground water; overruling Ruling 6287, in part, to the extent
16 that the State Engineer declared vested water right V-010493 abandoned; and ordering
17 the State Engineer to grant application 83246. That decision is being appealed by the
18 State Engineer.

- 19 11. Indicate whether the case has previously been the subject of an appeal to or original writ
20 proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of
21 the prior proceeding:

22 No, this case has not been the previous subject of an appeal or writ proceeding in the
23 Supreme court.

- 24 12. Indicate whether this appeal involves child custody or visitation:

25 This appeal does not involve child custody or visitation.

- 26 13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

27 Based upon the nature of the appeal, this case does not involve the possibility of
28 settlement.

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 20th day of May, 2016.

ADAM PAUL LAXALT
Attorney General

By:

JUSTINA A. CAVIGLIA
Deputy Attorney General
Nevada Bar No. 9999
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1222
Fax: (775) 684-1108
Email: jcaviglia@ag.nv.gov
*Counsel for Respondent,
Nevada State Engineer*

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 20th day of May, 2016, I served a true and correct copy of the foregoing CASE APPEAL STATEMENT, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Paul G. Taggart, Esq.
Rachel L. Wise, Esq.
TAGGART & TAGGART
108 North Minnesota Street
Carson City, Nevada 89703

Dorene A. Wright
Dorene A. Wright

Case #: CV-0020112

Judge: KOSACH, STEVEN

Date Filed: 08/22/14 Department: 03

Case Type: OTHRSP OTHER SPECIAL PROCEEDINGS

Title/Caption: Rodney St. Clair
vs.
Jason King P.E., et al.

Comments: ORDER OF RECUSAL FROM DEPT 2

Defendant(s)	Attorney(s)
KING, JASON	ATTORNEY GENERAL CAVIGLIA, JUSTINA A.

Defendant(s)	Attorney(s)
DIVISION OF WATER RESOURCES	ATTORNEY GENERAL

Defendant(s)	Attorney(s)
DEPARTMENT OF CONSERVATION	ATTORNEY GENERAL

Plaintiff(s)	Attorney(s)
ST. CLAIR, RODNEY	TAGGART, PAUL G.

Disp/Judgment: JRBT Date: 04/22/16

Hearings:

Date	Time	Hearing	Reference
		ORAL ARGUMENTS - CONT'D	K/MF/RW8/12
11/03/15	3:00	CONT'D ORAL ARGUMENTS	K/J/P10/20
1/05/16	10:00	CONT'D ORAL ARGUMENTS (CARSON CITY)	ORD 1/4/16

Filings:

Date	Pty	Filing	Fee
8/22/14	P	PETITION FOR JUDICIAL REVIEW	230.00
8/22/14	P	NOTICE OF APPEAL RULING 6287 OF THE NV STATE ENGINEER	
9/11/14	D	NOTICE OF INTENT TO DEFEND	
9/25/14	D	SUMMARY OF RECORD ON APPEAL	
10/13/14	P	STIPULATION AGREEING TO BRIEFING SCHEDULE	
11/19/14	P	STIPULATION AND ORDER EXTENDING BRIEFING SCHEDULE	
12/08/14	P	PETITIONER'S OPENING BRIEF	
1/20/15	D	STIPULATION AND ORDER FOR EXTENSION OF TIME	
1/22/15	D	RESPONDENT'S ANSWERING BRIEF	
2/23/15	P	STIPULATION & ORDER EXTENDING BRIEFING SCHEDULE	
2/27/15	P	PETITIONER'S REPLY BRIEF	
2/27/15	P	PETITIONER'S APPENDIX	
4/23/15	P	REQUEST FOR SUBMISSION	
6/03/15	P	REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER'S REPLY	
7/02/15	P	PETITIONER'S REQUEST FOR ORAL ARGUMENT	
7/02/15	P	APPLICATION FOR SETTING	
7/02/15	P	REQUEST TO SUBMIT	
8/06/15	D	NOTICE OF CHANGE OF ATTY FOR RESPONDENT (SEE EVENTS)	
8/06/15	D	NON-OPPOSITION TO PETITIONER'S REQ. FOR ORAL ARGUMENT	
8/10/15	P	STIPULATION AND ORDER TO EXTEND TIME	

Run: 05/23/16
14:35:39

Sixth Judicial District Court - Humboldt County
Case Summary

Page
DC210

10/20/15 D NOTICE OF CHANGE OF ATTORNEY (CAVIGLIA FOR FAIRBANK)
11/03/15 O MINUTES - CONTINUED ORAL ARGUMENTS
11/16/15 O ORDER OF RECUSAL
11/19/15 O MEMORANDUM OF TEMPORARY ASSIGNMENT (JUDGE KOSACH)
11/19/15 D OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE IN SU
12/01/15 P REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S REQ FOR JUD
12/04/15 P AMENDED CERTIFICATE OF SERVICE TO THE REPLY TO RESPONDENT'S
1/04/16 O STIPULATION AND ORDER SETTING ORAL ARGUMENT
1/21/16 O MINUTES - ORAL ARGUMENTS - 1/5/16 (FAXED COPY)
3/21/16 R RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED ORDER
3/30/16 P JUNGO RANCH RESPONSE ST ENGINEER'S OBJECTION TO PROPOSED ORD
4/11/16 O MINUTES - HEARING ON OBJECTIONS
4/22/16 P ORDER OVERRULING STATE ENGINEER'S RULING 6287
4/29/16 P NOTICE OF ENTRY OF ORDER
5/23/16 R NOTICE OF APPEAL
5/23/16 R CASE APPEAL STATEMENT

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

R. St. Clair, Deputy

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondent.

**ORDER OVERRULING STATE
ENGINEER'S RULING 6287**

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 - Telephone
(775)883-9900 - Facsimile

THIS MATTER came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "St. Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed an Opening Brief on December 8, 2014. Respondent, JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State Engineer") filed an Answering Brief on January 22, 2015. St. Clair filed a Reply Brief on February 27, 2015.

Oral argument was heard by this Court on January 5, 2016 in the First Judicial District Courthouse by stipulation of the parties. Petitioner is represented by Paul G. Taggart, Esq. and Rachel L. Wise, Esq. of Taggart and Taggart, Ltd. Respondent is represented by Attorney General Adam Laxalt and Deputy Attorney General Justina Caviglia.

This Court, having reviewed the record on appeal,¹ and having considered the arguments of the parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this matter, hereby **OVERRULES** Ruling 6287 in part; based upon the following findings of fact, conclusions of law and judgment.

FACTS AND PROCEDURAL HISTORY

St. Clair owns real property located in Humboldt County, Nevada, (Assessor's Parcel Number ("APN") 03-491-17), which was purchased in August, 2013. On November 8, 2013, St. Clair filed two documents with the State Engineer. The first was a Proof of Appropriation, V-010493, claiming a vested right to an underground water source for irrigation of 160 acres of land. The second was Application No. 83246T to change the point of diversion of the vested water claim. To support the vested claim, St. Clair presented evidence of the application of the water to beneficial use prior to March 25, 1939, the operative date for the State Engineer to consider for vested claims to groundwater.

In Ruling 6287, the State Engineer found that St. Clair had pre-statutory rights to the underground percolating water which were vested prior to March 25, 1939.² The State Engineer stated that "[t]ogether, these facts evidence that underground waters [V-010493] were appropriated by the drilled well and used beneficially . . . prior to March 25, 1939."³ The following facts support the State Engineer's decision:

(1) A land patent was acquired by Mr. Crossley pursuant to the Homestead Act of 1862 for the St. Clair property;

(2) A well was constructed with technology which ceased to be utilized in the mid-1930's;

(3) Aerial photographs exist for the property for the years 1968, 1975, 1986, 1999, 2006, and 2013;⁴

(4) Lack of any evidence of the failure to pay taxes and assessment fees for the right to use the water right;

(5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa

¹ See Respondent's Summary of Record on Appeal ("SE ROA"); see also Petitioner's Appendix; see also Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief ("Request for Judicial Notice").

² SE ROA 0006.

³ SE ROA 004-006.

⁴ These documents were not included in the State Engineer's ROA and were not subject to review by this Court.

1 with groundwater using drilled wells;

2 (6) A report created by Stanka Consulting, LTD., stating that on February 19th, 1924, George
3 Crossley signed the Testimony of Claimant as part of the final paperwork required to complete the
4 Homestead Act land acquisition which described the water right;⁵

5 (7) A patent from President Calvin Coolidge dated April 21st, 1924 describing the water right
6 granted to St. Clair;⁶

7 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933⁷ was found
8 on the property; and

9 (9) A chain of title from St. Clair's predecessors-in-interest that does not include any
10 conveyances by tax or foreclosure sales.⁸

11 The State Engineer's determination that St. Clair's water rights were valid pre-1939 vested
12 rights was not appealed. However, the State Engineer then declared that 502.4 acre-feet annually
13 ("afa") of a vested water right was abandoned by the holder of the right.⁹ Notably, this declaration of
14 abandonment was the first time in Nevada's history that the State Engineer declared a vested
15 groundwater right abandoned.¹⁰ In doing so the State Engineer placed the burden of proof on St. Clair
16 to demonstrate a lack of intent to abandon Vested Claim 010493. Specifically, the State Engineer stated
17 that, "[a]t minimum, then, proof of continuous use of the water right should be required to support a
18 finding of *lack* of intent to abandon."¹¹ Also, the State Engineer repeatedly referred to evidence of non-
19 use of the underground water as constituting evidence of St. Clair's intent to abandon their water
20 rights.¹²

21 St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287
22 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that
23 the intent to abandon a water right must be shown by more than mere non-use evidence.¹³ St. Clair also

24 ⁵ SE ROA 0037.

25 ⁶ SE ROA 0045.

26 ⁷ SE ROA 0102.

27 ⁸ SE ROA 0038-0066.

28 ⁹ SE ROA 008 - 009.

¹⁰ Petitioner's Reply Brief, Exhibit 1.

¹¹ *Id.* (emphasis in the original) (citing *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)).

¹² SE ROA 007- 009.

¹³ *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1072 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the*

1 argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent
2 to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to
3 support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to
4 abandon the water rights without conducting a formal adjudication.

5 DISCUSSION

6 The State Engineer's holding that "Applicants' admission the water has not been used
7 continuously coupled with the admission they are without knowledge of when it was, or was not used . . .
8 find that Proof of Appropriation V-010493 has been abandoned" is overturned because it is arbitrary,
9 capricious, contrary to law and not supported by substantial evidence.¹⁴ The State Engineer's
10 misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment of
11 a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair to
12 demonstrate lack of intent to abandon the water right.

13 I. STANDARD OF REVIEW

14 A party aggrieved by an order or decision of the State Engineer is entitled to have the order or
15 decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is "in the
16 nature of an appeal," and review is generally confined to the administrative record.¹⁵ The role of the
17 reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discretion,
18 or if it was otherwise affected by prejudicial legal error.¹⁶ A decision is arbitrary and capricious if it is
19 "baseless" or evidences "a sudden turn of mind without apparent motive...."¹⁷ With regard to factual
20 findings, the court must determine whether substantial evidence exists in the record to support the State
21 Engineer's decision.¹⁸ Substantial evidence is "that which a 'reasonable mind might accept as adequate to
22 support a conclusion.'"¹⁹ With regard to purely legal questions, such as statutory construction, the standard

23 *State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264
24 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

25 ¹⁴ SE ROA 005.

¹⁵ NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

26 ¹⁶ *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dist. v.*
State, Dep't Taxation, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992) ("[a]s a general rule, a decision of an administrative
agency will not be disturbed unless it is arbitrary and capricious").

27 ¹⁷ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

¹⁸ *Id.*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert v Ray*, 95 Nev. at 786, 603 P.2d at 264.

28 ¹⁹ *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Employee Sec. Dep't v. Hilton Hotels*
Corp., 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

of review is de novo.²⁰

II. ST. CLAIR'S REQUEST FOR JUDICIAL NOTICE.

As a preliminary matter, on February 27, 2015, St. Clair filed Petitioners' Appendix. Petitioners' Appendix included twenty-six (26) previous rulings by the State Engineer between 1984 and 2012 which demonstrate the State Engineer's prior application of the law of abandonment to water rights. The rulings are public documents capable of review maintained by the State Engineer at his office and online. On June 3, 2015, St. Clair submitted a Request for Judicial Notice in Support of Petitioners' Reply Brief ("Request for Judicial Notice") to this Court. The Request for Judicial Notice contained three exhibits:

(1) the State Engineer's July 24, 2002 *Appellee Nevada State Engineer's Answering Brief* in the Ninth Circuit Court of Appeals, Case Nos.: 01-15665; 01-15814; 01-15816; of the case *United States of America, and Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Company, et., al.* ("Alpine Decree"); the Nevada State Engineer appeared as a Real-Party-in-Interest/Appellee in the *Alpine Decree* and filed the above-referenced Answering brief in the matter that resulted in the decision that is published at 291 F.3d 1062;

(2) the State Engineer's Ruling on Remand 5464-K, issued as a result of the Ninth Circuit District Court's Decision at 291 F.3d 1062; and

(3) the Nevada State Engineer's Answering Brief filed in the Ninth Circuit District Court of Appeals, Case No.: 06-15738, filed on or around November 22, 2006, relating to the *Alpine Decree*.

This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorable Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance of impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition to Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judicial Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility of Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included in the Request for Judicial Notice exist or are public documents.

The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court further finds that all documents submitted are public documents capable of accurate and ready determination by

²⁰ *In re Nevada State Eng'r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

1 resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that all
2 documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are entered
3 onto the record of this Court for this case pursuant to NRS 47.130-150.

4 **III. EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.**

5 Nevada follows a bright line rule of law to guide courts and the State Engineer in determining and
6 analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owner
7 *with the intent* to "forsake and desert it."²¹ Intent is the necessary element the State Engineer is required to
8 prove in abandonment cases.²² This is the standard the State Engineer has previously relied upon.²³ In fact,
9 the State Engineer has explained that "Nevada case law discourages and abhors the taking of water rights
10 away from people," and that is why abandonment must be proven by clear and convincing evidence.²⁴

11 Abandonment requires a union of facts and intent to determine whether the owner of the water
12 right intended abandonment.²⁵ As intent to abandon is a subjective element, the courts utilize all
13 surrounding circumstances to determine the intent.²⁶ Because subjective intent to abandon is a necessary
14 element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer's
15 burden because nonuse does not necessarily mean an intent to forsake.²⁷ Thus, if a vested water right
16 holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occur.
17 For this reason, the State Engineer has previously ruled that "bare ground by itself does not constitute
18 abandonment."²⁸ Also, the Ninth Circuit has upheld the position that bare ground must be coupled with a
19 use inconsistent with irrigation to show intent to abandon.²⁹ The standard of proof for demonstrating
20 abandonment is clear and convincing evidence, and the burden of proof is on the party advocating
21 abandonment, which in this case is the State Engineer.³⁰

22 The Ninth Circuit has consistently upheld and endorsed Nevada's rule of law for abandonment in

23 ²¹ *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.

24 ²² *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek*,
77 Nev. at 354, 364 P.2d at 1075; and *Revert*, 95 Nev. at 786, 603 P.2d at 266.

25 ²³ See Petitioner's Appendix at 00001-0000135.

26 ²⁴ Petitioner's Appendix at 000030-000037.

27 ²⁵ *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 ²⁶ *Alpine*, 291 F.3d at 1072.

29 ²⁷ Petitioner's Appendix 0000131-0000135; See also Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-
000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

30 ²⁸ Petitioner's Appendix 000051-000054.

²⁹ *Orr Ditch*, 256 F.3d at 946.

³⁰ *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

1 the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated “from all
2 surrounding circumstances,” and not only non-use evidence.³¹ The surrounding circumstances test,
3 although not exhaustive, has definitively produced one bright line rule regarding abandonment of water
4 rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonment.
5 This Court reiterates the canon that a water right may not be abandoned absent the showing of “subjective
6 intent on the part of the holder of a water right to give up that right.”³²

7 This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and as
8 such, indirect and circumstantial evidence may be used to show intent of abandonment.³³ The most
9 consistent element in Nevada water law that applies to abandonment cases is the determination that non-
10 use of the water is not enough to constitute abandonment.³⁴ The Ninth Circuit Appeals Court, when
11 analyzing Nevada case law, has continually recognized that Nevada’s abandonment rules indicate that
12 non-use alone is not enough to constitute abandonment.³⁵ Nevada requires non-use evidence to be coupled
13 with other evidence to determine the subjective intent of the water user.³⁶ This well-developed rule was
14 originally taken from Nevada’s mining law.³⁷ The Ninth Circuit, while applying Nevada state law, has
15 held that the following factors should be considered to determine whether a water owner had the intent to
16 abandon a water right: (1) substantial periods of non-use, (2) evidence of improvements inconsistent with
17 irrigation, and (3) payment of taxes and assessments.³⁸

18 Here, St. Clair is currently using water from another water right on the land which is the place of
19 use for Vested Claim 010493, and that evidence proves that there are no improvements inconsistent with
20 irrigation on the property. Also, there is no evidence that St. Clair or their predecessors in interest failed to
21 pay taxes and assessments. St. Clair filed a Report of Conveyance which demonstrated a clear chain of
22 title for the vested claim, and that chain of title did not rely on any tax sales or foreclosures based on
23 failure to pay assessments.

24 _____
³¹ *Alpine* 291 F.3d at 1072.

25 ³² *Orr Ditch*, 256 F.3d at 944-45.

26 ³³ *Id.*

27 ³⁴ *In re Manse Spring*, 60 Nev at 288, 108 P.2d at 317; *Orr Ditch*, 256 F.3d at 941, *Alpine*, 291 F.3d at 1072, *Franktown Creek*,
77 Nev. at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.

28 ³⁵ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

³⁶ *Id.*

³⁷ *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

³⁸ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

Further, St. Clair filed a Change Application for the place and manner and use, and clearly has present-day intent to use the water right. As such, St. Clair demonstrated a lack of the subjective intent of the subjective water right owner to abandon the water right.³⁹ Previously, the State Engineer has held that this type of evidence (i.e. filing of a Change Application and a Report of Conveyance) is evidence that a party does not intend to abandon their water right, and can be enough to demonstrate the lack of the subjective intent of abandonment.⁴⁰ The State Engineer has declined to declare a water right abandoned if an applicant filed a change application, stating that filing an application is “evidence that the Applicant does not intend to abandon its water right...”⁴¹ This Court concludes that by this action alone, St. Clair demonstrated he did not intend to abandon his water rights.

Also, the State Engineer deemed that action over and above mere nonuse (i.e. failure to maintain corporate status, relinquishment of grazing rights or right-of-way, lack of communication with State Engineer’s office) was necessary to show abandonment.⁴² None of these facts are present in this case.

The State Engineer’s determination of abandonment regarding Proof of Appropriation V-010493 was based only on evidence of non-use. The State Engineer references only evidence that shows nonuse, such as the condition of St. Clair’s well, that a pump was pulled out of St. Clair’s well, and the failure of St. Clair to submit evidence of continuous use. Further, there was no field investigation conducted by the State Engineer to show when the water right was last used, or when the pump was removed from the well. In total, the only evidence before the Court was that of non-use. The State Engineer’s reliance solely on non-use evidence was improper. Therefore, the State Engineer’s conclusion that St. Clair’s water right was abandoned is not supported by substantial evidence, and was therefore, arbitrary, capricious, and is overruled.

IV. THE STATE ENGINEER UNLAWFULLY IMPAIRED ST. CLAIR’S WATER RIGHT BY APPLYING A RULE THAT IS STRICTER THAN THE WATER STATUTES.

Vested water rights are “regarded and protected as property.”⁴³ The term vested water rights is

³⁹ *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F. 3d at 1072; Petitioner’s Appendix at 00015-00020, 000091-000096.

⁴⁰ Petitioner’s Appendix at 000084-000090, 000128-000130; See also Petitioner’s Appendix .

⁴¹ Petitioner’s Appendix at 0000115-0000121; See also Petitioner’s Appendix at 000015-000020.

⁴² See Petitioner’s Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.

⁴³ *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

1 often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment of
2 Nevada's statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed to
3 have been perfected before the current statutory water law, the State Engineer does not have powers to
4 alter vested water rights.⁴⁴ Thus, the State Engineer cannot apply a rule to a vested water right unless that
5 rule existed at common law. The State Engineer has recognized this limitation in the past, holding that
6 applying a rebuttable presumption standard would further undercut the stability and security of pre-1913
7 vested water rights.⁴⁵

8 Here, the State Engineer applied a more restrictive law of abandonment than existed prior to the
9 adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be shown
10 to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to St.
11 Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide a
12 water right owner with a notice of forfeiture before the water right can be forfeited.⁴⁶ A water right owner
13 can then cure the forfeiture.⁴⁷ Yet here, the State Engineer did not give St. Clair any notice of forfeiture,
14 nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair was
15 more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a less
16 restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right was
17 abandoned was arbitrary and capricious, and as such is overruled.

18 **V. THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO ST.**
19 **CLAIR TO PROVE LACK OF INTENT TO ABANDON.**

20 This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects the
21 assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of proof
22 to a party defending a water right from abandonment.⁴⁸ In the *Alpine* case, the Ninth Circuit upheld the
23 ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference of
24 intent to abandon, it does not create a rebuttable presumption."⁴⁹ Nevada maintains the rule that there is no
25

26 ⁴⁴ *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

27 ⁴⁵ Petitioner's Appendix 000021-000025.

28 ⁴⁶ *Town of Eureka*, 108 Nev. At 168.

⁴⁷ *Id.*

⁴⁸ *Orr Ditch*, 256 F.3d at 945-946.

⁴⁹ *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

1 rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme and
2 long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on only
3 non-use evidence when considering the intent element of abandonment.⁵⁰

4 The State Engineer correctly identified the standard that "[n]on-use for a period of time *may*
5 inferentially be *some* evidence of intent to abandon a water right,"⁵¹ and the State Engineer correctly stated
6 that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."⁵²
7 However, in the very next sentence, the State Engineer mischaracterized the leading case law on point
8 when he stated that "proof of continuous use of the water right should be required to support a finding of
9 *lack* of intent to abandon."⁵³ The State Engineer hinged his abandonment determination of this
10 misstatement of law.

11 The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstance
12 of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and
13 state government regarding change applications for a change in place, manner and use of water rights in
14 the Newlands Project prior to 1983.⁵⁴ The *continuous use* language the State Engineer relied on is in the
15 Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."⁵⁵ In that section, the
16 Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only
17 *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no
18 bearing on the current instance because this case does not involve the circumstance that existed in the
19 Newlands Project, or an intrafarm transfer.

20 The State Engineer's actions in the current action clearly demonstrate an attempt by the State
21 Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burden-
22 shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies on
23 the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The State

24 ⁵⁰ *Id.* See also *In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316.; *United States v. Alpine Land and Reservoir Co.*, 27 F.Supp.2d
25 1230, 1239-1241 (D.Nev. 1998) (a protestant alleging forfeiture or abandonment "bears the burden of proving clear and
convincing evidence" to establish that fact); see also *Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 951
(1992).

26 ⁵¹ SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

27 ⁵² SE ROA at 0008; *Orr Dutch*, 256 F.3d at 945.

28 ⁵³ At 5; v. *Alpine*, 291 F.3d at 1077.

⁵⁴ *Alpine*, 291 F.3d at 1073-74.

⁵⁵ *Id.*

1 Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of the
2 burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

3 **VI. THE STATE ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRARY**
4 **AND CAPRICIOUS BECAUSE HE APPLIED THE WRONG RULE OF LAW.**

5 This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudden
6 turn of mind without apparent motive demonstrates the State Engineer's decision is arbitrary and
7 capricious.⁵⁶ Previously, the State Engineer continually upheld the standards for abandonment that were
8 established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpine*
9 *Decree* proceeding that was relied upon by the Court and which recognized the principles of
10 abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents a
11 specialized circumstance.⁵⁷ The State Engineer later demonstrated a keen understanding of the application
12 of the *Alpine Decree* to intrafarm transfers.⁵⁸ Yet, in the current instance, the State Engineer completely
13 changed course without evidence or facts in the record to explain his action.

14 Therefore, Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that
15 cannot remedy his sudden and improper application of well-settled Nevada water law. This Court has
16 already discussed the lack of evidence of intent to abandon produced by the State Engineer in Ruling
17 6387. However, the State Engineer's sudden departure from his application of the *Alpine* and *Orr Ditch*
18 *Decree* was also arbitrary and capricious.

19 **CONCLUSIONS OF LAW**

20 This Court, having reviewed the record on appeal,⁵⁹ and having considered the arguments of the
21 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this
22 matter, hereby ORDERS as follows:

23 1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has a
24 vested water right under V-010493;

25 2. Ruling 6287 is OVERRULED in part to the extent it declares V-010493 abandoned; and
26

27 ⁵⁶ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

28 ⁵⁷ *See Request for Judicial Notice* at 3.

⁵⁸ *Id.*

⁵⁹ *See SE ROA; see also Petitioner's Appendix; see also Petitioner's Request for Judicial Notice.*

IT IS SO ORDERED.

~~Senior District Court Judge~~

-16-

Rodney St. Clair, Petitioner vs. Jason King, P.E. et al, Respondent
Sixth Judicial District Court of Nevada, Case No. CV 20,112

DECLARATION OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am an employee of the Humboldt County Clerk's Office, and my business address is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following document(s): **ORDER OVERRULING STATE ENGINEER'S RULING 6287**

 X By placing in a sealed envelope, with postage fully prepaid, in the United States Post Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in the designated area for pick up by the United States Postal Service.

 By personal delivery of a true copy to the person(s) set forth below by placement in the designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative of said person(s) set forth below.

Taggart & Taggart, Ltd
108 North Minnesota St.
Carson City, Nevada 89703

Attorney General's Office
Attn.: Justina Caviglia
100 N. Carson St.
Carson City, Nevada 89701

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on April 22, 2016, at Winnemucca, Nevada.


DEPUTY CLERK

1 Case No. CV 20112

2 Dept. No. 2

FILED

2016 APR 29 AM 10:38

TAMARA Spero
TAMARA Spero

3 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

4 IN AND FOR THE COUNTY OF HUMBOLDT

5
6 * * *

7 RODNEY ST. CLAIR.)

8 Petitioner,)

9 vs.)

10 JASON KING, P.E., Nevada State Engineer,)
11 DIVISION OF WATER RESOURCES,)
12 DEPARTMENT OF CONSERVATION AND)
NATURAL RESOURCES.)

13 Respondent.)
14

NOTICE OF ENTRY OF ORDER

15 PLEASE TAKE NOTICE that on April 22, 2016, the above-entitled court entered an *Order*
16 *Overruling State Engineer's Ruling 6287*, a copy of which is attached hereto as "Exhibit1."

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23

24

25

26

27

28


Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any persons.

DATED this 27th day of April 2016.

TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

By: 
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
Attorneys for Petitioner

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile


CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the foregoing, as follows:

☒ By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

Justina Caviglia
Nevada Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701

DATED this 21st day of April 2016.



Employee of TAGGART & TAGGART, LTD.

Case Title: *St. Clair v. King*
Case No.: CV 20112

INDEX OF EXHIBITS

Exhibit No.

Description

1

Order Overruling State Engineer's Ruling 6287

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile

EXHIBIT 1

EXHIBIT 1

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondent.

**ORDER OVERRULING STATE
ENGINEER'S RULING 6287**

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 - Telephone
(775)883-9900 - Facsimile

THIS MATTER came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "St. Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed an Opening Brief on December 8, 2014. Respondent, JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State Engineer") filed an Answering Brief on January 22, 2015. St. Clair filed a Reply Brief on February 27, 2015.

Oral argument was heard by this Court on January 5, 2016 in the First Judicial District Courthouse by stipulation of the parties. Petitioner is represented by Paul G. Taggart, Esq. and Rachel L. Wise, Esq. of Taggart and Taggart, Ltd. Respondent is represented by Attorney General Adam Laxalt and Deputy Attorney General Justina Caviglia.

1 This Court, having reviewed the record on appeal,¹ and having considered the arguments of the
2 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this
3 matter, hereby **OVERRULES** Ruling 6287 in part; based upon the following findings of fact, conclusions
4 of law and judgment.

5 FACTS AND PROCEDURAL HISTORY

6 St. Clair owns real property located in Humboldt County, Nevada, (Assessor's Parcel Number
7 ("APN") 03-491-17), which was purchased in August, 2013. On November 8, 2013, St. Clair filed two
8 documents with the State Engineer. The first was a Proof of Appropriation, V-010493, claiming a vested
9 right to an underground water source for irrigation of 160 acres of land. The second was Application
10 No. 83246T to change the point of diversion of the vested water claim. To support the vested claim, St.
11 Clair presented evidence of the application of the water to beneficial use prior to March 25, 1939, the
12 operative date for the State Engineer to consider for vested claims to groundwater.

13 In Ruling 6287, the State Engineer found that St. Clair had pre-statutory rights to the
14 underground percolating water which were vested prior to March 25, 1939.² The State Engineer stated
15 that "[t]ogether, these facts evidence that underground waters [V-010493] were appropriated by the
16 drilled well and used beneficially . . . prior to March 25, 1939."³ The following facts support the State
17 Engineer's decision:

18 (1) A land patent was acquired by Mr. Crossley pursuant to the Homestead Act of 1862 for the
19 St. Clair property;

20 (2) A well was constructed with technology which ceased to be utilized in the mid-1930's;

21 (3) Aerial photographs exist for the property for the years 1968, 1975, 1986, 1999, 2006, and
22 2013;⁴

23 (4) Lack of any evidence of the failure to pay taxes and assessment fees for the right to use the
24 water right;

25 (5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa

26
27 ¹ See Respondent's Summary of Record on Appeal ("SE ROA"); see also Petitioner's Appendix; see also Petitioner's Request
for Judicial Notice in Support of Petitioner's Reply Brief ("Request for Judicial Notice").

28 ² SE ROA 0006.

³ SE ROA 004-006.

⁴ These documents were not included in the State Engineer's ROA and were not subject to review by this Court.

1 with groundwater using drilled wells;

2 (6) A report created by Stanka Consulting, LTD., stating that on February 19th, 1924, George
3 Crossley signed the Testimony of Claimant as part of the final paperwork required to complete the
4 Homestead Act land acquisition which described the water right;⁵

5 (7) A patent from President Calvin Coolidge dated April 21st, 1924 describing the water right
6 granted to St. Clair;⁶

7 (8) An Armstrong Manufacturing Company: Waterloo LA drill rig dated pre-1933⁷ was found
8 on the property; and

9 (9) A chain of title from St. Clair's predecessors-in-interest that does not include any
10 conveyances by tax or foreclosure sales.⁸

11 The State Engineer's determination that St. Clair's water rights were valid pre-1939 vested
12 rights was not appealed. However, the State Engineer then declared that 502.4 acre-feet annually
13 ("afa") of a vested water right was abandoned by the holder of the right.⁹ Notably, this declaration of
14 abandonment was the first time in Nevada's history that the State Engineer declared a vested
15 groundwater right abandoned.¹⁰ In doing so the State Engineer placed the burden of proof on St. Clair
16 to demonstrate a lack of intent to abandon Vested Claim 010493. Specifically, the State Engineer stated
17 that, "[a]t minimum, then, proof of continuous use of the water right should be required to support a
18 finding of *lack* of intent to abandon."¹¹ Also, the State Engineer repeatedly referred to evidence of non-
19 use of the underground water as constituting evidence of St. Clair's intent to abandon their water
20 rights.¹²

21 St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287
22 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that
23 the intent to abandon a water right must be shown by more than mere non-use evidence.¹³ St. Clair also

24 ⁵ SE ROA 0037.

25 ⁶ SE ROA 0045.

26 ⁷ SE ROA 0102.

27 ⁸ SE ROA 0038-0066.

28 ⁹ SE ROA 008 - 009.

¹⁰ Petitioner's Reply Brief, Exhibit 1.

¹¹ *Id.* (emphasis in the original) (citing *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)).

¹² SE ROA 007- 009.

¹³ *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1072 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the*

argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to abandon the water rights without conducting a formal adjudication.

DISCUSSION

The State Engineer's holding that "Applicants' admission the water has not been used continuously coupled with the admission they are without knowledge of when it was, or was not used . . . find that Proof of Appropriation V-010493 has been abandoned" is overturned because it is arbitrary, capricious, contrary to law and not supported by substantial evidence.¹⁴ The State Engineer's misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment of a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair to demonstrate lack of intent to abandon the water right.

I. STANDARD OF REVIEW

A party aggrieved by an order or decision of the State Engineer is entitled to have the order or decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is "in the nature of an appeal," and review is generally confined to the administrative record.¹⁵ The role of the reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discretion, or if it was otherwise affected by prejudicial legal error.¹⁶ A decision is arbitrary and capricious if it is "baseless" or evidences "a sudden turn of mind without apparent motive..."¹⁷ With regard to factual findings, the court must determine whether substantial evidence exists in the record to support the State Engineer's decision.¹⁸ Substantial evidence is "that which a 'reasonable mind might accept as adequate to support a conclusion.'"¹⁹ With regard to purely legal questions, such as statutory construction, the standard

State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782 Nev. 782, 786, 603 P.2d 262, 264 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

¹⁴ SE ROA 005.

¹⁵ NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

¹⁶ *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dist. v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992) ("[a]s a general rule, a decision of an administrative agency will not be disturbed unless it is arbitrary and capricious").

¹⁷ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

¹⁸ *Id.*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert v Ray*, 95 Nev. at 786, 603 P.2d at 264.

¹⁹ *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Employee Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

of review is de novo.²⁰

II. ST. CLAIR'S REQUEST FOR JUDICIAL NOTICE.

As a preliminary matter, on February 27, 2015, St. Clair filed Petitioners' Appendix. Petitioners' Appendix included twenty-six (26) previous rulings by the State Engineer between 1984 and 2012 which demonstrate the State Engineer's prior application of the law of abandonment to water rights. The rulings are public documents capable of review maintained by the State Engineer at his office and online. On June 3, 2015, St. Clair submitted a Request for Judicial Notice in Support of Petitioners' Reply Brief ("Request for Judicial Notice") to this Court. The Request for Judicial Notice contained three exhibits:

(1) the State Engineer's July 24, 2002 *Appellee Nevada State Engineer's Answering Brief* in the Ninth Circuit Court of Appeals, Case Nos.: 01-15665; 01-15814; 01-15816; of the case *United States of America, and Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Company, et. al.* ("Alpine Decree"); the Nevada State Engineer appeared as a Real-Party-in-Interest/Appellee in the *Alpine Decree* and filed the above-referenced Answering brief in the matter that resulted in the decision that is published at 291 F.3d 1062;

(2) the State Engineer's Ruling on Remand 5464-K, issued as a result of the Ninth Circuit District Court's Decision at 291 F.3d 1062; and

(3) the Nevada State Engineer's Answering Brief filed in the Ninth Circuit District Court of Appeals, Case No.: 06-15738, filed on or around November 22, 2006, relating to the *Alpine Decree*.

This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorable Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance of impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition to Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judicial Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility of Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included in the Request for Judicial Notice exist or are public documents.

The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court further finds that all documents submitted are public documents capable of accurate and ready determination by

²⁰ *In re Nevada State Eng'r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

1 resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that all
2 documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are entered
3 onto the record of this Court for this case pursuant to NRS 47.130-150.

4 **III. EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.**

5 Nevada follows a bright line rule of law to guide courts and the State Engineer in determining and
6 analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owner
7 *with the intent* to "forsake and desert it."²¹ Intent is the necessary element the State Engineer is required to
8 prove in abandonment cases.²² This is the standard the State Engineer has previously relied upon.²³ In fact,
9 the State Engineer has explained that "Nevada case law discourages and abhors the taking of water rights
10 away from people," and that is why abandonment must be proven by clear and convincing evidence.²⁴

11 Abandonment requires a union of facts and intent to determine whether the owner of the water
12 right intended abandonment.²⁵ As intent to abandon is a subjective element, the courts utilize all
13 surrounding circumstances to determine the intent.²⁶ Because subjective intent to abandon is a necessary
14 element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer's
15 burden because nonuse does not necessarily mean an intent to forsake.²⁷ Thus, if a vested water right
16 holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occur.
17 For this reason, the State Engineer has previously ruled that "bare ground by itself does not constitute
18 abandonment."²⁸ Also, the Ninth Circuit has upheld the position that bare ground must be coupled with a
19 use inconsistent with irrigation to show intent to abandon.²⁹ The standard of proof for demonstrating
20 abandonment is clear and convincing evidence, and the burden of proof is on the party advocating
21 abandonment, which in this case is the State Engineer.³⁰

22 The Ninth Circuit has consistently upheld and endorsed Nevada's rule of law for abandonment in

23 ²¹ *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.
24 ²² *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek*,
77 Nev. at 354, 364 P.2d at 1075; and *Revert*, 95 Nev. at 786, 603 P.2d at 266.
25 ²³ See Petitioner's Appendix at 00001-0000135.
26 ²⁴ Petitioner's Appendix at 000030-000037.
27 ²⁵ *Revert*, 95 Nev. at 786, 603 P.2d at 264.
28 ²⁶ *Alpine*, 291 F.3d at 1072.
29 ²⁷ Petitioner's Appendix 0000131-0000135; See also Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-
000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.
30 ²⁸ Petitioner's Appendix 000051-000054.
31 ²⁹ *Orr Ditch*, 256 F.3d at 946.
32 ³⁰ *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

1 the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated "from all
2 surrounding circumstances," and not only non-use evidence.³¹ The surrounding circumstances test,
3 although not exhaustive, has definitively produced one bright line rule regarding abandonment of water
4 rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonment.
5 This Court reiterates the canon that a water right may not be abandoned absent the showing of "subjective
6 intent on the part of the holder of a water right to give up that right."³²

7 This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and as
8 such, indirect and circumstantial evidence may be used to show intent of abandonment.³³ The most
9 consistent element in Nevada water law that applies to abandonment cases is the determination that non-
10 use of the water is not enough to constitute abandonment.³⁴ The Ninth Circuit Appeals Court, when
11 analyzing Nevada case law, has continually recognized that Nevada's abandonment rules indicate that
12 non-use alone is not enough to constitute abandonment.³⁵ Nevada requires non-use evidence to be coupled
13 with other evidence to determine the subjective intent of the water user.³⁶ This well-developed rule was
14 originally taken from Nevada's mining law.³⁷ The Ninth Circuit, while applying Nevada state law, has
15 held that the following factors should be considered to determine whether a water owner had the intent to
16 abandon a water right: (1) substantial periods of non-use, (2) evidence of improvements inconsistent with
17 irrigation, and (3) payment of taxes and assessments.³⁸

18 Here, St. Clair is currently using water from another water right on the land which is the place of
19 use for Vested Claim 010493, and that evidence proves that there are no improvements inconsistent with
20 irrigation on the property. Also, there is no evidence that St. Clair or their predecessors in interest failed to
21 pay taxes and assessments. St. Clair filed a Report of Conveyance which demonstrated a clear chain of
22 title for the vested claim, and that chain of title did not rely on any tax sales or foreclosures based on
23 failure to pay assessments.

24 ³¹ *Alpine* 291 F.3d at 1072.

25 ³² *Orr Ditch*, 256 F.3d at 944-45.

26 ³³ *Id.*

27 ³⁴ *In re Manse Spring*, 60 Nev at 288, 108 P.2d at 317; *Orr Ditch*, 256 F.3d at 941, *Alpine*, 291 F.3d at 1072, *Franktown Creek*,
77 Nev. at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.

28 ³⁵ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

³⁶ *Id.*

³⁷ *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

³⁸ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

Further, St. Clair filed a Change Application for the place and manner and use, and clearly has present-day intent to use the water right. As such, St. Clair demonstrated a lack of the subjective intent of the subjective water right owner to abandon the water right.³⁹ Previously, the State Engineer has held that this type of evidence (i.e. filing of a Change Application and a Report of Conveyance) is evidence that a party does not intend to abandon their water right, and can be enough to demonstrate the lack of the subjective intent of abandonment.⁴⁰ The State Engineer has declined to declare a water right abandoned if an applicant filed a change application, stating that filing an application is "evidence that the Applicant does not intend to abandon its water right..."⁴¹ This Court concludes that by this action alone, St. Clair demonstrated he did not intend to abandon his water rights.

Also, the State Engineer deemed that action over and above mere nonuse (i.e. failure to maintain corporate status, relinquishment of grazing rights or right-of-way, lack of communication with State Engineer's office) was necessary to show abandonment.⁴² None of these facts are present in this case.

The State Engineer's determination of abandonment regarding Proof of Appropriation V-010493 was based only on evidence of non-use. The State Engineer references only evidence that shows nonuse, such as the condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and the failure of St. Clair to submit evidence of continuous use. Further, there was no field investigation conducted by the State Engineer to show when the water right was last used, or when the pump was removed from the well. In total, the only evidence before the Court was that of non-use. The State Engineer's reliance solely on non-use evidence was improper. Therefore, the State Engineer's conclusion that St. Clair's water right was abandoned is not supported by substantial evidence, and was therefore, arbitrary, capricious, and is overruled.

IV. THE STATE ENGINEER UNLAWFULLY IMPAIRED ST. CLAIR'S WATER RIGHT BY APPLYING A RULE THAT IS STRICTER THAN THE WATER STATUTES.

Vested water rights are "regarded and protected as property."⁴³ The term vested water rights is

³⁹ *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F.3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.

⁴⁰ Petitioner's Appendix at 000084-000090, 000128-000130; *See also* Petitioner's Appendix .

⁴¹ Petitioner's Appendix at 0000115-0000121; *See also* Petitioner's Appendix at 000015-000020.

⁴² *See* Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.

⁴³ *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

1 often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment of
2 Nevada's statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed to
3 have been perfected before the current statutory water law, the State Engineer does not have powers to
4 alter vested water rights.⁴⁴ Thus, the State Engineer cannot apply a rule to a vested water right unless that
5 rule existed at common law. The State Engineer has recognized this limitation in the past, holding that
6 applying a rebuttable presumption standard would further undercut the stability and security of pre-1913
7 vested water rights.⁴⁵

8 Here, the State Engineer applied a more restrictive law of abandonment than existed prior to the
9 adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be shown
10 to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to St.
11 Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide a
12 water right owner with a notice of forfeiture before the water right can be forfeited.⁴⁶ A water right owner
13 can then cure the forfeiture.⁴⁷ Yet here, the State Engineer did not give St. Clair any notice of forfeiture,
14 nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair was
15 more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a less
16 restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right was
17 abandoned was arbitrary and capricious, and as such is overruled.

18 V. **THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO ST.**
19 **CLAIR TO PROVE LACK OF INTENT TO ABANDON.**

20 This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects the
21 assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of proof
22 to a party defending a water right from abandonment.⁴⁸ In the *Alpine* case, the Ninth Circuit upheld the
23 ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference of
24 intent to abandon, it does not create a rebuttable presumption."⁴⁹ Nevada maintains the rule that there is no
25

26 ⁴⁴ *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

27 ⁴⁵ Petitioner's Appendix 000021-000025.

28 ⁴⁶ *Town of Eureka*, 108 Nev. At 168.

⁴⁷ *Id.*

⁴⁸ *Orr Ditch*, 256 F.3d at 945-946.

⁴⁹ *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

1 rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme and
2 long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on only
3 non-use evidence when considering the intent element of abandonment.⁵⁰

4 The State Engineer correctly identified the standard that "[n]on-use for a period of time *may*
5 inferentially be *some* evidence of intent to abandon a water right,"⁵¹ and the State Engineer correctly stated
6 that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."⁵²
7 However, in the very next sentence, the State Engineer mischaracterized the leading case law on point
8 when he stated that "proof of continuous use of the water right should be required to support a finding of
9 *lack* of intent to abandon."⁵³ The State Engineer hinged his abandonment determination of this
10 misstatement of law.

11 The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstance
12 of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and
13 state government regarding change applications for a change in place, manner and use of water rights in
14 the Newlands Project prior to 1983.⁵⁴ The *continuous use* language the State Engineer relied on is in the
15 Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."⁵⁵ In that section, the
16 Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only
17 *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no
18 bearing on the current instance because this case does not involve the circumstance that existed in the
19 Newlands Project, or an intrafarm transfer.

20 The State Engineer's actions in the current action clearly demonstrate an attempt by the State
21 Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burden-
22 shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies on
23 the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The State

24 ⁵⁰ *Id.* See also *In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316.; *United States v. Alpine Land and Reservoir Co.*, 27 F.Supp.2d
25 1230, 1239-1241 (D.Nev. 1998) (a protestant alleging forfeiture or abandonment "bears the burden of proving clear and
convincing evidence" to establish that fact); see also *Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 951
(1992).

26 ⁵¹ SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

27 ⁵² SE ROA at 0008; *Orr Ditch*, 256 F.3d at 945.

28 ⁵³ At 5; *v. Alpine*, 291 F.3d at 1077.

⁵⁴ *Alpine*, 291 F.3d at 1073-74.

⁵⁵ *Id.*

1 Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of the
2 burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

3 **VI. THE STATE ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRARY**
4 **AND CAPRICIOUS BECAUSE HE APPLIED THE WRONG RULE OF LAW.**

5 This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudden
6 turn of mind without apparent motive demonstrates the State Engineer's decision is arbitrary and
7 capricious.⁵⁶ Previously, the State Engineer continually upheld the standards for abandonment that were
8 established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpine*
9 *Decree* proceeding that was relied upon by the Court and which recognized the principles of
10 abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents a
11 specialized circumstance.⁵⁷ The State Engineer later demonstrated a keen understanding of the application
12 of the *Alpine Decree* to intrafarm transfers.⁵⁸ Yet, in the current instance, the State Engineer completely
13 changed course without evidence or facts in the record to explain his action.

14 Therefore, Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that
15 cannot remedy his sudden and improper application of well-settled Nevada water law. This Court has
16 already discussed the lack of evidence of intent to abandon produced by the State Engineer in Ruling
17 6387. However, the State Engineer's sudden departure from his application of the *Alpine* and *Orr Ditch*
18 Decree was also arbitrary and capricious.

19 **CONCLUSIONS OF LAW**

20 This Court, having reviewed the record on appeal,⁵⁹ and having considered the arguments of the
21 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this
22 matter, hereby ORDERS as follows:

23 1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has a
24 vested water right under V-010493;

25 2. Ruling 6287 is OVERRULED in part to the extent it declares V-010493 abandoned; and
26

27 ⁵⁶ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

28 ⁵⁷ See *Request for Judicial Notice* at 3.

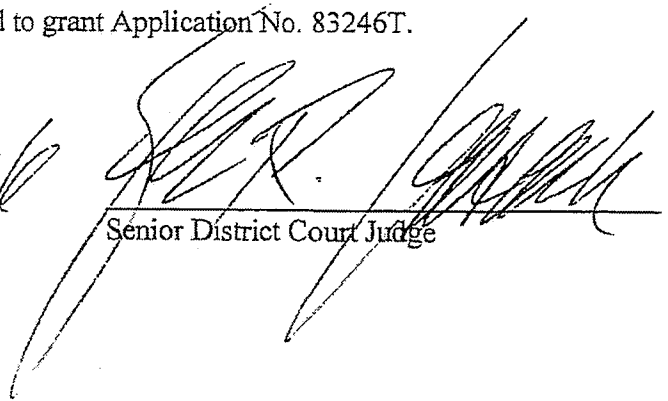
⁵⁸ *Id.*

⁵⁹ See SE ROA; see also *Petitioner's Appendix*; see also *Petitioner's Request for Judicial Notice*.

1 3. The State Engineer is directed to grant Application No. 83246T.

2 **IT IS SO ORDERED.**

3 *April 11, 2016*

4 
Senior District Court Judge

5
6
7
8
9
10
11
12 Taggart & Taggart, Ltd.
13 108 North Minnesota Street
14 Carson City, Nevada 89703
15 (775) 883-9900 - Telephone
16 (775) 883-9900 - Facsimile
17
18
19
20
21
22
23
24
25
26
27
28

1 Rodney St. Clair, Petitioner vs. Jason King, P.E. et al, Respondent
2 Sixth Judicial District Court of Nevada, Case No. CV 20,112
3

4 **DECLARATION OF SERVICE**
5

6 I am a citizen of the United States, over the age of 18 years, and not a party to or interested
7 in this action. I am an employee of the Humboldt County Clerk's Office, and my business address
8 is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following
9 document(s): **ORDER OVERRULING STATE ENGINEER'S RULING 6287**

10 X By placing in a sealed envelope, with postage fully prepaid, in the United States Post
11 Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's
12 practice whereby the mail, after being placed in a designated area, is given the appropriate postage
13 and is deposited in the designated area for pick up by the United States Postal Service.
14

15 _____ By personal delivery of a true copy to the person(s) set forth below by placement in the
16 designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative
17 of said person(s) set forth below.

18 Taggart & Taggart, Ltd
19 108 North Minnesota St.
20 Carson City, Nevada 89703

Attorney General's Office
Attn.: Justina Caviglia
100 N. Carson St.
Carson City, Nevada 89701

21 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
22 is true and correct.

23 Executed on April 22, 2016, at Winnemucca, Nevada.
24

25 
26 DEPUTY CLERK
27
28

SIXTH JUDICIAL DISTRICT COURT MINUTES

CASE NO. CV 20,112

TITLE: RODNEY ST. CLAIR VS JASON KING,
P.E., NEVADA STATE ENGINEER;
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES

**MATTER HEARD IN THE SPECIALTY COURTROOM OF THE
FIRST JUDICIAL DISTRICT COURT, CARSON CITY**

04/11/16 – SPECIALTY COURT– HONORABLE STEVEN KOSACH
J. Harkleroad, Clerk – Not Reported

HEARING ON OBJECTIONS

Present: Paul Taggart counsel for Petitioner; Justina Caviglia, Deputy A.G.

Statements were made by Court.

Caviglia stated her objections to the Proposed Order for the record. Taggart in response.

Further statements were made by Court and counsel.

Objection No. 1 - Taxes and assessment issue and the newspaper issue.

COURT ORDERED: Objection is overruled.

Further statements were made by Court.

Objection No. 2

COURT ORDERED: It overrules the objection.

Further statements were made by Court.

In regards to the forfeiture vs abonnement issue.

COURT ORDERED: It is overruling that issue.

Further statements were made by Court.

COURT ORDERED: Order Overruling State Engineer's Ruling 6287 granted in accordance with the Order signed in open Court on April 11, 2016. Clerk is directed to forward the original Order along with the JAVS recording of this hearing to Humboldt County Clerk for filing.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

SIXTH JUDICIAL DISTRICT COURT MINUTES

CASE NO. CV20-112

TITLE: RODNEY ST. CLAIR VS JASON KING,
P.E., NEVADA STATE ENGINEER,
DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES

MATTER HEARD IN DEPT. 1 OF THE FIRST JUDICIAL DISTRICT COURT, CARSON CITY

01/05/16 – DEPT. II – HONORABLE SR. JUSTICE STEVEN R. KOSACH
J. Higgins, Clerk – Not Reported

ORAL ARGUMENTS

Present: Petitioner with counsel, Paul Taggart; Justina A. Caviglia, Deputy A.G.; Susan Joseph-Taylor, Deputy Administrator of Division of Water Resources.

Statements were made by Court.

Counsel presented arguments.

Court stated its findings of facts and conclusions of law.

COURT ORDERED: It overturns the State Engineer's decision.

Taggart to draft the decision.

Statements were made by Court.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

CV 20,112

Rodney St. Clair vs. Jason King, P E, et al

Judge: Michael R. Montero

Clerk: Jody Clark

Bailiff: Ron Moser

November 3, 2015

CONTINUED ORAL ARGUMENTS

PRESENT: Rodney St. Clair, present with counsel, Paul G. Taggart. Respondent, Jason King, P E. Nevada State Engineer, Division of Water Resources Department of Conservation and Natural Resources, present with counsel, Deputy Attorney General, Justina Caviglia.

The Court disclosed to the parties that he is a minority shareholder in his family ranching operation. Further, the ranch also holds water rights but does not believe there is any contested matters. Also, the Attorney General's Office has represented him as a State employee. Also, Jason King was the Engineer who approved his plans for his cabin on his families' ranch.

The Court informed the parties and counsel that should anyone have any concerns with what he has just informed them, he would recuse himself.

The Court gave the parties and counsel some time to discuss the matter.

After a brief recess, Taggart informed the Court that his client would be motioning the Court to recuse himself.

Caviglia concurred with Taggart's decision.

The Court addressed St. Clair.

The Court will recuse himself and immediately have the Clerk appoint a senior judge.

The Court thanked the parties for their patience.

CERTIFICATION OF COPY

STATE OF NEVADA,
COUNTY OF HUMBOLDT,

I, TAMIRAE SPERO, the duly elected, qualifying and acting Clerk of Humboldt County, in the State of Nevada,
and Ex-Officio Clerk of the District Court, do hereby certify that the foregoing is a true , full and correct copy
of the original: Notice of Appeal; Case Appeal Statement; District Court Docket Entries; Order Overruling State
Engineer's Ruling 6287; Notice of Entry of Order; District Court Minutes;

Rodney S. Clair,

Petitioner,

vs.

Jason King, P.E., Nevada State Engineer,
Division of Water Resources, Department
of Conservation and Natural Resources.

Respondent.

CASE NO. CV 20112

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto set
my hand and affixed the seal of the Court at my
office, Winnemucca, Nevada, this 23rd
day of May, 2016, A.D.


TAMIRAE SPERO, CLERK