

ATTACHMENT 3

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1 Case No. CV 20112

2 Dept. No. 2

FILED

2016 APR 29 AM 10:38

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

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.

NOTICE OF ENTRY OF ORDER

14
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."
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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
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By: 
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
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Nevada State Bar No. 12303
Attorneys for Petitioner

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 27th 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

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**

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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 1.

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*

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.

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.

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, 000128-0000130; *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*.

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IT IS SO ORDERED.

April 11, 2016

Senior District Court Judge

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.
Carson City, Nevada 89703

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

20
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
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ATTACHMENT 2

ATTACHMENT 2

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**

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 1.

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

³² *Orr Ditch*, 256 F.3d at 944-45.

³³ *Id.*

26 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.

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

³⁶ *Id.*

28 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.

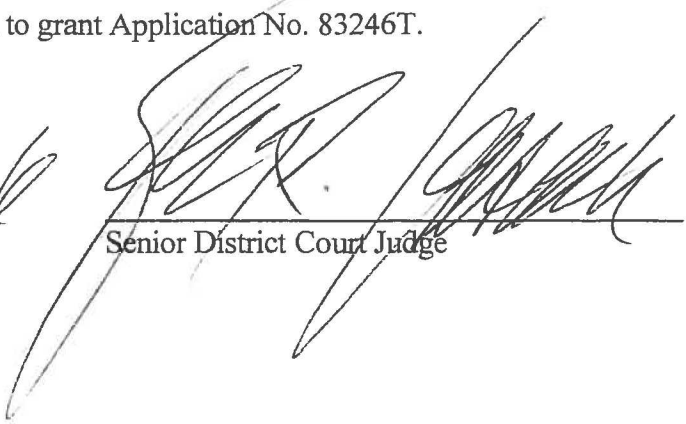
⁵⁸ *Id.*

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

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.
Carson City, Nevada 89703

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

20
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

ATTACHMENT 1

ATTACHMENT 1

1 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
2 GREGORY H. MORRISON, ESQ.
Nevada State Bar No. 12454
3 TAGGART & TAGGART, LTD.
108 North Minnesota Street
4 Carson City, Nevada 89703
5 (775)882-9900 - Telephone
(775)883-9900 - Facsimile
6 Attorneys for Petitioner

RECEIVED
2014 AUG 22 AM 11:53
STATE ENGINEERS OFFICE

7
8 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR THE COUNTY OF HUMBOLDT

10 RODNEY ST. CLAIR,

11 Petitioner,

12 vs.

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

16 Respondent.

* * *

CASE NO.: _____

DEPT. NO.: _____

17
18 **PETITION FOR JUDICIAL REVIEW**

19 COMES NOW, Petitioner, RODNEY ST. CLAIR (hereinafter "Petitioner"), by and through
20 its attorney of record, PAUL G. TAGGART, Esq. and GREGORY H. MORRISON, ESQ. of the law
21 firm of TAGGART & TAGGART, LTD., and hereby petitions the Court to reverse or remand Ruling
22 No. 6287 issued by Jason King, P.E., Nevada State Engineer, attached hereto as Exhibit "A".

23 This Petition for Judicial Review as well as Notice of Appeal is filed pursuant to NRS
24 533.450. The State Engineer's findings of fact, conclusions of law, and rulings in Ruling No. 6287
25 will injure Petitioner's interests because the ruling, if upheld, will deprive Petitioners of a vested right
26 to groundwater, and thereby greatly diminish the value of real property that is owned by Petitioners.

27 At least one of the conclusions reached by the State Engineer relied in an incorrect application
28 of Nevada statute, as well as reliance on case law taken out of context and without support.

1 **I. JURISDICTIONAL STATEMENT**

2 Pursuant to NRS 533.450(1), rulings of the State Engineer are subject to judicial review “in
3 the proper court of the county in which the matters affected or a portion thereof are situated.” The
4 real property to which the water at issue in this appeal is appurtenant lies within Humboldt County.
5 Therefore, the Sixth Judicial District Court of the State of Nevada in and for Humboldt County is the
6 proper venue for judicial review of Ruling No. 6287.

7 **II. BACKGROUND**

8 Petitioner owns real property located in Humboldt County, Nevada, (Assessor’s Parcel
9 Number (“APN”) 03-49-17), which it purchased in August, 2013. On November 8, 2013, Petitioner
10 filed two documents with the State Engineer. The first was Proof of Appropriation V-010493,
11 claiming a vested right to an underground water source for irrigation of 160 acres of land. The
12 second was Application No. 83246T to change the point of diversion of the vested water claim. To
13 support the vested claim, Petitioners presented evidence of application of the water to beneficial use
14 prior to March 25, 1939, the operative date for the State Engineer to consider vested claims to
15 groundwater.

16 On July 25, 2014, the State Engineer issued Ruling 6287 in which the State Engineer found
17 that the Petitioner had presented sufficient evidence to prove a vested right to groundwater was
18 established prior to March 25, 1939. Subsequent to that finding, the State Engineer declared that
19 Proof of Appropriation V-010493 had been abandoned and denied application 83246T based on the
20 grounds that no appropriated water was available.

21 In considering whether the vested right had been abandoned, the State Engineer cited multiple
22 judicial interpretations of NRS 534.090(4)’s requirement that abandonment of a groundwater right
23 requires a finding of intent to abandon that right. First, the State Engineer quoted the 9th Circuit
24 Court of Appeals’ holding in *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935, 945 (9th Cir. 2001), in
25 which the Court stated that “[a]lthough a prolonged period of non-use may raise an inference of intent
26 to abandon . . . it does not create a rebuttable presumption of abandonment.” State Eng’r Ruling 6287
27 at 4 (July 25, 2014). The very next sentence then states that as a result of that holding, “proof of
28 continuous use of the water right should be required to support a finding of *lack* of intent to

1 abandon.” *Id.* (emphasis in original). The State Engineer improperly applied the holding of this case,
2 and made other errors which require reversal or remand of Ruling 6287.

3 **III. CONCLUSION**

4 For the reasons explained above, and others that may be discovered and raised during the
5 pendency of this appeal, Petitioner respectfully requests that this Court reverse or remand Ruling No.
6 6287 to the State Engineer with instructions to reverse the finding of abandonment on Vested Claim
7 V-010493 and grant Application 83246T, and provide the full scope of protection that Vested Claim
8 V-010493 is entitled to receive under the Nevada water law.

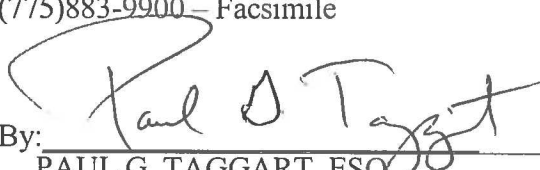
9 **AFFIRMATION**
10 **Pursuant to NRS 239B.030**

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

13 DATED this 21 day of August, 2014.

14 TAGGART & TAGGART, LTD.
15 108 North Minnesota Street
16 Carson City, Nevada 89703
17 (775)882-9900 – Telephone
18 (775)883-9900 – Facsimile

19 By:

20 
21 PAUL G. TAGGART, ESQ.
22 Nevada State Bar No. 6136
23 GREORY H. MORRISON, ESQ.
24 Nevada State Bar No. 12454
25 Attorneys for Petitioner
26
27
28

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 this Petition for Judicial Review, as follows:

☒ By **U.S. CERTIFIED, RETURN RECEIPT 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:

☒ By **HAND DELIVERY**, via:

☐ Reno-Carson Messenger Service

☒ Interoffice-type messenger

☐ other type of delivery service: _____

by placing a true and correct copy of the above-identified document in an envelope addressed as follows:

Jason King, P.E.
Nevada Division of Water Resources
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

DATED this 21 day of August, 2014.



Employee of TAGGART & TAGGART, LTD.

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

JASON KING, P.E., NEVADA STATE
ENGINEER, et. al.,
Appellant,

vs.

RODNEY ST. CLAIR,
Respondent,

No. 70458

Electronically Filed
Jun 14 2016 01:36 p.m.

DOCKETING STATEMENT
CIVIL APPEALS
Tara K. Linn
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Sixth Department 2

County Humboldt Judge Steven R. Kosach

District Ct. Case No. CV 20112

2. Attorney filing this docketing statement:

Attorney Justina A. Caviglia Telephone (775) 684-1222

Firm Office of the Attorney General

Address 100 North Carson Street
Carson City, NV 89701-4717

Client(s) Appellant, Jason King, P.E., Nevada State Engineer, et al.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Paul Taggart, Esq. Telephone (775) 882-9900

Firm Taggart & Taggart, Ltd.

Address 108 North Minnesota Street
Carson City, NV 89703

Client(s) Respondent, Rodney St. Clair

Attorney Rachel L. Wise, Esq. Telephone (775) 882-9900

Firm Taggart & Taggart, Ltd.

Address 108 North Minnesota Street
Carson City, NV 89703

Client(s) Respondent, Rodney St. Clair

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None.

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action and the result below:

Petitioner Rodney St. Clair filed proof of appropriation V-010493 for pre-statutory vested water rights and application 83246T to change the point of diversion of proof of appropriation V-010493 with the State Engineer. The State Engineer issued Ruling 6287 finding that there was sufficient evidence to demonstrate the establishment of a pre-statutory vested right to underground water in support of proof of appropriation V-010493. However, the State Engineer further found that the pre-statutory vested groundwater right V-010493 had been abandoned. Based upon the abandonment of V-010493, the State Engineer denied application 83246T. Petitioner filed a petition for judicial review of the State Engineer's Ruling 6287. The district court issued a decision affirming Ruling 6287, in part, where the State Engineer found sufficient evidence to demonstrate the establishment of a pre-statutory vested right to underground water in support of proof of appropriation V-010493; overruling Ruling 6287, in part, to the extent that the State Engineer declared pre-statutory vested water right V-010493 abandoned; and ordering the State Engineer to grant application 83246T. That decision is being appealed by the State Engineer.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

The State Engineer appeals the District Court's determination that proof of appropriation V-010493 for pre-statutory vested water rights was not abandoned.

The State Engineer appeals the District Court's exercise of the executive authority in violation of the Nevada Constitution Article 3, Section 1 and NRS Chapter 533.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

State Engineer, et. al. v. Eureka County, et.al., No. 70157, raises a similar issue. Both cases involve district courts exercising executive authority in violation of the Nevada Constitution Article 3, Section 1 and NRS Chapter 533.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9) as an administrative agency appeal involving a water determination.

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from Apr 22, 2016

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served Apr 29, 2016

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed May 23, 2016

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

This is an appeal from a final decision of the Sixth Judicial District Court based upon a petition for judicial review commenced before the court where the judgment was rendered.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

RODNEY ST. CLAIR, Petitioner

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

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Rodney St. Clair appealed the State Engineer's determination finding that proof of appropriation V-010493 for pre-statutory vested water rights were abandoned and denying application 83246T to change the point of diversion of proof of appropriation V-010493.

On April 22, 2016, the district court entered a written order disposing of all claims.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

Not applicable.

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Jason King, P.E., State Engineer, et. al.
Name of appellant

Justina A. Caviglia
Name of counsel of record

June 14, 2016
Date

/s/ Justina A. Caviglia, Deputy Attorney General
Signature of counsel of record

Carson City, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 14th day of June, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☒ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

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

Dated this 14th day of June, 2016

/s/ Dorene A. Wright
Signature