

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., NEVADA STATE
ENGINEER, DIVISION OF WATER
RESOURCES, DEPARTMENT OF
CONSERVATION AND NATURAL
RESOURCES,

Appellant,

vs.

RODNEY ST. CLAIR,

Respondent.

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Case No. 70458

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from the April 22, 2016, final order of the district court granting Respondent's Petition for Judicial Review, which was served on April 29, 2016. Joint Appendix (JT APP) at 805. Jurisdiction is proper pursuant to NRAP 3A(a) and 3A(b)(1), and NRS 533.450(9). Appellant State Engineer timely filed his Notice of Appeal on May 23, 2016. JT APP 823. Accordingly, Appellant State Engineer's appeal is timely pursuant to NRAP 4(a)(1).

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9), as it is a case involving an administrative agency appeal concerning the determination of an application to change the point of diversion of a pre-statutory vested water claim.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. The State Engineer appeals the district court's determination that Proof of Appropriation No. V-10493 claiming a pre-statutory vested water claim was not abandoned.

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B. The State Engineer appeals the district court's decision to approve Rodney St. Clair's pending application to change the point of diversion pursuant to NRS 533.345 as being in excess of its constitutional authority set forth in Nev. Const. art. III, § 1.

C. The State Engineer appeals the district court's decision to approve Rodney St. Clair's request to expand the record.

IV. STATEMENT OF THE CASE

This appeal arises from the district court's March 11, 2016, Order Overruling State Engineer's Ruling No. 6287, in which the district court overruled the State Engineer's determination that Proof of Appropriation No. V-10493, which claimed a pre-statutory vested water right, was abandoned. After determining the vested right was *not* abandoned, the district court rejected a remand to the State Engineer to consider Application No. 83246T to change the point of diversion of Proof of Appropriation No. V-10493, and instead ordered that Application No. 83246T be granted pursuant to NRS 533.345 without further analysis and review of the change application by the State Engineer. JT APP at 557-559.

V. STATEMENT OF THE FACTS

Rodney St. Clair (hereinafter referred to as “St. Clair”) filed Proof of Appropriation No. V-10493 with the State Engineer, claiming a pre-statutory vested groundwater right located on property that St. Clair acquired in 2013 in the Quinn River, Orvada sub-basin. JT APP 043-047. The Quinn River, Orvada sub-basin is located in Humboldt County, Nevada, and is a fully appropriated basin that has not been subject to a full adjudication of the pre-statutory vested groundwater rights under NRS 533.090, *et seq.*¹ Because the Quinn River, Orvada sub-basin has not been adjudicated, Proof of Appropriation No. V-10493 is an unadjudicated claim that has not been quantified or decreed by a court under NRS chapter 533. St. Clair claims a vested right to groundwater, which, pursuant to NRS 534.080, requires the appropriation to have been initiated prior to March 22, 1913 (in the case of artesian or definable groundwater), or March 26, 1939 (in the case of percolating groundwater). The State

¹ The Quinn River, Orvada sub-basin has combined perennial yield with the McDermitt sub-basin, at 60,000 acre-feet annually. The Division of Water Resources has allocated 97,891.08 acre-feet annually in the Orvada sub-basin 033A and has allocated 5,595.16 acre-feet annually in the McDermitt sub-basin 033B. *Available at* <http://water.nv.gov/data/underground/>.

Engineer determined that Proof of Appropriation No. V-10493 claimed a vested right to percolating groundwater, was thus subject to the March 26, 1939, cutoff date. JT APP 16.

Traditionally, the State Engineer does not review or analyze a claim to a vested right until an adjudication process is initiated. However, in addition to Proof of Appropriation No. V-10493, St. Clair also filed Application No. 83246T to temporarily change the point of diversion of Proof of Appropriation No. V-10493.² JT APP 038. As St. Clair applied for a temporary change of the point of diversion of his claim, the State Engineer examined St. Clair's claim to preliminarily determine the veracity of the claim prior to acting on the temporary change application.³ JT APP 016.

In support of Proof of Appropriation No. V-10493, St. Clair provided land patents that showed that George Crossley obtained the underlying property from the United States government pursuant to

² A point of diversion is the point from which water is diverted from its source, in this case, the location of the original well.

³ The public policy served by preliminarily examining an unadjudicated claim, which is serving as the base right to change application, is to avoid creating "new water" by granting a change application on a vested right that was either never established or was established in a lesser amount than claimed under the proof.

the Homestead Act in 1924. JT APP 049-053. As part of that land patent application, there was documentation that a well was located on the property and was used by Mr. Crossley to cultivate the land. *Id.* The well, which is still located on the property, has an 8-inch casing made from rolled thin metal with horizontal rivet seams, placed in short sections, which are connected with riveted collars. JT APP 054. This well construction method was used until the mid-1930s. JT APP 089-094. In addition, it appeared that the well was installed using a type of drill rig that was last manufactured in 1933. JT APP 110-113. Based on this evidence, the State Engineer concluded that St. Clair had established that his predecessor in interest, Mr. Crossley, had placed water to beneficial use prior to 1939, and thus this claim for a vested percolating groundwater right was likely valid. JT APP 017.

St. Clair had also submitted newspaper articles written by George Crossley; however, those articles were written after Mr. Crossley sold the property and did not directly mention the property. JT APP 081-084. The State Engineer did not consider them
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relevant to prove that a vested water right was present; nevertheless, the other evidence supported the claim. JT APP 017.

Although the evidence in the record supports that a vested percolating groundwater right claim was established, there is very little evidence in the record to indicate that the owners of the property continued irrigating after 1924. As part of his claim, St. Clair submitted a 1954 aerial photograph that purports to show the property was being irrigated. JT APP 115. However, the State Engineer concluded that the photograph was inconclusive because it only showed one quarter of the property, and the photograph was not clear. JT APP 019. Furthermore, St. Clair failed to provide any evidence in the record that the property had been irrigated, or that the well had been otherwise used since 1954. *Id.* In Proof of Appropriation No. V-10493, St. Clair admitted that he was unaware of the last time any irrigation had occurred on the property or to what extent irrigation occurred. JT APP 047.

After his initial review, the State Engineer informed St. Clair of the lack of evidence of continued beneficial use of the water under the claim and requested St. Clair provide additional evidence on that point.

JT APP 116-117. St. Clair did not submit any additional evidence for the State Engineer to consider and merely resubmitted his original evidence which was inconclusive, and which admitted St. Clair was unaware when irrigation on the property last occurred. JT APP 019, 118-197.

In addition to the lack of evidence by St. Clair that continued beneficial use had taken place, St. Clair's photographs of the well demonstrated the well was not in a usable condition where the well casing was rusted through and had silted in. JT APP 086-087. The State Engineer concluded that this evidence showed that the "casing is unusable in its current condition and that it has gone unused for a significant period of time." JT APP 018. Moreover, the photographs show that at some point the pump was removed from the well, which would render the well useless. JT APP 086-087.

Based on this evidence, on July 25, 2014, the State Engineer issued Ruling No. 6827, concluding that St. Clair had established the existence of a vested groundwater right. JT APP 017. However, the State Engineer determined that the right had been abandoned by the intentional actions of the prior owners of the property who did not place

the water to beneficial use since at least 1954, had allowed the well to become unusable, and had removed the pump from the well. JT APP 017-021. As the water right was deemed abandoned, the State Engineer determined that change Application No. 83246T could not be granted because the base right (Proof of Appropriation No. V-10493) was no longer valid. *Id.* Thus, the State Engineer denied Application No. 83246T without analyzing the application on its merits of whether it met the statutory criteria for grant or denial. *Id.*

St. Clair timely filed his petition for judicial review. JT APP 004-007. The matter was briefed by February 27, 2015. However, four months after filing his reply brief, St. Clair filed a request for judicial notice in support of his reply brief on June 2, 2015, which requested the district court take notice of various new documents, which were not part of the State Engineer's record on appeal. JT APP 430-556. The State Engineer opposed the request. JT APP 563-566. The matter was set for oral argument with Judge Montero on November 3, 2015. JT APP 587. At the designated time, Judge Montero disclosed two issues to the parties: (1) that he is a minority shareholder in Pine Forest Land & Stock Company, which has

had prior dealings with the Division of Water Resources, and (2) that the current State Engineer, Jason King, had engineered Judge Montero's log cabin many years ago prior to becoming State Engineer. JT APP 587; 557-559. Based upon the disclosures, the Court asked the parties if they had any objections to him hearing the matter. JT APP 587. State Engineer did not, but St. Clair requested recusal and Judge Montero recused himself. Senior Judge Steven R. Kosach was appointed to hear the matter and held oral arguments on January 5, 2016, in Carson City. JT APP 557-559. After hearing arguments by the parties, Judge Kosach ruled from the bench, granted the petition for judicial review and ordered St. Clair to prepare an order. JT APP 666-670.

On March 7, 2016, St. Clair provided a proposed Order Overruling State Engineer's Ruling 6287 to counsel for the State Engineer requesting comments or changes. JT APP 679. In the draft order, St. Clair included an order for the State Engineer to grant Application No. 83246T. JT APP 706-717. Counsel for the State Engineer advised St. Clair she objected to the Order as it was not in conformance with Judge Kosach's oral ruling and specifically objected to the inclusion of

the granting of Application No. 83246T. JT APP 681-698. St. Clair submitted the order without changes to the Court and the State Engineer filed his formal objection. JT APP 672-749. St. Clair filed a response and a hearing on the objection was held on April 11, 2016. JT APP 470-755. At the hearing on the objection, Judge Kosach adopted St. Clair's order, including the order to grant Application No. 83246T without any further review of the application by the State Engineer. JT APP 792-803.

VI. SUMMARY OF THE ARGUMENT

This Court should address the legal question of whose intent controls with respect to the abandonment of a water right in Nevada. The district court and St. Clair focused on the intent of St. Clair—the current owner of the claim, who by happenstance, discovered the disused well casing upon purchasing the property in 2013 and filed a claim of vested right on it. JT APP 047. However, the State Engineer, when issuing Ruling No. 6287, considered the intent of St. Clair's predecessors who failed to continue beneficially using the water since at least 1954, failed to maintain the well, removed the pump from the well and abandoned the water right. JT APP 017-021. Nevada law is silent

regarding whose intent should control when determining if a water right has been abandoned. The Colorado Supreme Court has addressed this legal question holding that the intent of the party that abandoned the water must be addressed by the courts, not the intent of the current owner who is attempting to revive the water right. *See Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 554 (Colo. 2000) (en banc); *Purgatoire River Water Conservancy Dist. v. Witte*, 859 P.2d 825, 833-34 (Colo. 1993); *Southeastern Colorado Water Conservancy District v. Twin Lakes Association, Inc., et al.*, 770 P.2d 1231, 1243 (1989) (en banc). This Court needs to similarly determine which party's intent controls in Nevada, with respect to abandoning a water right.

Additionally, the district court exceeded its constitutional authority when it ordered the State Engineer to grant Application No. 83246T without any analysis or review by the State Engineer in violation of NRS 533.345. Here, the State Engineer did not review Application No. 83246T on its merits because the State Engineer determined the base right had been abandoned. Therefore, the State Engineer did not address whether Application No. 83246T would conflict with existing rights or whether use of the water would threaten

to prove detrimental to the public interest under NRS 533.345. Over the objection of the State Engineer, the district court ordered the approval of the change application. Furthermore, the district court, as part of its ruling from the bench, did not initially order the granting of this application or the various other statements the State Engineer objected to that were included in the order prepared by St. Clair. Rather, the district court inappropriately adopted St. Clair's order based upon a post hoc rationalization. The order, drafted by St. Clair, greatly expanded the district court's oral decision, which ultimately resulted in the district court violating the separation of powers doctrine by ordering the State Engineer to grant Application No. 83246T, rather than remand the application to the State Engineer for further action.

The district court also violated this Court's pronouncement that in water right appeals, the petitioner does not have a right to de novo review or to offer additional evidence at the district court. Here, the district court granted St. Clair's request for judicial notice which improperly expanded the record to include evidence outside of the record on appeal. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943).

VII. STANDARD OF REVIEW ON APPEAL

Here, the legal question is in three parts: (a) did the district court improperly focus on the intent of the current owner of water right subject to abandonment; or, should the intent of the owner who abandoned the water right control; (b) did the district court exceed its constitutional authority by granting an application to change the point of diversion pursuant to NRS 533.345; and (c) did the district court err by granting St. Clair's request for judicial notice which improperly expanded the record in violation of NRS 533.450? Because questions of law and interpretation of statutory and constitutional authority are present, de novo review of the district court's order is proper. *See, e.g., Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 616 (2014) (while a district court's decision is generally reviewed for abuse of discretion, where "as here, the decision implicates a question of law, the appropriate standard of review is de novo."); *Milton v. State Dep't of Prisons*, 119 Nev. 163, 164, 68 P.3d 895, 895 (2003) (where the district court applied the wrong legal standard, a pure question of law is raised, ///
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subject to de novo review.); *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007) (“We review purely legal issues, including issues of constitutional and statutory construction, de novo.”).

VIII. ARGUMENT

A. The District Court Improperly Considered St. Clair’s Intent To Revive A Vested Groundwater Right, Rather Than The Intent Of Prior Owners Who Abandoned The Right

Abandonment of a water right is the voluntary “relinquishment of the right by the owner with the intention to forsake and desert it.” *In Re Manse Springs*, 60 Nev. 208, 108 P.2d. 311, 315 (1940). Abandonment is the union of acts and intent; and, under Nevada law is “a question of fact to be determined from all the surrounding circumstances.” *Revert v. Ray*, 95 Nev. 782, 786, 603 P. 2d 262, 264 (1979); *see also In Re Manse Springs*, 108 P.2d at 316. As part of that factual review, nonuse for a prolonged period of time may inferentially be some evidence of intent to abandon. *In re Determination of Relative Rights in & to Waters of Franktown Creek, Washoe County*, 77 Nev. 348, 354–55, 364 P.2d 1069, 1072 (1961); *In re Waters of Manse Springs*, 108 P.2d 311. “Nevada law holds that abandonment of an appropriation of water for irrigation is a question of intention to be

evidenced by overt acts; but, when such overt acts appear, the right to appropriate water ceases and cannot be resumed as against intervening rights of others.” *Anderson Land & Stock Co. v. McConnell, et al.*, 188 F. 818 (C.C.D. Nev. 1910). However, the question of whose intent to abandon the water rights is relevant, for the review has never been addressed in Nevada.

The district court ruled that “[t]he law is that you are not abandoning when you have the intent to revise [sic] the claim, when you have the intent to apply for the application, that shows that your intent is not to abandon.” JT APP 667. However, the district court was incorrect, Nevada water law does not provide for or state that a subsequent purchaser, in Nevada, can revive a water right, through their intent alone. Rather it is silent. However, Colorado has addressed this important question of law.

As in Nevada, under Colorado water law, abandonment of a water right requires, in part, intent to abandon. *Allard Cattle Co. v. Colorado & Southern Railway Co.*, 530 P.2d 503 (Colo. 1974). In Colorado, intent may be shown either expressly or by implication, with nonuse for a long period of time being evidence of intent to abandon.

Upper Harmony Ditch Co. v. Carwin, 539 P.2d 1282 (Colo. 1975). Furthermore, nonuse alone will not establish abandonment where the owner introduces sufficient evidence to show that during the period of nonuse there never was any intention to permanently discontinue the use of the water. *Parsons v. Fort Morgan Reservoir & Irrigation Co.*, 136 P. 1024 (Colo. 1913); *Alamosa Creek Canal Co. v. Nelson*, 93 P. 1112 (Colo. 1908). Nonuse can be manifested by conditions inconsistent with active use of a water right. Such conditions include failure to make beneficial use of water [and] failure to repair or maintain diversion structures.” *Haystack Ranch*, 997 P.2d at 554; *Twin Lakes*, 770 P.2d at 1243; see also *Knapp v. Colorado River Water Conservation Dist.*, 279 P.2d 420, 424 (Colo. 1955); *Masters Inv. Co. v. Irrigationists Ass’n*, 702 P.2d 268 (Colo. 1985) (where the evidence established that a headgate had not been replaced in at least 50 years, and that a ditch was *in disrepair* a finding by the water court that abandonment had occurred was not error; and evidence that water rights were not used because they were not needed is probative of the question of intent).

However, the Colorado Supreme Court has held that it considers the intent of the owner during the period during which abandonment

allegedly took place, not the intent of a subsequent purchaser attempting to revive a water right. *See Haystack Ranch, LLC*, 997 P.2d at 554; *Purgatoire River*, 859 P.2d at 833-34; *Twin Lakes*, 770 P.2d at 1243. The Colorado Supreme Court has consistently held “that subsequent efforts by current owners to put water rights to beneficial use cannot revive water rights already abandoned by previous owners.” *Id.* Furthermore, Colorado has upheld findings of abandonment by previous owners despite the activities of the current owner. *See Twin Lakes*, 770 P.2d at 1243. Colorado has adopted the view that such “activities constitute only an attempt to revive what was already dead.” *Id.* at 1243 (quotation marks omitted).

Basing a review of the intent necessary to prove abandonment on the prior owner who owned the right during the time period when the water was abandoned, rather than focusing on a subsequent purchaser who is attempting to revive a dead water right, is also good public policy. Stability in Nevada’s water law requires this conclusion in order to avoid a complete circumvention of the water right statutes and avoids the situation, which will result in this case, where an individual is able to revive a water right which has not been used in decades in a

fully or over-appropriated basin, which causes harm to the other water right holders and the resource.

In this case, the water rights in question have not been placed to beneficial use in at least 62 years. JT APP 019. A claim was never filed with the State Engineer's office until 2013. JT APP 043-046. This claim is also located in a basin that is fully appropriated. As a fully appropriated basin, had this been an application for a new water right it would be denied as there is no unappropriated water in the source of supply. NRS 533.370(3). However, as a claim of pre-statutory vested water right, if allowed to continue based on St. Clair's intent, a new owner will be able to use water, leap-frog over the other users in the basin and enjoy a senior right. "Water being a property right, and its enjoyment arising primarily on appropriation and priority, each of these elements is essential to the right under the doctrine of first in time first in right." *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803, 819-820 (1914). After such a long period of nonuse, the revival of the dead right by St. Clair seriously impacts other users in the basin who have been

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diligent in their beneficial use, but now may be deprived of water in times of shortage.⁴

The district court based its ruling, not upon the law, but rather upon the court's interpretation that the current owner's actions, which were nothing more than filing a claim and temporary application with the State Engineer, and his desire to reuse this water, was enough to overcome abandonment. JT APP 017-21. As Nevada law is unclear, the State Engineer requests this Court announce the standard of whether the intent of a subsequent purchaser should be considered rather than the intent of the owner in the chain of title at the time the water right was abandoned. This determination is imperative in this case where the prior owner's actions were probative of their intent to abandon the water right as they never filed a proof of appropriation with the State Engineer, at some point removed the pump, allowed the well itself to fail and failed to use water from at least 1954. The State Engineer urges this Court to accept Colorado's view as persuasive. The intent of

⁴ As a pre-statutory vested water right, St. Clair's priority date would be 1924. Water right holders with a priority later than 1924 would essentially have their priority pushed back by the inclusion of this new right. If curtailment or shortages occur, St. Clair would have a priority under Nevada's first in time first in right water law doctrine.

a prior owner who abandoned their right should be the relevant intent, not that of a subsequent purchaser.

B. The District Court's Decision To Grant St. Clair's Temporary Application To Change the Point of Diversion Exceeds Its Constitutional Authority And Is A Violation Of The Separation Of Powers Set Forth In Article III, Section 1, Of The Constitution Of The State Of Nevada

The Legislature created the Office of the State Engineer in 1903 for the express purpose of performing those duties prescribed by the Legislature through the statutes of Nevada. NRS 532.010, NRS 532.110. Of the many duties and responsibilities conferred upon the State Engineer is the authority to appropriate water and to approve or deny applications that change current water rights within the state. Specifically, the Legislature stated:

Any person who wishes to appropriate any of the public waters, or *to change the place of diversion*, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, *apply to the State Engineer* for a permit to do so. NRS 533.325. (emphasis added).

The authority to approve or reject an application to change a place of diversion explicitly rests with the State Engineer, not the District

Court. *See* NRS 533.345. As part of that authority, the State Engineer is required to review the application and determine if “(b) The temporary change is in the public interest; and (c) The temporary change does not impair the water rights held by other persons.” NRS 533.345. Furthermore, “if the State Engineer determines that the temporary change may not be in the public interest, or may impair the water rights held by other persons, the State Engineer shall give notice of the application as provided in NRS 533.360 and hold a hearing and render a decision as provided in this chapter.” NRS 533.345. Thus, the authority to approve or deny an application to change a point of diversion rests solely within the authority of the State Engineer, a role explicitly delegated to the executive branch by the Legislature.

Although the Legislature unambiguously vested the judicial branch with the authority to determine whether decisions of the State Engineer are in conformity with the laws enacted by the legislative branch, the Legislature did not extend that authority to usurp the State Engineer’s role. NRS 533.450(1). *See also Howell v. State Engineer*, 124 Nev. 1222, 1227-28, 197 P.3d 1044, 1048 (2008); *Albuquerque-Bernalillo County Water Utility Authority v. New Mexico State Engineer*,

Case No. 31,861 (N.M. App. Ct. 2013) (unpublished) (reversing a District Court order which granted the issuance of a change application as exceeding the Court's powers, holding it should have been remanded to the State Engineer to grant the application); *Lion's Gate Water v. D'Antonio*, 229 P.3d 622 (N.M. 2009) (holding the District Court exceeded jurisdiction by examining the merits of a water right application over the State Engineer. Generally, the court stated district courts could not be transformed into general administrators of water right applications over the State Engineer, who is granted the broad powers of water rights administration).

Accordingly, the district court's review, and this Court's subsequent review, is restricted to determining whether the State Engineer's decision was in conformity with Nevada law. *See Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1980). When the ultimate finding is that the State Engineer's decision is not in conformity with Nevada law, as was the district court's finding in this case,⁵ the case should be remanded to the State Engineer for a full and fair determination in

⁵ This argument assumes *arguendo* that this Court finds the district court did not err in its abandonment interpretation, *supra*, and that there was not substantial evidence supporting the State Engineer's determination of abandonment, *infra*.

conformity with the court's findings. *See Id.*, 95 Nev. at 787-88, 603 P.2d at 264-65.

This separation of powers is fundamental to our system of government. *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). The Nevada Constitution clearly defines the separate roles of each branch of government. Nev. Const. art. III, § 1. And within these separate roles designated to each branch, “no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.” Nev. Const. art. III, § 1(1).

The authority to decide an application to change a point of diversion rests squarely within the authority of the State Engineer, not the courts. When the district court declined to remand this matter back to the State Engineer for further proceedings, the district court exceeded its constitutional authority and violated the separation of powers doctrine. The authority to grant or deny an application to appropriate water for a beneficial use or to change the place of diversion, manner of use, or place of use of appropriated water rests

squarely under the authority of the executive branch and the office of the State Engineer. NRS 533.325; NRS 533.345; NRS 533.370; *Kearney*, 37 Nev. 314, 142 P. 803.

The district court erred in granting an application, whose merits were never addressed, reviewed or evaluated by the State Engineer. The absence of sufficient evidence regarding the specific application was a valid basis for the district court to remand the issue to the State Engineer. However, the court substituted itself and its judgment for the State Engineer in acting upon the application pursuant to NRS 533.345 and in violation of Nev. Const. art. III, § 1(1). The district court never analyzed the statutory criteria the State Engineer reviews when considering a water right application, and would be prohibited from doing so, because the district court has no inherent authority to grant or deny water right applications. The district court impermissibly exercised the power conferred to the State Engineer by the Legislature in NRS 533.325 and NRS 533.345 by granting St. Clair's temporary change application. Accordingly, the district court's decision must be reversed.

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C. The District Court's Decision To Adopt St. Clair's Order, Which Did Not Comply With The Court's Oral Ruling, Was In Error

Nevada Rule of Civil Procedure 52 provides that “[i]n all actions *tried upon the facts* without a jury or with an advisory jury, *the court shall find the facts specially and state separately its conclusions of law thereon* and judgment shall be entered pursuant to Rule 58.” NRCP 52(a) (emphasis added). In situations where the facts are at issue and the court is required to find the facts specially and separately state its conclusions of law thereon, the federal courts, under FRCP 52(a),⁶ which is similar to NRCP 52(a), have held that these findings should represent the judge’s own determination “rather than the delayed, argumentative, overdetailed documents prepared by winning counsel.” *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942) (citing *Matton Oil Transfer Corp. v. Tug Dynamic*, 123 F.2d 999, 1001 (2d Cir. 1941)); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944). Consequently, they should be a part of the judge’s opinion
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⁶ “In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.” FRCP 52(a)(1).

and decision, either stated therein or stated separately. *Matton Oil Transfer Corp. v. Tug Dynamic*, 123 F.2d at 1001.

Abandonment, which was the basis for Ruling No. 6287, is “a question of fact to be determined from all the surrounding circumstances.” *Revert*, 95 Nev. at 786, 603 P.2d at 264; *see also In Re Manse Springs*, 108 P.2d at 316. Accordingly, the district court was required to “*find the facts specially and state separately its conclusions of law thereon.*” NRCP 52(a) (emphasis added). Here Senior Judge Kosach made a short and succinct ruling from the bench, which he was allowed to do under NRCP 52(a). JT APP 666-669. However, the ruling was not complete, nor did it address all of the factual findings or conclusions of law, which were at issue, such as the request of judicial notice or the instructions on remand.

Therefore, the draft order written by St. Clair did not limit itself to the oral ruling from the bench and expanded the district court’s ruling to address those issues. St. Clair’s order expanded that ruling, specifically included an order granting Application No. 83246T and included an approval of St. Clair’s request for judicial notice, none of which were ordered or even contemplated by the district court at the

time of oral argument when the Judge made his decision on the record. The district court, only after the fact, chose to adopt St. Clair's post hoc rationale by adopting the order in its entirety. The district court inappropriately delegated his authority and responsibility of making findings of fact and conclusions of law to St. Clair. The district court allowed St. Clair to draft an order which was delayed, argumentative, overdetailed and granted St. Clair the ability to include any and all of St. Clair's objectives in the order, regardless of what the Court actually stated on the record.

Although the State Engineer objected to this order, the district court denied his objection. St. Clair was given the opportunity to act not only as a party to this matter, but as the final judge, granting his own requests. The District Court violated NRCP 52(a) by failing to fully address all issues in this case and inappropriately delegated his authority to St. Clair.

D. State Engineers' Ruling No. 6287 Was Based On Substantial Evidence In The Record. However, The District Court Inappropriately Expanded The Record

In Ruling No. 6287, the State Engineer properly determined that St. Clair's water right had been abandoned based upon the evidence in

the record at the time of Ruling No. 6287. JT APP 015-021. The evidence provided to the State Engineer by St. Clair, established a pre-statutory vested groundwater right, showed that the well was in disrepair, the pump had been removed from the well, and showed that the water has not been used since at least 1954. JT APP 017; 075-076; 0104. The condition of the well, the lack of use, the intentional act of removing the pump all supported the State Engineer's determination in Ruling No. 6287 that the claim was previously abandoned prior to St. Clair's tardy attempt to revive it.

Furthermore, St. Clair admitted that he had no indication of when or to what extent the water had last been used and he failed to provide any information that the water had been used since at least 1954, even when requested to do so by the State Engineer. JT APP 017; 047. Although St. Clair casts the State Engineer's request as an attempt by the State Engineer to shift the burden to St. Clair, the State Engineer provided St. Clair the opportunity to provide additional evidence of

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continued beneficial use before a ruling was issued.⁷ JT APP 116-117. However, St. Clair provided nothing. JT APP 017. *See U.S. v. Alpine Land & Reservoir Co.*, 340 F.3d 903 (9th Cir. 2003) (Once a party has offered some evidence of abandonment, the applicant must make some showing of use or of a lack of intent to abandon in order to withstand the challenge).

The evidence also showed that St. Clair's actions since purchasing the property, relied upon by the Court, only included applying for a change of point of diversion, filing a proof of appropriation asserting a pre-statutory vested water right claim, and claiming he wanted to place the water back to beneficial use. JT APP 038-039; 043-046. When he was before the State Engineer, based upon this evidence, St. Clair could not and did not overcome the clear fact that his predecessor in interest had abandoned the water right by removing the pump, allowing the well to become unusable, and failing to use the water for decades. However, the district court improperly allowed St. Clair to augment the record through his Request for Judicial Notice by allowing St. Clair to

⁷ NRS 533.375 specifically provide that “[b]efore either approving or rejecting the application, the State Engineer may require such additional information as will enable the State Engineer to guard the public interest properly.”

introduce extrinsic evidence, including legal briefs, which clouded the record for review.

NRS 533.450 has been interpreted to mean that a petitioner does not have a right to de novo review or to offer additional evidence at the district court. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943). As a result, the function of the district court is to review the evidence on which the State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the court is bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

The district court granted St. Clair's request for judicial review, which allowed St. Clair to expand the record beyond what was reviewed by the State Engineer in issuing Ruling No. 6287. St. Clair and the district court incorrectly focused on the fact St. Clair labelled his document a "request for judicial notice." JT APP 773-774. Regardless of what the request is labelled, the result is the same; once granted, extrinsic evidence outside of the evidence considered by the State Engineer, was introduced by St. Clair and relied upon by the district

court in reversing the decision of the State Engineer. This information even included prior legal briefs filed by the State Engineer in prior cases, written by St. Clair's own counsel when he represented the State Engineer.

The district court's approval and consideration of this extrinsic evidence was completely improper. It was inappropriate for the district court to allow the record to be supplemented by St. Clair with evidence that was not offered within the time constraints established in the proceedings before the State Engineer or considered by him in reaching his determinations. *See Revert*, 95 Nev. at 786, 603 P.2d at 264; *Kent*, 62 Nev. at 32, 140 P.2d at 358. Further, the district court did not grant this request until after its initial ruling, through St. Clair's proposed order based upon a post hoc rationale. At that point, the Court granted the request and expanded the record to include all of the evidence provided by St. Clair, none of which was ever part of the State Engineer's review before issuing Ruling No. 6287. In deciding Ruling No. 6287, the State Engineer considered only that evidence that

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was submitted in relation to Proof of Appropriation No. V-10493 and Application No. 83246T to change the point of diversion. JT APP 008-197.

The district court inappropriately expanded the record, and rather than review the information that Ruling No. 6287 was based upon and determine whether there was substantial evidence to support the State Engineers' decision, the district court incorrectly based the decision on an expanded record. The substantial evidence within the record utilized by the State Engineer supports his decision to declare that the water right was abandoned by the actions and intent of the prior owner, and thus resulted in the denial of Application No. 83246T.

IX. CONCLUSION

Because the district court incorrectly assumed that Nevada law required him to consider St. Clair's intent, rather than the intent of the prior owner who owned the water rights during the period of abandonment, the district court's order was in error. This Court should join in Colorado's rule that the intent of the owner in the period during which abandonment allegedly took place must be considered, not the intent of a subsequent purchaser attempting to revive a dead water

right. Further, the district court's decision to exceed its constitutional authority and exercise the duty of the executive branch by granting Application No. 83246T was also in error. Accordingly, the State Engineer respectfully requests this Court vacate the district court's March 11, 2016, order and remand this matter to the district court for further proceedings consistent with this Court's ruling.

RESPECTFULLY SUBMITTED this 9th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14 pitch Century Schoolbook.

2. I further certify that this opening brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding

the parts of the opening brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, and contains 6,647 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this opening brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying opening brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 9th day of December, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 9th day of December, 2016, I served a copy of the foregoing APPELLANT'S OPENING BRIEF, by electronic service to:

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