

1 THE COURT: That's right. That's what it was.  
2 And that's a previous statute. Okay.

3 MR. TAGGART: And to be able to do it. And  
4 that gives those rights more protection.

5 So that was the point. I think, you asked  
6 Ms. Caviglia a question about that, and she had a  
7 response in her rebuttal as well. So that, I mean we  
8 did, we did discuss this point. But, you know, that's  
9 what I recall.

10 THE COURT: Okay. Any comment?

11 MS. CAVIGLIA: For the response on that, the  
12 State Engineer has -- there's different types of  
13 forfeiture. There are the four-year letters of  
14 forfeiture under the statute. And then, based on if you  
15 look at the legislative history in that section and the  
16 way it's worded, forfeitures for rights that have not  
17 been utilized for more than five years, the State  
18 Engineer's position is they can forfeit those without  
19 doing the letter.

20 So there's a slightly different argument  
21 whether or not it's the four-year under the basins that  
22 have the -- they do groundwater checks, and they see  
23 who's pumping and not pumping. Those are slightly  
24 different than long forfeiture cases, which the State  
25 Engineer does believe, based on the legislative history

1 and the language of that statute, they can do without a  
2 letter.

3 THE COURT: Right. And that --

4 MS. CAVIGLIA: We're not here today on that.

5 THE COURT: And that -- correct. But it's  
6 clear that the State Engineer went on abandonment  
7 because it was -- they were not within the timing of  
8 sending out a forfeiture notice. Yeah, I remember that  
9 well.

10 Okay. Do you care to argue any more, any other  
11 particular points?

12 MS. CAVIGLIA: There's just a few little  
13 strike-throughs that the State Engineer included in some  
14 of the language that petitioner included. On some of  
15 the case law, he refers to a bright-line rule in  
16 section -- on page six and seven, "And the evidence  
17 doesn't support the finding of abandonment." We didn't  
18 like the language "bright-line rule." We don't believe  
19 it is a specific bright-line rule.

20 He also discussed "An intent to abandon is a  
21 subjective element." In the case law, there's no  
22 discussion of subjective intent. So we struck that out  
23 as well.

24 On page eight, something similar, "The Ninth  
25 Circuit, while applying Nevada state law, has held that

1 the following factors should be considered." The State  
2 Engineer is asking, or requesting that it change to "may  
3 be considered." Mainly because those were -- it's not  
4 the same as groundwater, surface water, so we thought it  
5 should be a "may."

6 THE COURT: "May be" versus "must be"?

7 MS. CAVIGLIA: "Should be."

8 THE COURT: "Should be." This reminds me of --

9 MS. CAVIGLIA: Yeah.

10 THE COURT: Yeah.

11 MS. CAVIGLIA: Just little things. The  
12 majority of the strike-throughs were based upon the  
13 judicial notice and the using of the prior rulings of  
14 the State Engineer.

15 So, I believe, that would be it, Your Honor.

16 Oh, and there's one final thing. On the  
17 conclusions of law, petitioner has asked that this Court  
18 grant the application for the change, the change  
19 application. The State Engineer does not believe that  
20 is appropriate.

21 The application itself was never reviewed by  
22 the State Engineer's Office. The State Engineer's  
23 Office is required to use best scientific studies. It's  
24 required to look at the actual application. The State  
25 Engineer's Office never got to that step. They chose,

1 decided that it was abandoned prior to looking at the  
2 application.

3 So we do not believe that this Court can just  
4 grant an application without having the State Engineer  
5 review it, ensure that it is proper based on what it has  
6 been provided for.

7 THE COURT: So, in a sense -- well, I'm not  
8 putting words in your mouth. I don't mean it. But am I  
9 incorrect in this conclusion, that the abandonment issue  
10 was decided before the application was looked at?

11 MS. CAVIGLIA: Yes, Your Honor. And if you  
12 look at the ruling, that's what the State Engineer did.  
13 They looked at whether or not this was a vested right.  
14 They found it was. They looked at whether that vested  
15 right continues to this day. And they said, no, it  
16 wasn't. And because of that, this isn't a merits of the  
17 application that were looked at. It was deemed  
18 abandoned before the merits were actually reached.

19 So, and the State Engineer believes that this  
20 Court should remand it back to the State Engineer's  
21 Office to look at the application, ensure that's in the  
22 proper format, ensure that it doesn't affect other users  
23 in the area, and then grant the application if it's  
24 required, or it meets all of the standards.

25 THE COURT: Well, do I order them to grant the

1 application?

2 MS. CAVIGLIA: If the order -- well, and that's  
3 the question --

4 THE COURT: Prior to their review? I'm doing  
5 the same thing that they did, in a sense, on the  
6 application.

7 MS. CAVIGLIA: Yeah, if you order them to grant  
8 the application, it'll just be granted without any  
9 review of whether it affects other surrounding  
10 groundwater users, if -- there's a list under the  
11 statute.

12 THE COURT: M-hm (affirmative).

13 MS. CAVIGLIA: I believe, it's 533.370, that  
14 discusses what the State Engineer has to find to grant  
15 an application.

16 THE COURT: Interesting. What does that do to  
17 the argument, your argument number two, "Not based on  
18 the evidence; so, therefore, the Engineer's decision is  
19 arbitrary and capricious"? Do you see what I mean?

20 MS. CAVIGLIA: And, I think, it would be  
21 slightly different if this case was based on the merits  
22 of the application itself, and that the State Engineer  
23 never got into those merits.

24 THE COURT: All right.

25 MS. CAVIGLIA: And, I think, that's where it's

1 slightly different, is the State Engineer hasn't gone  
2 through that checklist for every single item to make  
3 sure that this application is appropriate.

4 THE COURT: Any comments?

5 MR. TAGGART: Yeah, just a couple, is that it  
6 is a bright-line rule. I guess, we just disagree on  
7 that.

8 Again, when I clerked for the judge, and I  
9 listened to him rule, I went back and wrote an order.

10 And I heard you talk about, for instance, that  
11 this is like a crime, this is like a -- you got to have  
12 the physical and the mental aspect of -- that's the  
13 subjective intent. All right. What I heard you say is  
14 this is just like, I don't know if it was murder or  
15 something, some kind of criminal case where you've got  
16 the mens rea, and you've got the -- you've got the  
17 physical act.

18 And so that's where the subjective intent idea  
19 came from. Because it is. That's what it is. You've  
20 got to have the physical act of nonuse plus the intent  
21 to abandon. That's a subjective element.

22 And I don't think "may" versus "should." I  
23 think, it should say "should." I think, that's what the  
24 Ninth Circuit said.

25 You know, what are we going to do? Is the

1 State Engineer forcing my client to appeal, spend, you  
2 know, lots of money, and now he has to go back to the  
3 State Engineer, the same person that just got reversed,  
4 and the State Engineer gets to take another shot at him?

5 And that, that's not just. The State Engineer  
6 had his opportunity to look at this water right  
7 application. And, and he found that the water, it was  
8 valid, and then he found that it -- at first, and then  
9 he found that it was abandoned.

10 So now we're going to go back to the State  
11 Engineer and let him take another cut at this. And that  
12 really worries my client. How long is it going to take?  
13 Is it going to be another year before we find out from  
14 the State Engineer what his review is of that  
15 application? Is he going to just throw out some more  
16 roadblocks because he doesn't like the way this Court  
17 ruled on this case?

18 That's, that's the concern we have, that we  
19 went through all of this. Let's just get it done. Let  
20 the guy use his water. He has a vested water right. He  
21 should be able to use it however he wants. And the  
22 State Engineer shouldn't be able to put up roadblocks to  
23 him being able to use that water.

24 THE COURT: Mm. I going to call it. I'll say  
25 it for the record. Water right, water rights, double

1 jeopardy, if I send it back to the State Engineer to  
2 have -- have you, I mean with your fertile mind,  
3 sincerely -- and this is not criticism. I really  
4 sincerely mean that. But, again, 26 years on the bench,  
5 and it is a bright line, I did give that subjective act  
6 and intent, the criminal subjective act and intent.

7 I'm going to, I'm going to make a call right  
8 now, because I think it's the right thing to do.

9 MS. CAVIGLIA: Your Honor, may I just respond  
10 really quickly?

11 THE COURT: Sure.

12 MS. CAVIGLIA: Vested right claims, if they  
13 want to change the location of the use, have to go  
14 through the State Engineer's office and get an  
15 application. Even though they are vested, and they do  
16 have their water rights, they do have to go through and  
17 make sure that there's not domestic wells being  
18 impacted, other users are being impacted. And that's  
19 what, I guess, our concern is.

20 If Mr. -- or St. Clair wanted to use the water  
21 in the well that it's currently -- was found to be a  
22 vested water right, we'd have no problem. However,  
23 they're not doing that. They want to move the water.  
24 And because they want to move the water, impacts to  
25 other people, that aren't here today, not the State

1 Engineer, but other property owners, could be impacted.

2 And that's why, I think, the State Engineer is  
3 concerned about having the Court just grant the  
4 application without looking at the merits.

5 THE COURT: Okay. And thank you for that.

6 I don't remember, I don't remember in the  
7 hearing that -- did it come up, as far as moving? I saw  
8 where it looked like the well was abandoned, you know,  
9 according to the State Engineer. But are we talking  
10 about --

11 MR. TAGGART: Well, we showed you an aerial  
12 photograph, and you looked at that.

13 THE COURT: Where it was at one time, and.

14 MR. TAGGART: And, and, you know, there's  
15 nobody else out there, for one thing. I think, you  
16 could tell from the aerial photograph, we're out in the  
17 middle of rural Nevada here.

18 And, you know, we went over and over this rule,  
19 533.085. It says that there's no statute that can  
20 impair a vested right. Very, very simple. In 1913, the  
21 Legislature put that rule in there.

22 THE COURT: M-hm (affirmative).

23 MR. TAGGART: And they put it in again, with  
24 respect to groundwater rights, that you cannot impair a  
25 vested right.

1           And so to apply, you know, these change  
2 procedures, I think -- my client applied, applied to the  
3 State Engineer, but he's getting the runaround now. And  
4 he should get the right to use his water.

5           I mean, again, we're now going to hit another  
6 irrigation season. And, and is he going to be able to  
7 get to use his water this irrigation season? And I'm  
8 afraid not if, if this goes back to the State Engineer  
9 for him to reconsider the application and go through all  
10 those steps. We're going to have one more season of not  
11 being able to use his water.

12           THE COURT: Okay. And thank you very much for  
13 your arguments. I thought they were, they were -- this  
14 is an interesting case. And it seems to me that I'm --  
15 I'm ready to make a ruling based on today's objections.

16           Objection number one, taxes and assessment  
17 issue and that newspaper issue, is the objection is  
18 overruled. Both of those, the tax issue and the  
19 newspapers, were supplied by the petitioner.

20           And in regards to number two, I am overruling  
21 the objection. I certainly don't want to offend. But  
22 those are just words of art, "arbitrary and  
23 capricious." And I do believe that the State's, State  
24 Engineer's decision to not grant, based on abandonment,  
25 is an incorrect, wrong decision.

1           In regards to the forfeiture versus abandonment  
2 issue, I'm overruling that objection. I think, it is a  
3 bright line. I think, I'm the one that brought up  
4 subjective only in the sense of an example. And "should  
5 be" is the words I'm using.

6           Now, I'm prepared to sign the order given to me  
7 by Mr. Taggart, as I've read it numerous times. And  
8 after the hearing this afternoon, I'm going to sign the  
9 order that was given to me about the middle of March, or  
10 that kind of thing. I have it.

11           Do you have that order, Ms. Caviglia?

12           MS. CAVIGLIA: I do, Your Honor.

13           THE COURT: And that's the one that you  
14 delineated that you objected to, and so on, correct?

15           MS. CAVIGLIA: Yes.

16           THE COURT: I just want to make sure we're on  
17 the right page.

18           But number three on the order, the State  
19 Engineer is directed to grant application number 83246T,  
20 correct?

21           MS. CAVIGLIA: Yes.

22           THE COURT: Number two, ruling 6287 is  
23 overruled, in part, to the extent it declares V-010493  
24 abandoned.

25           And then number one, the ruling 6287 is

1 affirmed, in part, where ruling 6287 determines that  
2 St. Clair has a vested water right, under V-010493.

3 All right. I'm dating it today. I'm signing  
4 it April 11th, 2016.

5 And, Ms. Clerk, you go ahead and file this in,  
6 and supply a copy to each counsel.

7 THE CLERK: I can't file it for Humboldt  
8 County.

9 THE COURT: Oh, that's right. That's right.

10 THE CLERK: But I can --

11 THE COURT: But I'll get it to --

12 THE CLERK: I can make sure it gets sent up  
13 there.

14 THE COURT: Can you, can you send it up? And  
15 this recording will be sent up, also. Go ahead, send  
16 that up to Humboldt County. And I've got the clerk's  
17 name that initially contacted me, so. I think, her  
18 name's Tammy. But I'll get that to you.

19 THE CLERK: Okay.

20 THE COURT: Back, it's on my cell phone.

21 Thank you very much for your time. And good  
22 luck to all of you. And I will maybe see you.

23 \* \* \* \* \*

24 (The Hearing on Proposed Orders adjourned at 2:23 p.m.)

25 -oOo-

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TRANSCRIBER'S CERTIFICATE

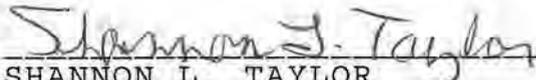
I, SHANNON L. TAYLOR, a Nevada Certified Court Reporter, Nevada CCR #322, do hereby certify:

That I was provided by the Nevada Attorney General's Office with a CD containing a Hearing on Proposed Orders held on Monday, April 11, 2016, regarding Case No. CV 20112, Dept. No. 2, in the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, St. Clair vs. Nevada State Engineer, which was held in a courtroom in Carson City, Nevada, and that I thereafter transcribed, to the very best of my ability, the contents of said Hearing on Proposed Orders on said CD;

That the within transcript, consisting of pages 1 through 36, is the transcription of said Hearing on Proposed Orders;

I further certify that I am not an attorney or counsel for any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

DATED at Carson City, Nevada, this 5th day of July, 2016.

  
SHANNON L. TAYLOR  
Nevada CCR #322, RMR

**CERTIFIED COPY**

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2: 48

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

\* \* \*

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

Taggart & Taggart, Ltd.  
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Carson City, Nevada 89703  
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(775)883-9900 - Facsimile

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

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

1 This Court, having reviewed the record on appeal,<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> 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;<sup>4</sup>
- 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 <sup>1</sup> 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 <sup>2</sup> SE ROA 0006.

<sup>3</sup> SE ROA 004-006.

<sup>4</sup> 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;<sup>5</sup>

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

7 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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."<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> St. Clair also

24 <sup>5</sup> SE ROA 0037.

25 <sup>6</sup> SE ROA 0045.

26 <sup>7</sup> SE ROA 0102.

27 <sup>8</sup> SE ROA 0038-0066.

28 <sup>9</sup> SE ROA 008 – 009.

<sup>10</sup> Petitioner's Reply Brief, Exhibit 1.

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

<sup>12</sup> SE ROA 007- 009.

<sup>13</sup> *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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> A decision is arbitrary and capricious if it is  
19 "baseless" or evidences "a sudden turn of mind without apparent motive..."<sup>17</sup> 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.<sup>18</sup> Substantial evidence is "that which a 'reasonable mind might accept as adequate to  
22 support a conclusion.'"<sup>19</sup> 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 <sup>14</sup> SE ROA 005.

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

27 <sup>16</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dist. v.*  
28 *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").

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

30 <sup>18</sup> *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.

31 <sup>19</sup> *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)).

1 of review is de novo.<sup>20</sup>

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

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

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

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

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

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

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

28 <sup>20</sup> *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."<sup>21</sup> Intent is the necessary element the State Engineer is required to  
8 prove in abandonment cases.<sup>22</sup> This is the standard the State Engineer has previously relied upon.<sup>23</sup> 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.<sup>24</sup>

11 Abandonment requires a union of facts and intent to determine whether the owner of the water  
12 right intended abandonment.<sup>25</sup> As intent to abandon is a subjective element, the courts utilize all  
13 surrounding circumstances to determine the intent.<sup>26</sup> 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.<sup>27</sup> 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."<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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

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

24 <sup>22</sup> *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 <sup>23</sup> See Petitioner's Appendix at 00001-0000135.

26 <sup>24</sup> Petitioner's Appendix at 000030-000037.

27 <sup>25</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 <sup>26</sup> *Alpine*, 291 F.3d at 1072.

29 <sup>27</sup> 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 <sup>28</sup> Petitioner's Appendix 000051-000054.

<sup>29</sup> *Orr Ditch*, 256 F.3d at 946.

<sup>30</sup> *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.<sup>31</sup> 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.”<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Nevada requires non-use evidence to be coupled  
13 with other evidence to determine the subjective intent of the water user.<sup>36</sup> This well-developed rule was  
14 originally taken from Nevada’s mining law.<sup>37</sup> 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.<sup>38</sup>

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 <sup>31</sup> *Alpine* 291 F.3d at 1072.

26 <sup>32</sup> *Orr Ditch*, 256 F.3d at 944-45.

27 <sup>33</sup> *Id.*

28 <sup>34</sup> *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.

<sup>35</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

<sup>36</sup> *Id.*

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

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

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

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

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

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

24 Vested water rights are “regarded and protected as property.”<sup>43</sup> The term vested water rights is  
25

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

27 <sup>40</sup> Petitioner’s Appendix at 000084-000090, 000128-0000130; *See also* Petitioner’s Appendix .

28 <sup>41</sup> Petitioner’s Appendix at 0000115-0000121; *See also* Petitioner’s Appendix at 000015-000020.

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

<sup>43</sup> *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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> A water right owner  
13 can then cure the forfeiture.<sup>47</sup> 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.<sup>48</sup> 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.”<sup>49</sup> Nevada maintains the rule that there is no  
25

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

27 <sup>45</sup> Petitioner’s Appendix 000021-000025.

28 <sup>46</sup> *Town of Eureka*, 108 Nev. At 168.

<sup>47</sup> *Id.*

<sup>48</sup> *Orr Ditch*, 256 F.3d at 945-946.

<sup>49</sup> *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.<sup>50</sup>

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,”<sup>51</sup> and the State Engineer correctly stated  
6 that a prolonged period of non-use “does not create a rebuttable presumption of abandonment.”<sup>52</sup>  
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.”<sup>53</sup> 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.<sup>54</sup> 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.”<sup>55</sup> 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 <sup>50</sup> *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 <sup>51</sup> SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

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

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

<sup>54</sup> *Alpine*, 291 F.3d at 1073-74.

<sup>55</sup> *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.<sup>56</sup> 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.<sup>57</sup> The State Engineer later demonstrated a keen understanding of the application  
12 of the *Alpine Decree* to intrafarm transfers.<sup>58</sup> 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,<sup>59</sup> 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 <sup>56</sup> *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

28 <sup>57</sup> See *Request for Judicial Notice* at 3.

<sup>58</sup> *Id.*

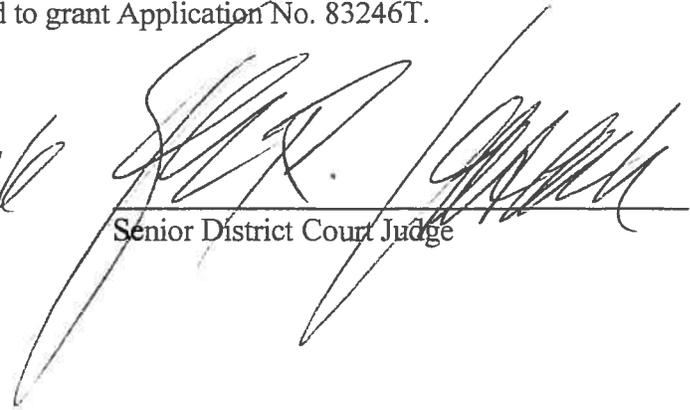
<sup>59</sup> See SE ROA; see also *Petitioner's Appendix*; see also *Petitioner's Request for Judicial Notice*.

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

**IT IS SO ORDERED.**

*April 11, 2016*



Senior District Court Judge

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

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

3  
4 **DECLARATION OF SERVICE**

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

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

14  
15 \_\_\_\_\_ By personal delivery of a true copy to the person(s) set forth below by placement in the  
16 designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative  
17 of said person(s) set forth below.

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

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

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

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

24   
25 DEPUTY CLERK

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

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  
13 NATURAL RESOURCES.

14 Respondent.

NOTICE OF ENTRY OF ORDER

15 PLEASE TAKE NOTICE that on April 22, 2016, the above-entitled court entered an *Order*  
16 *Overruling State Engineer's Ruling 6287*, a copy of which is attached hereto as "Exhibit1."  
17

18 ///  
19 ///  
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23

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

1  
2 The undersigned does hereby affirm that the preceding document does not contain the social  
3 security number of any persons.

4 DATED this 27<sup>th</sup> day of April 2016.  
5

6 TAGGART & TAGGART, LTD.  
7 108 North Minnesota Street  
8 Carson City, Nevada 89703  
9 (775)882-9900 – Telephone  
10 (775)883-9900 – Facsimile

11 By:   
12 PAUL G. TAGGART, ESQ.  
13 Nevada State Bar No. 6136  
14 RACHEL L. WISE, ESQ.  
15 Nevada State Bar No. 12303  
16 Attorneys for Petitioner  
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Taggart & Taggart, Ltd.  
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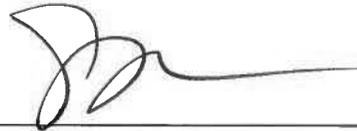
**CERTIFICATE OF SERVICE**

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 27<sup>th</sup> day of April 2016.



\_\_\_\_\_  
Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89703  
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1 Case Title: *St. Clair v. King*

2 Case No.: CV 20112

3 **INDEX OF EXHIBITS**

4 Exhibit No.

Description

5 1

Order Overruling State Engineer's Ruling 6287

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Taggart & Taggart, Ltd.  
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(775)883-9900 ~ Facsimile

# **EXHIBIT 1**

# **EXHIBIT 1**

1 Case No.: CV 20, 112

FILED

2 Dept. No. 2

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

6  
7 \* \* \*

8  
9 RODNEY ST. CLAIR,

10 Petitioner,

11 vs.

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

16 Respondent.

17 )  
18 ) **ORDER OVERRULING STATE**  
19 ) **ENGINEER'S RULING 6287**  
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17 **THIS MATTER** came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "St.  
18 Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed an  
19 Opening Brief on December 8, 2014. Respondent, JASON KING, P.E., Nevada State Engineer,  
20 DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL  
21 RESOURCES (hereinafter "State Engineer") filed an Answering Brief on January 22, 2015. St. Clair  
22 filed a Reply Brief on February 27, 2015.

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

Taggart & Taggart, Ltd.  
108 North Minnesota Street  
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(775)883-9900 - Facsimile

1 This Court, having reviewed the record on appeal,<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> 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;<sup>4</sup>
- 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 <sup>1</sup> 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 <sup>2</sup> SE ROA 0006.

<sup>3</sup> SE ROA 004-006.

<sup>4</sup> 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;<sup>5</sup>

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

7 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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."<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> St. Clair also

24 <sup>5</sup> SE ROA 0037.

25 <sup>6</sup> SE ROA 0045.

26 <sup>7</sup> SE ROA 0102.

27 <sup>8</sup> SE ROA 0038-0066.

28 <sup>9</sup> SE ROA 008 - 009.

<sup>10</sup> Petitioner's Reply Brief, Exhibit 1.

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

<sup>12</sup> SE ROA 007- 009.

<sup>13</sup> *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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> A decision is arbitrary and capricious if it is  
19 "baseless" or evidences "a sudden turn of mind without apparent motive...."<sup>17</sup> 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.<sup>18</sup> Substantial evidence is "that which a 'reasonable mind might accept as adequate to  
22 support a conclusion."<sup>19</sup> With regard to purely legal questions, such as statutory construction, the standard

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23 *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  
24 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

25 <sup>14</sup> SE ROA 005.

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

27 <sup>16</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dist. v.*  
28 *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").

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

<sup>18</sup> *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.

<sup>19</sup> *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)).

1 of review is de novo.<sup>20</sup>

2 **II. ST. CLAIR’S REQUEST FOR JUDICIAL NOTICE.**

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

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

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

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

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

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

28 \_\_\_\_\_  
<sup>20</sup> *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.”<sup>21</sup> Intent is the necessary element the State Engineer is required to  
8 prove in abandonment cases.<sup>22</sup> This is the standard the State Engineer has previously relied upon.<sup>23</sup> 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.<sup>24</sup>

11 Abandonment requires a union of facts and intent to determine whether the owner of the water  
12 right intended abandonment.<sup>25</sup> As intent to abandon is a subjective element, the courts utilize all  
13 surrounding circumstances to determine the intent.<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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

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

24 <sup>22</sup> *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 <sup>23</sup> See Petitioner’s Appendix at 00001-0000135.

26 <sup>24</sup> Petitioner’s Appendix at 000030-000037.

27 <sup>25</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 <sup>26</sup> *Alpine*, 291 F.3d at 1072.

<sup>27</sup> Petitioner’s Appendix 0000131-0000135; See also Petitioner’s Appendix 0000122-0000127; 000047-000050; 000076-  
000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

<sup>28</sup> Petitioner’s Appendix 000051-000054.

<sup>29</sup> *Orr Ditch*, 256 F.3d at 946.

<sup>30</sup> *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.<sup>31</sup> 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.”<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Nevada requires non-use evidence to be coupled  
13 with other evidence to determine the subjective intent of the water user.<sup>36</sup> This well-developed rule was  
14 originally taken from Nevada’s mining law.<sup>37</sup> 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.<sup>38</sup>

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 <sup>31</sup> *Alpine* 291 F.3d at 1072.

26 <sup>32</sup> *Orr Ditch*, 256 F.3d at 944-45.

27 <sup>33</sup> *Id.*

28 <sup>34</sup> *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.

<sup>35</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

<sup>36</sup> *Id.*

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

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

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

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

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

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

24 Vested water rights are “regarded and protected as property.”<sup>43</sup> The term vested water rights is  
25

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

27 <sup>40</sup> Petitioner’s Appendix at 000084-000090, 000128-0000130; *See also* Petitioner’s Appendix .

28 <sup>41</sup> Petitioner’s Appendix at 0000115-0000121; *See also* Petitioner’s Appendix at 000015-000020.

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

<sup>43</sup> *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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> A water right owner  
13 can then cure the forfeiture.<sup>47</sup> 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.<sup>48</sup> 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."<sup>49</sup> Nevada maintains the rule that there is no  
25

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

27 <sup>45</sup> Petitioner's Appendix 000021-000025.

28 <sup>46</sup> *Town of Eureka*, 108 Nev. At 168.

<sup>47</sup> *Id.*

<sup>48</sup> *Orr Ditch*, 256 F.3d at 945-946.

<sup>49</sup> *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.<sup>50</sup>

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,"<sup>51</sup> and the State Engineer correctly stated  
6 that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."<sup>52</sup>  
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."<sup>53</sup> 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.<sup>54</sup> 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."<sup>55</sup> 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 <sup>50</sup> *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 <sup>51</sup> SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

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

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

<sup>54</sup> *Alpine*, 291 F.3d at 1073-74.

<sup>55</sup> *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.<sup>56</sup> 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.<sup>57</sup> The State Engineer later demonstrated a keen understanding of the application  
12 of the *Alpine Decree* to intrafarm transfers.<sup>58</sup> 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,<sup>59</sup> 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

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

27 <sup>57</sup> See *Request for Judicial Notice* at 3.

28 <sup>58</sup> *Id.*

28 <sup>59</sup> See SE ROA; see also *Petitioner's Appendix*; see also *Petitioner's Request for Judicial Notice*.

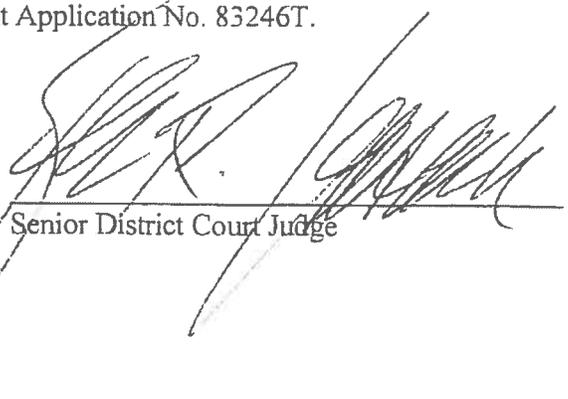
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3. The State Engineer is directed to grant Application No. 83246T.

**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 5<sup>th</sup> 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

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

 **COPY**

**FILED**

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TAMI RAE SPERO  
DIST. COURT CLERK

1 Case No. CV 20112

2 Dept. No. 2

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

7

**IN AND FOR THE COUNTY OF HUMBOLDT**

8

9

RODNEY ST. CLAIR,

10

Petitioner,

**NOTICE OF APPEAL**

11

vs.

12

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

14

15

Respondent.

16

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

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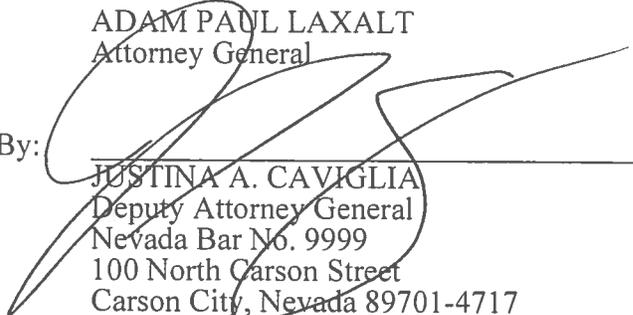
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1 **AFFIRMATION (Pursuant to NRS 239B.030)**

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

4 DATED this 20th day of May, 2016.

5 ADAM PAUL LAXALT  
6 Attorney General

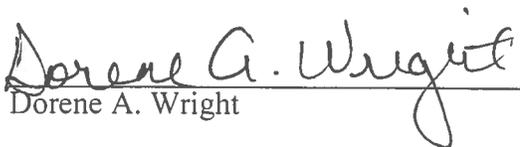
7 By: 

8 JUSTINA A. CAVIGLIA  
9 Deputy Attorney General  
10 Nevada Bar No. 9999  
11 100 North Carson Street  
12 Carson City, Nevada 89701-4717  
13 Tel: (775) 684-1222  
14 Fax: (775) 684-1108  
15 Email: jcaviglia@ag.nv.gov  
16 *Counsel for Respondent,*  
17 *Nevada State Engineer*

18 **CERTIFICATE OF SERVICE**

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

22 Paul G. Taggart, Esq.  
23 Rachel L. Wise, Esq.  
24 TAGGART & TAGGART  
25 108 North Minnesota Street  
26 Carson City, Nevada 89703

27   
28 Dorene A. Wright

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

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

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INDEX OF EXHIBITS

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

# EXHIBIT 1

# EXHIBIT 1

1 Case No. CV 20112

2 Dept. No. 2

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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  
13 NATURAL RESOURCES.

14 Respondent.

NOTICE OF ENTRY OF ORDER

15 PLEASE TAKE NOTICE that on April 22, 2016, the above-entitled court entered an *Order*  
16 *Overruling State Engineer's Ruling 6287*, a copy of which is attached hereto as "Exhibit1."  
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108 North Minnesota Street  
Carson City, Nevada, 89703  
(775)883-9900 - Telephone  
(775)883-0900 - Facsimile

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

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

DATED this 27<sup>th</sup> day of April 2016.

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

By: 

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

Taggart & Taggart, Ltd.  
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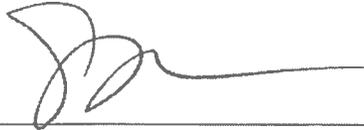
**CERTIFICATE OF SERVICE**

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:

[ X ] 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 21<sup>st</sup> day of April 2016.

  
\_\_\_\_\_  
Employee of TAGGART & TAGGART, LTD.

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

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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**

1 Case No.: CV 20, 112

2 Dept. No. 2

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

6  
7 \* \* \*

8  
9 RODNEY ST. CLAIR,

10 Petitioner,

11 vs

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

16 Respondent.

17 )  
18 ) **ORDER OVERRULING STATE**  
19 ) **ENGINEER'S RULING 6287**  
20 )  
21 )  
22 )  
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17 **THIS MATTER** came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "St.  
18 Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed an  
19 Opening Brief on December 8, 2014. Respondent, JASON KING, P.E., Nevada State Engineer,  
20 DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL  
21 RESOURCES (hereinafter "State Engineer") filed an Answering Brief on January 22, 2015. St. Clair  
22 filed a Reply Brief on February 27, 2015.

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

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

1 This Court, having reviewed the record on appeal,<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> 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;<sup>4</sup>
- 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 <sup>1</sup> 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 <sup>2</sup> SE ROA 0006.

<sup>3</sup> SE ROA 004-006.

<sup>4</sup> 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;<sup>5</sup>

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

7 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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*."<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> St. Clair also

24 <sup>5</sup> SE ROA 0037.

<sup>6</sup> SE ROA 0045.

25 <sup>7</sup> SE ROA 0102.

<sup>8</sup> SE ROA 0038-0066

26 <sup>9</sup> SE ROA 008 - 009

<sup>10</sup> Petitioner's Reply Brief, Exhibit I

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

<sup>12</sup> SE ROA 007- 009.

28 <sup>13</sup> *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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> A decision is arbitrary and capricious if it is  
19 "baseless" or evidences "a sudden turn of mind without apparent motive...."<sup>17</sup> 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.<sup>18</sup> Substantial evidence is "that which a 'reasonable mind might accept as adequate to  
22 support a conclusion."<sup>19</sup> 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 Nev. 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 <sup>14</sup> SE ROA 005.

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

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

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

<sup>18</sup> *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 <sup>19</sup> *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)).

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1 of review is de novo.<sup>29</sup>

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

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

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

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

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

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

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

28 <sup>29</sup> *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.”<sup>21</sup> Intent is the necessary element the State Engineer is required to  
8 prove in abandonment cases.<sup>22</sup> This is the standard the State Engineer has previously relied upon.<sup>23</sup> 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.<sup>24</sup>

11 Abandonment requires a union of facts and intent to determine whether the owner of the water  
12 right intended abandonment.<sup>25</sup> As intent to abandon is a subjective element, the courts utilize all  
13 surrounding circumstances to determine the intent.<sup>26</sup> 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.<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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

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

24 <sup>22</sup> *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 <sup>23</sup> See Petitioner’s Appendix at 00001-0000133.

26 <sup>24</sup> Petitioner’s Appendix at 000030-000037.

27 <sup>25</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 <sup>26</sup> *Alpine* 291 F.3d at 1072

29 <sup>27</sup> 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 <sup>28</sup> Petitioner’s Appendix 000051-000054.

<sup>29</sup> *Orr Ditch*, 256 F.3d at 946

<sup>30</sup> *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.<sup>31</sup> 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.”<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Nevada requires non-use evidence to be coupled  
13 with other evidence to determine the subjective intent of the water user.<sup>36</sup> This well-developed rule was  
14 originally taken from Nevada’s mining law.<sup>37</sup> 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.<sup>38</sup>

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 \_\_\_\_\_  
<sup>31</sup> *Alpine* 291 F.3d at 1072.

25 <sup>32</sup> *Orr Ditch*, 256 F.3d at 944-45.

26 <sup>33</sup> *Id.*

27 <sup>34</sup> *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 <sup>35</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

<sup>36</sup> *Id.*

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

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

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

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

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

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

24 Vested water rights are “regarded and protected as property.”<sup>43</sup> The term vested water rights is  
25

26 <sup>39</sup> *Orin Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F.3d at 1072; Petitioner’s Appendix at 00015-00020, 000091-000096.

27 <sup>40</sup> Petitioner’s Appendix at 000084-000090, 000128-000130, *See also* Petitioner’s Appendix.

28 <sup>41</sup> Petitioner’s Appendix at 0000115-0000121; *See also* Petitioner’s Appendix at 000015-000020.

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

<sup>43</sup> *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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> A water right owner  
13 can then cure the forfeiture.<sup>47</sup> 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. CLAIR TO PROVE LACK OF INTENT TO ABANDON.**  
19

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.<sup>48</sup> 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."<sup>49</sup> Nevada maintains the rule that there is no  
25

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26 <sup>44</sup> *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).  
27 <sup>45</sup> Petitioner's Appendix 000021-000025.  
28 <sup>46</sup> *Town of Eureka*, 108 Nev. At 168.  
<sup>47</sup> *Id.*  
<sup>48</sup> *Orr Ditch*, 256 F.3d at 945-946.  
<sup>49</sup> *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.<sup>50</sup>

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,"<sup>51</sup> and the State Engineer correctly stated  
6 that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."<sup>52</sup>  
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."<sup>53</sup> 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.<sup>54</sup> 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."<sup>55</sup> 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 <sup>50</sup> *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 <sup>51</sup> SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

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

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

<sup>54</sup> *Alpine*, 291 F.3d at 1073-74.

<sup>55</sup> *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.<sup>56</sup> 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.<sup>57</sup> The State Engineer later demonstrated a keen understanding of the application  
12 of the *Alpine Decree* to intrafarm transfers.<sup>58</sup> 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,<sup>59</sup> 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 <sup>56</sup> *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994)

28 <sup>57</sup> See *Request for Judicial Notice* at 3.

<sup>58</sup> *Id.*

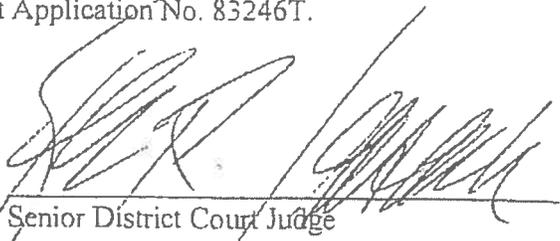
<sup>59</sup> See SE ROA; see also *Petitioner's Appendix*, see also *Petitioner's Request for Judicial Notice*

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

**IT IS SO ORDERED.**

*April 11, 2016*



Senior District Court Judge

Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89701  
(775)852-9900 - Telephone  
(775)852-9900 - Facsimile

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

4 **DECLARATION OF SERVICE**

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

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

14  
15 \_\_\_\_\_ By personal delivery of a true copy to the person(s) set forth below by placement in the  
16 designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative  
17 of said person(s) set forth below.

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

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

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

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

24   
25 \_\_\_\_\_  
26 DEPUTY CLERK  
27  
28

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.

Electronically Filed  
Dec 09 2016 03:21 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 70458

**JOINT APPENDIX**

**Volume II of II  
(JT APP 557-844)**

<b>DATE</b>	<b>DOCUMENT DESCRIPTION</b>	<b>VOLUME</b>	<b>PAGE NOS.</b>
01/22/15	Answering Brief (Respondent's)	I	218-232
02/27/15	Appendix and APP 1-145 (Petitioner's)	I	255-429
11/19/15	Memorandum of Temporary Assignment (Judge Kosach)	II	560-561
01/05/16	Minutes - Oral Argument	II	587
08/22/14	Notice of Appeal	I	001-003
05/23/16	Notice of Appeal	II	823-844
04/29/16	Notice of Entry of Order	II	805-822
03/21/16	Objection to Petitioner's Proposed Order (Respondent's)	II	672-749
12/08/14	Opening Brief (Petitioner's)	I	198-217
11/19/15	Opposition to Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief	II	562-566
11/16/15	Order of Recusal (Judge Montero)	II	557-559
04/22/16	Order Overruling State Engineer's Ruling 6287	II	792-804

<b>DATE</b>	<b>DOCUMENT DESCRIPTION</b>	<b>VOLUME</b>	<b>PAGE NOS.</b>
08/22/14	Petition for Judicial Review	I	004-007
02/27/15	Reply Brief (Petitioner's)	I	233-254
12/01/15	Reply to Respondent's Opposition to Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief	II	567-586
06/03/15	Request for Judicial Notice in Support of Petitioner's Reply Brief	I	430-556
03/30/16	Response to State Engineer's Objection to Proposed Order (Petitioner's)	II	750-755
09/25/14	Summary of Record on Appeal and SE ROA 1-186	I	008-197
04/11/16	Transcript - Hearing on Objections to Proposed Order	II	756-791
01/05/16	Transcript - Oral Argument	II	588-671

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RESPECTFULLY SUBMITTED this 9th day of December, 2016.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Justina A. Caviglia  
JUSTINA A. CAVIGLIA  
Deputy Attorney General  
Nevada Bar No. 9999  
100 North Carson Street  
Carson City, Nevada 89701-4717  
Tel: (775) 684-1222  
Fax: (775) 684-1108  
Email: [jcaviglia@ag.nv.gov](mailto:jcaviglia@ag.nv.gov)  
*Attorney for Appellant*

### 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 JOINT APPENDIX, by electronic service to:

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

/s/ Dorene A. Wright

1 CASE NO. CV 20,112

2 DEPT. NO. 2

**FILED**  
2015 NOV 16 PM 4:41

TAMI RAE SPERO  
DIST. COURT CLERK

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5 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
6 IN AND FOR THE COUNTY OF HUMBOLT

7 -o0o-

8 RODNEY ST. CLAIR,

9 Plaintiff,

10 vs.

**ORDER OF RECUSAL**

11 JASON KING, P.E., Nevada State  
12 Engineer, DIVISION OF WATER  
13 RESOURCES, DEPARTMENT OF  
14 CONVERSATION AND NATURAL,

15 Defendants.  
16 \_\_\_\_\_/

17 GOOD CAUSE APPEARING, and in the interest of fairness and  
18 justice and to avoid even the appearance of impropriety, the  
19 undersigned does RECUSE himself. The basis for Judge Montero's  
20 recusal is due to three issues he disclosed to the parties. First,  
21 Judge Montero disclosed he is a minority shareholder in the Pine  
22 Forest Land & Stock Company, which hold a number of water rights  
23 and occasionally there are issues with the Division of Water  
24 Resources. Further, Judge Montero built a log cabin on the family  
ranch, in which the building plans required the approval of a  
structural engineer. Mr. King was the engineer who approved those

SIXTH JUDICIAL  
DISTRICT COURT  
HUMBOLDT COUNTY, NEVADA  
MICHAEL R. MONTERO  
DISTRICT JUDGE



1 plans. Also, as a District Court Judge there have been times when  
2 the Attorney General's Office has represented Judge Montero in  
3 certain matters. Due these issues the parties requested that Judge  
4 Montero recuse himself from the case.

5 Therefore, pursuant to the Code of Judicial Conduct Rule  
6 2.11, Judge Montero is disqualifying himself from deciding this  
7 matter and respectfully asks the Supreme Court to assign a  
8 Senior Judge to hear all further proceedings with regard to this  
9 case.

10 IT IS SO ORDERED this 16<sup>th</sup> day of November, 2015.

11   
12 \_\_\_\_\_  
13 DISTRICT JUDGE

SIXTH JUDICIAL  
DISTRICT COURT  
HUMBOLDT COUNTY, NEVADA  
MICHAEL R. MONTERO  
DISTRICT JUDGE

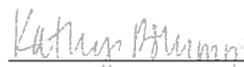


AFFIDAVIT OF MAILING

1  
2 I, hereby certify that I am an employee of the Honorable  
3 Michael R. Montero and that on this 16<sup>th</sup> day of November, 2015, I  
4 deposited for mailing, first-class mail, postage prepaid at  
5 Winnemucca, Nevada 89445, a copy of the foregoing Order addressed  
6 to the following:

7 Paul G. Taggart, Esq.  
8 108 North Minnesota Street  
9 Carson City, Nevada 89703

10 Justina A. Caviglia  
11 Deputy Attorney General  
12 100 North Carson Street  
13 Carson City, Nevada 89701

14   
15 \_\_\_\_\_  
16 KATHY BRUMM  
17 JUDICIAL ASSISTANT  
18  
19  
20  
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SIXTH JUDICIAL  
DISTRICT COURT  
HUMBOLDT COUNTY, NEVADA  
MICHAEL R. MONTERO  
DISTRICT JUDGE



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--FILED--  
Administrative Office of the Courts  
Date: 11/19/15  
By: Seborah Crews

**SUPREME COURT OF THE STATE OF NEVADA  
ADMINISTRATIVE OFFICE OF THE COURTS**

IN THE MATTER OF THE ASSIGNMENT OF  
A SENIOR JUDGE

Order No. 16-00290

TAMARA SPERO  
DIST. COURT CLERK

2015 NOV 19 AM 10:55

FILED

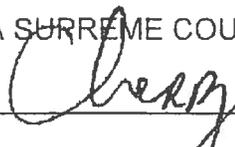
**MEMORANDUM OF TEMPORARY ASSIGNMENT**

WHEREAS, the Honorable Michael R. Montero, District Judge, is unable to hear the matter of *Rodney St. Clair v. Jason King, et al.*, Case Number CV 20112, now pending in the Sixth Judicial District, now therefore

IT IS HEREBY ORDERED that the Honorable Steven Kosach, Senior Judge, is assigned to hear any and all matters in *Rodney St. Clair v. Jason King, et al.*, Case Number CV 20112, and he shall have authority to sign any orders arising out of this assignment. The Court shall notify the parties of the assignment and provide Steven Kosach, Senior Judge with any assistance as requested.

Entered this 19 day of November 2015.

NEVADA SUPREME COURT

By: , Justice

Copy: The Honorable Steven Kosach, Senior Judge  
The Honorable Michael R. Montero, District Judge, Sixth Judicial District Court

1 Rodney St. Clair, Plaintiff vs. Jason King, P.E., Et Al, Defendants.  
2 Sixth Judicial District Court of Nevada, Case No. CV 20112

3  
4 **DECLARATION OF SERVICE**

5  
6 I am a citizen of the Untied 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 5<sup>th</sup> Street, Winnemucca, NV 89445. On this day I caused to be served the following  
9 document(s):

10 **Memorandum of Temporary Assignment**

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

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

19 Paul G. Taggart, Esq.  
20 Taggart & Taggart, Ltd  
21 108 N Minnesota Street  
Carson City, NV 89703

Justina A. Caviglia  
Deputy Attorney General  
Office of the Nevada Attorney General  
100 N Carson Street  
Carson City, NV 89701

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

24 Executed on November 19, 2015 at Winnemucca, Nevada.

25  
26   
27 \_\_\_\_\_  
Humboldt County Clerk

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

1 Case No. CV 20112

2 Dept. No. 2



COPY

FILED

2015 NOV 19 AM 11:34

DIANA RAE SPERO  
DIST. COURT CLERK

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

8

9 RODNEY ST. CLAIR,

10 Petitioner,

11 vs.

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

17 Respondent.

**OPPOSITION TO**  
**PETITIONER'S REQUEST FOR**  
**JUDICIAL NOTICE IN SUPPORT OF**  
**PETITIONER'S REPLY BRIEF**

16 Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer,  
17 Department of Conservation and Natural Resources, Division of Water Resources ("Nevada  
18 State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and  
19 Deputy Attorney General Justina A. Caviglia, hereby files this Limited Opposition to  
20 Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief. This Limited  
21 Opposition is based upon the attached Points and Authorities and the pleadings and papers  
22 on file herein.

23

**POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 To the extent Petitioner Rodney St. Clair seeks to have this Court take notice and  
26 utilize supplemental documents for the purpose of considering Petitioner's Petition for Judicial  
27 Review, the State Engineer opposes Petitioner's effort to introduce evidence into the record  
28 for the purpose of this Court's review of the State Engineer's Ruling No. 6287. Accordingly,

1 the State Engineer objects to the consideration of the supplemental documents and records  
2 provided in Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief in this  
3 Court's review of the State Engineer's decision.

4 **II. ARGUMENT**

5 Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief seeks to  
6 present to the Court pleadings previously filed by the State Engineer in an entirely separate  
7 matter and a prior ruling. These documents were not a part of the record on review by the  
8 State Engineer in making his decision in Ruling No. 6287. This Court's review is strictly  
9 limited to the documents and evidence which were part of the record and considered by the  
10 State Engineer in making his decision.

11 Supplementation of the record by Petitioner is not proper and contrary to Nevada law  
12 as interpreted by the Nevada Supreme Court. NRS 533.450(1) states that actions to review  
13 decisions of the State Engineer are "in the nature of an appeal." The Nevada Supreme Court  
14 has interpreted NRS 533.450 to mean that a petitioner does not have a right to *de novo*  
15 review or to offer additional evidence at the district court. *Revert v. Ray*, 95 Nev. 782, 786,  
16 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943)  
17 (a court may construe a prior judgment, but cannot properly consider extrinsic evidence). As  
18 a result, the function of the court is to review the evidence on which the State Engineer based  
19 his decision to ascertain whether the evidence supports the decision, and if so, the court is  
20 bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park Manor Water*  
21 *Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (In reviewing the order for an abuse  
22 of discretion, our function is to review the evidence upon which the Engineer based his  
23 decision and ascertain whether that evidence supports the order. If so, this court is bound to  
24 sustain the Engineer's decision.).

25 "[N]either the district court nor this court will substitute its judgment for that of the State  
26 Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but  
27 limit ourselves to a determination of whether substantial evidence in the record supports the  
28 State Engineer's decision." *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205

1 (1991). That is whether the evidence which was considered by the State Engineer was  
2 sufficient to support the decision, not whether the State Engineer should have gone beyond  
3 the record to consider additional evidence not referenced or otherwise before him.

4 Nevada law provides that "the proceedings in every case must be heard by the court,  
5 and must be informal and summary, but full opportunity to be heard must be had before  
6 judgment is pronounced." NRS 533.450. This Court is not permitted to engage in a *de novo*  
7 review; rather, this Court's review is under the abuse of discretion standard. *Id.* See also  
8 *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979); *Las Vegas Valley Water Dist. v. Curtis Park*  
9 *Manor Water Users Ass'n*, 98 Nev. 275, 278, 646 P.2d 549, 550 (1982); *State Eng'r v. Curtis*  
10 *Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985); *State Eng'r v.*  
11 *Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Town of Eureka v. State Eng'r*,  
12 108 Nev. 163, 165, 826 P.2d 948, 949 (1992); *Turnipseed v. Truckee-Carson Irrig. Dist.*,  
13 116 Nev. 1024, 1029, 13 P.3d 395, 398 (2000); *Desert Valley Constr. v. Hurley*, 120 Nev.  
14 499, 502, 96 P.3d 739, 502 (2004); *Bacher*, 122 Nev. at 1121, 146 P.3d at 800; *United States*  
15 *v. Alpine Land & Reservoir Co.*, 919 F.Supp. 1470, 1474 (D. Nev. 1996).

16 Here, the State Engineer considered only that evidence that was submitted in relation  
17 to Petitioner's application to change the point of diversion and proof of appropriation for  
18 claim V10493. SE ROA at 0001-186. It is inappropriate to allow the record to be  
19 supplemented with evidence that was not offered within the time constraints established in the  
20 proceedings before the State Engineer or considered by him in reaching his determinations.  
21 See *Revert*, 95 Nev. at 786, 603 P.2d at 264; *Kent*, 62 Nev. at 32, 140 P.2d at 358. The Court  
22 is only permitted to consider that evidence on which the State Engineer based his decision.  
23 NRS 533.450; *Curtis Park*, 101 Nev. at 32, 692 P.2d at 497.

24 Additionally, the State Engineer is not bound by *stare decisis*. *Desert Irrigation, Ltd. v.*  
25 *State of Nevada, State Engineer*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). "The facts  
26 and circumstances of each case are to be considered on an individual basis, taking into  
27 account the nature of the task and the difficulties encountered." *Id.* quoting *Patricia Bailey v.*  
28 *State of Nevada, State Engineer*, 95 Nev. 378, 385, 594 P.2d 734, 738 (1979). The State

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1 Engineer is not bound by arguments it made in separate, federal cases, involving bureau of  
2 reclamation projects, whose facts and circumstances are extremely distinguishable from those  
3 in this case. Additionally, the State Engineer is not bound by a separate ruling in a different  
4 proceeding, whose facts and circumstances differ than those presented in his decision with  
5 respect to Petitioner's application and proof of appropriation.

6 Consideration of Petitioner's exhibits is beyond the record considered by the State  
7 Engineer and an improper attempt to assert stare decisis against the State Engineer. This  
8 evidence cannot be contemplated as a part of this Court's determination as to whether  
9 substantial evidence within the record utilized by the State Engineer supports his decision.  
10 *Morris*, 107 Nev. at 701, 819 P.2d at 205.

11 **III. CONCLUSION**

12 Based upon the foregoing, the State Engineer respectfully requests that this Court not  
13 consider Petitioner's extrinsic evidence in considering Petitioner's Petition for Judicial Review.  
14 Therefore, to the extent Petitioner seeks to introduce this extrinsic evidence for consideration  
15 by means of this Request for Judicial Notice in Support of Petitioner's Reply Brief, the State  
16 Engineer requests this Court to deny Petitioner's request.

17 **AFFIRMATION (Pursuant to NRS 239B.030)**

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

20 DATED this 17th day of November 2015.

21 ADAM PAUL LAXALT  
22 Attorney General

23 By:

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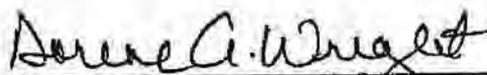
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this this 17<sup>th</sup> day of November 2015, I served a true and correct copy of the foregoing Opposition to Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief via United States Postal Service, Carson City, Nevada, to the following addresses:

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Case No.: CV 20, 112

Dept. No. 2

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DIST. COURT CLERK

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. )

REPLY TO RESPONDENT'S  
OPPOSITION TO PETITIONER'S REQUEST  
FOR JUDICIAL NOTICE IN SUPPORT OF  
PETITIONER'S REPLY BRIEF

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**POINTS AND AUTHORITIES IN SUPPORT OF  
PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO  
REQUEST FOR JUDICIAL NOTICE**

**I. INTRODUCTION**

On June 2, 2015, Petitioner filed a Request for Judicial Notice in Support of Petitioner's Reply Brief ("Request"). On November 17, 2015, Respondent State Engineer filed an Opposition to that Request ("Opposition"). The State Engineer's Opposition is untimely and should be rejected.

A threshold issue in this case is whether the State Engineer applied the proper legal test for the determination of abandonment of water rights in Nevada. In the State Engineer's Ruling that is under review here (Ruling 6287), the State Engineer cited the wrong rule of law. Petitioner's Request contained Ninth Circuit legal briefs filed by the State Engineer and a prior ruling of the State Engineer that explain the proper rule of law for abandonment. These documents are public record and clearly qualify for judicial notice pursuant to NRS 47.130 because the Court can take notice of the fact the State Engineer took these positions in prior briefs and rulings. For that reason, Petitioners' Request should be granted.

**II. STANDARD OF REVIEW**

Judicial notice applies based on NRS 47.130-150. These statutes allow a court to take judicial notice of matters of fact and matters of law. A fact can be judicially recognized if it is something that is (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.<sup>1</sup> Long standing case law further recognizes that judicial notice may be taken of any public documents or the executive acts of an agency.<sup>2</sup>

To the extent documents are offered to expand an administrative record, a court may allow such an expansion of the administrative record if the administrative agency has not provided an complete administrative record to the court. An administrative record can be expanded when (1) the supplementation is necessary to determine if the agency has considered all factors and explained its

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<sup>1</sup> NRS 47.130(2)(a)&(b).

<sup>2</sup> *Jones v. United States*, 11 S.Ct. 80, 84 (1890).

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1 decision; (2) the agency relied on documents not in the record; (3) the supplementation is needed to  
2 explain technical terms or complex subjects; and (4) the plaintiffs have shown bad faith on the part of the  
3 agency.<sup>3</sup> A court may also "consider extra-record evidence to develop a background against which it can  
4 evaluate the integrity of the agency's analysis."<sup>4</sup> These factors all support the inclusion of evidence that  
5 will assist a court in reviewing whether an administrator acted in an arbitrary and capricious manner.<sup>5</sup>

6  
7 **III. ARGUMENT**

8 **A. The State Engineer's Opposition is Untimely and the Arguments Contained Within**  
9 **It Should Be Rejected.**

10 Oral arguments were set to be heard in this case on Tuesday, November 3, 2015. Due to  
11 unforeseen factors, the honorable Judge Montero recused himself from the above-entitled case on  
12 November 3, 2015 and entered the *Order of Recusal* on November 16, 2015. On November 19, 2015,  
13 the honorable Steven Kosach, senior judge, was assigned to hear the matters of this case. Between the  
14 time of Judge Montero's recusal and Judge Kosach's assignment to this matter, the State Engineer filed  
15 the untimely Opposition. If oral argument had occurred as scheduled, obviously the State Engineer  
16 would have been precluded from filing the Opposition. The State Engineer should not be allowed to take  
17 advantage of Judge Montero's recusal by having their late-filed Opposition considered because such  
18 consideration will prejudice the Petitioner.

19 District Court Rules ("DCR") 13(3) requires an opposing party to serve and file a written  
20 opposition within 10 days after service. Nevada Rules of Civil Procedure ("NRC") 6(e) allows for 3  
21 days to be added to the prescribed period after service of notice or other paper if the paper is served by  
22 mail or electronic means. Petitioner's Request was served on June 2, 2015 and file stamped with the  
23

24  
25 <sup>3</sup> *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); see also *Autotel v. Bureau of Land Magnt.*,  
26 2:12-CV-00164-RFB, 2015 WL 1471518, at \*1 (D. Nev. Mar. 31, 2015) (allowing petitioner to supplement the record on  
27 appeal with files relating to the action); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) (quoting *Siv. Ctr. For*  
28 *Biological Diversity*, 100 F.3d 1443, 1450 (9th Cir. 2001) (internal quotation marks omitted); see also *Bundorf v. Jewell*, 2:13-  
CV-00616-MMD-PA, 2015 WL 430600, at \*4 (D. Nev. Feb. 3, 2015).

<sup>4</sup> *Autotel v. Bureau of Land Magnt.*, 2:12-CV-00164-RFB, 2015 WL 1471518, at \*1 (D. Nev. Mar. 31, 2015) citing *San Luis*  
& *Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014).

<sup>5</sup> *Autotel v. Bureau of Land Magnt.*, 2:12-CV-00164-RFB, 2015 WL 1471518, at \*1 (D. Nev. Mar. 31, 2015) citing *Western*  
*Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007).

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1 Court on June 3, 2015. An opposition was due no later than June 19, 2015.<sup>6</sup> The State Engineer's  
2 Opposition is four (4) months late.

3 This is not the first time the State Engineer has submitted untimely documents. In a case in the  
4 Eighth Judicial District, a petitioner (Moapa Band of Paiutes) filed a motion to expand the administrative  
5 record. The State Engineer did not file a timely opposition to that motion and, on July 29, 2015, the  
6 court granted the Tribe's motion to include documents on the record. The court granted the Moapa Band  
7 of Paiutes motion based on DCR 13(3) and the State Engineer failure to oppose the motion. On August  
8 5, 2015, the State Engineer attempted to set aside the court's order. On September 9, 2015, the district  
9 court entered an Order Denying Respondent's Unopposed Motion to Set Aside District Court Order  
10 Granting Petitioner's Motion to Include Documents in the Record ("September 9 Order").<sup>7</sup> The court  
11 stated,

12 The Court notes the [State Engineer's] motion sets forth absolutely no authority in  
13 support of the request by the State Engineer in violation of EDCR 2.20. The fact that  
14 counsel failed to timely oppose the motion does not support reconsideration of the  
15 order, and the Court is not inclined to set aside its order [ . . . ]. The Motion was filed  
16 on July 1, 2015. The Opposition should have been filed by July 20, 2015. No  
17 opposition was filed. No motion for extension of time to file an opposition was filed.  
18 No stipulation to extend the time to oppose was filed.

19 . . .

20 The failure of counsel to properly calendar and timely respond to motions is neither a  
21 basis for reconsideration nor a basis to set aside an order. Therefore, the Motion by  
22 the State Engineer is denied.<sup>8</sup>

23 The State Engineer opposition here should be similarly rejected. The State Engineer has filed an  
24 Opposition four (4) months late, and after the time oral arguments were set to be heard.

25 **B. This Court Should Take Judicial Notice of the Documents Offered by Petitioner.**

26 Petitioner requested judicial notice of three (3) documents. The first was a brief by the State  
27 Engineer to the Ninth Circuit in the same case that the State Engineer cited to in Ruling 6287. The  
28 second document was the State Engineer's decision on remand (Ruling 5464-K) from the Ninth Circuit

<sup>6</sup> DCR 13(3); NRCF 6(e).

<sup>7</sup> See September 9 Order attached hereto as Exhibit 1.

<sup>8</sup> See Exhibit 1 attached hereto.

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1 case that explains the rule of law for abandonment in Nevada based on the Ninth Circuit's holding. The  
2 third document is the brief of the State Engineers to the Ninth Circuit defending his application of the  
3 rule of abandonment in Ruling 5464-K. Each document is a true and correct copy of the official and  
4 public documents. At no point in the State Engineer's Opposition has the State Engineer questioned the  
5 authenticity of any of these documents.

6 1. All Court Documents and State Engineer Rulings are Subject to Judicial  
7 Notice.

8 Court documents are subject to judicial notice pursuant to NRS 47.130 because there can be no  
9 dispute over whether these documents were in fact filed. The documents, rulings, permits, and  
10 applications that are kept on record with the State Engineer's office are public documents. These official  
11 records are subject to judicial notice under NRS 47.130 because there can be no reasonable dispute over  
12 the fact these documents exist or that the State Engineer issued, approved, or maintains these files in his  
13 office.<sup>9</sup> Also, all these documents are "capable of accurate and ready determination by resort to sources  
14 whose accuracy cannot reasonably be questioned."<sup>10</sup>

15 2. State Engineer's July 24, 2002, Answering Brief in *Alpine V.*

16 Petitioner has requested this Court take judicial notice of the June 24, 2002, Answering Brief.  
17 The fact the State Engineer made these arguments to the Ninth Circuit cannot be disputed. The June 24,  
18 2002 Answering Brief is an official court document and the neither circumstances nor the opposition  
19 indicate a lack of trustworthiness.<sup>11</sup> The June 24, 2002 Answering brief is capable of accurate and ready  
20 determination by resort to sources whose accuracy cannot reasonably be questioned. The Ninth Circuit  
21 Court's online docket and the fact that the State Engineer entered and argued an answering brief in the  
22 *Alpine* court on June 24, 2002 are not in dispute.<sup>12</sup>  
23  
24  
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26

27 <sup>9</sup> NRCF 11(a).

28 <sup>10</sup> *Dudum v. Armitz*, 640 F.3d 1098, 1101, n.6 (9th Cir. 2011).

<sup>11</sup> NRS 51.155.

<sup>12</sup> NRS 47.130(b).

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3. **Ruling on Remand 5464-K.**

Petitioner has requested this Court take judicial notice of the State Engineer's Ruling 5464-K. This is a public documents and the accuracy is not in question. No party has questioned the authenticity of this document, which allows this Court to judicially notice this document under NRS 47.130. As such, Ruling 5464-K is subject to judicial notice.

4. **State Engineer's November 22, 2006, Answering Brief.**

For all prior reasons that are applicable to the June 24, 2002 Answering Brief and Ruling 5464-K, the November 22, 2006 Answering Brief is also subject to judicial notice. This is a brief that was filed on behalf of the State Engineer. The authenticity is not challenged. Each answering brief relates to application of the Ninth Circuit's holding on the rule of abandonment. The source of this document cannot reasonably be questioned.

C. **Petitioner's Request for Judicial Notice Does Not Offer New Evidence Because the Request Relates Only to Determining Judicial Precedent.**

The State Engineer incorrectly argues that the Petitioner is asking for *de novo* review and adding evidence into the record for consideration by this Court. The Request includes documents related to the proper legal standard, not the substantial evidence review.

While this Court is limited in its consideration of evidence, it is not "contrary to law" for the Court to consider documents that reflect the legal standard that should be applied. This precedent and the State Engineer's prior position should not be ignored or hidden from this Court's review. The Court should have the opportunity to review these documents to develop the proper legal standard before reviewing the evidence to judge whether Ruling 6287 is sound.

The documents that are offered relate to the legal standard that should be applied in this case. The State Engineer is not afforded deference to reinterpret Nevada water law after it has been articulated by the judiciary. Yet, Ruling 6287 represents a sharp departure from judicial precedent and the State Engineer's prior practice. This Court may take judicial notice of the documents offered by Petitioners that best articulate the proper rule of law that should be applied in this case. Precedent is based on judicial decisions and the Court should be afforded the best opportunity to determine judicial precedent by reviewing the documents in the Request. Briefs to the *Alpine V* court before and after its decision,

1 and the administrative order that applied the *Alpine V* holding certainly are informative to what rule of  
2 law should be applied by this Court.

3 Stated simply, in Ruling 6287, the State Engineer applied the wrong standard for abandonment.  
4 He stated that “[a]t a minimum, then, proof of continuous use of the water right should be required to  
5 support a finding of *lack of intent to abandon*.” Ruling 6287 at 4. For this proposition, he cited to the  
6 Ninth Circuit’s decision in *Alpine V*. But proposition was contained in a specific section of the *Alpine V*  
7 ruling that applies only to intrafarm transfers. Other portions of *Alpine V* make it clear that this standard  
8 does not apply except in intrafarm transfers, which were a unique fact pattern in the Newland’s Project.  
9 The documents offered in Petitioners’ Request prove the fact that the State Engineer took the same  
10 position that Petitioners take in this case, and they explain to this Court the meaning of the Ninth  
11 Circuit’s decision in *Alpine V*. Accordingly, the Request offers documents that are not new evidence but  
12 are relevant to the legal standard for this case and should, therefore, be accepted for judicial notice by the  
13 Court.

14 **D. The Document in the Request are Relevant to Determine that the State Engineer**  
**Was Arbitrary and Capricious.**

15  
16 Certainly this Court is entitled to review documents that demonstrate the State Engineer’s was  
17 arbitrary and capricious in the issuance of Ruling 6287. If the State Engineer applied to wrong rule of  
18 law, that is clearly arbitrary and capricious. If the State Engineer made prior arguments to a judicial  
19 tribunal and entered official decisions that espoused a position contrary to the position he espouses now,  
20 that is clearly relevant to a determination of whether the State Engineer is currently acting in an arbitrary  
21 and capricious fashion. At a minimum, the State Engineer should have to explain to this Court why he  
22 has applied the rule of law he chose in Ruling 6287, despite his contrary positions in official court  
23 records and rulings. Accordingly, this Court may take judicial notice of these documents based on NRS  
24 47.130 and the relevance exceptions espoused in *Fence Creek*.<sup>13</sup>

25 The State Engineer boldly argues he is not bound by the doctrine of *stare decisis*. Petitioner’s  
26 Request offers documents not to allege that State Engineer is bound by his prior rulings, they are offered

27  
28 <sup>13</sup> NRS 47.130; NRS 47.150; NRS 51.155; *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir.  
2014); see also *Autotel v. Bureau of Land Mgmt.*, 2:12-CV-00164-RFB, 2015 WL 1471518, at \*1 (D. Nev. Mar. 31, 2015);  
*Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

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1 to demonstrate the State Engineer is bound to follow judicial precedent. In fact, Ruling 5464-K  
2 demonstrates exactly how he applied judicial precedent in the *Alpine V* case. The thought that stare  
3 decisis does not bind the State Engineer is not a free pass to ignore the decisions of courts. At most, it  
4 allows him to vary from his own prior decisions, not the holdings of the judiciary.

5 Further, even if stare decisis does not bind the State Engineer, the State Engineer cannot  
6 arbitrarily and capriciously change course in the application of Nevada water law. An aggrieved party is  
7 always entitled to claim such an abrupt change of course is not justified. The abuse of discretion  
8 standard that controls state officials calls for the consideration of the legal standard the State Engineer  
9 applied, and prior applications of a different rule are relevant to measuring whether that discretion was  
10 abused. The point is not that the State Engineer is bound by prior arguments or rulings, it is that the State  
11 Engineer abuses his discretion when he applies the wrong rule of law. Therefore, isn't it relevant to a  
12 Court and an aggrieved party that the State Engineer applied a different rule before and aren't the Court  
13 and an aggrieved party entitled to have the State Engineer explain why?

14 Finally, the State Engineer claims that when fact patterns are different, he is not obliged to follow  
15 his prior rulings. When the State Engineer is fully capable of explaining why certain cases are  
16 distinguishable from others. This is not a ground to exclude consideration of important inconsistencies  
17 from the Court's review.

18 **E. Prior Precedent Does Not Support The State Engineer's Opposition.**

19 The State Engineer misapplied Supreme Court precedent in his opposition.

20 **1. Kent v. Smith, 62 Nev. 30, 140 P.2d 357 (1943).**

21 The holding in *Kent v. Smith* does not apply to the current instance as implied by the State  
22 Engineer. *Kent* relates to the administration of a previous decree determining relative rights of water  
23 users of the Humboldt River (the Humboldt Decree).<sup>14</sup> In *Kent*, the Nevada Supreme Court was  
24 reviewing a non-decree court's interpretation of the Humboldt Decree. *Kent* does not apply to a district  
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28 <sup>14</sup> *Id.*, 62 Nev. at 32, 140 P.2d at 353; see also *United States v. Alpine Land and Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999)  
(holding continuing and exclusive jurisdiction of the federal court to hear appeals on the Carson or Truckee Rivers based on  
the Alpine or Orr Ditch Decrees).

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1 court reviewing an administrative decision. *Kent* applied the legal theory of continuing and exclusive  
2 jurisdiction of decree courts.<sup>15</sup>

3 Under water law, the court which decrees a water right will retain jurisdiction of the water  
4 regardless of which county has control over the *rem*.<sup>16</sup> Prior to any decision over the *rem* both federal  
5 and state courts enjoy concurrent jurisdiction and may commence proceedings to decide questions about  
6 the allocation of water rights.<sup>17</sup> In *Kent*, the Nevada Supreme Court concluded the non-decree court did  
7 not have jurisdiction over the proceedings.<sup>18</sup> However, this case does not involve a *Kent* issue or a  
8 continuing and exclusive jurisdiction issue.

9 2. *State Engineer v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 692 P.2d  
10 495 (1985)

11 The State Engineer cites one case to suggest erroneously that the State Engineer may unilaterally  
12 determine what documents a reviewing court may consider.<sup>19</sup> In *State Engineer v. Curtis Park Manor*  
13 *Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985), the Nevada Supreme Court discussed the  
14 limited "abuse of discretion" standard for reviewing decisions of the State Engineer. In that decision, the  
15 Court said that "our function is to review the evidence upon which the State Engineer based his decision  
16 and ascertain whether that evidence supports the order." Nothing in *Curtis Park*, however, suggests what  
17 should be in the administrative record. In *Curtis Park*, the district court failed to limit their review of the  
18 issues on remand as instructed by the Nevada Supreme Court.<sup>20</sup> This is entirely different from the  
19 present case. Here, the State Engineer wants the Court to ignore public documents and evidence that  
20 directly show the State Engineer's actions are arbitrary or capricious.

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25 <sup>15</sup> See generally *Kent v. Smith*, 62 Nev. 30, 140 P.2d 357 (1943).  
26 <sup>16</sup> *State Engineer v. South Fork Band of Te-Moak Tribe*, 66 F. Supp. 2d 1163 (D. Nev. 1999); see generally, *United States v.*  
*Alpine Land & Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999).  
27 <sup>17</sup> *State Engineer v. South Fork Band of Te-Moak Tribe*, 339 F.3d 804, 812 (9th Cir. 2003) citing *Colorado River Water*  
*Conservation District v. United States*, 424 U.S. 800, 808-09, 96 S.Ct. 1236, \_\_\_ (1976).  
28 <sup>18</sup> *Id.*, 62 Nev. at 40, 140 P.2d at 361.  
<sup>19</sup> See Opposition at 2:18-20.  
<sup>20</sup> *Curtis Park*, 101 Nev. at 32, 692 P.2d at 497.

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3. Revert v. Ray, 95 Nev. 782, 603 P.2d 262 (1979).

The State Engineer contends that the ruling in *Revert v. Ray* prevents the Petitioners from requesting judicial notice.<sup>21</sup> This reading of *Revert* is wrong. In *Revert*, the Petitioner received a hearing before the State Engineer where "appellants vigorously contended that they had a vested right. . . ."<sup>22</sup> The State Engineer held a hearing on all objections to the Preliminary Order of Determination.<sup>23</sup> The Petitioners did not receive a hearing in the current instance.

In *Revert*, the Court found that the State Engineer did not address certain issues in his determination and "thus deprived [petitioner] of a full and fair determination of their claims."<sup>24</sup> The Court held that the "State Engineer manifestly abused his discretion."<sup>25</sup> Manifest abuse of discretion can be found in issuing rulings that are a rapid departure from prior rulings of the State Engineer. In this instance, the State Engineer argued the *Alpine* brief in front of the Ninth Circuit Court of Appeals and was well aware of the application of intrafarm transfers and abandonment. The State Engineer's current holding is a departure from his prior holdings and arguments. This is improper.

4. Desert Irrigation, Ltd. v. State of Nevada, State Engineer, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1971).

The State Engineer alleges that *Desert Irrigation* holds the State Engineer is not bound by stare decisis.<sup>26</sup> This is based on the theory that every basin and water right is different. Administrative agencies are granted deference, according to the United States Supreme Court, because it promotes uniformity of the agency's decisions.<sup>27</sup> Uniformity cannot be achieved through sudden departures from judicial precedent.

In *Desert Irrigation*, the State Engineer cancelled the uncommitted portion of the plaintiff Desert Irrigation's water right, after concluding that Desert Irrigation had not sufficiently met its obligation to put the uncommitted water to beneficial use.<sup>28</sup> The Nevada Supreme Court agreed with the State

<sup>21</sup> *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); See Respondents' Motion to Strike at 2:22-24.

<sup>22</sup> *Revert*, 95 Nev. at 785, 603 P.2d at 263-234.

<sup>23</sup> *Revert*, 95 Nev. at 785, 603 P.2d at 263-234; NRS 533.150.

<sup>24</sup> *Revert*, 95 Nev. at 787, 603 P.2d at 265.

<sup>25</sup> *Id.*

<sup>26</sup> See Opposition at 3:24-25.

<sup>27</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>28</sup> *Id.* 113 Nev. at 1052-53, 944 P.2d at 838.

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1 Engineer's conclusion that cancelled water rights revert to the public domain, but nonetheless,  
2 overturned the ruling.<sup>29</sup> The Court applied the doctrine of judicial estoppel and explained that Desert  
3 Irrigation, the water holder, was entitled to rely on the State Engineer's earlier (legally incorrect)  
4 representation that cancelled permit rights revert to the certificated base right.<sup>30</sup> The Court clarified that  
5 the policy underlying governmental estoppel is as follows: "the State Engineer has been charged with the  
6 statutory duty of administering the complex system of water rights within the state. We believe that lay  
7 members of the public are entitled to rely upon its advice as to the procedures to be followed under the  
8 state water law."<sup>31</sup>

9 In support of the Petitioner's request, the Nevada Supreme Court concluded that the State  
10 Engineer was barred from enforcing a correct application of law against applications because his staff  
11 had mischaracterized the law to the applicants -- binding the State Engineer to the mischaracterization.  
12 This is not the case here.

13 **IV. CONCLUSION**

14 For the reasons stated above, this Court should conclude that Exhibits 1, 2, and 3 are subject to  
15 judicial notice.

16 DATED this 30<sup>th</sup> day of November, 2015.

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22 By:   
23 PAUL G. TAGGART, ESQ.  
24 Nevada State Bar No. 6136  
25 RACHEL L. WISE, ESQ.  
26 Nevada State Bar No. 12303  
27 Attorneys for Petitioner

28 <sup>29</sup> *Id.* 113 Nev. at 1060-61, 944 P.2d at 843.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* 113 Nev. at 1061, 944 P.2d at 843.

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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 REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER'S REPLY BRIEF, as follows:

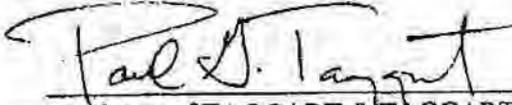
By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

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 ELECTRONIC DELIVERY, via:

DATED this 30<sup>th</sup> day of November, 2015.

  
Employee of TAGGART & TAGGART, LTD.

Case Title: *Rodney St. Clair v. Jason King, P.E.*

Case No.: CV 20112

Dept.: II

**INDEX OF EXHIBITS**

Exhibit No.

Description

1.

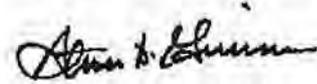
Order Denying Respondent's Unopposed Motion to Set Aside District Court Order Granting Petitioner's Motion to Include Documents in the Record

**EXHIBIT 1**



**EXHIBIT 1**



  
CLERK OF THE COURT

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ORDR

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE MOAPA BAND OF PAIUTE INDIANS,  
Petitioner(s),

vs.

STATE ENGINEER, STATE OF NEVADA,  
DEPARTMENT OF CONSERVATION AND  
NATURAL RESOURCES, DIVISION OF  
WATER RESOURCES,

Case No.: A-14-697004-J  
Dept. No.: 7

Respondent(s).

In re Nevada State Engineer Ruling #6258

**ORDER DENYING RESPONDENT'S UNOPPOSED MOTION TO SET ASIDE DISTRICT  
COURT ORDER GRANTING PETITIONER'S MOTION TO INCLUDE DOCUMENTS IN  
THE RECORD**

The State Engineer, through their counsel the Attorney General's Office, filed a motion to set aside the court's order of July 29, 2015. The Court notes the motion sets forth absolutely no authority in support of the request by the State Engineer in violation of EDCR 2.20. The fact that counsel failed to timely oppose the motion does not support reconsideration of the order, and the Court is not inclined to set aside its order granting the Tribe's Motion to Include Documents in the Record. The Motion was filed on July 1, 2015. The Opposition was due on July 20, 2015. No opposition was filed. No motion for extension of time to file an opposition was filed. No stipulation to extend the time to oppose was filed. Any stipulation by the parties to extend time to file an opposition should have been filed by July 20, 2015 pursuant to EDCR 2.22(c) and 2.25 (a). The Court issued an

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT-VII

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order more than a week after the opposition was due, denying the motion under EDCR 2.23.

The Court finds no basis to reconsider the motion under either NRCP 60 or EDCR 2.24. The failure of counsel to properly calendar and timely respond to motions is neither a basis for reconsideration nor a basis to set aside an order. Therefore, the Motion by the State Engineer is denied.

The briefing schedule in the July 29, 2015 order will stand: Petitioner's Opening Brief must be filed no later than Tuesday, September 15, 2015. Respondent's Answering Brief must be filed no later than Thursday, October 15, 2015. Any Reply Brief must be filed by Monday, November 2, 2015. Counsel is reminded that the schedule will only be changed in case of extreme emergency. The Court will also not accept a stipulation to modify the briefing schedule. Oral arguments will be heard on November 12, 2015 at 9:00 a.m.

The September 8, 2015 hearing is vacated.

DATED this 3rd day of September, 2015.

  
\_\_\_\_\_  
LINDA MARIE BELL  
DISTRICT COURT JUDGE

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Don Springmeyer, Esq.  
Christopher W. Mixson, Esq.  
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Richard M. Berley, Esq. (pro hac vice)  
ZIONTZ CHESTNUT

Adam Paul Laxalt, Attorney General  
Jerry M. Snyder, Sr. Deputy Attorney General  
ATTORNEY GENERAL'S OFFICE

  
TINA HURD  
JUDICIAL EXECUTIVE ASSISTANT

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII

**SIXTH JUDICIAL DISTRICT COURT MINUTES**

CASE NO. CV20-112

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

---

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

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

**ORAL ARGUMENTS**

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

Statements were made by Court.

Counsel presented arguments.

Court stated its findings of facts and conclusions of law.

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

Taggart to draft the decision.

Statements were made by Court.

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

---

1 Case No. CV20-112  
2 Dept. No. 2

3 ORIGINAL

4 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF  
5 NEVADA IN AND FOR THE COUNTY OF PERSHING  
6 THE HONORABLE STEVEN R. KOSACH, PRESIDING

7 -o0o-

8 RODNEY ST. CLAIR, )  
9 an individual, )  
10 Petitioner, )  
11 vs. )  
12 JASON KING., P.E., Nevada )  
13 State Engineer, Division of )  
14 Water Resources & Department )  
of Conservation and Natural )  
Resources, )  
Respondents. )

15 JAVS TRANSCRIPT OF PROCEEDINGS  
16 ORAL ARGUMENT  
17 JANUARY 5, 2016  
18 CARSON CITY, NEVADA

19 For the Petitioner: Paul Taggart, Esq.

20  
21 For the Respondents: Justina Caviglia,  
22 Deputy Attorney General

23 Transcribed by: Capitol Reporters  
24 Nicole Alexander

1 CARSON CITY, NEVADA; JANUARY 5, 2016; 10:12 A.M.  
2 -o0o-

3  
4 THE COURT: Thank you. Good morning,  
5 everybody. Please be seated. All right. Let me  
6 announce the case. This is in the Sixth Judicial  
7 District Court of the State of Nevada. And thank you,  
8 Counsel and parties, for allowing this to be heard  
9 through stipulation in Carson City. Both of your offices  
10 are in Carson City, and I'm in Reno, and I've been  
11 appointed this case. So it's case number CV20-112,  
12 Department 2 of the Sixth Judicial District Court, Rodney  
13 St. Clair, petitioner. Are you Mr. St. Clair?

14 MR. ST. CLAIR: Sir.

15 THE COURT: Good morning, to you,  
16 Mr. St. Clair, represented by Mr. Paul Taggart of Carson  
17 City, Nevada. Good morning to you, Mr. Taggart.

18 MR. TAGGART: Good morning, Your Honor.

19 THE COURT: And the respondent is the  
20 Attorney General, Ms. Justina Caviglia. Good morning to  
21 you, Ms. Caviglia. And who do you have with you, please?

22 MS. CAVIGLIA: I have Susan Joseph-Taylor,  
23 Your Honor.

24 MS. JOSEPH-TAYLOR: Good morning.

1 THE COURT: Ms. Taylor, good morning to you.  
2 And you're with the Attorney General's Office?

3 MS. JOSEPH-TAYLOR: No, sir. I'm a Deputy  
4 Administrator for the Nevada Division of Water Resources.

5 THE COURT: Thank you. Thank you. This is a  
6 petition for judicial review filed by Mr. St. Clair. It  
7 was originally assigned to Judge Montero in Winnemucca,  
8 in when was it? November, Judge Montero stepped down,  
9 recused himself, and I got the case. I have been  
10 appointed by the Supreme Court on this case. I've read  
11 the petition, the response, and the reply. I've also  
12 worked closely with the law clerk, Ms. Laura Guidry,  
13 Judge Montero's law clerk. I'm ready to proceed, and my  
14 understanding is this is oral arguments; correct?

15 MR. TAGGART: Yes, Your Honor.

16 THE COURT: So I want to tell you, I have a  
17 lunch date I want to take. I have a friend here in  
18 Carson that I told the friend I would meet them around  
19 noon. So if we go further, I'll take a lunch break, and  
20 then we'll come back around 1:30, but I want you to go  
21 ahead and summarize, go ahead with your oral arguments.

22 I've said this for 24 years -- well, 25 years  
23 now. I think I'm ready. I'm not one of those that come  
24 on the bench saying, "Hmm. I'm ready. I know

1 everything." No. I've read the briefs, and I think I  
2 understand them, and so go ahead and help. Mr. Taggart,  
3 please.

4 MR. TAGGART: Thank you, Your Honor. I have  
5 this map to kind of help you understand where we're  
6 talking about in Nevada and -- put it right there -- and  
7 I have a presentation that I'm going to give a copy to  
8 opposing counsel and also to -- may I approach?

9 THE COURT: Certainly.

10 MR. TAGGART: And this is just what we're  
11 going to see on the screen as well.

12 THE COURT: Thank you.

13 MR. TAGGART: Would it be possible to have  
14 that up here, too?

15 THE COURT: I don't know if I did this  
16 already, but my name is Steve Kosach. I'm a senior judge  
17 for the State, and I was District Judge in Washoe County,  
18 Nevada for 23 years. I have been a senior for the last  
19 three years. But with that introduction, I don't know if  
20 I introduced myself. But please, Mr. Taggart.

21 MR. TAGGART: Good morning, Your Honor. I'm  
22 going to start by introducing who Jungo Ranch is, who  
23 Rodney St. Clair is, talk a little bit about the water  
24 rights, and then get into the specific legal points. On

1 this map, which is -- what it is is it's a map of all of  
2 the hydrographic basins in the state of Nevada that the  
3 State Engineer prepared, and I put a blue pen where the  
4 ranches are that Mr. St. Clair has.

5 Mr. St. Clair owns Jungo Ranch and is the  
6 petitioner in this case. He has a series of ranches in  
7 that area of Nevada. He has approximately 1,040 acres in  
8 one ranch, 520 acres in another ranch, and 780 acres in a  
9 third ranch, all located up in this area on the road to  
10 Orovada.

11 The property that we're talking about right  
12 now is 160 acres of ground that was requested to be  
13 irrigated with the water right at 4 acre feet per acre,  
14 so that would be 640 acre feet. So the amount of water  
15 we're talking about today is 640 acre feet to irrigate  
16 160 acres. And I'll just, if I can, I'll hand this out.  
17 This is out of the State Engineer's Record on Appeal, and  
18 it's just an aerial photograph submitted with information  
19 about the application. So my client, his engineer  
20 submitted this to the State Engineer, and this is an  
21 aerial photograph which is marked as State Engineer  
22 Record on Appeal, page 104, and it shows an area that's  
23 pointed to with an arrow, northwest corner of Section 8,  
24 and that's the ground that we're talking about. And this

1 is a 1954 aerial that was provided to the State Engineer  
2 by my client. And so that gives you a little bit of an  
3 idea of what we're talking about and a little bit of an  
4 idea of where it's located.

5 The water right that we're talking about has  
6 been identified as vested claim 10498, and a vested claim  
7 in Nevada water law is a water right that's initiated  
8 prior to the adoption of statutes that require a person  
9 to file an application with the State Engineer. So we  
10 have, if you will, two types of water rights. We have  
11 statutory water rights that postdate that statute being  
12 adopted that requires you to file with the State  
13 Engineer. That dates 1939 for groundwater, and so a  
14 water right that was initiated, the use of it was  
15 initiated prior to 1939, would not go through that  
16 statutory process. It would go through what we call the  
17 vested water right process, and the vested water right  
18 process involves adjudications with courts. So Your  
19 Honor may be familiar with some of these, but there's a  
20 statutory process where these water rights that came into  
21 being prior to the adoption of the statute, they are  
22 adjudicated by a court after a preliminary adjudication  
23 by the State Engineer.

24 So a process occurs where the State Engineer

1 allows anyone to submit claims that they own water rights  
2 in an area, and then he prepares that into an abstract of  
3 claims. Then he reviews those and develops a preliminary  
4 order determination, and then that becomes a final order  
5 that's given to a Court, and the Court reviews that and  
6 decides whether to make that a decree. So that's how we  
7 determine what vested water rights are in the State of  
8 Nevada, but post-1939 water rights would be through the  
9 statutory system. So we're talking about a vested water  
10 right here.

11 And so the reason I've kind of gone through  
12 that is a determination initially was made by the State  
13 Engineer in his ruling that there was a vested claim in  
14 existence at this location, and then he determined that  
15 the water right was abandoned due to non-use. And so the  
16 challenge that we've raised is that the abandonment  
17 determination was improper. And so I'll get into what  
18 the law of abandonment is and how that law applies to  
19 these facts and then argue why we believe the State  
20 Engineer erred in determining that this water was  
21 abandonment.

22 So vested right 10498 was pumped from a well  
23 on the Jungo Ranch area and was historically used for  
24 irrigation on that property. And in 2013, Jungo Ranch

1 filed an application with the State Engineer to move the  
2 point of diversion of that water right to an existing  
3 well in the area where that property is. So in 2013,  
4 Rodney St. Clair came into the State Engineer and said,  
5 "I would like to take the water right that I have from  
6 this well, this historic well, and move it to a well that  
7 I have that operates, and use it on the same land that it  
8 was historically used on in the same manner of use as  
9 irrigation." So the one change that he wanted to do was  
10 change the point of diversion, move it to a new well.

11 The State Engineer reviewed that application  
12 and did not hold an evidentiary hearing, and then issued  
13 a ruling that denied the application. And as I said  
14 earlier, the State Engineer ruled that the right was --  
15 that there was a vested right, but that it had been  
16 abandoned. Now the -- I'm on page 3 now of my  
17 presentation.

18 There was a certain amount of evidence that  
19 was submitted to support the vested claim, and that was  
20 submitted in a report by Stanka Consulting, which is an  
21 engineering firm, and that is found at Record on Appeal  
22 37. In that packet of documents were title documents  
23 which showed the chain of title of these water rights  
24 from the time when they were initiated until

1 Mr. St. Clair acquired them. So in those title  
2 documents, what you would find is conveyances among  
3 family, essentially, as folks died and then their  
4 children received the property. The land moved through a  
5 series of individuals all within the same family until  
6 Rodney St. Clair acquired it from that family. And so  
7 you have a lot of estate type of documents, probate  
8 documents, but each one of them includes a clause that  
9 says that all appurtenances are conveyed with the land.  
10 Water rights are appurtenant to land, and so in Nevada,  
11 when a deed for land includes a general appurtenance  
12 clause that says that all appurtenances convey with the  
13 land, that also conveys all water rights. So all of  
14 those deeds were submitted to show that the water rights  
15 had been conveyed from one family member to another and  
16 ultimately to Mr. St. Clair.

17           There was also documents about a land patent  
18 by George Crosley in 1924, so that's a federal  
19 determination that land can be withdrawn from the public  
20 land and become private land. That was signed by  
21 President Coolidge, and it indicated that all of the land  
22 in appurtenance and appurtenances were be being given to  
23 this individual. So the land and the water rights were  
24 given to that person who was awarded the patent,

1 Mr. Crosley.

2 There were also a series of newspaper  
3 articles that indicated that irrigation was occurring in  
4 the 1920s, and there were specifically articles about the  
5 use of drilling rigs for -- or drilled wells for  
6 irrigating alfalfa. Well casing material and information  
7 on the construction of that well casing was submitted,  
8 all tracing the well casing back to prior to 1930 or, I'm  
9 sorry, to the mid '30s, and there was also a drill rig, a  
10 picture of a drill rig, that is on the next page of the  
11 presentation that indicates that that was prior to 1933,  
12 and also the aerial photograph that we showed you already  
13 was submitted.

14 So based on that information, the State  
15 Engineer found that there was sufficient evidence to  
16 demonstrate the establishment of a vested right to  
17 underground water in support of our proof. And so this  
18 picture here is the drill rig that's on Mr. St. Clair's  
19 property, and it goes -- it dates back a long way, and it  
20 shows that this well was in place prior to 1939.

21 Now, then -- what the point I want to make,  
22 though, is that all of this evidence I just talked about  
23 was submitted for the purpose of establishing the vested  
24 claim. And as you'll see as I go through this, the State

1 Engineer took this evidence and used it to make his  
2 abandonment determination. So he didn't have any  
3 additional evidence that he relied upon. He took this  
4 evidence that was submitted to show the pre-1933 use and  
5 used that to make his abandonment determination.

6 Now this next page is a, I'm sorry, in the  
7 materials I gave you, there's a hydrographic abstract  
8 that looks like this.

9 THE COURT: I have it.

10 MR. TAGGART: And this is attached to our  
11 reply brief as Exhibit 1. And what this is is it's a  
12 printout off the State Engineer's website, and it shows  
13 that only one time in the history of Nevada has the State  
14 Engineer determined that a vested groundwater right is  
15 abandoned, and it's this case here right now. This is  
16 the only time this has ever happened.

17 So what this readout shows us is that it's a  
18 search. If you see selection criteria, it's looking for  
19 applications that are ABN, abandoned, and their source is  
20 underground. So it's all applications in the State of  
21 Nevada that have been determined to be abandoned and are  
22 underground. So you can tell that there haven't been a  
23 lot of determinations of abandonment of underground water  
24 rights in Nevada to begin with, but as you go down the

1 second column from the left, you'll see the first one  
2 with the V in front of it is V10493. That's the only  
3 vested claim that's been determined to be abandoned. All  
4 of the other actions are statutory water rights and not  
5 vested claims. There is, on the bottom, an R in front of  
6 one, and that's a reserved right. That's a federal right  
7 which really isn't significant here. So the point of  
8 this is that we're talking about something that is the  
9 first time this has ever happened.

10 Now I'm going to get into the law of  
11 abandonment. So as Your Honor is aware, the law of  
12 abandonment is well developed in Nevada, and it follows  
13 the mining law. The case that we provided in our opening  
14 brief is a mining case called Mallet from 1965. It's  
15 really there as an illustration of a principle that the  
16 water law in Nevada, the original water law, the  
17 pre-statutory water law, adopted the ideas of the mining  
18 camps in how to give out water rights.

19 So mines would allow an individual to go out  
20 and stake a claim, literally put a stake in the ground,  
21 and then be able to leave that area, go to town and get  
22 materials to come back and work the claim. And while he  
23 was gone, no one would be able to take that claim away  
24 from him. And the same idea was adopted in the water

1 well. So this particular case, though, focuses more on  
2 abandonment of a mining claim, and it stresses that  
3 intention to abandon is critical to abandonment, that the  
4 idea of intent is a critical element.

5 And the Court said that, "In determining  
6 whether one has abandoned his property rights, the  
7 intention is the first and paramount object of inquiry,  
8 for there can be no strict abandonment of property  
9 without intention to do so." And the Supreme Court  
10 stated that, "The moment the intention to abandon and the  
11 relinquishment of possession unite, the abandonment is  
12 complete." And then the Court went on to stress the  
13 difference between abandonment and forfeiture.

14 So that idea is carried forward by the  
15 Supreme Court in a series of cases. And so on page 6 of  
16 my presentation here, the first one we talk about is  
17 Manse Springs. And in Manse Springs, the Court said that  
18 abandonment is the relinquishment of a right by the owner  
19 with the intent to forsake and desert it. And then in  
20 Revert v. Ray, the Supreme Court said that it requires a  
21 union of acts and intent. In Franktown Creek, the  
22 Supreme Court said that intent is essential, and then in  
23 Alpine 5, the federal court, the Ninth Circuit, explained  
24 that non-use evidence must be coupled with evidence of

1 improvements inconsistent with irrigation to establish  
2 abandonment.

3           So you might wonder well, what are we talking  
4 about? Because my esteemed colleague is going to step up  
5 and say that this water hadn't been used for a long time,  
6 and so therefore, it was proper to declare it abandoned.  
7 If I have a property in Orovada, a piece of property,  
8 land, and I don't go visit it for 50 years or a hundred  
9 years, it cannot be determined abandoned unless I intend  
10 to abandon it. If I don't pay taxes, if I don't show up  
11 at any event involving the property, it's a very  
12 difficult proof to show that I've abandoned property,  
13 land, a mining claim, and water rights. So the notion  
14 that someone does not use their water for a significant  
15 period of time does not mean they lose their water right  
16 when it's a vested claim like the water right we're  
17 talking about here. So that's what I want to emphasize,  
18 is that like any other piece of property, my failure to  
19 visit it, my failure to use it for substantial periods of  
20 time, does not establish an intent to abandon that  
21 property.

22           Now, it's important, and we're going to talk  
23 about this, that there's two ideas: abandonment and  
24 forfeiture for water rights. Abandonment, I've talked

1 about. It's the intent plus the act, so we have a  
2 physical act, and we have a mental state. So it's very  
3 similar to criminal law, and what we all learn in law  
4 school and in criminal cases that the physical act, the  
5 dead body, is not enough to prove murder. You've got to  
6 prove the intent of the accused of the intent to kill,  
7 and you can't just base it on the fact that there's a  
8 dead body. So you have to have a union of that intent  
9 and that act.

10 Forfeiture, on the other hand, is just a  
11 physical act. Forfeiture can be established by simple  
12 non-use. And forfeiture applies to post-statutory water  
13 rights if it's surface water, and forfeiture applies to  
14 groundwater, whether it's pre-statutory or not. So  
15 forfeiture can occur to the very water right we're  
16 talking about now, and I'll get into that later, but  
17 forfeiture is non-use of a water right for a statutory  
18 period of time. In Nevada, five years.

19 The State Engineer did not declare this water  
20 right forfeited. He declared it abandoned. But it's  
21 important to understand that the courts have considered  
22 the application of abandonment and forfeiture to water  
23 rights significantly, and the Ninth Circuit has in a  
24 series of cases that we're going to get into in detail.

1 And those cases involve the Newlands Project, which is  
2 Fernley and Fallon and those irrigation areas that began  
3 to be irrigated after the construction of the Truckee  
4 Canal.

5 And to give you just a brief intro to that,  
6 we have the Truckee Canal that leaves the Truckee River  
7 and takes water from the Truckee River to Lahontan  
8 Reservoir. Well, if it's taken from the Truckee River to  
9 Lahontan Reservoir, it doesn't go to Pyramid Lake. And  
10 at Pyramid Lake, there's an Indian tribe that has gotten  
11 very, very serious into litigation to get that water  
12 back, to stop the water from being diverted at Truckee  
13 Canal and taken to Lahontan Reservoir.

14 So they went into -- in 1993, they filed a  
15 petition to have water rights declared abandoned and  
16 forfeited throughout the Newlands Project. Prior to  
17 1993, they challenged change applications that were being  
18 filed in the Newlands Project, and they claimed that  
19 those water rights were abandoned and forfeited. And so  
20 the Ninth Circuit had many opportunities to evaluate  
21 Nevada law and apply it to the facts with Nevada water  
22 rights in those cases. So that's why we see -- and the  
23 reason they're at the Ninth Circuit is because the water  
24 system, the Truckee River, is in a federal decree, the

1 Orr Ditch Decree, and the Carson River is in a federal  
2 decree, the Alpine Decree. So we're going to see Alpine  
3 cases and Orr Ditch cases in my discussion that deal with  
4 abandonment and forfeiture and the law in Nevada about  
5 abandonment and forfeiture.

6 So in those cases, the Ninth Circuit said  
7 that it's easier to establish forfeiture than  
8 abandonment, and they explained that the threshold to  
9 show forfeiture only requires a showing of non-use for  
10 five successive years, but abandonment is the  
11 relinquishment of the right by the owner with the intent  
12 to forsake and desert it. And they quote it to the Manse  
13 Springs case, which I talked about earlier.

14 So the elements of abandonment, again, are  
15 the mental state and the physical act, and non-use of a  
16 water right can only establish the physical element of  
17 abandonment. It cannot establish the mental state. And  
18 this is a Brightline Rule that was established by the  
19 courts, and the Ninth Circuit commented on the fact that  
20 Nevada law is more protective than other western states  
21 in this regard. And I need to change the citation that  
22 we put on this PowerPoint slide because we cited to the  
23 Alpine case, but this is actually -- this is actually a  
24 statement that was made in the Orr Ditch case, which is

1 at 256 F. 3rd 935 and was decided in 2001.

2 And in that decision, the Courts said, on  
3 page 945, the following. This is under the heading of  
4 "Abandonment." And it says, "Subjective intent is  
5 difficult to prove by direct evidence. Few water right  
6 holders say in front of witnesses, 'I intend to abandon  
7 my water rights.' Therefore, indirect and circumstantial  
8 evidence must almost always be used to show abandonment."

9 Then they say, "Many states have adopted  
10 legal presumptions designed to ease the burden upon a  
11 challenger to increase the likelihood that water will be  
12 put to beneficial use. In particular, nearly all western  
13 states presume an intent to abandon upon a showing of  
14 prolonged period of use." So they're saying that many  
15 states have a presumption based upon non-use.

16 Then the Court says, "The State Engineer  
17 ruled in this case, however, that Nevada does not include  
18 such a presumption in its common law of abandonment and  
19 that the tribe could not therefore shift the burden of  
20 proof to require Fernley" -- in this case, Fernley was a  
21 party, "to show affirmatively that there was no intent to  
22 abandon merely by showing a prolonged period of use. The  
23 district court agreed."

24 So the State Engineer in this case said

1 prolonged periods of non-use are not enough to shift the  
2 burden of proof in an abandonment situation. Then they  
3 said, "While we consider the State Engineer's  
4 interpretations of Nevada statutes persuasive, they are  
5 not controlling. Review of the district court's  
6 conclusions of law de novo."

7 And then they went on to cite to the Manse  
8 Springs case, the Franktown case that I've already cited  
9 to, and they say, "Under Nevada case law, a prolonged  
10 period of non-use may be taken into consideration to  
11 determine whether a water right has been abandoned.  
12 Non-use may inferentially be some evidence of an intent  
13 to abandon, but Nevada law goes no further than an  
14 inference. It is only a matter of degree, but a legal  
15 presumption is stronger than an inference."

16 And then they say that, "None of the cases  
17 cited by Fernley explicitly disclaims a presumption, but  
18 neither the tribe nor the government cites any Nevada  
19 decision knowing that Nevada law has changed since our  
20 decision in Alpine 3 where we stated though the longer  
21 the period of nonuse the greater the likelihood of  
22 abandonment, we find no support of a rebuttal presumption  
23 for abandonment."

24 And this is the most important part about

1 this decision that I want you to be aware of is they say,  
2 "We acknowledge that Nevada appears to be the only  
3 western state that maintains this position, but in our  
4 federal system, it is entitled to do so."

5 So the Ninth Circuit reviewed that and made a  
6 determination that Nevada law is very strict on this  
7 point, and it is a Brightline. So the consistent holding  
8 throughout the Nevada case law is that non-use is not  
9 enough to constitute intent to abandon. And the Ninth  
10 Circuit upheld and endorsed the Ninth Circuit in  
11 Alpine -- a case I'm going to talk about in a few  
12 minutes -- upheld this Orr Ditch case and the holdings  
13 that I just talked about.

14 So non-use, the time of not using the water  
15 right for a period of time, can bring about an inference  
16 but not a presumption. What does that mean? The Orr  
17 Ditch case that I just cited to said that, "Abandonment  
18 requires the showing of subjective intent on the part of  
19 the holder of the water right to give up that right.  
20 Since subjective intent is difficult to show, indirect  
21 and circumstantial evidence must be used to show  
22 abandonment." And then they said that, "Nevada law only  
23 allows non-use evidence to be viewed as an inference of  
24 intent to abandon," and that's many of the same things we

1 just went through.

2 Now, this is how it came up in these cases,  
3 though, is it came up in the idea of the proof -- the  
4 burden of proof, the standard of proof, and shifting of  
5 the burden. So as you're aware, the plaintiff in a civil  
6 case has the initial job of establishing the elements of  
7 the cause of action that they're claiming. So they have  
8 the initial burden of proof to establish that the  
9 elements exist, and then the opposing side has to rebut  
10 that, the presumption. And if the opposing side did not  
11 have any -- rested and they had met their prima facie  
12 case, they would win because there was no rebutting of  
13 that presumption.

14 So that same idea was presented to the Ninth  
15 Circuit in the Alpine cases and the Orr Ditch cases, and  
16 what the Court said is first of all, the burden of proof  
17 for abandonment is on the party alleging abandonment. In  
18 that case, it was the tribe. But in this case, it's the  
19 State Engineer. So the State Engineer has the burden of  
20 proof to prove intent to abandon and non-use of the  
21 water.

22 The next point they made was that the  
23 standard of proof for abandonment is clear-and-convincing  
24 evidence. Since these are property rights and many of

1 the cases say the law abhors a forfeiture, there has to  
2 be clear-and-convincing evidence before a water right can  
3 be determined abandoned. So the State Engineer has the  
4 burden of proof to show by clear-and-convincing evidence  
5 the intent to abandon in this case.

6 And then evidence of non-use of a water right  
7 can be an inference of intent to abandon, but that  
8 evidence is never enough to satisfy the burden of proof  
9 or show clear-and-convincing evidence of the intent to  
10 forsake forever. And that's why -- and that's because  
11 it's the same idea about this rebuttal or presumption.  
12 Non-use evidence cannot be enough to shift the burden.  
13 It is never enough to establish intent to abandon. It  
14 has to be coupled with other evidence in order to shift  
15 the burden to the water right owner to defend. And when  
16 there is enough evidence to shift the burden to the water  
17 right owner, then the water right owner is required to  
18 show lack of intent to abandon.

19 The reason I'm bringing all of this up is in  
20 this case, the State Engineer required us to show lack of  
21 intent to abandon. And in our view, that's not Nevada  
22 law; that they shifted the burden to us to show lack of  
23 intent to abandon. They did not meet their burden to  
24 show intent because they only relied on non-use evidence.

1 So again, this rebuttal presumption is -- I think I've  
2 made that clear.

3 And so the Orr Ditch Court and the Alpine  
4 Court, in the early 2000s, in 2000 and in 2002,  
5 established this idea that a prolonged period of non-use  
6 can raise an inference of intent to abandon, but it does  
7 not create that rebuttable presumption. So clearly,  
8 non-use evidence alone cannot be enough to establish  
9 abandonment.

10 And what the Court said is you have to look  
11 at surrounding facts in addition to the intent to abandon  
12 in order to determine whether or not abandonment has  
13 occurred. Again, I cited here to Alpine and that you --  
14 non-use evidence is not enough. You have to show intent  
15 to abandon. And the ways that you can show intent to  
16 abandon are things like construction of improvements that  
17 are inconsistent with irrigation. If someone puts a road  
18 in over the top of their property, if someone puts a  
19 house on the top of their property, a driveway, that's an  
20 improvement inconsistent with irrigation. You can't  
21 irrigate when that happens.

22 The Ninth Circuit said that can be evidence  
23 of an intent to abandon. That is subjective or  
24 circumstantial evidence of a subjective intent, or if

1 someone doesn't pay their taxes on their water rights,  
2 that can be considered circumstantial evidence of intent  
3 to abandon. So these are the kinds of outside the  
4 non-use evidence, the types of evidence that can be used  
5 to establish a claim.

6 None of that's present here. There's no --  
7 we're currently irrigating the property that was  
8 irrigated by this right originally. There's no  
9 improvements inconsistent with irrigation, and the taxes  
10 have been paid, and that's evidenced by the fact that the  
11 chain of title shows that the water rights were conveyed  
12 throughout that chain of title, there was no tax sale for  
13 any of the property, so there was no failure to pay taxes  
14 that led to a tax sale. The property was clear of that.

15 Now, prior to the adoption or, I'm sorry,  
16 prior to Ruling 6287, the State Engineer has made quite a  
17 few decisions about abandonment. And in our view, they  
18 properly articulated the rule for abandonment, and on  
19 this Slide, No. 14, I go through a series of decisions by  
20 the State Engineer.

21 And before I get into this, I'll just say  
22 that the prior rulings of the State Engineer, I will  
23 concede, are not precedential on the State Engineer. But  
24 in a world where water rights are not well-understood --

1 this isn't an area where a lot of cases get to courts.  
2 We don't have a lot of Supreme Court decisions on facts  
3 and how laws apply to facts and water rights. What we  
4 have is many, many, many rulings by the State Engineer  
5 that go into application of Nevada water law to facts.  
6 And it's relevant in a determination of whether the State  
7 Engineer has been arbitrary and capricious, which is our  
8 allegation in this case. It's relevant to look at how  
9 decisions were made historically on these points and then  
10 to weigh the current decision against that pattern.

11 And so these prior decisions by the State  
12 Engineer are helpful to explain what we can't find in  
13 statutes or in case law. And they are public records of  
14 the State Engineer, and so they are things that the Court  
15 can take into account. They're also not additional facts  
16 or evidence. It's just what it is is public records of  
17 the State Engineer that show the application of facts to  
18 the water law in the State of Nevada.

19 So in these four decisions, the State  
20 Engineer enforced this rule that non-use evidence alone  
21 is not enough to determine abandonment. In Ruling 462,  
22 the State Engineer said that Nevada case law discourages  
23 and abhors the taking of water rights away from people.  
24 Therefore, the Supreme Court in Nevada had to set the

1 standard of clear-and-convincing evidence. The Ninth  
2 Circuit's union of acts means more than just non-use.

3 And then the State Engineer in this case, in  
4 an oral ruling, said, "I find nothing in this record as  
5 to the other union of acts or circumstances that would  
6 lead the factfinder to find that these waters have been  
7 abandoned. The union of acts means more than just  
8 non-use."

9 Ruling 6201 says a very similar holding.  
10 Ruling 6182, which we'll talk about a little bit more,  
11 the State Engineer found that a rail yard was not used  
12 for many decades, but he refused to rely solely on the  
13 physical evidence of non-use to make an abandonment  
14 determination, and that's because we have to make a  
15 determination of actual intent. All of these rulings are  
16 attached to our appendix for your review.

17 And then in Ruling 4116, the State Engineer  
18 also said that non-use is only some evidence of intent to  
19 abandon the right. Bare ground by itself does not  
20 constitute abandonment. Bare ground is something we're  
21 going to talk about a little more. Bare ground is  
22 another way of referring to a piece of ground where water  
23 wasn't used, and that's the argument the tribe made in  
24 all of those cases that, "Hey, I've got an aerial

1 photograph that shows that there's bare ground." Well,  
2 bare ground just means nonuse of water. And that was  
3 found to not be sufficient to establish abandonment  
4 without more evidence. That ruling, 4116, is the one  
5 that was upheld in the Ninth Circuit in that Orr Ditch  
6 case that i read earlier.

7 So concluding on this idea about non-use  
8 evidence. A water rights owner's mental state for  
9 abandonment cannot be inferred from non-use. The State  
10 Engineer has always until now required more than mere  
11 nonuse to declare abandonment, and the State Engineer has  
12 consistently ruled until now that evidence of bare ground  
13 alone is not enough to establish intent to abandon. And  
14 the State Engineer previously advocated the same position  
15 to the Ninth Circuit that we advocate here, and the Ninth  
16 Circuit upheld that position.

17 Okay. So now we're going to get into a lot  
18 more detail about what the Ninth Circuit said, and the  
19 reason why this is important is because in the ruling  
20 that you're reviewing, the State Engineer cited to a rule  
21 of law and applied that rule of law, and that rule of law  
22 that he cited to comes from this case. And in our view,  
23 that rule of law does not apply in the situation we have  
24 before us. It was stated for a specific reason that is

1 different from what we have in front of us today.

2           So in Alpine 5, we had a thing called  
3 intrafarm transfers. And what I'm going to do is hand  
4 out a copy of this decision. And before I do, though, I  
5 want to -- I just want to point you to the last bullet on  
6 Slide 16. So the Ninth Circuit made this statement. "To  
7 qualify for a particular equitable remedy, the Court held  
8 at a minimum, proof of continuous use of the water right  
9 should be required to support a finding of lack of intent  
10 to abandon the water right." The language there shifts  
11 the burden to the water right owner. That's the language  
12 the State Engineer cited to in the ruling that you're  
13 reviewing.

14           And now we're going to talk about what that  
15 meant, what that ruling meant in Alpine 5. And in the  
16 State Engineer's ruling, they quote to that and they cite  
17 to Alpine 5. So if we go to Alpine 5, if you go to the  
18 first tab that I've included, the first Post-it I have on  
19 there, it has a highlighted area up in the top left  
20 there, and it goes back to the page before, which is page  
21 6, and this is at page 1,071 in the case, which is 291 F.  
22 3rd, 1062. And it says, "The district court also set  
23 forth a standard for evaluating evidence of abandonment.  
24 In particular, it held that where there is evidence of

1 both a substantial period of non-use combined with  
2 evidence of an improvement which is inconsistent with  
3 irrigation, the payment of taxes and assessments alone  
4 will not defeat a claim of abandonment."

5 So the Court was weighing facts. They were  
6 saying that, you know, in addition to non-use evidence,  
7 you have to look at are there improvements with  
8 irrigation? Is there taxes being paid? And then on the  
9 next page, in the next column under analysis, the Court  
10 says that they're reviewing three things. And so under  
11 sub -- under Roman III, sub A, it says, "First," and this  
12 is -- and they're attributing argument to parties. First  
13 they argue that the district court improperly evaluated  
14 different evidentiary factors in determining abandonment.  
15 Second, they asked this Court to reconsider our ruling in  
16 Alpine 3. Finally, they contended that the district  
17 court erred in exempting intrafarm transfers from state  
18 forfeiture and abandonment law. So first the Court looks  
19 at the abandonment rule in general, and then they look at  
20 intrafarm transfers.

21 And so then in the first paragraph, they  
22 re-state the rule I've said over and over again already.  
23 They say, "First, with respect to the evidentiary issues  
24 related to abandonment, the United States and the tribe

1 argued that the district court erred in affirming the  
2 engineer's determination that a prolonged period of  
3 non-use of water rights does not create a rebuttal  
4 presumption that a landowner intended to abandon those  
5 rights. We rejected this argument in Orr Ditch" --  
6 that's the case I read from before -- "holding that while  
7 a prolonged period of non-use may raise an inference, it  
8 does not create a rebuttal presumption."

9 So they make the statement in this case, the  
10 same rule of law that has applied in Nevada in all of the  
11 other cases we've talked about. But then if you go to  
12 page -- to the second tab or the second Post-it that I  
13 have in here, I've highlighted sub B of the case. So  
14 they have an outlined heading called, "Equitable Relief  
15 for Intrafarm Transfers."

16 So this is where they go into a very specific  
17 situation that was happening in the Newlands Project, and  
18 what it was is that folks would have a farm. They called  
19 it a farm unit, and it might be a thousand acres, and  
20 they had a water right on certain land. And over time,  
21 they picked up that water and moved it on other parts of  
22 their land in the same farm unit. And the tribe came in  
23 and said, "Well, you haven't used the water where you  
24 were supposed to. You had a right to use it on this part

1 of your farm, and you're now using it on this part of  
2 your farm, so you've abandoned your water right at this  
3 location, and/or you've forfeited it at this location."

4 And what Judge McKibben said was that, "No,  
5 that's not fair. Equity plays a role in water cases.  
6 That's not fair." If this -- and there's more  
7 complications. It's a very litigious situation out there  
8 in the Newlands Project, but the judge determined that it  
9 was okay for someone to move water around within their  
10 property, that they could be relieved from the strict  
11 rules of filing change applications to move water from  
12 one place to another if it was within their farm. And so  
13 he said there's an equitable remedy whenever it's an  
14 intrafarm transfer. That's what Judge McKibben said at  
15 the district court level.

16 Well, the Ninth Circuit reviewed his  
17 decision, and the Ninth Circuit said, "You know, we kind  
18 of agree with you, but we don't think it's a blanket  
19 rule. We don't think it's anytime anywhere it's within  
20 someone's farm unit, it creates this is equitable remedy.  
21 You've got to look at the facts of each case." And  
22 that's when they made the statement that at a minimum --  
23 on the next page -- I have this here. "At a minimum,  
24 proof of continuous use of water -- of the water right

1 should be required to support a finding of lack of intent  
2 to abandon."

3           So the Court applied that rule in the very  
4 limited instance of intrafarm transfers and said, "We're  
5 not going to adopt Judge McKibben's intrafarm transfer  
6 rule. We're not going to say it's a blanket equitable  
7 remedy in all situations. We're only going to let it  
8 work in this one kind of situation." But if it's not  
9 intrafarm transfer, the same rule applies as I've stated  
10 and as applies in all of the cases.

11           So when we go to Ruling 6287, you'll see that  
12 the State Engineer, in our view, took that out of  
13 context. So this is the ruling that we're reviewing  
14 today. This is Ruling 6287, and this is the one that we  
15 filed the appeal from. And if you go to page 4 of the  
16 ruling, which is marked as State Engineer's ROA No. 7,  
17 I've highlighted where they've made this statement. But  
18 let me read that whole paragraph.

19           So they're stating what the law is in their  
20 view, and then they apply that law to the facts of this  
21 case. The State Engineer says, "Non-use" at the  
22 beginning of that paragraph -- "nonuse of a period of  
23 time may inferentially be some evidence of an intent to  
24 abandon a water rights." We agree. "Although a

1 prolonged period of non-use may raise an inference to  
2 intent to abandon, it has been held it does not create a  
3 rebuttal presumption of abandonment." We agree. But  
4 then they say, "At a minimum then, proof of continuous  
5 use of the water right should be required to support a  
6 finding of lack of intent to abandon."

7 In our view, they took that sentence out of  
8 the intrafarm transfer exception of Alpine 5. They  
9 ignored what Alpine 5 really said, that it carried  
10 forward the same rule that has always existed in those  
11 cases, that you cannot shift the burden to the water  
12 right owner to show lack of intent to abandon. But what  
13 they have said is that at a minimum, that water right  
14 owner is required to support a finding of lack of intent  
15 to abandon. So we just think the State Engineer is  
16 applying the wrong rule of law. And that is one of the  
17 points that we would request Your Honor to reverse their  
18 decision based upon.

19 THE COURT: But isn't this an intrafarm  
20 transfer?

21 MR. TAGGART: No.

22 THE COURT: Intrafarm in the sense that  
23 there's a group of farms. This particular section, the  
24 160 acres, is part of a larger farm, "intra." The

1 request for these 160 acres they use -- why is it not  
2 then? Why is it not intrafarm?

3 MR. TAGGART: Well, this -- we're going to  
4 use the water on the same piece of ground where we used  
5 the water before.

6 THE COURT: Okay. All right. That answers  
7 my question.

8 MR. TAGGART: It's not moving it within one  
9 farm unit to another location.

10 THE COURT: That's right. And forgive me  
11 because I realize it might be intrafarm, but it is an  
12 existing quote unquote, "well or use."

13 MR. TAGGART: Uh-uh.

14 THE COURT: And maybe the term in general can  
15 explain, or maybe you can, could it be that the State  
16 Engineer thought it was intrafarm and therefore starts  
17 using these standards? I'm speculating when I say that.

18 MR. TAGGART: I'm sure my esteemed colleague  
19 can answer that for you. In our view, it's not an  
20 intrafarm. We think that was a specific situation in the  
21 Ninth Circuit case that does not apply here.

22 THE COURT: I can see from his decision on  
23 ROA 0007, he shifted the proof, he, the engineer, shifted  
24 the proof. "At a minimum then, proof of continuous use

1 of the water rights should be required to support a  
2 finding of lack of intent to abandon." See, I'm looking  
3 for why did he shift? What was on the engineer's mind?  
4 But I'm thinking out loud. My wife says, "Don't think  
5 out loud when you're on the bench," but I can't help  
6 myself, so please go on.

7 MR. TAGGART: Right. I mean, to understand  
8 what an intrafarm transfer is, we really would need to go  
9 more in-depth into what was going on in those cases, and  
10 those cases went back and forth to the State Engineer  
11 three or four times. It was terrible, the amount of  
12 litigation that happened. The rulings the State Engineer  
13 issued were hundreds and hundreds of pages. But you also  
14 have this complication that forever, the State Engineer's  
15 Office did not consider water rights in the Newlands  
16 Project to be under their jurisdiction. They believed  
17 they were federal water rights not under their  
18 jurisdiction.

19 In 1984, the U.S. Supreme Court had a case,  
20 Nevada v. U.S., which said that the water rights in that  
21 project are actually state water rights, and the State  
22 Engineer, as a result, did have jurisdiction over those  
23 water rights. And so what the tribe was saying is, "Hey,  
24 you know what? You guys weren't following the rules

1 before 1984. You're moving water around in your farms  
2 without going to the State Engineer." And the farmers  
3 are saying, "Well, wait a second. Before 1984, the  
4 government told us we didn't need to go to the State  
5 Engineer. Everyone believed that the situation was that  
6 the federal government controlled the reclamation  
7 project, not the State Engineer."

8 And so that's what the Ninth Circuit and  
9 Judge McKibben were looking at is that the farmers were  
10 saying, "Hey. We shouldn't be prejudiced because we  
11 didn't file a change application with the State Engineer  
12 prior to 1984. We didn't even know that we needed to do  
13 that then." And so the Ninth Circuit then said, "Okay.  
14 We buy that, but we're not just going to let everybody  
15 have that out. You have to at least show that you used  
16 the water." And so that's what the intrafarm transfer  
17 exception was all about.

18 Now, we have made a request for judicial  
19 notice with some documents that relate to the decisions  
20 that we've been talking about. And those decisions  
21 demonstrate that the State Engineer has not applied that  
22 intrafarm exception the way he has in this case. What we  
23 have included is the brief that was filed by the State  
24 Engineer to the Ninth Circuit prior to the Alpine 5 case,

1 and it argues the same principles that we're advocating  
2 about intent to abandon. Then the Ninth Circuit adopted  
3 that decision or adopted that particular argument.

4 Then the case got remanded by back to the  
5 State Engineer, in the Ruling 5464, the State Engineer  
6 applied that rule, and in the intrafarm transfer context  
7 applied one rule, but everywhere else applied the same  
8 rule that we believe applies here. And then in defense  
9 of that decision, they've had another decision to the  
10 Ninth Circuit, another argument to the Ninth Circuit, and  
11 another brief was filed, and we've provided that. And  
12 what they all show -- our intent is to show that this is  
13 the proper reading of Alpine 5, that the State Engineer  
14 even made these points about what Alpine 5 means. And so  
15 we've provided those for that purpose.

16 The Attorney General filed an opposition to  
17 our request for judicial notice. That was filed four  
18 months after we submitted our request for judicial  
19 notice, so the first point is we think that their  
20 opposition is late and should be denied for that purpose.  
21 One of the points they make is that there's no new --  
22 that you cannot consider new evidence in the first  
23 instance here, and that's true. This is an appellate  
24 matter.

1           If new evidence is submitted, the State  
2 Engineer should review it in the first instance, and so  
3 your only option, if there was new evidence, would be to  
4 remand him to consider evidence first, and it would come  
5 back up to you for consideration. But these aren't new  
6 evidence. These are just -- these are public documents  
7 that demonstrate the precedent that the Ninth Circuit had  
8 established for water rights. And the reason why these  
9 particular documents are so important is because they tie  
10 directly to the rule of law that the State Engineer  
11 applied in this case, so it's not just a different case  
12 or a different situation. It's the very rule that  
13 they're relying upon here.

14           So stepping back a little bit, because now  
15 I'll move on from talking about the law, and we'll get  
16 into the facts and the evidence. But before I do that, I  
17 just wanted to just restate that vested water rights are  
18 property rights, and the law abhors the taking of those  
19 property rights by abandonment or forfeiture. That's why  
20 clear-and-convincing evidence is required to prove  
21 abandonment. And if a person does not use their water  
22 right, it does not -- but does not intend to forsake it  
23 forever, abandonment cannot occur. And this is important  
24 because a lot of people think about water rights, use it

1 or lose it. But that's just not the case when it comes  
2 to a property right that's owned and when abandonment is  
3 being alleged.

4 Forfeiture is different. Forfeiture is a  
5 different situation, but that's not what was claimed here  
6 by the State Engineer. And non-use evidence cannot  
7 express the intent of a landowner. And the reason here  
8 is if you just showed aerial photographs of the land and  
9 say, "Okay. The aerial photographs are the evidence of  
10 non-use, and that shows the intent to abandon," there's a  
11 lot of problems with aerial photographs. And in all of  
12 those cases that we have involving the tribe -- we went  
13 through all of those problems. I mean, you'd have photos  
14 that weren't taken during irrigation season. You'd have  
15 photos taken during droughts. And so just looking at  
16 aerial photographs to determine whether or not water is  
17 being put to use or if someone intends to abandon their  
18 water right is not sufficient.

19 So now what I want to want do is focus on how  
20 -- and all of the evidence that the State Engineer relied  
21 upon is non-use evidence. And if all he has is non-use  
22 evidence, he cannot meet the standard required for  
23 abandonment. And the State Engineer references evidence  
24 to show that water was not used. He cites to the well

1 condition, he cites to aerial photographs, and he  
2 indicates that the pump was pulled from the well. So  
3 these are three points that he makes. And in our view,  
4 all of those facts show non-use of water. That's all  
5 they show. They don't show an intent to abandon. They  
6 just show that the water wasn't being used at the time.  
7 And that's all the condition of the well can show or the  
8 lack of a pump in the well. And the State Engineer  
9 relies upon a statement made in the application that the  
10 water had not been used every year and that the applicant  
11 failed to submit evidence to show continuous use.

12 We don't think that the burden is on us to  
13 show evidence of continuous use, and the State Engineer  
14 has to have more than nonuse evidence to show  
15 abandonment. Also, all of the evidence that was  
16 submitted that the State Engineer relied upon was  
17 submitted by my client, so they didn't do any independent  
18 evaluation. They didn't come up with any facts  
19 themselves. They didn't travel out to the property and  
20 do a field investigation. They don't have any idea when  
21 the well (sic) was pulled out of the well or when the  
22 pump was pulled out of the well. They have no idea about  
23 the property because they didn't visit it, so they didn't  
24 do an independent analysis of the property, and they just

1 relied upon the information we submitted to prove that it  
2 was a vested right. We were focusing on water use prior  
3 to 1939 in order to establish a vested right. They took  
4 that evidence and used it against us to allege that we  
5 had abandoned this water right without doing any  
6 independent analysis.

7 And whenever there's a lack of certainty  
8 about whether the person has an intent to abandon, then  
9 there's going to have to be a finding of no abandonment  
10 because the clear-and-convincing evidence standard  
11 certainly requires a higher showing than uncertainty  
12 about those particular facts.

13 Now, abandonment can happen. I mean, I don't  
14 want so say that it's never possible. And it has  
15 happened. And the one case that we have from the Supreme  
16 Court is Revert, which talked about abandonment. So  
17 Revert v Ray is a case that we often cite to, and it is  
18 at 95 Nevada 782. And in that case, there was a finding  
19 of abandonment of a water right. What happened was --  
20 and this is quoting from the case at page 783 or, I'm  
21 sorry, 784.

22 They say, "Prior to 1905, Montilius M.  
23 Beatty, subsequently known as 'Old Man Beatty,' acquired,  
24 by squatter's possession, a vested right of some

1 magnitude in the use of waters flowing from the Beatty  
2 Springs. In 1905, Beatty conveyed his water rights for  
3 consideration to Bullfrog Water, Light and Power Company.  
4 Bullfrog initially put the water to beneficial use,  
5 installing a pipeline running from the springs to the  
6 short-lived boomtown time of Rhyolite and executing a  
7 two-year lease of those water rights to the Indian  
8 Springs Water Company in January 1915. Bullfrog,  
9 however, eventually lost interest in the springs and  
10 vanished from the area at some time between 1915 to 1920  
11 without transferring or selling the water rights."

12 Now, in our brief at page -- in our opening  
13 brief at page 9, in our reply brief at page 111, we refer  
14 to this case. And what it's saying is when a corporation  
15 owns a water right and the corporation vanishes,  
16 disappears, that can be considered intent to abandon.  
17 And later in that case, the Supreme Court said exactly  
18 that.

19 The record reflects that prior to 1919,  
20 Bullfrog had ceased all business and corporate operations  
21 in the Beatty area, had vanished from the community, and  
22 had allowed part of its property to be sold for  
23 delinquent taxes. So the Supreme Court upheld an  
24 abandonment when the company disappeared, they vanished

1 from the community, they stopped paying taxes, and that's  
2 the kind of evidence that is sufficient for abandonment  
3 to be found in the State of Nevada. And the State  
4 Engineer has taken that same view throughout a series of  
5 rulings that we've attached to our appendix, and the  
6 first one is Ruling 6201.

7 The facts here were that the owner of a water  
8 right had relinquished the grazing rights that they had  
9 in an area, so that was a fact outside nonuse of water.  
10 They relinquished the public right that they had with the  
11 BLM to graze cattle, and they did not continue to  
12 register their corporation with the Secretary of State's  
13 Office, and they didn't inquire of the State Engineer's  
14 Office when the State Engineer asked about the water  
15 right. Those are the kinds of things that are  
16 circumstantial evidence that can establish abandonment; a  
17 corporation going defunct, just like in the Revert v Ray  
18 case, giving up grazing rights, and the like. So that's  
19 Ruling 6201.

20 In Ruling 6182, this was an interesting one  
21 because it comes from an area out close to where we're  
22 talking about. This involved a water right for a rail  
23 yard in Imlay, Nevada, and the rail yard had not been  
24 used for decades. But the fact that the rail yard hadn't

1 been used for decades was not the reason the State  
2 Engineer found abandonment. So just the nonuse of water  
3 at the rail yard was not enough. There was also evidence  
4 that the water right owner had relinquished a  
5 right-of-way across public land that was required to use  
6 the water. So that was one thing. And then there was no  
7 communication from the owner of that water right with the  
8 State Engineer's Office when the State Engineer asked for  
9 information about the water right. So those, again,  
10 giving public rights of way that can inhibit your ability  
11 to use the water, not communicating with the State  
12 Engineer's Office, these are the kinds of things that are  
13 legitimate reasons for abandonment to be determined. And  
14 on page 23, we talk about more rulings that have similar  
15 decisions that involve other circumstantial evidence of  
16 intent to abandon.

17 So on Slide 24, we say that facts -- these  
18 are the types of facts in addition to nonuse that are  
19 required. The State Engineer must have evidence that  
20 actually reflects the actual intent and state of mind of  
21 the water right owner. I went through a couple of those:  
22 construction of a structure incompatible with irrigation,  
23 failure to pay taxes, failure to update title, failure to  
24 update an address, failure to maintain corporate

1 standing, failure to maintain communications with the  
2 State Engineer. Those are the things that evidence an  
3 intent to abandon.

4 Now, on Slide 25, we talk about bare ground  
5 again. The State Engineer, in prior rulings, has found  
6 that bare ground alone is not enough to find abandonment,  
7 and in our view, that's all the evidence they can point  
8 to when they talk about aerial photographs of our  
9 property, is that it shows bare ground. So in Ruling  
10 4116, they found that that type of evidence is not  
11 sufficient to find abandonment.

12 Now, in the ruling -- in the ruling, the  
13 State Engineer refers to a series of aerial photographs.  
14 And if we could look at the -- you have that ruling in  
15 front of you. On page 5, which is State Engineer Ordway,  
16 page 8, they say, in the middle, the first full paragraph  
17 in the middle of that paragraph, "Further, the Office of  
18 the State Engineer informed applicants that it was  
19 questionable whether the 1954 image showed disturbed land  
20 in light of future aerial images from 1968, 1975, 1986,  
21 1999, 2006 and 2013."

22 Those aerial photographs have not been  
23 provided to my client. They're not in the record before  
24 Your Honor. The only aerial photograph that's been

1 provided is the one that we provided, so we've asked that  
2 any reference to those documents of support for the State  
3 Engineer's decision be stricken because those documents  
4 aren't even before you to look at. But even if they  
5 were, our view is that all they can show is bare ground,  
6 and bare ground is just evidence of nonuse, and that's  
7 not evidence of an intent to abandon.

8 All right. Now I'm going to go through a few  
9 other slides that talk about other reasons why a water  
10 right cannot be -- why a person cannot be determined to  
11 have an intent to abandon. And so there's a series of  
12 rulings in the past where the State Engineer has said  
13 that the filing of a change application, like if I have a  
14 water right I haven't used in a long time, but then I  
15 come in and I file a change application with the State  
16 Engineer to use the water, that shows an intent to not  
17 abandon the water, or you can't find an intent to abandon  
18 from that.

19 If I record my water right information with  
20 the State Engineer, if I go in there and I give them my  
21 deeds and say, "Okay. I'm the current owner of this  
22 water right," that shows I don't intend to abandon the  
23 water right. And if the State Engineer needs to asks me  
24 about my water right and I respond to him, then that's a

1 reason why I don't have an intent to abandon. So those  
2 are in a series of rulings that we've provided. Ruling  
3 6177 goes through this.

4 The State Engineer found that the filing of a  
5 change application itself is evidence of lack of intent  
6 to abandon a water right. We filed a change application,  
7 and that's why this is important because in the past,  
8 that would have been good enough for him to say, Okay.  
9 They said the applicant has filed an application to move  
10 the point of diversion of a well located on applicant's  
11 property to allow for easier access to the water. This  
12 is evidence that the applicant does not intend to abandon  
13 its water right and seeks to ensure that the water can be  
14 placed to beneficial use." So again, we did that.

15 On Slide 29, the State Engineer, in 2011,  
16 relied upon a change application, the filing of a change  
17 application to reject a protestant's claim that nonuse of  
18 a water right had occurred since 1956. The sole evidence  
19 the State Engineer relied upon in that ruling was that  
20 the applicant had filed a change application. The State  
21 Engineer found the applicant's intent to place the water  
22 to beneficial use is evidence by the filing of  
23 applications, and they go through the four applications.

24 We also included Ruling 5840 and 5791. Those

1 are rulings where the State Engineer ruled abandonment  
2 did not occur because someone had filed an extension of  
3 time. So that's a little bit different than a change  
4 application, but it's another filing that can be made  
5 with the State Engineer that evidences an intent not to  
6 abandon a water right.

7 So in this case, we filed change -- the  
8 present applications, we filed them, so that evidenced a  
9 lack of intent not to abandon the water rights, and we  
10 think that -- and then on page 31, we've cited to Ruling  
11 6191, which shows that recording ownership with the State  
12 Engineer's Office has been enough to overcome a claim of  
13 abandonment. Ruling 6191 is the specific one there. The  
14 State Engineer found that nonuse evidence coupled with  
15 the fact that no conveyance documents or reports had been  
16 filed on that water right demonstrated an intent to  
17 abandon.

18 So in that case, the State Engineer said,  
19 "You haven't submitted any records or reports of  
20 conveyance, and therefore, you've intended to abandon the  
21 right." And they hadn't communicated with the State  
22 Engineer for 16 years.

23 Here, there's clearly evidence that Jungo  
24 bought the property and the water right that we're

1 debating conveyance documents and title evidence was  
2 submitted to the State Engineer, and in contrast to the  
3 prior rulings, there is evidence of the title documents  
4 and the reports in conveyance and also communications  
5 with the State Engineer's Office. So all of that should  
6 have been enough for the State Engineer to find that we  
7 did not intend to abandon the water right.

8 Now, the next series of slides I have here  
9 goes to this question of well, why care about what we  
10 want to do in 2013 if someone had abandoned a water right  
11 50 years ago? And these series of cases say we look at  
12 what the intent is, the State Engineer has looked at what  
13 the intent of the current owner is, and if they don't  
14 intend to abandon the water right, the State Engineer  
15 will not declare it abandoned. So there's a series of  
16 rulings there that we've cited to Ruling 385 on that  
17 point.

18 Also on Slide 34, there's Ruling 6083 where  
19 the State Engineer -- and this is important because in  
20 this case, he's relied upon the disrepair of works of  
21 diversion to imply abandonment. And in 6083, the State  
22 Engineer said that -- and we've included this on the  
23 slide. We've cited to it.

24 "The protest requests the State Engineer

1 declare permit 10105 abandoned. The abandonment of the  
2 service water right in Nevada is the relinquishment of a  
3 right with the intention to forsake it within the meaning  
4 of the term abandonment and intent to abandon and as a  
5 necessary element. Nonuse of the water right is only  
6 some evidence of an intent to abandon. The right and use  
7 -- the right and does not create a rebuttal presumption."

8 "At the field investigation, Permittee  
9 Lincoln expressed a continued interest in returning the  
10 pipeline or other works of diversion to operate in  
11 condition, and based upon the statement of the individual  
12 at the time of the application that he wanted to continue  
13 using the water. The State Engineer declined to make a  
14 finding of abandonment." And then the next slide, 35, in  
15 Ruling 6090, is the same idea.

16 Another point that we make in our brief about  
17 the intent of the current owner being relevant on intent  
18 to abandon is that in 1999, the legislature indicated  
19 that abandonment cannot occur if a water right is  
20 conveyed to a municipality. So if Reno gets a water  
21 right, if Fernley gets a water right, that water right  
22 cannot be declared abandoned. So it's the owner of the  
23 water right, the municipality, and the intent to use the  
24 water right that overcomes any challenge of abandonment

1 regardless of the period of nonuse. So that's what the  
2 legislature said in 1999.

3 So in our case, we certainly have the intent  
4 to use the water and not to abandon the water. So in our  
5 case -- and this is now I'm on Slide 38 -- we filed a  
6 change application. We filed the conveyance documents  
7 and the reports of conveyance. We have a present day  
8 intent to use the well, and we've communicated with the  
9 State Engineer's Office about our well and about our  
10 desire to have the water right. So these should be  
11 enough facts to overcome any claim of abandonment.

12 Okay. Now the burden of proof, I've gone  
13 through that extensively already, so I'm not going to  
14 dwell on that anymore, but the burden of proof in this  
15 case is certainly on the State Engineer, and in our view,  
16 he improperly placed that onto my client. Throughout the  
17 ruling and in the brief to the Court, the State Engineer  
18 shifts that burden to Jungo Ranch to show lack of intent  
19 to abandon. This was improper.

20 All right. Now a couple more points.  
21 Stepping away a little bit from the facts, there's  
22 another few principles about water rights that we need to  
23 talk about. When the statutes were adopted to control  
24 water rights in the State of Nevada, there were all of

1 these people that had initiated water rights prior to  
2 that time, and they all said, "Whoa. No, we can't do  
3 that. You can't impair my property rights with a new  
4 statute." And the case went to the Supreme Court.

5 In 1913, Justice McCarran at the time decided  
6 that the State Engineer and the legislature cannot adopt  
7 a law that impairs a preexisting vested right. And then  
8 the statutes were changed subsequent to that, and we have  
9 the water law that we have today. So the principle is  
10 that we cannot -- we cannot impair a preexisting water  
11 right like a pre-1939 groundwater right, and we cannot  
12 impair it by applying a rule that's more strict than  
13 would have applied at common law prior to the statutes  
14 being adopted.

15 And that's the constitutional dimension of  
16 this case, is that by shifting the burden, the State  
17 Engineer is now putting a stricter rule on our vested  
18 water right than existed before the statutes were  
19 adopted, and that's a violation of the Constitution, and  
20 it's a violation of express statute, which calls for no  
21 impairment of preexisting water rights. And those more  
22 significant or stricter rules are the shifting of the  
23 burden and requiring us to prove lack of intent to  
24 abandon.

1           This idea that the State Engineer cannot  
2 apply a stricter rule to a pre-statutory water right has  
3 been agreed to by the State Engineer. On Slide 44, we  
4 point out that this is what was stated by the State  
5 Engineer at the time. "Applying a rebuttal presumption  
6 standard would further undercut the stability and  
7 security of pre-1939 vested water rights." And that was  
8 the State Engineer's way of saying that he cannot apply a  
9 stricter rule.

10           All right. Now, a big question should be  
11 asked. Why didn't the State Engineer just declare the  
12 water right forfeited?

13           THE COURT: I was there about 45 minutes ago.  
14 I was waiting for you or the State to answer that.  
15 What's the difference?

16           MR. TAGGART: Well, forfeiture --

17           THE COURT: Well, I didn't mean to get you  
18 off track.

19           MR. TAGGART: Yeah. Well, what I have here  
20 is the statute. So the reason is they couldn't have done  
21 it. I'll tell you why. So in 1992, the Supreme Court  
22 decided Town of Eureka. Town of Eureka is a case that  
23 there was a declaration of forfeiture by the State  
24 Engineer, and the Supreme Court said that someone could

1 cure forfeiture before a proceeding for forfeiture is  
2 initiated.

3 So if I don't use water for 20 years, and  
4 what the statute said, if I don't use water for five  
5 years in a row, that's forfeiture. And what Town of  
6 Eureka said is, "Hey, we re-used the water before you  
7 started your forfeiture proceeding, so we cured it." The  
8 Supreme Court said, "Yeah, that makes sense because the  
9 law abhors a forfeiture. It's an equitable remedy. The  
10 last thing we want is for the government to take people's  
11 property away." So the Supreme Court in Town of Eureka  
12 established a cure for forfeiture.

13 Then the legislature adopted a change to NRS  
14 534.090. And here's the part that I've highlighted. It  
15 says -- well, you'll see in the first sentence, it says  
16 that "The failure for five successive years on the part  
17 of a water right owner," and you can go through the rest  
18 of it, that was a forfeiture.

19 But then it says, "If the records of the  
20 State Engineer or any other document specified by the  
21 State Engineer indicate at least four consecutive years  
22 but less than five consecutive years of non-use of all or  
23 any part of a water right which is governed by this  
24 chapter, the State Engineer shall notify the owner of the

1 water right as determined in the records of the Office of  
2 the State Engineer by registered or certified mail that  
3 the owner has one year from the date of the notice in  
4 which to use the water beneficially and to provide proof  
5 of such use to the State of Engineer or apply for relief  
6 due to Subsection 2 to avoid forfeiting the right.

7 So he has to give a four-year letter. That's  
8 what we call it. He has to give a warning. I'm going to  
9 forfeit your water right. I've got evidence of -- I've  
10 got these aerial photographs. They're showing me nonuse.  
11 So he would have had to give us a notice, and he didn't  
12 do it.

13 And then it says, "If after one year after  
14 the date of the notice, proof of presumption of  
15 beneficial use is not filed with the Office of the State  
16 Engineer, the State Engineer shall, unless the State  
17 Engineer is granted an extension of time, declare the  
18 water right forfeited." So he couldn't declare our water  
19 right forfeited without giving us a year to cure the  
20 forfeiture.

21 And how would we cure the forfeiture? We  
22 would file an application, which we already did. Now I  
23 think it's important to understand that we didn't just go  
24 out -- because a lot of people would do this. This is

1 what's happening in the State of Nevada. We could have  
2 advised our client, "Just go start using the water.  
3 Don't even ask for -- don't file a change application  
4 with the State Engineer. Just go start using the water.  
5 You've got a vested claim that predates 1939. You don't  
6 have to comply with the State Engineer. Just go start  
7 using the water." And then he could have cured that way.  
8 But instead, he filed an application with the State  
9 Engineer, and the State Engineer went the abandonment  
10 route. So I think that's why we don't see a forfeiture  
11 happening here because they didn't want to give us the  
12 four-year letter and give us the opportunity to cure.

13 THE COURT: Didn't want to, or how would even  
14 the State Engineer know? Didn't want to -- using your  
15 words -- didn't want to give you notice versus  
16 inadvertence or didn't give notice? Any idea?

17 MR. TAGGART: Well, I don't know. I mean, I  
18 respect the State Engineer. I'm sure that they did the  
19 best they could, but that's the only way I can reconcile  
20 my understanding of those cases that I was involved with  
21 with the Ninth Circuit. In this case, they had  
22 prolonged, you know, what they believed to be prolonged  
23 evidence of nonuse. They could have declared it  
24 forfeited, but this statute requires a process to occur.

1 So instead, they went abandonment and used a rule that I  
2 don't think applies.

3 All right. Now, a couple other points that  
4 we raised just point to the clear -- the fact that the  
5 State Engineer directed us to prove lack of intent to  
6 abandon.

7 And this is a letter that the State Engineer  
8 sent to my client, and this is in the Record on Appeal  
9 (inaudible.) And on the second page, it says -- and I've  
10 highlighted it, "In order for a claim of vested right to  
11 be valid, beneficial use must be perpetrated from the  
12 inception of the right to the present time." I just  
13 don't think that statement is the proper statement of the  
14 law. You have to show that you used the water prior to  
15 1939 to get a vested right, and then a different set of  
16 rules apply on use up to the present time.

17 And then, at the end of the paragraph though,  
18 and it makes me think the State Engineer was thinking  
19 forfeiture when he sent this letter was, "Please be aware  
20 that even unadjudicated proofs of appropriation from an  
21 underground source are subject to the same statutes  
22 concerning forfeiture such as five or more successive  
23 years of nonuse." So we weren't put on notice that he  
24 was thinking about abandonment. We were put on notice

1 that he was thinking about forfeiture at the time that he  
2 sent this letter.

3 So the big points that we make here is that  
4 in our view, the wrong point of law was used; that  
5 intrafarm transfer was applied improperly to this case.  
6 The State Engineer shifted the burden to Jungo Ranch to  
7 show use of water. That was the second major mistake.  
8 They didn't rely on any additional evidence of their own.  
9 All of the evidence that they did have is nonuse  
10 evidence. That's all it is. And it was all provided by  
11 Jungo. They didn't do any of their own analysis, and  
12 they were really trying to avoid the forfeiture process  
13 by declaring this water right abandoned.

14 Now, in the Record on Appeal that the State  
15 Engineer submitted, if you go through it, there's really  
16 not much of any help to the State Engineer's decision.  
17 There's a series of documents that are the application  
18 being filed, the ruling itself, the publication of the  
19 application, letters for fees to be paid, letters about  
20 the publication, the information that was sent to the  
21 newspaper, the map of the area where the water was going  
22 to be used, the application itself, the file cover from  
23 the application, the, you know, another short letter to  
24 the applicant.

1           Then there is a large submittal by the  
2 applicant's engineer that was submitted to the State  
3 Engineer. They have that in there. And then they have  
4 the letter that I just showed you, and then they have  
5 more information submitted by the engineer. And that's  
6 it. There's no evidence submitted by them of their  
7 analysis. All of the documents are just procedural  
8 documents, or they're the documents that we submitted.  
9 Okay.

10           Now, I'm going to finish. I know that will  
11 make you happy. If you look at the ruling that we're  
12 reviewing -- you still have a copy of that. This is what  
13 you have to decide whether is sound or not -- I'll go  
14 through that real quick -- is on page 4, they talk about  
15 the rule of law. We already talked about that.

16           Then on the next page -- this is what we need  
17 to look at. The last paragraph on page 4 says that, "The  
18 photographs of the well casing strongly suggest a case  
19 for abandonment of the water right. The casing is silted  
20 in and shows areas which are rusted through, confirming  
21 that the casing is unusable in its current condition and  
22 has gone unused for a significant period of time."

23           We're looking at all of the photographs we  
24 submitted. "As well, proof of appropriation concedes the

1 water has not been used each and every year since the  
2 right was initiated, and the response to question 16 on  
3 the proof form likewise admits the land has not been  
4 irrigated recently. And in fact, it is unknown what  
5 years the land was or was not irrigated. These factors  
6 favor finding there has not been continuous use of water  
7 since perfection of the water right." The State Engineer  
8 is saying that those facts are relevant to show nonuse.  
9 He's conceding it. All he's got is nonuse.

10 Then he goes through the paragraph I showed  
11 you before about the aerial photographs, and I've talked  
12 at length about that. Then he says, "Even if the State  
13 Engineer afforded applicants every benefit of the doubt  
14 by considering this 1954 aerial photograph, this singular  
15 piece of evidence to suggest continued beneficial use is  
16 insufficient. No evidence has been presented to  
17 demonstrate that the water was used continuously."

18 Burden on us. "The State Engineer finds no evidence  
19 pointing to lack of intent of the prior owner's intent to  
20 abandon," putting the burden on us. And then in the next  
21 paragraph, he lists a series of facts that go to the  
22 nonuse of the water, none of which go to intent to  
23 abandon.

24 So based upon that, we think that the wrong

1 rule was applied, and that the facts, if the proper rule  
2 was applied, would show that there has not been an intent  
3 to abandon. We ask that you reverse the ruling and  
4 require that the application that was filed be granted.  
5 We urge the Court to consider that because otherwise,  
6 we'll be waiting another year or two before we'll go back  
7 through the State Engineer's process again.

8 We want to use this water. My client's had  
9 to take water from other places to use on this land. He  
10 could be using that water on other land. He could be  
11 irrigating an additional 160 acres right now if he had  
12 this water, and so if Your Honor reverses the decision of  
13 the State Engineer, he can start to use the water that he  
14 owns and do that quickly and not have to wait the time it  
15 will take if this gets remanded. And that's all of my  
16 comments.

17 THE COURT: Thank you. I'm just looking --  
18 Ms. Caviglia, let's go and let's start with your  
19 response, and then we can leave about 15 minutes or so  
20 and then come back.

21 MS. CAVIGLIA: Okay.

22 THE COURT: What we'll do, we'll do a  
23 response on whatever the State wants, and then we'll do a  
24 reply.

1 MS. CAVIGLIA: Thank you, Your Honor. I'm  
2 not going to go over a lot of the law because the law is  
3 what the law states that Mr. Taggart went copiously  
4 through with this Court. But what the State Engineer has  
5 to look at is the totality of the circumstances. What he  
6 received in 2013 was an application to prove a vested  
7 right from the 1930s. There was no communication with  
8 the prior owner for that entire time. This was the first  
9 time this water right was brought to his attention was in  
10 2013.

11 This is a fully-appropriated basin. The  
12 basin has -- it's actually overappropriated if you look  
13 at the numbers of the basin. So in order to get new  
14 water, you would have to be able to find a previously  
15 vested water right. As part of the finding of facts  
16 within the State Engineer's finding, it actually does  
17 state that the applicants discovered the remnants of the  
18 well casing after they purchased the property. So this  
19 wasn't a well or water they even knew they purchased at  
20 the time when they got the property in 2013. It was done  
21 after the fact. So that's one of the bases that the  
22 State Engineer looked at when he received this  
23 application to prove one, vested water right, if it  
24 existed, and two, if it continues to exist.

1           The State Engineer looked at everything. He  
2 looked at the surrounding circumstances with the well  
3 casing. It's not just about non-use. It's about the  
4 lack of the ability to put the water to beneficial use.  
5 And that hasn't been in place for quite a number of  
6 years. Even if we gave, as the State Engineer did, the  
7 applicant the benefit of the doubt, the last time there  
8 was any indication water had been used was in the 1950s.  
9 That's well over 60 years ago. So that's what the State  
10 Engineer looked at.

11           When you look at the prior owners, none of  
12 the claims, none of the court cases or the court --  
13 because this was through probate a few times, that's  
14 actually in the record, there was no mention of the water  
15 right. The only mention of the water right was when the  
16 initial property owner took possession in 1924, and that  
17 was required to obtain that 160 acres through the  
18 Homestead Act. They were required to seek water to put  
19 that land to beneficial use. There is no pump. There is  
20 not the ability to use the water right now, so even if  
21 you look at St. Clair's ability to use that water, they  
22 can't, not with the current condition of the well.

23           The applicants, on their own application  
24 which was received by the State Engineer, couldn't even

1 acknowledge when the last time the water was put to  
2 beneficial use. If you look at Item 16 -- it's on page  
3 34 of the Record on Appeal -- Item 16 has "unknown."  
4 They don't know when the last time that water had been  
5 used.

6 The applicants point toward deeds to a lack  
7 of an intent to abandon. However, those deeds are  
8 silent. An appurtenance could be anything. If it's  
9 going to be a vested water right that has a huge  
10 financial value in this area, why isn't it in there?  
11 When the petitioner purchased the property, the right did  
12 not exist, and it had been abandoned by the prior owner.  
13 The prior owner never filed anything with the State  
14 Engineer's Office, and they only filed this application  
15 after they found the remnants of that well. So whether  
16 or not --

17 THE COURT: The prior owners?

18 MS. CAVIGLIA: No. Mr. St. Clair. So there  
19 is nothing from the prior owner. There is nothing in our  
20 files to show who that was. There was no reports of  
21 conveyance filed with the State Engineer. There was  
22 nothing on this well.

23 And like I said, this area, the hydrographic  
24 basin falls in is the Quinn River/Orovada sub area.

1 There's approximately 60,000 acre feet of water available  
2 in the perennial yield. And currently, there's over  
3 102,000 acre feet that's been appropriated. It is a  
4 designated basin and has been since the 1960s. The 1960s  
5 was when the prior owner actually had the property.

6           Petitioner has also somewhat twisted the  
7 December 2nd, 2013 letter the State Engineer had sent  
8 them. The State Engineer, that letter that Mr. Taggart  
9 did provide to you, was asking for additional information  
10 from the applicant. They were asking for clarifications  
11 on exactly what was in the application, information that  
12 was missing, and they were trying to give the application  
13 or applicant an opportunity to answer those questions,  
14 and they didn't take that opportunity. They didn't file  
15 additional information. They didn't file anything with  
16 the State Engineer after that. So that was different  
17 than from the first application. So the State  
18 Engineer -- they tried to help him, but they did not.  
19 That letter is found on page 105 from the State Engineer,  
20 and that letter does talk about forfeiture.

21           If you look at the legislative history of  
22 that specific section of forfeiture, the legislative  
23 history actually shows that if more than five years of  
24 nonuse is evident, they didn't have to give notice to

1 resurrect forfeiture rights. So this was more than five  
2 years. The nonuse here was indicated from the 1950s on,  
3 if we give them the benefit of the doubt. They're the  
4 ones seeking this water. They're the ones trying to  
5 claim that they should have a water right and resurrect  
6 an old vested claim that hasn't been used in a number of  
7 years.

8           Petitioners also have riddled the reply and  
9 their requests with everything from other rulings of the  
10 State Engineer to briefs done by my office on behalf of  
11 State Engineer. The Nevada Supreme Court has been very  
12 clear in Desert Irrigation versus State of Nevada that  
13 even if the -- and this is a quote -- "Even if the State  
14 Engineer has failed to follow some of its prior  
15 decisions, the State Engineer has not abused its  
16 discretion or acted in ignorance of the law."

17           It further discusses that the State Engineer  
18 is not bound by stare decisis. The citation for that is  
19 113 Nevada 1049 on page 1,058. So the State Engineer is  
20 not bound by its prior decisions or rulings. It has not  
21 committed abuse or discretion by not following those  
22 rulings. The Supreme Court has done that for numerous  
23 administrative agencies. We're not bound by anything  
24 that we've decided in the past, and we shouldn't be bound

1 by briefs filed by attorneys on behalf of the State  
2 Engineer in different cases. Each of those cases are  
3 different. Each of the cases have a different twist or  
4 turn as well as Orr Ditch and Alpine Decrees. Those are  
5 slightly different because they are federal-decreed  
6 courts. They do have special rules.

7 One of the issues in the Orr Ditch Decree is  
8 the payment of maintenance fees and taxes. You don't pay  
9 maintenance fees and taxes on a traditional groundwater  
10 right. That's only found in the Newlands Project where  
11 they're required to pay operation and maintenance fees.  
12 A traditional groundwater, they're not taxed upon that  
13 under the Nevada tax system. So each of these cases that  
14 the petitioner has cited to in which the State Engineer  
15 may have found a different ruling is different than this  
16 case, in which this case, he did look at the surrounding  
17 circumstances on which were filed by the applicant.

18 And even if you look at those cases, none of  
19 those cases have a period of over 60 years of nonuse.  
20 They don't have the inability to use the water, which we  
21 don't have here. They don't have a pump on the well,  
22 which we don't have here.

23 And going further than that, if you look at  
24 the Orr decision, it does talk about the construction of

1 structures incompatible with irrigation. Here, it's  
2 somewhat similar where you look at the ability to divert  
3 water. When the necessary to use -- in that case, they  
4 discuss, "When the necessity to use water does not exist,  
5 the right to divert it ceases."

6 This case is just like that. They have  
7 allowed the well to silt in, and this wasn't done by  
8 Mr. St. Clair. This was done by the previous owners, and  
9 it was done a long time ago. When you look at the photos  
10 of the well, which are in the Record of Appeal, and I do  
11 believe it's page 158, you can look at the condition of  
12 the well. It's completely silted in, and it has not been  
13 used in numerous, numerous years. And when you do look,  
14 although non-use in and of itself does not rise to the  
15 level of abandonment, the longer the period of long use,  
16 the greater the ability that it shows an intent to  
17 abandon. In this case, it was 60 years, 60 years of  
18 nothing that we can see. And that was even after giving  
19 the applicant the benefit of the doubt and seeking  
20 additional information which they didn't provide.

21 The State Engineer looked at everything on  
22 file at the time that they filed the application. He  
23 looked at everything on file that was provided to them.  
24 They looked at the aerial photos which are available

1 online. They're available at the State Engineer's site.  
2 They were informed of them. They could have looked at  
3 them at any time. And he saw that there was no use of  
4 this water right for a number of years. This isn't a  
5 case where vested water rights have been found years ago  
6 and that they're trying to reuse them again. This is one  
7 where they're seeking new water rights, water rights that  
8 were not aware of until 2013.

9 Let's see. You asked a question of why the  
10 State Engineer shifted the burden. That's because the  
11 application, the information the application -- the  
12 applicant provided to the State Engineer was missing.  
13 The State Engineer is allowed to ask for additional  
14 information from applicants. When we asked for  
15 additional information, instead of providing additional  
16 information, they provided the same information. And  
17 that's why the Record on Appeal, when you look at it,  
18 looks like it's a duplicative process because they didn't  
19 provide anything else.

20 They didn't answer question 16 of when the  
21 water was put to beneficial use. They couldn't prove  
22 anything past 1956 that water had been used. The State  
23 Engineer is different from those cases where the shifting  
24 of burden occurred. In those cases, a separate

1 independent party was attacking water rights. In this  
2 case, they're seeking water rights or confirmation of  
3 water rights from the State Engineer. They're a slightly  
4 different scenario. So the State Engineer has that right  
5 to ask for additional information from an applicant, and  
6 that's what they did in that December 10th, 2013 letter.

7 THE COURT: December 2nd?

8 MS. CAVIGLIA: Or December 2. I'm sorry,  
9 Your Honor. He sought additional information. And they  
10 chose not to take that opportunity. And so the State  
11 Engineer does believe that these water rights were  
12 abandoned previously by the prior owner.

13 It's not just nonuse, but it's the inability  
14 to use the water. And because of the location of the  
15 water, the fully appropriated basin it's located in and  
16 the information provided by the applicant themselves even  
17 after asking for additional information, the State  
18 Engineer believes that there's enough evidence to show  
19 that this water right was abandoned, and we would request  
20 that this Court affirm the ruling.

21 THE COURT: I have some questions, but I'll  
22 wait until the end of the reply. And as I said -- and I  
23 hope I didn't cut you off in any way because I want to  
24 give you an opportunity to go longer if you wish.

1 MS. CAVIGLIA: I was going to talk about the  
2 law in itself, Your Honor, but Mr. Taggart did cover a  
3 majority of that, so there's no point in rehashing that.

4 THE COURT: Okay. All right. Well, let's go  
5 ahead and take a break. As I said, I want to take lunch.  
6 Let's be back at 1:30, and we'll start up with the reply,  
7 and then I'll formulate -- I think I'm going to formulate  
8 questions. The first question I have -- will counsel  
9 approach before we take the break?

10 Mr. Taggart, you, in the very beginning when  
11 you gave me the aerial map, aerial photo, excuse me, you  
12 talked about arrow. Is this the property?

13 MR. TAGGART: (Inaudible.)

14 THE COURT: Oh, thank you. I thought I saw  
15 an arrow here.

16 MR. TAGGART: No.

17 MS. CAVIGLIA: I think that's a building.

18 MR. TAGGART: This is a box, and then there's  
19 an arrow next to the box.

20 THE COURT: Okay. Thank you. This is good.  
21 Thanks. That's all I needed. I'll cross this one out.  
22 And that's what I meant. Probably what I said was this  
23 not a --

24 MR. TAGGART: Intrafarm?

1 THE COURT: Yeah, thanks. Intrafarm.  
2 Because I thought the property was right next to, maybe,  
3 this cultivated area. And when was this photo taken?

4 MS. CAVIGLIA: 1950 -- it's written on the  
5 corner, Your Honor. It's 19 --

6 THE COURT: '54.

7 MS. CAVIGLIA: -- 54.

8 THE COURT: I've driven through, you know,  
9 that area, and you certainly don't see any of these dark  
10 areas now during the drought. And that was one of the  
11 questions I asked when we met informally. Okay.  
12 Everybody have a pleasant lunch. Let's be back at 1:30.

13 (Recess was taken.)

14 THE COURT: Thank you. Please be seated,  
15 everybody. Good afternoon. Okay. We're back on the  
16 record with St. Clair versus the State Engineer. And,  
17 Ms. Caviglia, do you have anything else that you care to  
18 present in regards to response? Again, I just didn't  
19 want to cut you off.

20 MS. CAVIGLIA: No, Your Honor.

21 THE COURT: Okay. Mr. Taggart, please.

22 MR. TAGGART: Good afternoon, Your Honor. A  
23 few comments just in response to Ms. Caviglia's response  
24 there. First of all, one of the comments is that we

1 discovered the well after the fact. Well, the fact is  
2 that we knew water rights existed on the property, and we  
3 didn't know where the well was, but we knew there were  
4 water rights.

5 Before the property was bought, due diligence  
6 occurred, and the deeds were collected, the same deeds  
7 that were submitted to the State Engineer and are in the  
8 Record on Appeal. And if you go back in those deeds to  
9 the first deed from the United States Government in 1924,  
10 which is Record on Appeal 127, it is a deed from the  
11 United States to George Crosley. It's signed by Calvin  
12 Coolidge, the President of the United States, and it says  
13 that the United States -- it says that, "There is,  
14 therefore, granted by the United States onto the said  
15 claimant the tract of land above described to have and to  
16 hold the said tract of land with the appurtenances  
17 thereto onto the said claimant and to the heirs and  
18 assigns of that said claimant forever."

19 And most people in this field understand that  
20 if the government granted a homestead, one of the  
21 requirements of a homestead is that water -- you had to  
22 irrigate. You had to cultivate a certain amount of  
23 acreage in order to get a homestead. So whenever you buy  
24 a piece of property in Nevada, the anticipation is

1 there's water rights because that's how the land was  
2 originally patented. So the idea that we discovered the  
3 water rights after we bought the property just isn't  
4 true, but the well itself is something that we didn't  
5 know exactly where it was. And when we found it, that  
6 was when we did the filing that we're here to talk about.

7 Now, there was an argument that the silting  
8 in the well shows a lack of ability to use the water, and  
9 that that is similar to being an improvement inconsistent  
10 with irrigation. An improvement inconsistent with  
11 irrigation is something like pavement or a home on the  
12 ground. It is not a works of diversion that can be  
13 repaired. We referenced Ruling 6083 earlier in my  
14 comments which involved a failed pipeline, and the  
15 failure of that pipeline was not enough for the State  
16 Engineer to find intent to abandon.

17 There's a comment that the last evidence of  
18 water use was in the 19 -- was in the 1960s. Again, the  
19 only evidence that the State Engineer has of what  
20 happened after 1954 are aerial photographs that aren't in  
21 the record, and so the Court can't review those. I  
22 haven't reviewed those, so there can't be a, you know,  
23 this allegation that there hadn't been water used since  
24 1954. There's no evidence to support that.

1           There was a comment that the prior owner  
2 never filed on this water right. Well, there was never a  
3 requirement for the prior owner to file on this water  
4 right, so that really doesn't appear to be pertinent.  
5 There has never been an adjudication on this water, on  
6 this groundwater source, so there was never a requirement  
7 that anyone come in and file a claim with the State  
8 Engineer.

9           There was a statement that the basin's  
10 overappropriated, and therefore, somehow that has an  
11 impact on whether this water right should be abandoned.  
12 The fact that the basin is overappropriated shouldn't  
13 have any impact on the determination of whether there was  
14 intent to abandon in this case. If the State Engineer  
15 found that there was a water right and he found that it  
16 predated 1939, and so that water right would be in a  
17 senior priority to many of the groundwater rights that  
18 came later. So the fact that the basin is  
19 overappropriated should not be relevant to whether or not  
20 there was intent to abandon.

21           There was some points made about the letter  
22 that was sent on December 2nd, 19 -- 2013, excuse me.  
23 After that letter was sent, the application was amended,  
24 but information was not provided regarding the

1 consistency of use of the water right. And there isn't  
2 anything wrong with that. The State Engineer does have  
3 the right to inquire about the pertinent information  
4 that's necessary for him to make his determination on  
5 whether a water right is vested, but whether a water  
6 right is vested depends on whether it was used prior to  
7 1939.

8           There's no reason for the State Engineer to  
9 ask an individual what happened after 1939 or whether the  
10 water was consistently used. The problem with that is it  
11 puts the burden on the water right owner to have to prove  
12 the actual use of water, and that's putting the burden on  
13 the water right owner, and the burden should be on the  
14 State Engineer when the State Engineer is trying to  
15 declare forfeiture.

16           There was some comments about the legislative  
17 history of the forfeiture statute, and that the statute  
18 -- apparently, there's some legislative history that says  
19 that if there's more than five years of nonuse, then they  
20 don't have to do a four-year letter. I'm not aware of  
21 that. That information hasn't been put before the Court.  
22 But even if it does exist, Town of Eureka specifically  
23 says that you can cure a forfeiture before a proceeding  
24 for forfeiture commences. We did that by filing the

1 change application.

2 Desert Irrigation, it does say the State  
3 Engineer is not bound by stare decisis, but it doesn't  
4 say the State Engineer is not bound by Nevada water law,  
5 and the cases that we've cited to clearly are Nevada  
6 water law. The federal decree is the fact that -- the  
7 federal cases shouldn't make a difference. Those federal  
8 courts were applying Nevada water law, they were  
9 interpreting Nevada water law, they were interpreting  
10 Manse Springs, Revert v Ray, Franktown, the same cases  
11 the state supreme court has interpreted in abandonment  
12 cases.

13 Taxes are paid on land when there are water  
14 rights attached to the land that increase the value of  
15 the land. The taxes that are paid on the land reflect  
16 the value of the water rights. So the fact that there  
17 was never a tax sale, that the property conveyed from one  
18 party to another through time is evidence that taxes were  
19 paid on the property.

20 Now, we cited to many, many rulings that  
21 support our position. The State Engineer hasn't cited to  
22 a single ruling in their records that support the  
23 proposition that the burden should be shifted to the  
24 water right owner to prove lack of intent to abandon. We

1 also cited to cases that have the type of timeframe. One  
2 case, the Ruling 6159, involved an alleged nonuse from  
3 1956. And in that case, the State Engineer found there  
4 was not an intent to abandon.

5 And then there was a point that the State  
6 Engineer is different than others, than when a proponent  
7 of abandonment is an opposing party, there's one rule,  
8 but if it's the State Engineer who is purporting to or  
9 advanced -- or who is advancing abandonment, that a  
10 different standard applies. That's not true. Town of  
11 Eureka was a case from our Nevada Supreme Court where the  
12 State Engineer was the party who in that case declared  
13 forfeiture, and the Court said that if the burden was on  
14 him, it still has to be clear-and-convincing evidence.  
15 It doesn't matter who the proponent is of the forfeiture  
16 or abandonment. The same rules apply.

17 So to summarize, Your Honor, it's very  
18 simple. In this case, the State Engineer applied the  
19 wrong standard. He improperly shifted the burden to the  
20 water right owner to prove lack of intent to abandon, he  
21 relied on evidence that's not in the record to show long  
22 periods of non-use, and there's no clear-and-convincing  
23 evidence of intent to abandon in this case.

24 And it's like the example I talked about in

1 the beginning. If you have a piece of property that you  
2 haven't visited in a long time, that doesn't mean you've  
3 abandoned it. Water rights, mining rights, property are  
4 not abandoned simply by the lack of use of those assets.  
5 And those are all of the comments I have. Thank you,  
6 Your Honor.

7 THE COURT: Thank you. Any comments by  
8 either party?

9 MS. CAVIGLIA: No, Your Honor.

10 THE COURT: Thank you. Counsel, do you  
11 request to submit this case to me for decision?

12 MR. TAGGART: Yes.

13 MS. CAVIGLIA: Yes.

14 THE COURT: All right. I'm going to give a  
15 decision right now. First of all, I want to thank both  
16 of you for the very fine briefs. I found them to be very  
17 detailed and very, basically, on point.

18 I can -- in some ways, I can see how the  
19 State made this -- the engineer made his decision, and I  
20 can understand it. I can understand it from the physical  
21 evidence of abandonment. However, abandonment in Nevada  
22 is defined as the relinquishment of the right by the  
23 owner with the intention to forsake and desert it. Those  
24 two have to coincide, and it's very similar. You said

1 something, Mr. Taggart, that hit home, you know.

2 Criminal Law 101. Intent and act coincided. That is  
3 exactly what this -- the law of abandonment is in the  
4 State of Nevada.

5 And you answered my question when I talked  
6 about what's the difference in forfeiture? You answered  
7 my question with this letter of December of '13 and the  
8 statute as far as the five-year notice and that type of  
9 thing or the one-year notice, excuse me. But I do not  
10 see any abandonment here because I do not see any  
11 intention to abandon.

12 As you were talking earlier, and even when  
13 Ms. Caviglia was talking, again, totally understanding  
14 the State's point of view, I believe the law is -- and I  
15 don't mind saying this -- the law is you're not  
16 abandoning when you have the intent to revise the claim,  
17 when you have the intent to apply for the application.  
18 That shows that your intent is not to abandon. So  
19 shifting the burden was not, in my opinion, proper.

20 Basically, if there's only evidence of  
21 non-use, that's not good enough. It has to be the intent  
22 to abandon. What is intent? It has to be shown by  
23 clear-and-convincing evidence that the petitioner  
24 abandoned with intent. No, there is no

1 clear-and-convincing evidence of that here. That's why I  
2 said it's improper to shift the burden.

3 The facts show that the owner filed a change  
4 application, filed a conveyance of documents and reports  
5 of conveyance, has a present-day intent to use the well.  
6 It's not really -- I don't know if Mr. St. Clair can go  
7 out and use that well right now as you said, Mr. Taggart,  
8 by but by the same token, he'd better repair the well and  
9 get things going before. But, I mean, that doesn't show  
10 any abandonment according to Nevada law. He has the  
11 intent to use that water.

12 And as far as communication with the State  
13 Engineer's Office, you know, I'm not quite sure. It's  
14 almost like a demurrer. I'm not quite sure if  
15 Mr. Taggart and Mr. St. Clair thought about this, but why  
16 do you have to respond to the State's letter of December  
17 of '13? In other words, if you don't understand it, you  
18 don't understand it. It's not forfeiture. You did what  
19 you did. You applied for your change, and it was denied  
20 based on abandonment, which was wrong.

21 Based on that, I believe that the State  
22 Engineer abused his discretion, and I'm going to overturn  
23 the State Engineer's decision. I'm going to ask  
24 Mr. Taggart to -- it's not in a sense of findings as we

1 normally would because this is a judicial review, but if  
2 you would, according to this decision and the evidence  
3 that's in, if you would please draft a decision, run it  
4 by the State.

5 You can include findings of fact, you can  
6 include conclusions of law, but it will not be a quote  
7 unquote, "decree." It will be an order that once you run  
8 it past the State and listen to any objections, if the  
9 State has any in regards to the order, go ahead and send  
10 it to me, and I'll look at it, and we might have a  
11 hearing if there's an issue that needs to be resolved on  
12 the record, but my intention was to give this decision in  
13 front of the bench.

14 Do either of you have any questions in  
15 regards to my decision? I do not mean to leave anything  
16 out from this oral decision because I feel very strongly  
17 that I'm backed by the law. I feel very strongly that  
18 this is not a difficult decision for a Court to make  
19 based on what was presented to me in the briefs and in  
20 the argument. Anybody have any questions or comments?

21 MR. TAGGART: No, Your Honor.

22 THE COURT: Okay. Thank you very much for  
23 your presentation. Nice meeting you all. I thank you  
24 for having it here in Carson City. I'm sure it saved the

1 State and all of us time and expense, but it's been a  
2 pleasure this morning and this afternoon to be here.  
3 Thank you. We'll be in recess.

4 (The proceedings concluded at 2:02 p.m.)

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1 STATE OF NEVADA )

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3 CARSON TOWNSHIP )

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5 I, Nicole Alexander, a transcriptionist for  
6 Capitol Reporters, do hereby certify:

7 That I was given a JAVS CD recording of the  
8 above proceeding held in Department No. 2 of the  
9 above-entitled court and took stenotype notes of the  
10 proceedings entitled herein, and thereafter transcribed  
11 the same into typewriting as herein appears;

12 That the foregoing transcript is a full, true  
13 and correct transcription of my stenotype notes of said  
14 proceedings.

15 DATED: At Carson City, Nevada, this 1st day  
16 of June, 2016.

*Nicole J. Alexander*

\_\_\_\_\_  
Nicole Alexander, Transcriptionist

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

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Case No. CV 20112

Dept. No. 2

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TAMARA SPERO  
DIST. COURT CLERK

**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.

**RESPONDENT'S OBJECTION TO  
PETITIONER'S PROPOSED ORDER**

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer Department of Conservation and Natural Resources, Division of Water Resources ("Nevada State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General Justina A. Caviglia, hereby files this Objection to Petitioner's Proposed Order. This Objection is based upon the attached Points and Authorities and the pleadings and papers on file herein.

**POINTS AND AUTHORITIES**

Attached as Exhibit 1 is the letter emailed to Petitioner's counsel containing the State Engineer's general comments and objections to the original proposed order, which include the requested changes that the State Engineer made to his proposed order. Petitioner did not amend the order, but rather sent this Court a copy of both his proposed order and the State Engineer's revisions. See email from Petitioner's Counsel, Exhibit 2 and Exhibit 3, Petitioner's response to the State Engineer's Opposition. In his email, Petitioner's counsel admits that

1 their proposed order was based upon Petitioner's own arguments to support the Court'  
2 findings.

3 The Court made a very short and succinct ruling from the bench. See Exhibit 4  
4 JAVS Recording and Exhibit 5, Sixth Judicial District Court Minutes. The pertinent portions c  
5 this Court's ruling provided:

6 In some ways, I can see how the State made this, the Engineer  
7 made his decision, and I can understand it. I can understand it  
8 from the physical evidence of abandonment; however,  
9 abandonment in Nevada is defined as relinquishment of the right by  
10 the owner with the intention to forsake and desert it. Those two  
11 have to coincide. I do not see any abandonment here.

12 Again, totally understanding the State's point of view, I believe the  
13 law, is, and I do not mind saying this, the law is that you are not  
14 abandoning when you have the intent to revise the claim, when you  
15 have the intent to apply for the application, that shows that your  
16 intent is not to abandon. So shifting the burden was not, in my  
17 opinion, proper. Basically if there is only evidence of non-use, that  
18 is not good enough.

19 It has to be shown by clear and convincing evidence, that petition  
20 abandoned with intent. No, there is no clear and convincing  
21 evidence of that here. That is why I say it was improper to shift the  
22 burden.

23 The facts show that the owner filed a change application, filed a  
24 conveyance of documents, and reports of conveyance, has the  
25 present day intent to use the well...that doesn't show any  
26 abandonment according to Nevada law, he has the intent to use  
27 that water.

28 I feel very strongly that I am backed by the law. I feel very strongly  
that this is not a difficult decision for a court to make based on what  
was presented to me in the briefs and the argument.

Although the Court made a very succinct and brief ruling from the bench, Petitioner ha  
drafted a 12-page order. The State Engineer's objections to Petitioner's order are based upo  
the fact that Petitioner drafted an order using their arguments, rather than what the Cou  
actually stated on the record, which includes many findings the Court did not make.

25 **I. OBJECTIONS**

26 Petitioner included sections on the finding that the State Engineer made with holdin  
27 that the vested claim was valid. Petitioner did not object to this finding in his petition fc  
28 judicial review, nor was it opposed by the State Engineer. However, Petitioner still included

1 in the order, and included additional findings than those made by the State Engineer in the  
2 Ruling. For example, on page 2 of the order, “(4) Lack of any evidence of the failure to pay  
3 taxes and assessment fees for the right to use the water right.” Although factors set forth in  
4 *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935, 945 (2001), and *U.S. v. Alpine Land & Reservoir*  
5 *Co.*, 291 F.3d 1062, 1072 (2002), the payment of taxes and assessments was not included in  
6 the Ruling, or considered by the State Engineer. Another example on page 2 of the order  
7 “(5) Newspaper articles were published in the early 1920’s discussing the irrigation of alfalfa  
8 with groundwater using drilled wells.” The State Engineer rejected this evidence in  
9 Ruling 6287 as it did not discuss Crossley. ROA 0006. Petitioner’s inclusions of these two  
10 items did not accurately reflect the State Engineer’s findings.

11 Petitioner included an entire section on his Request for Judicial Notice and the State’s  
12 Opposition thereto. As this Court did not rule on the request, the State Engineer objected to  
13 its inclusion in the Order. Furthermore, throughout the Order, Petitioner relies upon the  
14 assumption that the Court based the decision on the inclusion of information provided by him  
15 to the Court in the appendix and Request for Judicial Notice. As such, throughout the ruling  
16 the State Engineer objects to the inclusion of any statement or citation that Petitioner made  
17 based upon those documents. An example of this is the many statements related to the State  
18 Engineer’s prior rulings or orders, such as page 6, lines 15-18; page 7, lines 3-4; page 8,  
19 lines 14-19, lines 21-22; and page 9, line 1; and the entire section titled “**THE STATE  
20 ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRARY AND CAPRICIOUS  
21 BECAUSE HE APPLIED THE WRONG RULE OF LAW.**” In that section, Petitioner actually  
22 references the fact that in Nevada, administrative agencies and specifically the State  
23 Engineer are not bound by stare decisis. *Desert Irrigation, Ltd. v. State of Nevada, State  
24 Engineer*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). In that case, the Nevada  
25 Supreme Court found that “even if the State Engineer has failed to follow some of its prior  
26 decisions, the State Engineer has not abused its discretion or acted in ignorance of the law  
27 *Id.* However, Petitioner does not cite to this case law. Rather Petitioner, knowing and  
28 referring to this legal precedent, ignores it, and ignores the fact that this Court did not make

1 any of the findings that support his argument. Furthermore, this Court did not rule that  
2 "Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that cannot  
3 remedy his sudden and improper application of well-settled Nevada water law" as proposed  
4 by Petitioner. Petitioner simply changed this Court's oral order.

5 Petitioner also included the section "THE STATE ENGINEER UNLAWFULLY  
6 IMPAIRED ST. CLAIR'S WATER RIGHT BY APPLYING A RULE THAT IS STRICTER  
7 THAN THE WATER STATUTES." based solely on Petitioner's argument, not on the oral  
8 order of the Court. This entire section was not briefed or argued by the parties, nor was it part  
9 of this Court's oral order.

10 Finally the State Engineer objects to Petitioner's relief listed on page 12, lines 19-20  
11 Ruling 6287 did not address the actual application 83246T, rather it was based upon the  
12 abandonment of Proof of Appropriation V-010493. This matter is a petition for judicial review  
13 of that ruling, which under NRS 534.450 is an appeal. As such, the Court would be exceeding  
14 its authority to grant an application, that has not been evaluated by the State Engineer's  
15 office, nor were its merits subject to the Petition for Judicial Review. As the State Engineer  
16 incorrectly determined that the Proof of Appropriation V-010493 had been abandoned, he did  
17 not evaluate the merits of that application. Therefore, the correct ruling is to remand the  
18 matter back to the State Engineer, as the abandonment of Proof of Appropriation V-010493  
19 has been overturned. Not an order granting an application, whose merits have not even been  
20 evaluated by the Division of Water Resources.

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

1 **II. CONCLUSION**

2 The State Engineer is requesting that this Court adopt Respondent's Alternativ  
3 Proposed Order, included as Exhibit 6, as it more accurately reflects the Court's oral order.

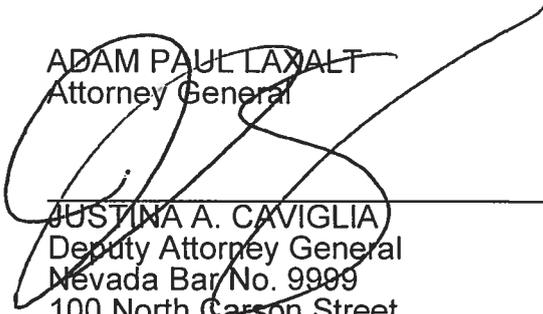
4 **AFFIRMATION (Pursuant to NRS 239B.030)**

5 The undersigned does hereby affirm that the preceding Respondent's Objection t  
6 Plaintiff's Proposed Order does not contain the social security number of any person.

7 DATED this 18th day of March, 2015.

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ADAM PAUL LAXALT  
Attorney General

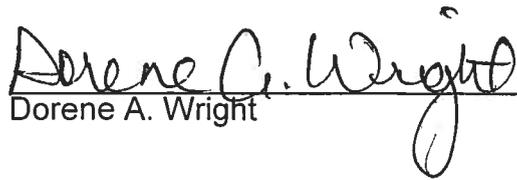
By: 

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

**CERTIFICATE OF SERVICE**

I certify that I am an employee of the State of Nevada, Office of the Attorney Genera  
and that on this 18th day of March, 2015, I served a true and correct copy of the foregoir  
RESPONDENT'S OBJECTION TO PLAINTIFF'S PROPOSED ORDER, by placing sa  
document in the U.S. Mail, postage prepaid, addressed to:

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

  
Dorene A. Wright

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**INDEX OF EXHIBITS**

<b>EXHIBIT No.</b>	<b>EXHIBIT DESCRIPTION</b>	<b>NUMBER OF PAGES</b>
1.	Letter to Paul Taggart dated March 11, 2016, containing the State Engineer's general comments and objections to the Plaintiff's original proposed order	20
2.	Email from Paul Taggart dated March 14, 2006, forwarding to the Court a copy of both Plaintiff's proposed order and the State Engineer's revisions	34
3.	Letter from Paul Taggart dated March 14, 2006, responding to the State Engineer's objections	5
4.	JAVS Recording from 01/05/16	1
5.	Sixth Judicial District Court Minutes	1
6.	State Engineer's Alternate Proposed Order	5

# EXHIBIT 1

# EXHIBIT 1

## Justina A. Caviglia

---

**From:** Justina A. Caviglia  
**Sent:** Friday, March 11, 2016 4:04 PM  
**To:** 'Paul Taggart'  
**Cc:** Dorene A. Wright  
**Subject:** RE: Jungo Ranch  
**Attachments:** 03-11-16 - Ltr to Taggart re Objection with Attachment.pdf

Attached are the State Engineer's comments to your proposed order.

### Justina Alyce Caviglia

Deputy Attorney General  
State of Nevada  
Office of the Attorney General  
Bureau of Government Affairs  
Government and Natural Resources Division  
100 N. Carson Street  
Carson City, NV 89701  
Telephone: (775) 684-1222  
Facsimile: (775) 684-1108

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PUBLIC RECORD: Any communication within this email may be subject to monitoring and disclosure to third parties.

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**From:** Paul Taggart [<mailto:Paul@legaltnt.com>]  
**Sent:** Monday, March 07, 2016 5:32 PM  
**To:** Justina A. Caviglia  
**Subject:** Jungo Ranch

Justina: Please find the attached proposed order that Judge Kosach requested. After your five day review period, I would like to forward it to the judge. Thanks.

Paul G. Taggart  
TAGGART & TAGGART, LTD.  
108 N. Minnesota St.  
Carson City, NV 89703  
(775) 882-9900 – Telephone  
(775) 883-9900 – Facsimile

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STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT  
*Attorney General*

WESLEY K. DUNCAN  
*First Assistant Attorney General*

NICHOLAS A. TRUTANICH  
*First Assistant Attorney General*

March 11, 2016

VIA EMAIL: [Paul@legaltnt.com](mailto:Paul@legaltnt.com)

Paul G. Taggart, Esq.  
Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89703

Re: ***St. Clair v. Jason King, P.E., Nevada State Engineer***  
**Case No. CV 20112; Dept. 2**

Dear Paul:

Enclosed please find a marked-up copy of St. Clair's proposed order that you emailed on Monday, March 7, 2016. The State Engineer is troubled that you have completely misconstrued the findings of the Court for your own benefit. The inclusion of these additional findings is in violation of your duty to candor to the court and will not be overlooked by the State Engineer.

Your order fails to accurately reflect the Court's oral order, based upon the notes of those present for the State Engineer and the recording of the hearing. The findings of the Court, based upon a review of the recording, are clear: The Court found that although there was physical evidence of abandonment, the intent element was missing. The Court further found that the State Engineer improperly shifted the burden to the Petitioner to prove lack of intent to abandon the claim to a vested water right. The absence of present-day intent and improper shifting of the burden by the State Engineer was an abuse of discretion, therefore the petition for judicial review was granted and the matter is remanded back to the State Engineer. None of the additional findings you included were ever stated by the Court; rather, those findings could only originate from your argument and briefs. As you should be fully aware, your argument does not become the ruling, but rather, the Court's findings.

Paul G. Taggart, Esq.  
March 11, 2016  
Page 2

The most troubling addition in your proposed order is Section II. The Court did not rule on your Request for Judicial Notice or the State Engineer's opposition thereto. The Court did not reference the materials that were considered as part of the record on appeal; therefore, the State Engineer requests that your entire Section II, which was not ordered by the Court at the hearing, be removed.

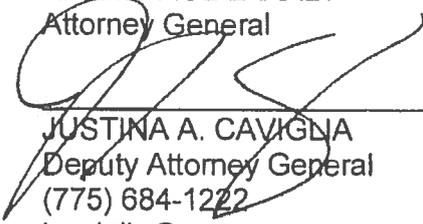
If you proceed to file the proposed order in its current state or with the gratuitous findings not made by the Court, the State Engineer will file an objection, its own proposed order based upon the transcript of the actual findings of the Court, and will seek any and all other remedies available.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

ADAM PAUL LAXALT  
Attorney General

By:

  
\_\_\_\_\_  
JUSTINA A. CAVIGNA  
Deputy Attorney General  
(775) 684-1222  
[jcaviglia@ag.nv.gov](mailto:jcaviglia@ag.nv.gov)

JAC:dw  
Enclosure



**Affirmation Pursuant to NRS 239B.030**

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

TAGGART & TAGGART, LTD.

---

PAUL G. TAGGART  
Nevada State Bar 6136  
RACHEL L. WISE  
Nevada State Bar 12303  
TAGGART & TAGGART, LTD.  
108 North Minnesota Street  
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Attorneys for Plaintiffs

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**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 Proposed Order, 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 Cavigila  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, Nevada 89701

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 ELECTRONIC DELIVERY, via:

DATED this day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Employee of TAGGART & TAGGART, LTD.

**EXHIBIT 1**

**EXHIBIT 1**

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Carson City, Nevada 89703  
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Case No.: CV 20, 112

Dept. No. 2

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

\* \* \*

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

**ORDER OVERRULING GRANTING THE  
PETITION FOR JUDICIAL REVIEW OF  
STATE ENGINEER'S RULING 6287**

**THIS MATTER** came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed 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.

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1 This Court, having reviewed the record on appeal,<sup>1</sup> and having considered the arguments of t  
2 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in th  
3 matter, hereby ~~OVERRULES~~ GRANTS the Petition for Judicial Review of Ruling 6287 ~~in part~~; bas  
4 upon the following findings of fact, conclusions of law and judgment.

5 **FACTS AND PROCEDURAL HISTORY**

6 St. Clair owns real property located in Humboldt County, Nevada, (Assessor's Parcel Numbe  
7 ("APN") 03-491-17), which was purchased in August, 2013. On November 8, 2013, St. Clair filed tw  
8 documents with the State Engineer. The first was a Proof of Appropriation, V-010493, claiming a veste  
9 right to an underground water source for irrigation of 160 acres of land. The second was Applicatio  
10 No. 83246T to change the point of diversion of the vested water claim. To support the vested claim, S  
11 Clair presented evidence of the application of the water to beneficial use prior to March 25, 1939, th  
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 presented evidence sufficient to~~  
14 demonstrate a pre-statutory rights to the underground percolating water which were vested prior to  
15 March 25, 1939.<sup>2,3</sup> The State Engineer stated that "[t]ogether, these facts evidence that underground  
16 waters [V-010493] were appropriated by the drilled well and used beneficially . . . prior to March 25,  
17 1939."<sup>4</sup> The following facts support the State 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;<sup>5</sup>
- 23 ~~(4) Lack of any evidence of the failure to pay taxes and assessment fees for the right to use the~~

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

26 <sup>2</sup> SE ROA 0006.

27 <sup>3</sup> As stated in the State Engineer's ruling, the State Engineer was not adjudicating the vested right, but only examining it to  
27 determine whether the right appeared valid to support granting a change application.

27 <sup>4</sup> SE ROA 004-006.

28 <sup>5</sup> These documents were not included in the State Engineer's ROA and were not subject to review by this Court.

1 water right;

2 ~~(5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa~~  
3 ~~with groundwater using drilled wells;~~

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

7 (7) A patent from President Calvin Coolidge dated April 21st, 1924 describing the water right  
8 granted to St. Clair;<sup>7</sup>

9 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933<sup>8</sup> was found  
10 on the property; and

11 (9) A chain of title from St. Clair's predecessors-in-interest that does not include any  
12 conveyances by tax or foreclosure sales.<sup>9</sup>

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

23  
24 \_\_\_\_\_  
25 <sup>6</sup> SE ROA 0037.

26 <sup>7</sup> SE ROA 0045.

27 <sup>8</sup> SE ROA 0102.

28 <sup>9</sup> SE ROA 0038-0066.

<sup>10</sup> SE ROA 008 – 009.

<sup>11</sup> Petitioner's Reply Brief, Exhibit 1.

<sup>12</sup> *Id.* (emphasis in the original) (citing *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)).

<sup>13</sup> SE ROA 007- 009.

1 St. Clair argued that the State Engineer’s determination of abandonment in Ruling 6287  
2 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that  
3 the intent to abandon a water right must be shown by more than mere non-use evidence.<sup>14</sup> St. Clair also  
4 argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent  
5 to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to  
6 support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to  
7 abandon the water rights without conducting a formal adjudication.

### 8 DISCUSSION

9 The State Engineer’s holding that “Applicants’ admission the water has not been us  
10 continuously coupled with the admission they are without knowledge of when it was, or was not used .  
11 find that Proof of Appropriation V-010493 has been abandoned” is overturned because it is arbitrar  
12 capricious, contrary to law and not supported by substantial evidence.<sup>15</sup> The State Engineer  
13 misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment  
14 a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair  
15 demonstrate lack of intent to abandon the water right.

### 16 STANDARD OF REVIEW

17 A party aggrieved by an order or decision of the State Engineer is entitled to have the order  
18 decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is “in  
19 nature of an appeal,” and review is ~~generally~~ confined to the administrative record.<sup>16</sup> The role of  
20 reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discreti  
21 or if it was otherwise affected by prejudicial legal error.<sup>17</sup> A decision is arbitrary and capricious if it  
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24 <sup>14</sup> *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, 10  
25 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and*  
*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, 2  
(1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

26 <sup>15</sup> SE ROA 005.

27 <sup>16</sup> NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

28 <sup>17</sup> *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”).

1 ““baseless”” or evidences “a sudden turn of mind without apparent motive...”<sup>18</sup> With regard to fact  
2 findings, the court must determine whether substantial evidence exists in the record to support the St  
3 Engineer’s decision.<sup>19</sup> Substantial evidence is “that which a ‘reasonable mind might accept as adequate  
4 support a conclusion.”<sup>20</sup> With regard to purely legal questions, such as statutory construction,  
5 standard of review is de novo.<sup>21</sup>

6 ~~—————~~ ST. CLAIR’S REQUEST FOR JUDICIAL NOTICE.

7 As a preliminary matter, on February 27, 2015, St. Clair filed Petitioners’ Appendix. ~~Petitioner~~  
8 ~~Appendix included twenty-six (26) previous rulings by the State Engineer between 1984 and 2012 whi~~  
9 ~~demonstrate the State Engineer’s prior application of the law of abandonment to water rights. The rulin~~  
10 ~~are public documents capable of review maintained by the State Engineer at his office and online. (~~  
11 ~~June 3, 2015, St. Clair submitted a Request for Judicial Notice in Support of Petitioners’ Reply Bri~~  
12 ~~(“Request for Judicial Notice”) to this Court. The Request for Judicial Notice contained three exhibits:~~

13 (1) ~~———— the State Engineer’s July 24, 2002 Appellee Nevada State Engineer’s Answering Brief in~~  
14 ~~the Ninth Circuit Court of Appeals, Case Nos.: 01-15665; 01-15814; 01-15816; of the case United Stat~~  
15 ~~of America, and Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Company, et.,~~  
16 ~~(“Alpine Decree”); the Nevada State Engineer appeared as a Real Party in Interest/Appellee in the Alpi~~  
17 ~~Decree and filed the above referenced Answering brief in the matter that resulted in the decision that~~  
18 ~~published at 291 F.3d 1062;~~

19 (2) ~~———— the State Engineer’s Ruling on Remand 5464 K, issued as a result of the Ninth Circ~~  
20 ~~District Court’s Decision at 291 F.3d 1062; and~~

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

23 This Court set a hearing date for this matter on October 22, 2015. ~~On that date, the Honorat~~  
24 ~~Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance~~

25  
26 <sup>18</sup> *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

27 <sup>19</sup> *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 <sup>20</sup> *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)).

<sup>21</sup> *In re Nevada State Eng’r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

1 impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition  
2 Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judicial  
3 Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility  
4 Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included  
5 the Request for Judicial Notice exist or are public documents.

6 The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court further  
7 finds that all documents submitted are public documents capable of accurate and ready determination  
8 resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that  
9 documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are entered  
10 onto the record of this Court for this case pursuant to NRS 47.130-150.

11 **EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.**

12 Nevada follows a bright line-rule of law to guide courts and the State Engineer in determining  
13 analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owner  
14 *with the intent* to "forsake and desert it."<sup>22</sup> Intent is the necessary element the State Engineer is required  
15 prove in abandonment cases.<sup>23</sup> This is the standard the State Engineer has previously relied upon.<sup>24</sup>  
16 fact, the State Engineer has explained that "Nevada case law discourages and abhors the taking of water  
17 rights away from people," and that is why abandonment must be proven by clear and convincing  
18 evidence.<sup>25</sup>

19 Abandonment requires a union of facts and intent to determine whether the owner of the water  
20 right intended abandonment.<sup>26</sup> As intent to abandon is a subjective element, the courts utilize  
21 surrounding circumstances to determine the intent.<sup>27</sup> Because subjective intent to abandon is a necessary  
22 element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer  
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25 <sup>22</sup> *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.

26 <sup>23</sup> *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*  
27 Nev. at 354, 364 P.2d at 1075; and *Revert*, 95 Nev. at 786, 603 P.2d at 266.

28 <sup>24</sup> See Petitioner's Appendix at 00001-0000135.

<sup>25</sup> Petitioner's Appendix at 000030-000037.

<sup>26</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

<sup>27</sup> *Alpine*, 291 F.3d at 1072.

1 burden because nonuse does not necessarily mean an intent to forsake.<sup>28</sup> Thus, if a vested water rig  
2 holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occ  
3 For this reason, the State Engineer has previously ruled that “bare ground by itself does not constit  
4 abandonment.”<sup>29</sup> Also, the Ninth Circuit has upheld the position that bare ground must be coupled wit  
5 use inconsistent with irrigation to show intent to abandon.<sup>30</sup> The standard of proof for demonstrati  
6 abandonment is clear and convincing evidence, and the burden of proof is on the party advocati  
7 abandonment, which in this case is the State Engineer.<sup>31</sup>

8 The Ninth Circuit has consistently upheld and endorsed Nevada’s rule of law for abandonment  
9 the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated “from  
10 surrounding circumstances,” and not only non-use evidence.<sup>32</sup> The surrounding circumstances to  
11 although not exhaustive, has definitively produced one a bright-line rule regarding abandonment of wa  
12 rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonme  
13 This Court reiterates the canon that a water right may not be abandoned absent the showing of “subject  
14 intent on the part of the holder of a water right to give up that right.”<sup>33</sup>

15 This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and  
16 such, indirect and circumstantial evidence may be used to show intent of abandonment.<sup>34</sup> The m  
17 consistent element in Nevada water law that applies to abandonment cases is the determination that ne  
18 use of the water is not enough to constitute abandonment.<sup>35</sup> The Ninth Circuit Appeals Court, wh  
19 analyzing Nevada case law, has continually recognized that Nevada’s abandonment rules indicate th  
20 non-use alone is not enough to constitute abandonment.<sup>36</sup> Nevada requires non-use evidence to  
21  
22

23 <sup>28</sup> Petitioner’s Appendix 0000131-0000135; See also Petitioner’s Appendix 0000122-0000127; 000047-000050; 000076-  
000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

24 <sup>29</sup> Petitioner’s Appendix 000051-000054.

25 <sup>30</sup> *Orr Ditch*, 256 F.3d at 946.

26 <sup>31</sup> *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

27 <sup>32</sup> *Alpine* 291 F.3d at 1072.

28 <sup>33</sup> *Orr Ditch*, 256 F.3d at 944-45.

<sup>34</sup> *Id.*

<sup>35</sup> *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 Cree*  
77 Nev. at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.

<sup>36</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

1 coupled with other evidence to determine the subjective intent of the water user.<sup>37</sup> This well-develop  
2 rule was originally taken from Nevada's mining law.<sup>38</sup> The Ninth Circuit, while applying Nevada sta  
3 law, has held that the following factors should may be considered to determine whether a water owner h  
4 the intent to abandon a water right: (1) substantial periods of non-use, (2) evidence of improvemen  
5 inconsistent with irrigation, and (3) payment of taxes and assessments.<sup>39</sup>

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

12 Further, St. Clair filed a Change Application for the place and manner and use, and clearly  
13 present-day intent to use the water right. As such, St. Clair demonstrated a lack of the subjective inten  
14 the subjective water right owner to abandon the water right.<sup>40</sup> Previously, the State Engineer has held t  
15 this type of evidence (i.e. filing of a Change Application and a Report of Conveyance) is evidence th  
16 party does not intend to abandon their water right, and can be enough to demonstrate the lack of  
17 subjective intent of abandonment.<sup>41</sup> The State Engineer has declined to declare a water right abandone  
18 an applicant filed a change application, stating that filing an application is "evidence that the Applic  
19 does not intend to abandon its water right..."<sup>42</sup> This Court concludes that by this action alone, St. C  
20 demonstrated he did not intend to abandon his water rights.

21 Also, the State Engineer deemed that action over and above mere nonuse (i.e. failure to main  
22 corporate status, relinquishment of grazing rights or right of way, lack of communication with S  
23  
24

25 <sup>37</sup> *Id.*

26 <sup>38</sup> *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

27 <sup>39</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

28 <sup>40</sup> *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.

<sup>41</sup> Petitioner's Appendix at 000084-000090, 000128-0000130; See also Petitioner's Appendix .

<sup>42</sup> Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.

1 Engineer's office) was necessary to show abandonment.<sup>43</sup> None of these facts are present in this case.

2 The State Engineer's determination of abandonment regarding Proof of Appropriation V-0104  
3 was based only on evidence of non-use. The State Engineer references only evidence that shows non-u  
4 such as the decayed condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and t  
5 failure of St. Clair to submit evidence of continuous use. Further, there was no field investigati  
6 conducted by the State Engineer to show when the water right was last used, or when the pump w  
7 removed from the well. In total, the only evidence before the Court was that of non-use. The St  
8 Engineer's reliance solely on non-use evidence was improper. Therefore, the State Engineer's conclusi  
9 that St. Clair's water right was abandoned in not supported by substantial evidence, and was therefo  
10 arbitrary, capricious, and is overruled.

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

13 ~~Vested water rights are "regarded and protected as property."<sup>44</sup> The term vested water rights~~  
14 ~~often used to refer to pre statutory water rights, i.e. rights that became fixed prior to the enactment~~  
15 ~~Nevada's statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed~~  
16 ~~have been perfected before the current statutory water law, the State Engineer does not have powers~~  
17 ~~alter vested water rights.<sup>45</sup> Thus, the State Engineer cannot apply a rule to a vested water right unless th~~  
18 ~~rule existed at common law. The State Engineer has recognized this limitation in the past, holding th~~  
19 ~~applying a rebuttable presumption standard would further undercut the stability and security of pre 19~~  
20 ~~vested water rights.<sup>46</sup>~~

21 ~~Here, the State Engineer applied a more restrictive law of abandonment than existed prior to t~~  
22 ~~adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be sho~~  
23 ~~to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to~~  
24

25  
26 <sup>43</sup> See Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100;  
000073-000080; 000104-000106; 000081-000083.

27 <sup>44</sup> *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

28 <sup>45</sup> *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

<sup>46</sup> Petitioner's Appendix 000021-000025.

1 Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide  
2 water right owner with a notice of forfeiture before the water right can be forfeited.<sup>47</sup> A water right owner  
3 can then cure the forfeiture.<sup>48</sup> Yet here, the State Engineer did not give St. Clair any notice of forfeiture  
4 nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair was  
5 more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a less  
6 restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right was  
7 abandoned was arbitrary and capricious, and as such is overruled.

8 **THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO ST. CLAIR TO PROVE LACK OF INTENT TO ABANDON.**  
9

10 This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects the  
11 assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of proof  
12 to a party defending a water right from abandonment.<sup>49</sup> In the *Alpine* case, the Ninth Circuit upheld the  
13 ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference  
14 intent to abandon, it does not create a rebuttable presumption."<sup>50</sup> Nevada maintains the rule that there  
15 no rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme and  
16 long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on or  
17 non-use evidence when considering the intent element of abandonment.<sup>51</sup>

18 The State Engineer correctly identified the standard that "[n]on-use for a period of time may  
19 inferentially be *some* evidence of intent to abandon a water right,"<sup>52</sup> and the State Engineer correctly  
20 stated that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."  
21 However, in the very next sentence, the State Engineer mischaracterized the leading case law on point

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23 <sup>47</sup> *Town of Eureka*, 108 Nev. At 168.

24 <sup>48</sup> *Id.*

25 <sup>49</sup> *Orr Ditch*, 256 F.3d at 945-946.

26 <sup>50</sup> *Alpine*, 291 F.3d at 1072, see also *Orr Ditch*, 256 F.3d at 945.

27 <sup>51</sup> *Id.* See also *In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316; *United States v. Alpine Land and Reservoir Co.*, 27  
28 F.Supp.2d 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).

29 <sup>52</sup> SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

30 <sup>53</sup> SE ROA at 0008; *Orr Ditch*, 256 F.3d at 945.

1 when he stated that “proof of continuous use of the water right should be required to support a finding  
2 *lack* of intent to abandon.”<sup>54</sup> The State Engineer hinged his abandonment determination of the  
3 misstatement of law.

4 The Ninth Circuit’s statement *continuous use* specifically applied to only the unique circumstan  
5 of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and  
6 state government regarding change applications for a change in place, manner and use of water rights  
7 the Newlands Project prior to 1983.<sup>55</sup> The *continuous use* language the State Engineer relied on is in the  
8 Ninth Circuit’s opinion under the section “Equitable Relief for Intrafarm Transfers.”<sup>56</sup> In that section, the  
9 Ninth Circuit was specifically analyzing whether equitable principles should apply to protect or  
10 *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has  
11 bearing on the current instance because this case does not involve the circumstance that existed in the  
12 Newlands Project, or an intrafarm transfer.

13 The State Engineer’s actions in the current action clearly demonstrate an attempt by the State  
14 Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burden  
15 shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies on  
16 the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The State  
17 Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of the  
18 burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

19 **THE STATE ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRARY**  
20 **AND CAPRICIOUS BECAUSE HE APPLIED THE WRONG RULE OF LAW.**

21 This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudden  
22 turn of mind without apparent motive demonstrates the State Engineer’s decision is arbitrary and  
23 capricious.<sup>57</sup> Previously, the State Engineer continually upheld the standards for abandonment that were  
24 established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpine*

26 <sup>54</sup> At 5; v. *Alpine*, 291 F.3d at 1077.

27 <sup>55</sup> *Alpine*, 291 F.3d at 1073-74.

28 <sup>56</sup> *Id.*

<sup>57</sup> *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

1 ~~Decree~~ proceeding that was relied upon by the Court and which recognized the principles  
2 abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents  
3 specialized circumstance.<sup>58</sup> The State Engineer later demonstrated a keen understanding of the  
4 application of the *Alpine Decree* to intrafarm transfers.<sup>59</sup> Yet, in the current instance, the State Engineer  
5 completely changed course without evidence or facts in the record to explain his action.

6 Therefore, Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that  
7 cannot remedy his sudden and improper application of well settled Nevada water law. This Court has  
8 already discussed the lack of evidence of intent to abandon produced by the State Engineer in Ruling  
9 6387. However, the State Engineer's sudden departure from his application of the *Alpine* and *Orr-Ditt*  
10 Decree was also arbitrary and capricious.

### 11 CONCLUSIONS OF LAW

12 This Court, having reviewed the record on appeal,<sup>60</sup> and having considered the arguments of the  
13 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this  
14 matter, hereby ORDERS as follows:

- 15 1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has  
16 vested water right under V-010493;
- 17 2. Ruling 6287 is ~~OVERRULED-REJECTED~~ in part to the extent it declares V-0104  
18 abandoned; and
- 19 3. This case is remanded to the State Engineer to process ~~The State Engineer is directed~~  
20 ~~grant~~ Application No. 83246T.

21 **IT IS SO ORDERED.**

22  
23 \_\_\_\_\_  
24 Senior District Court Judge

25  
26  
27 <sup>58</sup> See Request for Judicial Notice at 3.

28 <sup>59</sup> *Id.*

<sup>60</sup> See SE-ROA; see also Petitioner's Appendix; see also Petitioner's Request for Judicial Notice.

# EXHIBIT 2

# EXHIBIT 2

## Justina A. Caviglia

---

**From:** Paul Taggart <Paul@legaltnt.com>  
**Sent:** Monday, March 14, 2016 6:04 PM  
**To:** Justina A. Caviglia; 'srkosach@gmail.com'  
**Subject:** RE: Jungo Ranch v. State Engineer  
**Attachments:** Proposed Order Overruling State Engineer's Ruling 6287 (Jungo) - Final D....docx; State Engineer Redline to Proposed Order.pdf

Judge Kosach: Please find the proposed order and the alternative proposed order that was provided by counsel for the State Engineer. Due to the objection by the State Engineer, I included both proposed orders for your consideration. Counsel for the State Engineer objected to my proposed order because she claimed I included arguments and findings that you did not make in your oral ruling. My intention was to provide a proposed order that presents your findings with all the arguments that support those findings. Every argument that is included in the proposed order was made by me in oral argument.

Also, Ms. Caviglia objected because I included in the proposed order a ruling that addresses the State Engineer's Opposition to Jungo's Request for Judicial Notice. I included this because findings in the matter are based, in part, on the documents that were included in the Request for Judicial Notice, and it appeared to me that the Court denied the State Engineer's opposition. However, if that is not the case, we are prepared to attend a hearing to resolve that motion.

Please contact me with any other questions or concerns regarding the proposed order.

Paul G. Taggart  
TAGGART & TAGGART, LTD.  
108 N. Minnesota St.  
Carson City, NV 89703  
(775) 882-9900 – Telephone  
(775) 883-9900 – Facsimile

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---

**From:** Paul Taggart  
**Sent:** Wednesday, December 02, 2015 5:06 PM  
**To:** 'Justina A. Caviglia ([JCaviglia@ag.nv.gov](mailto:JCaviglia@ag.nv.gov))'; 'srkosach@gmail.com'  
**Subject:** Jungo Ranch v. State Engineer

Justina: This will confirm that we have an informal meeting with Judge Kosach to discuss this case on Wednesday, December 9, 2015, at 1:00 pm. The meeting will be held in my office at the below address.

Paul G. Taggart  
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Carson City, NV 89703

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PERSONAL AND CONFIDENTIAL: The above information is for the sole use of the intended recipient and contains information belonging to Taggart & Taggart, Ltd., which is confidential and may be legally privileged. If you are not the intended recipient, or believe you have received this communication in error, you are hereby notified that any printing, copying, distribution, use or taking of any action in reliance on the contents of this e-mail information is strictly prohibited. If you have received this e-mail in error, please immediately (1) notify the sender by reply e-mail; (2) call our office at (775) 882-9900 to inform the sender of the error, and (3) destroy all copies of the original message, including ones on your computer system and all drives. Thank you.

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1 Case No.: CV 20, 112  
2 Dept. No. 2  
3 PAUL G. TAGGART, ESQ.  
4 Nevada State Bar No. 6136  
5 RACHEL L. WISE, ESQ.  
6 Nevada State Bar No. 12303  
7 TAGGART & TAGGART, LTD.  
8 108 North Minnesota Street  
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10 (775)882-9900 - Telephone  
11 (775)883-9900 - Facsimile  
12 Attorneys for Petitioner

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

12 \* \* \*

13  
14 RODNEY ST. CLAIR, )  
15 )  
16 ) Petitioner, )  
17 )  
18 ) vs. )  
19 ) JASON KING, P.E., Nevada State )  
20 ) Engineer, DIVISION OF WATER RESOURCES, )  
21 ) DEPARTMENT OF CONSERVATION AND )  
22 ) NATURAL RESOURCES, )  
23 ) Respondent. )

**[PROPOSED] ORDER OVERRULING  
STATE ENGINEER'S RULING 6287**

21 A Proposed Order is attached hereto as Exhibit 1.

23 ///  
24 ///  
25 ///  
26 ///  
27 ///

**Affirmation Pursuant to NRS 239B.030**

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

TAGGART & TAGGART, LTD.

---

PAUL G. TAGGART  
Nevada State Bar 6136  
RACHEL L. WISE  
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Attorneys for Plaintiffs

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1  
2 **CERTIFICATE OF SERVICE**

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

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

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

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

18  By ELECTRONIC DELIVERY, via:

19  
20 DATED this day of \_\_\_\_\_, 20 \_\_\_\_.

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\_\_\_\_\_  
Employee of TAGGART & TAGGART, LTD.

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

**EXHIBIT**

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Case No.: CV 20, 112

Dept. No. 2

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

\* \* \*

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

**THIS MATTER** came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed 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,<sup>1</sup> and having considered the arguments of tl  
2 parties, the applicable law, State Engineer’s Ruling 6287, and all pleadings and papers on file in th  
3 matter, hereby **OVERRULES** Ruling 6287 in part; based upon the following findings of fact, conclusio  
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.<sup>2</sup> 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.”<sup>3</sup> 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;<sup>4</sup>
- 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 \_\_\_\_\_  
26 <sup>1</sup> See Respondent’s Summary of Record on Appeal (“SE ROA”); see also Petitioner’s Appendix; see also Petitioner’s Requ  
27 for Judicial Notice in Support of Petitioner’s Reply Brief (“Request for Judicial Notice”).

28 <sup>2</sup> SE ROA 0006.

<sup>3</sup> SE ROA 004-006.

<sup>4</sup> These documents were not included in the State Engineer’s ROA and were not subject to review by this Court.

1 (5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa  
2 with groundwater using drilled wells;

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

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

8 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933<sup>7</sup> was found  
9 on the property; and

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

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

22 St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287  
23

24 \_\_\_\_\_  
25 <sup>5</sup> SE ROA 0037.

26 <sup>6</sup> SE ROA 0045.

27 <sup>7</sup> SE ROA 0102.

28 <sup>8</sup> SE ROA 0038-0066.

<sup>9</sup> SE ROA 008 – 009.

<sup>10</sup> Petitioner's Reply Brief, Exhibit 1.

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

<sup>12</sup> SE ROA 007- 009.

1 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that  
2 the intent to abandon a water right must be shown by more than mere non-use evidence.<sup>13</sup> St. Clair also  
3 argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent  
4 to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to  
5 support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to  
6 abandon the water rights without conducting a formal adjudication.

## 7 DISCUSSION

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

### 15 I. STANDARD OF REVIEW

16 A party aggrieved by an order or decision of the State Engineer is entitled to have the order  
17 decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is “in  
18 nature of an appeal,” and review is generally confined to the administrative record.<sup>15</sup> The role of  
19 reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discreti  
20 or if it was otherwise affected by prejudicial legal error.<sup>16</sup> A decision is arbitrary and capricious if it  
21 ““baseless”” or evidences “a sudden turn of mind without apparent motive...”<sup>17</sup> With regard to fact

---

23  
24 <sup>13</sup> *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, 10  
(9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and  
25 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, 2  
(1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

26 <sup>14</sup> SE ROA 005.

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

28 <sup>16</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dis  
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”).

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

1 findings, the court must determine whether substantial evidence exists in the record to support the St  
2 Engineer's decision.<sup>18</sup> Substantial evidence is "that which a 'reasonable mind might accept as adequate  
3 support a conclusion.'"<sup>19</sup> With regard to purely legal questions, such as statutory construction,  
4 standard of review is de novo.<sup>20</sup>

## 5 **II. ST. CLAIR'S REQUEST FOR JUDICIAL NOTICE.**

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

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

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

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

22 This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorat  
23 Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance  
24 impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition  
25

26 <sup>18</sup> *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.

27 <sup>19</sup> *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)).

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

1 Petitioner’s Request for Judicial Notice in Support of the Petitioner’s Reply Brief (“Opposition to Judicial  
2 Notice”). The State Engineer’s Opposition to Judicial Notice did not challenge the admissibility  
3 Petitioners’ Appendix. Also, the State Engineer did not oppose that fact that the documents included  
4 the Request for Judicial Notice exist or are public documents.

5 The State Engineer’s Opposition to Judicial Notice is **DENIED** as untimely. This Court further  
6 finds that all documents submitted are public documents capable of accurate and ready determination  
7 resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that  
8 documents submitted by St. Clair in the Petitioner’s Appendix and Request for Judicial Notice are entered  
9 onto the record of this Court for this case pursuant to NRS 47.130-150.

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

11 Nevada follows a bright line rule of law to guide courts and the State Engineer in determining a  
12 analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owner  
13 *with the intent* to “forsake and desert it.”<sup>21</sup> Intent is the necessary element the State Engineer is required  
14 prove in abandonment cases.<sup>22</sup> This is the standard the State Engineer has previously relied upon.<sup>23</sup>  
15 fact, the State Engineer has explained that “Nevada case law discourages and abhors the taking of wa  
16 rights away from people,” and that is why abandonment must be proven by clear and convinci  
17 evidence.<sup>24</sup>

18 Abandonment requires a union of facts and intent to determine whether the owner of the wa  
19 right intended abandonment.<sup>25</sup> As intent to abandon is a subjective element, the courts utilize  
20 surrounding circumstances to determine the intent.<sup>26</sup> Because subjective intent to abandon is a necessa  
21 element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer  
22 burden because nonuse does not necessarily mean an intent to forsake.<sup>27</sup> Thus, if a vested water ri  
23

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

25 <sup>22</sup> *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*  
26 77 Nev. at 354, 364 P.2d at 1075; and *Revert*, 95 Nev. at 786, 603 P.2d at 266.

27 <sup>23</sup> See Petitioner’s Appendix at 00001-0000135.

28 <sup>24</sup> Petitioner’s Appendix at 000030-000037.

<sup>25</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

<sup>26</sup> *Alpine*, 291 F.3d at 1072.

<sup>27</sup> Petitioner’s Appendix 0000131-0000135; See also Petitioner’s Appendix 0000122-0000127; 000047-000050; 000076-  
000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

1 holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occ  
2 For this reason, the State Engineer has previously ruled that “bare ground by itself does not constit  
3 abandonment.”<sup>28</sup> Also, the Ninth Circuit has upheld the position that bare ground must be coupled wit  
4 use inconsistent with irrigation to show intent to abandon.<sup>29</sup> The standard of proof for demonstrat  
5 abandonment is clear and convincing evidence, and the burden of proof is on the party advocat  
6 abandonment, which in this case is the State Engineer.<sup>30</sup>

7 The Ninth Circuit has consistently upheld and endorsed Nevada’s rule of law for abandonmen  
8 the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated “from  
9 surrounding circumstances,” and not only non-use evidence.<sup>31</sup> The surrounding circumstances t  
10 although not exhaustive, has definitively produced one bright line rule regarding abandonment of wa  
11 rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonm  
12 This Court reiterates the canon that a water right may not be abandoned absent the showing of “subject  
13 intent on the part of the holder of a water right to give up that right.”<sup>32</sup>

14 This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and  
15 such, indirect and circumstantial evidence may be used to show intent of abandonment.<sup>33</sup> The m  
16 consistent element in Nevada water law that applies to abandonment cases is the determination that no  
17 use of the water is not enough to constitute abandonment.<sup>34</sup> The Ninth Circuit Appeals Court, wh  
18 analyzing Nevada case law, has continually recognized that Nevada’s abandonment rules indicate th  
19 non-use alone is not enough to constitute abandonment.<sup>35</sup> Nevada requires non-use evidence to  
20 coupled with other evidence to determine the subjective intent of the water user.<sup>36</sup> This well-develop  
21 rule was originally taken from Nevada’s mining law.<sup>37</sup> The Ninth Circuit, while applying Nevada st  
22

23 <sup>28</sup> Petitioner’s Appendix 000051-000054.

24 <sup>29</sup> *Orr Ditch*, 256 F.3d at 946.

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

26 <sup>31</sup> *Alpine* 291 F.3d at 1072.

27 <sup>32</sup> *Orr Ditch*, 256 F.3d at 944-45.

28 <sup>33</sup> *Id.*

<sup>34</sup> *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 Cree*  
77 Nev. at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.

<sup>35</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

<sup>36</sup> *Id.*

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

1 law, has held that the following factors should be considered to determine whether a water owner had the  
2 intent to abandon a water right: (1) substantial periods of non-use, (2) evidence of improvements  
3 inconsistent with irrigation, and (3) payment of taxes and assessments.<sup>38</sup>

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

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

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

22 The State Engineer’s determination of abandonment regarding Proof of Appropriation V-0104  
23 was based only on evidence of non-use. The State Engineer references only evidence that shows nonuse  
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25 <sup>38</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

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

27 <sup>40</sup> Petitioner’s Appendix at 000084-000090, 000128-0000130; *See also* Petitioner’s Appendix .

28 <sup>41</sup> Petitioner’s Appendix at 0000115-0000121; *See also* Petitioner’s Appendix at 000015-000020.

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

1 such as the condition of St. Clair’s well, that a pump was pulled out of St. Clair’s well, and the failure  
2 St. Clair to submit evidence of continuous use. Further, there was no field investigation conducted by  
3 State Engineer to show when the water right was last used, or when the pump was removed from the w  
4 In total, the only evidence before the Court was that of non-use. The State Engineer’s reliance solely  
5 non-use evidence was improper. Therefore, the State Engineer’s conclusion that St. Clair’s water ri  
6 was abandoned in not supported by substantial evidence, and was therefore, arbitrary, capricious, and  
7 overruled.

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

10 Vested water rights are “regarded and protected as property.”<sup>43</sup> The term vested water rights  
11 often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment  
12 Nevada’s statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed  
13 have been perfected before the current statutory water law, the State Engineer does not have powers  
14 alter vested water rights.<sup>44</sup> Thus, the State Engineer cannot apply a rule to a vested water right unless th  
15 rule existed at common law. The State Engineer has recognized this limitation in the past, holding th  
16 applying a rebuttable presumption standard would further undercut the stability and security of pre-19  
17 vested water rights.<sup>45</sup>

18 Here, the State Engineer applied a more restrictive law of abandonment than existed prior to t  
19 adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be show  
20 to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to  
21 Clair’s vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide  
22 water right owner with a notice of forfeiture before the water right can be forfeited.<sup>46</sup> A water right own  
23 can then cure the forfeiture.<sup>47</sup> Yet here, the State Engineer did not give St. Clair any notice of forfeitu  
24

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

27 <sup>44</sup> *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

28 <sup>45</sup> Petitioner’s Appendix 000021-000025.

<sup>46</sup> *Town of Eureka*, 108 Nev. At 168.

<sup>47</sup> *Id.*

1 nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair w  
2 more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a le  
3 restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right w  
4 abandoned was arbitrary and capricious, and as such is overruled.

5 V. THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO S  
6 CLAIR TO PROVE LACK OF INTENT TO ABANDON.

7 This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects t  
8 assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of pro  
9 to a party defending a water right from abandonment.<sup>48</sup> In the *Alpine* case, the Ninth Circuit upheld t  
10 ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference  
11 intent to abandon, it does not create a rebuttable presumption."<sup>49</sup> Nevada maintains the rule that there  
12 no rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme a  
13 long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on on  
14 non-use evidence when considering the intent element of abandonment.<sup>50</sup>

15 The State Engineer correctly identified the standard that "[n]on-use for a period of time *m*  
16 inferentially be *some* evidence of intent to abandon a water right,"<sup>51</sup> and the State Engineer correct  
17 stated that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."  
18 However, in the very next sentence, the State Engineer mischaracterized the leading case law on poi  
19 when he stated that "proof of continuous use of the water right should be required to support a finding  
20 *lack* of intent to abandon."<sup>53</sup> The State Engineer hinged his abandonment determination of t  
21 misstatement of law.

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24 <sup>48</sup> *Orr Ditch*, 256 F.3d at 945-946.

25 <sup>49</sup> *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

26 <sup>50</sup> *Id.* *See also In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316.; *United States v. Alpine Land and Reservoir Co.*, 27  
27 F.Supp.2d 1230, 1239-1241 (D.Nev. 1998) (a protestant alleging forfeiture or abandonment "bears the burden of proving clear  
28 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).

<sup>51</sup> SE ROA at 0007; (*citing Franktown Creek*, 77 Nev. at 354).

<sup>52</sup> SE ROA at 0008; *Orr Ditch*, 256 F.3d at 945.

<sup>53</sup> At 5; *v. Alpine*, 291 F.3d at 1077.

1 The Ninth Circuit’s statement *continuous use* specifically applied to only the unique circumstan  
2 of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal a  
3 state government regarding change applications for a change in place, manner and use of water rights  
4 the Newlands Project prior to 1983.<sup>54</sup> The *continuous use* language the State Engineer relied on is in th  
5 Ninth Circuit’s opinion under the section “Equitable Relief for Intrafarm Transfers.”<sup>55</sup> In that section, th  
6 Ninth Circuit was specifically analyzing whether equitable principles should apply to protect on  
7 *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has  
8 bearing on the current instance because this case does not involve the circumstance that existed in th  
9 Newlands Project, or an intrafarm transfer.

10 The State Engineer’s actions in the current action clearly demonstrate an attempt by the Sta  
11 Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burde  
12 shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies c  
13 the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The Sta  
14 Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of th  
15 burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

16 **VI. THE STATE ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRAR**  
17 **AND CAPRICIOUS BECAUSE HE APPLIED THE WRONG RULE OF LAW.**

18 This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudd  
19 turn of mind without apparent motive demonstrates the State Engineer’s decision is arbitrary ar  
20 capricious.<sup>56</sup> Previously, the State Engineer continually upheld the standards for abandonment that we  
21 established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpi*  
22 *Decree* proceeding that was relied upon by the Court and which recognized the principles  
23 abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents  
24 specialized circumstance.<sup>57</sup> The State Engineer later demonstrated a keen understanding of th

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27 <sup>54</sup> *Alpine*, 291 F.3d at 1073-74.

28 <sup>55</sup> *Id.*

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

<sup>57</sup> *See Request for Judicial Notice* at 3.

1 application of the *Alpine Decree* to intrafarm transfers.<sup>58</sup> Yet, in the current instance, the State Engineer  
2 completely changed course without evidence or facts in the record to explain his action.

3 Therefore, Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that  
4 cannot remedy his sudden and improper application of well-settled Nevada water law. This Court has  
5 already discussed the lack of evidence of intent to abandon produced by the State Engineer in Ruling  
6 6387. However, the State Engineer's sudden departure from his application of the *Alpine* and *Orr Ditch*  
7 Decree was also arbitrary and capricious.

8 **CONCLUSIONS OF LAW**

9 This Court, having reviewed the record on appeal,<sup>59</sup> and having considered the arguments of the  
10 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this  
11 matter, hereby ORDERS as follows:

- 12 1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has  
13 vested water right under V-010493;
- 14 2. Ruling 6287 is OVERRULED in part to the extent it declares V-010493 abandoned; and
- 15 3. The State Engineer is directed to grant Application No. 83246T.

16 **IT IS SO ORDERED.**

17  
18 \_\_\_\_\_  
19 Senior District Court Judge

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27 <sup>58</sup> *Id.*

28 <sup>59</sup> See SE ROA; see also *Petitioner's Appendix*; see also *Petitioner's Request for Judicial Notice*.

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13  
14 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
15  
16 IN AND FOR THE COUNTY OF HUMBOLDT

17 \* \* \*

18 RODNEY ST. CLAIR,

19 Petitioner,

20 vs.

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

25 Respondent.

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21 A Proposed Order is attached hereto as Exhibit 1.

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**Affirmation Pursuant to NRS 239B.030**

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

TAGGART & TAGGART, LTD.

---

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**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 Proposed Order, 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 Cavigila  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, Nevada 89701

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 ELECTRONIC DELIVERY, via:

DATED this day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Employee of TAGGART & TAGGART, LTD.

**EXHIBIT 1**

**EXHIBIT 1**

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Case No.: CV 20, 112

Dept. No. 2

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

\* \* \*

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

ORDER OVERRULING GRANTING THE  
PETITION FOR JUDICIAL REVIEW OF  
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,<sup>1</sup> 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~~ GRANTS the Petition for Judicial Review of Ruling 6287 in part; based  
4 upon the following findings of fact, conclusions 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 presented evidence sufficient to~~  
14 demonstrate a pre-statutory rights to the underground percolating water which were vested prior to  
15 March 25, 1939.<sup>2,3</sup> The State Engineer stated that “[t]ogether, these facts evidence that underground  
16 waters [V-010493] were appropriated by the drilled well and used beneficially . . . prior to March 25,  
17 1939.”<sup>4</sup> The following facts support the State 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;<sup>5</sup>
- 23 ~~(4) Lack of any evidence of the failure to pay taxes and assessment fees for the right to use the~~

24  
25 <sup>1</sup> 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”).

26 <sup>2</sup> SE ROA 0006.

27 <sup>3</sup> As stated in the State Engineer’s ruling, the State Engineer was not adjudicating the vested right, but only examining it to  
determine whether the right appeared valid to support granting a change application.

28 <sup>4</sup> SE ROA 004-006.

<sup>5</sup> These documents were not included in the State Engineer’s ROA and were not subject to review by this Court.

1 water right;

2 ~~(5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa~~  
3 ~~with groundwater using drilled wells;~~

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

7 (7) A patent from President Calvin Coolidge dated April 21st, 1924 describing the water right  
8 granted to St. Clair;<sup>7</sup>

9 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933<sup>8</sup> was found  
10 on the property; and

11 (9) A chain of title from St. Clair's predecessors-in-interest that does not include any  
12 conveyances by tax or foreclosure sales.<sup>9</sup>

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

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25 <sup>6</sup> SE ROA 0037.

26 <sup>7</sup> SE ROA 0045.

27 <sup>8</sup> SE ROA 0102.

28 <sup>9</sup> SE ROA 0038-0066.

<sup>10</sup> SE ROA 008 – 009.

<sup>11</sup> ~~Petitioner's Reply Brief, Exhibit 1.~~

<sup>12</sup> *Id.* (emphasis in the original) (citing *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)).

<sup>13</sup> SE ROA 007- 009.

1 St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287  
2 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that  
3 the intent to abandon a water right must be shown by more than mere non-use evidence.<sup>14</sup> St. Clair also  
4 argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent  
5 to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to  
6 support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to  
7 abandon the water rights without conducting a formal adjudication.

### 8 DISCUSSION

9 The State Engineer's holding that "Applicants' admission the water has not been used  
10 continuously coupled with the admission they are without knowledge of when it was, or was not used . . .  
11 find that Proof of Appropriation V-010493 has been abandoned" is overturned because it is arbitrary,  
12 capricious, contrary to law and not supported by substantial evidence.<sup>15</sup> The State Engineer's  
13 misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment of  
14 a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair to  
15 demonstrate lack of intent to abandon the water right.

### 16 STANDARD OF REVIEW

17 A party aggrieved by an order or decision of the State Engineer is entitled to have the order or  
18 decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is "in the  
19 nature of an appeal," and review is generally confined to the administrative record.<sup>16</sup> The role of the  
20 reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discretion  
21 or if it was otherwise affected by prejudicial legal error.<sup>17</sup> A decision is arbitrary and capricious if it is  
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24 <sup>14</sup> *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  
25 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the*  
*State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264  
26 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

<sup>15</sup> SE ROA 005.

<sup>16</sup> NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

27 <sup>17</sup> *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dist.*  
28 *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").

1 “baseless” or evidences “a sudden turn of mind without apparent motive...”<sup>18</sup> With regard to factua  
2 findings, the court must determine whether substantial evidence exists in the record to support the Stat  
3 Engineer’s decision.<sup>19</sup> Substantial evidence is “that which a ‘reasonable mind might accept as adequate t  
4 support a conclusion.”<sup>20</sup> With regard to purely legal questions, such as statutory construction, th  
5 standard of review is de novo.<sup>21</sup>

6 ~~—————~~ ST. CLAIR’S REQUEST FOR JUDICIAL NOTICE.

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

12 ~~(“Request for Judicial Notice”) to this Court. The Request for Judicial Notice contained three exhibits:~~

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

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

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

23 ~~This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorable~~  
24 ~~Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance of~~

25 ~~—————~~

26 <sup>18</sup> *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).  
27 <sup>19</sup> *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 <sup>20</sup> *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)).  
<sup>21</sup> *In re Nevada State Eng’r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

1 ~~impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition to~~  
2 ~~Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judicial~~  
3 ~~Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility of~~  
4 ~~Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included in~~  
5 ~~the Request for Judicial Notice exist or are public documents.~~

6 ~~The State Engineer's Opposition to Judicial Notice is DENIED as untimely. This Court further~~  
7 ~~finds that all documents submitted are public documents capable of accurate and ready determination by~~  
8 ~~resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that all~~  
9 ~~documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are entered~~  
10 ~~into the record of this Court for this case pursuant to NRS 47.130-150.~~

11 **EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.**

12 Nevada follows a bright-line rule of law to guide courts and the State Engineer in determining and  
13 analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owner  
14 *with the intent* to "forsake and desert it."<sup>22</sup> Intent is the necessary element the State Engineer is required to  
15 prove in abandonment cases.<sup>23</sup> ~~This is the standard the State Engineer has previously relied upon.<sup>24</sup> It~~  
16 ~~fact, the State Engineer has explained that "Nevada case law discourages and abhors the taking of water~~  
17 ~~rights away from people." and that is why abandonment must be proven by clear and convincing~~  
18 ~~evidence.<sup>25</sup>~~

19 Abandonment requires a union of facts and intent to determine whether the owner of the water  
20 right intended abandonment.<sup>26</sup> ~~As intent to abandon is a subjective element, the courts utilize all~~  
21 ~~surrounding circumstances to determine the intent.<sup>27</sup> Because subjective intent to abandon is a necessary~~  
22 ~~element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer's~~

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25 <sup>22</sup> *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.

26 <sup>23</sup> *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.

27 <sup>24</sup> See Petitioner's Appendix at 00001-0000135.

28 <sup>25</sup> Petitioner's Appendix at 000030-000037.

<sup>26</sup> *Revert*, 95 Nev. at 786, 603 P.2d at 264.

<sup>27</sup> *Alpine*, 291 F.3d at 1072.

1 burden because nonuse does not necessarily mean an intent to forsake.<sup>28</sup> Thus, if a vested water right  
2 holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occur.  
3 ~~For this reason, the State Engineer has previously ruled that "bare ground by itself does not constitute~~  
4 ~~abandonment."~~<sup>29</sup> ~~Also, t~~The Ninth Circuit has upheld the position that bare ground must be coupled with a  
5 use inconsistent with irrigation to show intent to abandon.<sup>30</sup> The standard of proof for demonstrating  
6 abandonment is clear and convincing evidence, and the burden of proof is on the party advocating  
7 abandonment, which in this case is the State Engineer.<sup>31</sup>

8 The Ninth Circuit has consistently upheld and endorsed Nevada's rule of law for abandonment in  
9 the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated "from all  
10 surrounding circumstances," and not only non-use evidence.<sup>32</sup> The surrounding circumstances test,  
11 although not exhaustive, has definitively produced ~~one a bright-line~~ rule regarding abandonment of water  
12 rights under Nevada law. That ~~bright-line~~ rule is that non-use alone is not enough to prove abandonment.  
13 This Court reiterates the canon that a water right may not be abandoned absent the showing of "subjective  
14 intent on the part of the holder of a water right to give up that right."<sup>33</sup>

15 This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and as  
16 such, indirect and circumstantial evidence may be used to show intent of abandonment.<sup>34</sup> The most  
17 consistent element in Nevada water law that applies to abandonment cases is the determination that non-  
18 use of the water is not enough to constitute abandonment.<sup>35</sup> The Ninth Circuit Appeals Court, when  
19 analyzing Nevada case law, has continually recognized that Nevada's abandonment rules indicate that  
20 non-use alone is not enough to constitute abandonment.<sup>36</sup> Nevada requires non-use evidence to be

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

24 ~~Petitioner's Appendix 000051-000054.~~

25 <sup>30</sup> *Orr Ditch*, 256 F.3d at 946.

26 <sup>31</sup> *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

27 <sup>32</sup> *Alpine* 291 F.3d at 1072.

28 <sup>33</sup> *Orr Ditch*, 256 F.3d at 944-45.

<sup>34</sup> *Id.*

<sup>35</sup> *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.

<sup>36</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

1 coupled with other evidence to determine the subjective intent of the water user.<sup>37</sup> This well-developed  
2 rule was originally taken from Nevada's mining law.<sup>38</sup> The Ninth Circuit, while applying Nevada state  
3 law, has held that the following factors ~~should~~ may be considered to determine whether a water owner had  
4 the intent to abandon a water right: (1) substantial periods of non-use, (2) evidence of improvements  
5 inconsistent with irrigation, and (3) payment of taxes and assessments.<sup>39</sup>

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

12 Further, St. Clair filed a Change Application for the place and manner and use, and clearly has  
13 present-day intent to use the water right. As such, St. Clair demonstrated a lack of the subjective intent of  
14 the subjective water right owner to abandon the water right.<sup>40</sup> ~~Previously, the State Engineer has held that~~  
15 ~~this type of evidence (i.e. filing of a Change Application and a Report of Conveyance) is evidence that a~~  
16 ~~party does not intend to abandon their water right, and can be enough to demonstrate the lack of the~~  
17 ~~subjective intent of abandonment.<sup>41</sup> The State Engineer has declined to declare a water right abandoned if~~  
18 ~~an applicant filed a change application, stating that filing an application is "evidence that the Applicant~~  
19 ~~does not intend to abandon its water right..."<sup>42</sup> This Court concludes that by this action alone, St. Clair~~  
20 demonstrated he did not intend to abandon his water rights.

21 ~~Also, the State Engineer deemed that action over and above mere nonuse (i.e. failure to maintain~~  
22 ~~corporate status, relinquishment of grazing rights or right-of-way, lack of communication with State~~

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25 <sup>37</sup> *Id.*

26 <sup>38</sup> *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

27 <sup>39</sup> *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

28 <sup>40</sup> *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F.3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.

<sup>41</sup> Petitioner's Appendix at 000084-000090, 000128-0000130; See also Petitioner's Appendix .

<sup>42</sup> Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.

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1 Engineer's office) was necessary to show abandonment.<sup>43</sup> None of these facts are present in this case.

2 The State Engineer's determination of abandonment regarding Proof of Appropriation V-01049:  
3 was based only on evidence of non-use. The State Engineer references only evidence that shows non-use  
4 such as the decayed condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and the  
5 failure of St. Clair to submit evidence of continuous use. Further, there was no field investigation  
6 conducted by the State Engineer to show when the water right was last used, or when the pump was  
7 removed from the well. In total, the only evidence before the Court was that of non-use. The State  
8 Engineer's reliance solely on non-use evidence was improper. Therefore, the State Engineer's conclusion  
9 that St. Clair's water right was abandoned is not supported by substantial evidence, and was therefore  
10 arbitrary, capricious, and is overruled.

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

13 ~~Vested water rights are "regarded and protected as property."<sup>44</sup> The term vested water rights is~~  
14 ~~often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment of~~  
15 ~~Nevada's statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed to~~  
16 ~~have been perfected before the current statutory water law, the State Engineer does not have powers to~~  
17 ~~alter vested water rights.<sup>45</sup> Thus, the State Engineer cannot apply a rule to a vested water right unless that~~  
18 ~~rule existed at common law. The State Engineer has recognized this limitation in the past, holding that~~  
19 ~~applying a rebuttable presumption standard would further undercut the stability and security of pre-1913~~  
20 ~~vested water rights.<sup>46</sup>~~

21 Here, the State Engineer applied a more restrictive law of abandonment than existed prior to the  
22 adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be shown  
23 to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to St

24  
25  
26 <sup>43</sup> See Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100;  
000073-000080; 000104-000106; 000081-000083.

27 <sup>44</sup> *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

28 <sup>45</sup> *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

<sup>46</sup> Petitioner's Appendix 000021-000025.

1 Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide a  
2 water right owner with a notice of forfeiture before the water right can be forfeited.<sup>47</sup> A water right owner  
3 can then cure the forfeiture.<sup>48</sup> Yet here, the State Engineer did not give St. Clair any notice of forfeiture,  
4 nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair was  
5 more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a less  
6 restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right was  
7 abandoned was arbitrary and capricious, and as such is overruled.

8 **THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO ST.**  
9 **CLAIR TO PROVE LACK OF INTENT TO ABANDON.**

10 This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects the  
11 assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of proof  
12 to a party defending a water right from abandonment.<sup>49</sup> In the *Alpine* case, the Ninth Circuit upheld the  
13 ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference of  
14 intent to abandon, it does not create a rebuttable presumption."<sup>50</sup> Nevada maintains the rule that there is  
15 no rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme and  
16 long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on only  
17 non-use evidence when considering the intent element of abandonment.<sup>51</sup>

18 The State Engineer correctly identified the standard that "[n]on-use for a period of time *may*  
19 inferentially be *some* evidence of intent to abandon a water right,"<sup>52</sup> and the State Engineer correctly  
20 stated that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."<sup>53</sup>  
21 However, in the very next sentence, the State Engineer mischaracterized the leading case law on point

22 \_\_\_\_\_  
23 <sup>47</sup> *Town of Eureka*, 108 Nev. At 168.

24 <sup>48</sup> *Id.*

25 <sup>49</sup> *Orr Ditch*, 256 F.3d at 945-946.

26 <sup>50</sup> *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

27 <sup>51</sup> *Id.* *See also In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316.; *United States v. Alpine Land and Reservoir Co.*, 27  
28 F.Supp.2d 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).

<sup>52</sup> SE ROA at 0007; (*citing Franktown Creek*, 77 Nev. at 354).

<sup>53</sup> SE ROA at 0008; *Orr Ditch*, 256 F.3d at 945.

1 when he stated that “proof of continuous use of the water right should be required to support a finding of  
2 *lack* of intent to abandon.”<sup>54</sup> The State Engineer hinged his abandonment determination of this  
3 misstatement of law.

4 The Ninth Circuit’s statement ~~*continuous use*~~ specifically applied to only the unique circumstance  
5 of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and  
6 state government regarding change applications for a change in place, manner and use of water rights in  
7 the Newlands Project prior to 1983.<sup>55</sup> ~~The *continuous use* language the State Engineer relied on is in the~~  
8 ~~Ninth Circuit’s opinion under the section “Equitable Relief for Intrafarm Transfers.”<sup>56</sup> In that section, the~~  
9 ~~Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only~~  
10 ~~*intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no~~  
11 ~~bearing on the current instance because this case does not involve the circumstance that existed in the~~  
12 ~~Newlands Project, or an intrafarm transfer.~~

13 The State Engineer’s actions in the current action clearly demonstrate an attempt by the State  
14 Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burden-  
15 shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies on  
16 the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The State  
17 Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of the  
18 burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

19 ~~THE STATE ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRARY~~  
20 ~~AND CAPRICIOUS BECAUSE HE APPLIED THE WRONG RULE OF LAW.~~

21 This Court recognizes that the State Engineer is not bound by *stare decisis*. However, his sudden  
22 turn of mind without apparent motive demonstrates the State Engineer’s decision is arbitrary and  
23 capricious.<sup>57</sup> ~~Previously, the State Engineer continually upheld the standards for abandonment that were~~  
24 ~~established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpine*~~

26 <sup>54</sup> At 5; v. *Alpine*, 291 F.3d at 1077.

27 <sup>55</sup> *Alpine*, 291 F.3d at 1073-74.

28 <sup>56</sup> *Id.*

<sup>57</sup> *City of Reno v. Estate of Wullis*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

1 ~~Decree proceeding that was relied upon by the Court and which recognized the principles of~~  
2 ~~abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents a~~  
3 ~~specialized circumstance.<sup>58</sup> The State Engineer later demonstrated a keen understanding of the~~  
4 ~~application of the *Alpine Decree* to intrafarm transfers.<sup>59</sup> Yet, in the current instance, the State Engineer~~  
5 ~~completely changed course without evidence or facts in the record to explain his action.~~

6 ~~Therefore, Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that~~  
7 ~~cannot remedy his sudden and improper application of well-settled Nevada water law. This Court has~~  
8 ~~already discussed the lack of evidence of intent to abandon produced by the State Engineer in Ruling~~  
9 ~~6387. However, the State Engineer's sudden departure from his application of the *Alpine* and *Orr Ditch*~~  
10 ~~Decree was also arbitrary and capricious.~~

#### 11 CONCLUSIONS OF LAW

12 This Court, having reviewed the record on appeal,<sup>60</sup> and having considered the arguments of the  
13 parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this  
14 matter, hereby ORDERS as follows:

- 15 1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has a  
16 vested water right under V-010493;
- 17 2. Ruling 6287 is ~~OVERRULED-REJECTED~~ in part to the extent it declares V-010493  
18 abandoned; and
- 19 3. This case is remanded to the State Engineer to process ~~The State Engineer is directed to~~  
20 ~~grant~~ Application No. 83246T.

21 **IT IS SO ORDERED.**

22  
23 \_\_\_\_\_  
24 Senior District Court Judge

25  
26  
27 <sup>58</sup> See Request for Judicial Notice at 3.

28 <sup>59</sup> *Id.*

<sup>60</sup> See SE ROA; see also Petitioner's Appendix; see also Petitioner's Request for Judicial Notice.

# EXHIBIT 3

# EXHIBIT 3

## Justina A. Caviglia

---

**From:** Paul Taggart <Paul@legalnt.com>  
**Sent:** Monday, March 14, 2016 6:00 PM  
**To:** Justina A. Caviglia  
**Cc:** Dorene A. Wright  
**Subject:** RE: Jungo Ranch  
**Attachments:** 2016-03-14 Ltr to Caviglia.pdf

Justina: Please find the attached response to your letter from Friday. Based on your objection, I will provide the original and your changes to the proposed order to the court.

Paul G. Taggart  
TAGGART & TAGGART, LTD.  
108 N. Minnesota St.  
Carson City, NV 89703  
(775) 882-9900 – Telephone  
(775) 883-9900 – Facsimile

This communication, including any attachments, is confidential and may be protected by privilege. If you are not the intended recipient, any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify the sender by telephone or email, and permanently delete all copies, electronic or other, you may have. The foregoing applies even if this notice is embedded in a message that is forwarded or attached.

---

**From:** Justina A. Caviglia [<mailto:JCaviglia@ag.nv.gov>]  
**Sent:** Friday, March 11, 2016 4:04 PM  
**To:** Paul Taggart  
**Cc:** Dorene A. Wright  
**Subject:** RE: Jungo Ranch

Attached are the State Engineer's comments to your proposed order.

**Justina Alyce Caviglia**  
Deputy Attorney General  
State of Nevada  
Office of the Attorney General  
Bureau of Government Affairs  
Government and Natural Resources Division  
100 N. Carson Street  
Carson City, NV 89701  
Telephone: (775) 684-1222  
Facsimile: (775) 684-1108

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recipient, please notify the sender immediately by return e-mail, delete this communication and destroy all copies.

**PUBLIC RECORD:** Any communication within this email may be subject to monitoring and disclosure to third parties.

---

**From:** Paul Taggart [<mailto:Paul@legaltnt.com>]  
**Sent:** Monday, March 07, 2016 5:32 PM  
**To:** Justina A. Caviglia  
**Subject:** Jungo Ranch

Justina: Please find the attached proposed order that Judge Kosach requested. After your five day review period, I would like to forward it to the judge. Thanks.

Paul G. Taggart  
TAGGART & TAGGART, LTD.  
108 N. Minnesota St.  
Carson City, NV 89703  
(775) 882-9900 – Telephone  
(775) 883-9900 – Facsimile

This communication, including any attachments, is confidential and may be protected by privilege. If you are not the intended recipient, any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify the sender by telephone or email, and permanently delete all copies, electronic or other, you may have. The foregoing applies even if this notice is embedded in a message that is forwarded or attached.

PAUL G. TAGGART  
SONIA E. TAGGART

**TAGGART & TAGGART, LTD.**  
A PROFESSIONAL CORPORATION  
108 NORTH MINNESOTA STREET  
CARSON CITY, NEVADA 89703  
[www.nvwaterlaw.com](http://www.nvwaterlaw.com)

RACHEL L. WISE  
DAVID H. RIGDON

March 14, 2016

Ms. Justina Caviglia  
Deputy Attorney General  
100 North Carson Street  
Carson City, NV 89701

Re: *St. Clair v. Jason King, P.E., Nevada State Engineer*  
Case No. CV 20112; Dept. 2

Justina Caviglia:

I am in receipt of your letter dated March 11, 2016. To say the least, our firm was taken by surprise at both the contents as well as the tone of the letter. Our firm strives to work ethically and diligently for our clients and our community, and as such, take accusations of ethical violations very seriously.

Our firm practices the same methods for proposing orders to the Courts as nearly all firms in Nevada, and likely the majority firms in the United States. The procedure, to us, is clear. After a hearing, both sides are invited to—if not required to—submit their proposed order to the Court. These proposed orders are to include both the basis and rationale for the Court's holding, including the facts and circumstances that lead to the holding. The purpose for this practice is to give context to the holding, not to alter findings of the court as you have stated. After reviewing both parties' proposed orders, the Court construes what it finds to be the state of the law in Nevada, using the parties' proposed orders as guidelines. This is not a rubber-stamp process. If, for whatever reason, the Court believes one party added, or omitted, any facts or law, the Court will ensure their final order is complete and accurate.

As such, we will submit both parties' proposed orders for the Court. Having established the common practice and procedure for submitting proposed orders to a Court, let me address your letter, issue by issue.

First and foremost, you open the letter claiming that we have violated our ethical duty of candor to the Court by adding additional findings to our proposed order. The duty of candor prohibits any attorney from knowingly making false statements of fact or law, or knowingly offering false evidence to the Court. The rule further prohibits failing to disclose the same.

You state in your letter that we have misconstrued the findings of the Court. To the contrary, every fact in our proposed order was brought before the Court both by oral argument and PowerPoint presentation on the date of the argument. There were no objections made during

TELEPHONE (775) 882-9900 – FACSIMILE (775) 883-9900

argument about these facts, and the Court relied on each of these facts when coming to his holding. Thus, it is *within* our duty of candor to include all relevant facts when proposing the order. To leave out relevant facts or factors which the Court relied on may taint the record, leave the record incomplete, or leave the Court with less information than it may need when creating their final order. The Court specifically directed that we draft a decision which includes the evidence heard at argument, findings of fact, and conclusions of law, and then run it by the State. Nothing within the proposed order is outside of the Court's direction. The direction was to create a draft order based on the oral decision *as well as* the evidence on record.

Second, you state that the findings of which we included could only originate from our client's argument and briefs. As the Court held in favor of our client, it is logical that the findings would also come from our client's argument. The Court clearly considered the arguments in the briefs when making his determination, as they stated on the record that both briefs were on point. While we are aware that our argument does not become the ruling, we are also aware that our argument was the foundation of the ruling. Proposing an order without a foundation for that proposed order would leave the Court empty-handed when creating their final order. Simply put, there can be no understanding of law without context.

You further stated in the letter that our proposed order fails to accurately reflect the Court's oral order. The letter states that the Court found that although there was physical evidence of abandonment, the intent element was missing. However, the Court did not find an absence of present-day intent as you stated in the letter. Rather, the Court found evidence of intent to use, and intent to *not* abandon, the water right. The Court ruled that while it understood where the State was coming from based on the physical evidence, it disagreed with the finding of abandonment. The Court stated quite clearly, time and again, that there was no abandonment:

In some ways I can see how the State made this, the Engineer, made his decision, and I can understand it. I can understand it from the physical evidence of abandonment; however, abandonment in Nevada is defined as the relinquishment of the right by the owner with the intention to forsake and desert it. Those two have to coincide.

I do not see any abandonment here.

Again, totally understanding the State's Point of view, I believe the law, is, and I do not mind saying this, the law is that you are not abandoning when you have the intent to revise the claim, when you have the intent to apply for the application, that shows that your intent is not to abandon. So shifting the burden was not, in my opinion, proper.

Basically if there is only evidence of non-use, that is not good enough

It has to be shown by clear and convincing evidence that the

petitioner abandoned with intent. No. There is no clear and convincing evidence of that here. That is why I say it was improper to shift the burden.

The facts show that the owner filed a change application, filed a conveyance of documents, and reports of conveyance, has the present day intent to use the well...that doesn't show any abandonment according to Nevada law, he has the intent to use that water.

I feel very strongly that I am backed by the law. I feel very strongly that this is not a difficult decision for a court to make based on what was presented to me in the briefs and the argument.

You also propose revisions to the draft order to indicate the Court simply remanded this issue back to the State Engineer. This, too, was not the Court's holding. The Court was clear that the denial of the application was improper, and that the finding of abandonment was *overturned*, not remanded. The Court specifically ruled that the State Engineer abused his discretion, and that the Court would overturn the State Engineer's decision. The Court further stated that the State Engineer was wrong in denying our client's change application based on abandonment.

Finally, you state that our firm's actions will not be overlooked by the State Engineer in the future. We are unsure how to read this sentence, and would like to ensure that the Attorney General does not mean what the sentence seems to imply. The sentence reads like a warning, indicating that the State Engineer will find against our future clients merely because of the dispute over this proposed order. We truly hope this is not the case, as such would be both unethical and unlawful. We ask for clarification on this sentence.

Sincerely,

  
PAUL G. TAGGART, ESQ.

PGT:tdo

# EXHIBIT 4

# EXHIBIT 4

...erk of Carson City, State  
...io Clerk of the District Court, in and to  
... hereby certify that the foregoing is a full, true  
...rect copy of the JADS recording from the hearing held on  
January 5, 2016 in the action entitled and numbered  
J-112 (Sixth Judicial District Ct): Rodney St. Clair vs. Jason King et. a  
which now remains on file and of record in my office in said Carson City



St. Clair  
1/5/16  
oral arg.

PLEASE NOTE: THE VIEWING OF DOMESTIC PROCEEDINGS BY MINOR CHILDREN IS NOT CONSIDERED TO BE IN THEIR BEST INTEREST. THE PURPOSE OF THE RECORDING IS FOR ATTORNEYS AND CLIENTS AND IS PROHIBITED FROM BEING PUBLISHED OR SOLD. YOU MAY BE FOUND IN CONTEMPT OF COURT FOR VIOLATING THIS POLICY.

# EXHIBIT 5

# EXHIBIT 5

**SIXTH JUDICIAL DISTRICT COURT MINUTES**

CASE NO. CV20-112

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

---

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

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

**ORAL ARGUMENTS**

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

Statements were made by Court.

Counsel presented arguments.

Court stated its findings of facts and conclusions of law.

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

Taggart to draft the decision.

Statements were made by Court.

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

---

# EXHIBIT 6

# EXHIBIT 6

1 Case No. CV 20112

2 Dept. No. 2

3

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6

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

7

8

9 RODNEY ST. CLAIR,

10 Petitioner,

11 vs.

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

15 Respondent.

**ORDER GRANTING  
PETITION FOR JUDICIAL REVIEW OF  
STATE ENGINEER'S RULING 6287**

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THIS MATTER was heard by the Court on January 5, 2016, in the First Judicial District Court Courthouse upon Petitioner RODNEY ST. CLAIR's (hereinafter "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. Petitioner was represented by Paul C. Taggart, Esq. and Rachel L. Wise, Esq. of Taggart and Taggart, Ltd., and Respondent JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State Engineer"), was represented by Attorney General Adam Laxalt and Deputy Attorney General Justina Caviglia. This Court, having reviewed the record on appeal, and having considered the arguments of the parties and all pleadings and papers on file in this matter, hereby

**GRANTS THE PETITION FOR JUDICIAL REVIEW OF RULING 6287.**

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///

1 FINDINGS OF FACT

2 This matter arises out of Petitioner's Petition for Judicial Review filed on August 22,  
3 2014, following the State Engineer's issuance of Ruling 6287. Ruling 6287 was based upon  
4 Petitioner's Application 83246T filed with the State Engineer to change a point of diversion on  
5 a portion of their vested water right claim, Proof of Appropriation V-010493. Record on  
6 Appeal ("ROA") at 4. The State Engineer's first finding in Ruling 6287 focused on Petitioner's  
7 vested claim. ROA 5-6. Based upon evidence provided by Petitioner, the State Engineer  
8 found that Petitioner's Proof of Appropriation V-010493 was valid. *Id.* Petitioner did not  
9 dispute this finding in the Petition for Judicial Review.

10 The second finding in Ruling 6287 reviewed whether Proof of Appropriation V-010493  
11 had been abandoned. ROA 6. The State Engineer reviewed Petitioner's application and  
12 found that the photos that Petitioner submitted in support of his application show that the well  
13 casing is rusted through and that the well has silted in. ROA 7, 75-76. The State Engineer  
14 concluded that this evidence showed that the "casing is unusable in its current condition and  
15 that it has gone unused for a significant period of time." ROA 7. The State Engineer  
16 considered the fact that Petitioner, in his application answered unknown for the question that  
17 asked what years the land was or was not irrigated. ROA 7-8. The State Engineer sent  
18 correspondence to Petitioner on December 2, 2013, requesting additional information and  
19 evidence from Petitioner that demonstrated continuous beneficial use to the present time with  
20 respect to the application. ROA 8, 105. The State Engineer found:

21 [w]hile sufficient evidence to support a vested right at the time the  
22 well was drilled and the land patents exists, the decayed state of  
23 the casing, Applicants' admission the water has not been used  
24 continuously coupled with the admission they are without  
25 knowledge of when it was, or was not used, in addition to the failure  
of evidence of continuous beneficial use of the water, compels the  
State Engineer to find that Proof of Appropriation V-010493  
has been abandoned.

26 ROA 008.

27 Petitioner filed his Petition for Judicial Review on December 8, 2014, and filed his  
28 Opening Brief on December 8, 2014. The State Engineer filed his Answering Brief on

1 January 22, 2015. Petitioner filed his Reply Brief on February 27, 2015. Petitioner also file  
2 an Appendix on March 3, 2015, and a Request for Judicial Notice in Support of Petitioner  
3 Reply Brief on June 2, 2015. The State Engineer filed an Opposition to the Request for  
4 Judicial Notice in Support of Petitioner's Reply Brief on November 19, 2015. Petitioner filed  
5 Reply to the Opposition on November 30, 2015.<sup>1</sup>

#### 6 STANDARD OF REVIEW

7 NRS 533.450 provides for judicial review of orders and decisions of the State Engineer  
8 made under NRS 533.270 through NRS 533.445 (setting forth the statutory procedure for  
9 appropriation). NRS 534.090(4) provides that any decision relating to forfeiture or  
10 abandonment is also to be reviewed as provided in NRS 533.450. Under this statute, "[t]he  
11 decision of the State Engineer is *prima facie* correct and the burden of proof is on the party  
12 attacking the same." NRS 533.450(10).

13 The Court's review under NRS 533.450 is limited to a determination of whether the  
14 State Engineer's decision is supported by substantial evidence. *Revert v. Ray*, 95 Nev. 782,  
15 786, 603 P.2d 262 (1979). Substantial evidence is "that which a reasonable mind might  
16 accept as adequate to support a conclusion." *Bacher v. State Engineer*, 122 Nev. 1110, 112  
17 146 P.3d 793, 800 (2006). Thus, in evaluating the present matter, this Court may not "pass  
18 upon the credibility of the witness nor reweigh the evidence." *Id.*

#### 19 DISCUSSION

20 The subject of this Petition for Judicial Review is whether the State Engineer incorrectly  
21 found that the Proof of Appropriation V-010493 had been abandoned.<sup>2</sup> Nevada law is clear  
22 abandonment occurs when there is a "relinquishment of the right by the owner with the  
23 intention to forsake and desert it." *In re: Manse Spring*, 60 Nev. 280, 108 P.2d 311, 313  
24 (1940). Abandonment requires a union of acts and intent and is a question of fact to be  
25 determined from all surrounding circumstances. *Revert v. Ray*, 95 Nev. 782, 603 P.2d

26 \_\_\_\_\_  
27 <sup>1</sup> The Request for Judicial Notice and its opposition were not addressed by this Court during the January 5, 2015  
hearing.

28 <sup>2</sup> As neither party objected to the State Engineer's determination that Petitioner's Vested Claim 010493 was  
valid, this Court will not address that finding in this Order.

1 262, 264 (1979). Non-use of a water right provides inferential evidence of an intent to  
2 abandon that right. *Franktown Creek Irr. Co., Inc. v. Marlette Lake Co.*, 77 Nev. 348, 35  
3 (1961). Prolonged non-use of a water right does not, by itself, create a presumption of  
4 abandonment. *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935 (9th Cir. 2001). Nonetheless, the  
5 Ninth Circuit has held that “proof of continuous use of the water rights should be required to  
6 support a finding of lack of intent to abandon.” *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d  
7 1062 (2002) (“*Alpine V*”). The subjective intent of abandonment is difficult to demonstrate  
8 and as such, indirect and circumstantial evidence may be used to show intent to  
9 abandonment. *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935 (9th Cir. 2001).

10 In Ruling 6287, the State Engineer based his finding that the Proof of Appropriation  
11 V 010493 was abandoned on evidence of non-use. This evidence included the photograph  
12 of the condition of the well, the lack of a pump on the well, and the failure of Petitioner to  
13 submit evidence of continuous use as requested by the State Engineer in his December 10, 2013,  
14 letter. ROA 7-8. However, the State Engineer was not able to show that Petitioner  
15 intended to abandon Proof of Appropriation V-010493.

16 Furthermore, the State Engineer incorrectly shifted the burden on Petitioner to show  
17 that he did not intend to abandon Proof of Appropriation V-010493. Petitioner clearly has  
18 present-day intent to use the water right, as indicated by the filing of their change application  
19 and reports of conveyance documents. The State Engineer has not provided clear and  
20 convincing evidence of an intent by Petitioner to abandon his water rights, the shifting of the  
21 burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

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CONCLUSIONS OF LAW

This Court, having reviewed the record on appeal, and having considered the arguments of the parties, the applicable law, and all pleadings and papers on file in the matter, hereby ORDERS as follows:

1. Based upon the non-opposition by either party, the portion of Ruling 6287 which found that Petitioner has a vested water right under Proof of Appropriation V-010493, AFFIRMED;

2. The Petition for Judicial Review of the portion of Ruling 6287 which declares V-010493 abandoned is GRANTED; and therefore

3. This case is remanded to the State Engineer to process Application 83246T.  
IT IS SO ORDERED.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
HONORABLE STEVEN R. KOSACH  
SENIOR DISTRICT COURT JUDGE

RESPECTFULLY SUBMITTED BY:  
ADAM PAUL LAXALT  
Attorney General  
JUSTINA A. CAVIGLIA  
Deputy Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
T: (775) 684-1222  
E: [jcaviglia@ag.nv.gov](mailto:jcaviglia@ag.nv.gov)  
*Attorney for Respondent*

1 Case No. CV 20112

2 Dept. No. 2

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

6 \* \* \*

7  
8 RODNEY ST. CLAIR, )

9 Petitioner, )

10 vs. )

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

Respondent. )

**JUNGO RANCH RESPONSE TO  
STATE ENGINEER'S OBJECTION TO  
PROPOSED ORDER**

15  
16 Petitioner, RODNEY ST. CLAIR (hereinafter "Petitioner", by and through his attorneys of record,  
17 PAUL G. TAGGART, ESQ. and RACHEL L. WISE, ESQ., of the law firm TAGGART & TAGGART,  
18 LTD., hereby responds to Respondent, JASON KING, P.E., the State Engineer's Objection to Petitioner's  
19 Proposed Order ("Objection") submitted on or around March 18, 2015 ("Response"). This Response is  
20 based upon the attached Points and Authorities and the pleadings and papers on file herein.  
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1 **POINTS AND AUTHORITIES**

2 The State Engineer correctly identifies that Petitioner did not alter their original proposed order  
3 after receiving the State Engineer’s requested changes. The simple reason behind this is that Petitioner  
4 believes the State Engineer is incorrect with regards to the process for proposing an order. As shown in  
5 Exhibit 1 of Respondent’s Objection to Petitioner’s Proposed Orders, Petitioner included in the Proposed  
6 Order both the basis and rational for the Court’s holding, including the facts and circumstances that lead  
7 to the holding. The purpose for this practice is to give context to the holding.

8 Petitioner prudently included all relevant facts when proposing the order. To leave out relevant  
9 facts or factors which the Court relied on may taint the record, leave the record incomplete, or leave the  
10 Court with less information than it may need when creating its final order. The Court specifically directed  
11 that Petitioner draft an order that includes the evidence heard at argument, findings of fact, and  
12 conclusions of law, and then submit it to the State for comment. Nothing within the proposed order is  
13 outside of the Court’s direction. The direction was to create a draft order based on the oral decision as  
14 well as the evidence on record.

15 **I. FACTUAL AND PROCEDURAL BACKGROUND**

16 The Petitioner submitted the Petitioner’s Appendix on February 27, 2015 (“Petitioner’s  
17 Appendix”). The State Engineer never objected to this submission. On June 2, 2015, Petitioner submitted  
18 their request for judicial notice in support of Petitioner’s Reply Brief (“Request for Judicial Notice”).  
19 Respondent, State Engineer, waited five (5) months to oppose Petitioner’s Request for Judicial Notice  
20 (“Opposition to Judicial Notice”). Furthermore, the State Engineer’s Objection to Judicial Notice was  
21 only filed after the November 16, 2015 Order of Recusal entered by the Honorable Judge Montero.<sup>1</sup>  
22 Petitioner timely replied to the State Engineer’s November 17, 2015 Opposition to Judicial Notice. The  
23 State Engineer objected to both: the Petitioner’s Appendix and the Petitioner’s Request for Judicial  
24 notice.<sup>2</sup>

25 During oral argument, Petitioner also presented the PowerPoint presentation attached hereto as  
26 Exhibit 1. During the hearing, the Honorable Judge Kosach issued an order from the bench, based on all

27  
28 <sup>1</sup> See November 16, 2016 Order of Recusal.  
<sup>2</sup> See Respondent’s Objection to Petitioner’s Proposed Order at 3:11-15.

1 the evidence. The Honorable Judge Kosach requested that the Petitioner’s draft a Proposed Order based  
2 upon the evidence produced at hearing and all issues briefed.<sup>3</sup>

3 **II. ARGUMENT**

4 The State Engineer first objects to Petitioner’s order on the basis that Petitioner included in the  
5 order: “additional findings than [sic] those made by the State Engineer in the Ruling.”<sup>4</sup> These findings  
6 include “a lack of evidence of the failure to pay taxes and assessment fees for the right to use the water  
7 right”, and “newspaper articles [that were] published in the early 1920s discussing the irrigation of alfalfa  
8 with groundwater using drilled wells.”<sup>5</sup> The State Engineer argues that he rejected this evidence when  
9 coming to a decision in his ruling, and thus it would be an inaccurate reflection of the State Engineer’s  
10 ruling to include them in the order. However, the Proposed Order is a reflection of the information used  
11 by the Court to come to its decision on the State Engineer’s ruling, and is not limited to the information  
12 used by the State Engineer to come to his ruling.

13 Through both oral argument and PowerPoint presentation, Petitioner argued that the factors listed  
14 above should have been relied on by the State Engineer in this case, and are relied on regularly as factors  
15 for determining forfeiture of a water right. The State Engineer cites to two federal cases in his objection  
16 which outline the approved use of these factors. Through the oral argument and presentation, Petitioner’s  
17 use of these cases and factors was never objected to by the State Engineer, and the Court further relied on  
18 these factors when coming to their holding.

19 Clearly, the State Engineer did not follow the lawful procedure for declaring a water right  
20 forfeited, as the Court ruled against him from the bench. This fact is only made more apparent in the State  
21 Engineer’s admission that he did not consider the two factors laid out above when coming to the  
22 determination in this ruling. His objections that the Court applied these factors in the Court’s own ruling

23  
24  
25 <sup>3</sup>See Oral Argument hearing video at 2:01 p.m – 2:03 p.m. (“and I am going to overturn the state engineer’s  
26 decision . . . pursuant to this decision and the evidence therein . . . you can include findings of fact. You can include  
27 conclusions of law . . . go ahead and send it to me and I’ll look at it . . . I don’t mean to leave anything out form this  
28 oral decision because I feel very strongly that I’m backed by the law. I feel very strongly that this is not a difficult  
decision for a Court to make based upon what was presented to me in the briefs and the argument”).

<sup>4</sup> Respondent’s Objection to Petitioner’s Proposed at 3.

<sup>5</sup> *Id.*

1 are untimely. If the State Engineer wished that the Court disregard these factors, that objection should  
2 have been made in argument.

3 The Proposed Order is a reflection of the information used by the Court to come to its ruling  
4 overturning the State Engineer; it is not limited to the information used by only the State Engineer to come  
5 to his ruling. As such, the inclusion of these relevant and approved factors should be included in the  
6 Court's Order.

7 The Petitioner submitted the Petitioner's Appendix on February 27, 2015 ("Petitioner's  
8 Appendix"). The State Engineer never objected to this submission. On June 2, 2015, Petitioner submitted  
9 their request for judicial notice in support of Petitioner's Reply Brief ("Request for Judicial Notice").  
10 Respondent, State Engineer, waited five (5) months to oppose Petitioner's Request for Judicial Notice  
11 ("Opposition to Judicial Notice"). Furthermore, the State Engineer's Objection to Judicial Notice was  
12 only filed after the November 16, 2015 Order of Recusal entered by the Honorable Judge Montero.<sup>6</sup>  
13 Petitioner timely replied to the State Engineer's November 17, 2015 Opposition to Judicial Notice. Now  
14 the State Engineer Objects to both, the Petitioner's Appendix and the Petitioner's Request for Judicial  
15 notice.<sup>7</sup>

16 During the hearing, the Honorable Judge Kosach issued an order from the bench, based on all the  
17 evidence. The Honorable Judge Kosach requested that the Petitioner's draft their Proposed Order for this  
18 Hearing based upon the evidence produced at hearing and all issues that were briefed.<sup>8</sup>

19 The Court's decision was clear, "this is not a difficult decision for the Court to make based upon  
20 what was presented to me in the briefs and the argument."<sup>9</sup> The Court was clear. The State Engineer's  
21 ruling is overturned.<sup>10</sup> To enter a proper order, the Petitioner had a duty to present the Court with an  
22  
23

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24 <sup>6</sup> See November 16, 2016 Order of Recusal.

25 <sup>7</sup> See Respondent's Objection to Petitioner's Proposed Order at 3:11-15.

26 <sup>8</sup> See Oral Argument hearing video at 2:01 p.m – 2:03 p.m. ("and I am going to overturn the state engineer's  
27 decision . . . pursuant to this decision and the evidence therein . . . you can include findings of fact. You can include  
28 conclusions of law . . . go ahead and send it to me and I'll look at it . . . I don't mean to leave anything out form this  
oral decision because I feel very strongly that I'm backed by the law. I feel very strongly that this is not a difficult  
decision for a Court to make based upon what was presented to me in the briefs and the argument").

<sup>9</sup> See Oral Argument hearing video at 2:01 p.m – 2:03 p.m.

<sup>10</sup> See Oral Argument hearing video at 2:01 p.m – 2:03 p.m.

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1 analysis of laws and facts that supported the Court's ultimate conclusion.<sup>11</sup> The Petitioner's actions were  
2 proper, and their proposed order is sound.

3 Petitioner requests, among other things, relief in the form of the Court directing the State Engineer  
4 to grant Application 83246T. The State Engineer argues that the Court would be exceeding its authority  
5 to grant the application of a water right. It is well understood law that, on appeal, a reviewing court has  
6 the power to direct the lower court to abide by its decision.

7 **III. CONCLUSION**

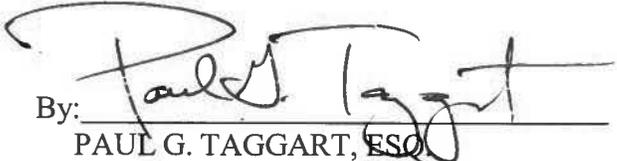
8 For the reasons stated above, Petitioner request this Court adopt the proposed order that was  
9 submitted by Petitioner on or around March 16, 2016.

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

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

14 DATED this 29<sup>th</sup> day of MLPct, 2016.

15 TAGGART & TAGGART, LTD.  
16 108 North Minnesota Street  
17 Carson City, Nevada 89703  
18 (775)882-9900 – Telephone  
19 (775)883-9900 – Facsimile

20 By:   
21 PAUL G. TAGGART, ESQ.  
22 Nevada State Bar No. 6136  
23 RACHEL L. WISE, ESQ.  
24 Nevada State Bar No. 12303  
25 Attorneys for Petitioners  
26  
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<sup>11</sup> *Bogan*, 65 F.2d at 526 (9th Cir. 1933).

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**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 Response to Objection, as follows:

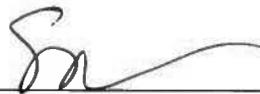
By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

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

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 ELECTRONIC DELIVERY, via:

DATED this 29<sup>th</sup> day of March, 20 16.

  
\_\_\_\_\_  
Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, Nevada 89703  
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SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF HUMBOLDT  
BEFORE THE HONORABLE STEVEN R. KOSACH,  
SENIOR DISTRICT COURT JUDGE

-oOo-

RODNEY ST. CLAIR, Case No. CV 20112  
Petitioner, Dept. No. 2  
vs.

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

**CERTIFIED COPY**

=====

TRANSCRIPT OF HEARING

Monday, April 11, 2016

(Humboldt County case, held in Carson City, Nevada)

TRANSCRIPT PREPARED BY:  
SHANNON L. TAYLOR, CCR, CSR, RMR  
Certified Court/Shorthand and Registered Merit Reporter  
Nevada CCR #322  
(775) 887-0472

A P P E A R A N C E S

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For the Petitioner, Rodney St. Clair:

Paul G. Taggart, Esq.  
Taggart & Taggart, Ltd.  
108 North Minnesota Street  
Carson City, NV 89703

For the Respondent, Nevada State Engineer:

Justina A. Caviglia, Esq.  
Deputy Attorney General  
100 North Carson Street  
Carson City, NV 89701-4717

1 CARSON CITY, NEVADA, MONDAY, APRIL 11, 2016, 1:42 P.M.

2 -oOo-

3 THE COURT: Okay. I want to, I want to thank  
4 you for coming, both of you. And I want to thank Angela  
5 of the District Court and the clerks for this room.

6 We're on the record in Rodney St. Clair,  
7 petitioner, vs. Jason King, Nevada State Engineer,  
8 Division of Water Resources, Department of Conservation  
9 and Natural Resources. And this is CV 20112 in the  
10 Sixth Judicial District Court of the State of Nevada, in  
11 and for the County of Humboldt.

12 We're doing this in Carson City because the  
13 Attorney General's Office is in Carson, represented by  
14 Ms. Justina Caviglia. And Mr. Paul Taggart, excuse me,  
15 is also an attorney in Carson City, representing the  
16 petitioner.

17 My name is Steve Kosach. I'm a Senior Judge  
18 for the State of Nevada.

19 And we're here based on the State's,  
20 respondent's objection to petitioner's proposed order.

21 Now, when I heard this case in January of 2016,  
22 I declared the what I thought was the law at that time  
23 as far as the issue of the primary issue of abandonment.  
24 And I found that there was no abandonment and,  
25 therefore, found in favor of the petitioner. I asked

1 Mr. Taggart to prepare an order overruling the State  
2 Engineer's ruling 6287. And then the State filed  
3 objections to the petitioner's proposed order. So  
4 instead of signing that order that Mr. Taggart prepared,  
5 I wanted to hear the objections. And that's why we're  
6 here today.

7 So I just, I met informally with the attorneys  
8 right before the hearing started this afternoon. And I  
9 asked Ms. Caviglia to state her objections for the  
10 record. And each, each one will be responded to,  
11 either -- well, I wouldn't say each one.

12 It depends on what you want to do, Mr. Taggart,  
13 in response. If you want to respond to everything,  
14 that's fine. If you want to respond to each one, that's  
15 fine, too. Because I'll sort them out.

16 I have a copy of the objections to  
17 respondent's -- to the proposed order. I'm ready, after  
18 all of that.

19 Ms. Caviglia, please.

20 MS. CAVIGLIA: Thank you, Your Honor.

21 Just for preliminary, Mr. Taggart did provide  
22 us with the proposed order. We responded and sent him a  
23 copy of the order with our strike-through and language  
24 that we were -- did not agree on. At that point,  
25 Mr. Taggart submitted it to the Court, and we did

1 provide the objection to the Court. And I'll go through  
2 page by page with the objection, and it's sort of set  
3 out that way in the objection as well.

4           The first objection that the State Engineer  
5 brought forth in its objection to the proposed order is  
6 on page two and page three. In the facts and procedural  
7 history of this matter, Mr. Taggart listed a number of  
8 following facts that supported the State Engineer's  
9 decision. However, when you look at numbers four and  
10 five, one was the lack of evidence of the payment of  
11 taxes and assessments, and the next was newspaper  
12 articles.

13           If you read the ruling itself, the State  
14 Engineer did not rely on the newspaper articles. And  
15 there's no mention at all of payment of taxes and  
16 assessment fees that was put into the ruling.

17           So even though Mr. Taggart had provided the  
18 newspaper articles to support the vested water rights  
19 claims, those are specifically, in the ruling,  
20 discounted by the State Engineer. And that's on the  
21 State Engineer record of appeal on page six. The State  
22 Engineer found that the newspaper articles do not help  
23 establish perfection of a vested right.

24           So we don't believe that that should be listed  
25 here, because that was not used by the State Engineer in

1 its ruling.

2 THE COURT: And when you say not listed here,  
3 you mean --

4 MS. CAVIGLIA: In the final order.

5 THE COURT: -- in the proposed order?

6 MS. CAVIGLIA: In the proposed order.

7 THE COURT: Okay. Mr. Taggart, can you respond  
8 to that?

9 MR. TAGGART: Yes, Your Honor.

10 THE COURT: Four and five, if you will. Pay  
11 taxes, failure to pay taxes and newspaper articles.

12 MR. TAGGART: The -- for the record, Paul  
13 Taggart on behalf of Jungo Ranch and Rodney St. Clair.

14 The State Engineer did review those pieces of  
15 evidence in his -- in his ruling. Those were pieces of  
16 evidence that were supplied by particularly the  
17 newspaper articles that were supplied by my client to  
18 the State Engineer, and he did review them when he made  
19 his decision, and he described why they were or were not  
20 relevant. So that's why we put it in there, because it  
21 was something that he relied upon.

22 And with respect to the failure to pay taxes  
23 and assessment fees, the State Engineer, if -- they're  
24 saying now that he didn't rely on that. I mean he made  
25 a finding of abandonment. And in order to make a

1 finding for abandonment, he has to make a determination  
2 about whether taxes or assessments were paid. So that  
3 would have been their position regarding that point.

4 THE COURT: Okay. Thank you.

5 Ms. Caviglia.

6 MS. CAVIGLIA: Further on, on page three, and  
7 it goes more towards the first section on the judicial  
8 review, there's a sentence, "Notably, this declaration  
9 of abandonment was the first in time Nevada history that  
10 the State Engineer declared a vested groundwater right  
11 abandoned."

12 It goes to the section on St. Clair's request  
13 for judicial notice and further on in the order -- oh,  
14 where is it? The section on the State -- on page 11,  
15 "The State Engineer's declaration of abandonment was  
16 arbitrary and capricious because he applied the wrong  
17 rule of law."

18 Both of those sentences are based upon  
19 petitioner's argument that the State Engineer was  
20 arbitrary and capricious because this ruling had  
21 diverted from prior rulings of the State Engineer. It  
22 also is based upon request for judicial notice and an  
23 objection to that judicial notice. That was not heard  
24 by the Court. Although it wasn't heard by the Court,  
25 and it wasn't stated by the Court, petitioner did

1 include it in this, his order. And I'm not sure it was  
2 actually even relevant to this ruling. The Court did  
3 not specifically state that day that the decision for  
4 arbitrary and capriciousness was based upon prior  
5 rulings of the State Engineer.

6 This ruling does talk about the case law  
7 regarding the State Engineer is not bound by stare  
8 decisis, but then switches it to make the finding for  
9 arbitrary and capriciousness based upon the State  
10 Engineer diverting from whatever rulings were in the  
11 past.

12 I don't believe that's what the Court ruled  
13 upon. When I looked at the recording, it's not clear  
14 that that was what the Court ruled upon. Mr. Taggart  
15 has used it in his argument. However, I'm not sure  
16 that's what this Court based, was based upon. And based  
17 upon my understanding of the Court's ruling, based upon  
18 the case law, it was clear that the Court didn't even  
19 need to go to this depth.

20 Petitioner did include this, based upon his  
21 argument --

22 THE COURT: And what does "this step" mean,  
23 "this step" mean to you, Ms. Caviglia? I just, I just  
24 got lost in the sense of "this step."

25 MS. CAVIGLIA: I don't think he -- the looking

1 at prior rulings of the State Engineer's Office would be  
2 required by this Court to find the rulings that -- or  
3 based, was based upon what this Court ruled upon. It  
4 was clear by your order that you were basing it on the  
5 evidence and the case law, and that was presented to  
6 you, not based upon prior rulings of the State Engineer.

7 THE COURT: I think, there was only one  
8 reference. And I'm really trying to be careful to not  
9 argue. But because, in a sense, we are arguing about  
10 what should or shouldn't be in, I'm going to respond.  
11 So let's put it that way.

12 This ruling -- or, no, not, not my ruling. The  
13 State Engineer's ruling, according to Mr. Taggart's  
14 pleadings, is the first time in the history of the State  
15 of Nevada that the State Engineer ruled that there was  
16 an abandonment.

17 Am I correct with that, with the facts as we  
18 know in this case, am I correct with that statement?

19 MR. TAGGART: Abandonment of a underground  
20 vested water right, yes, first time.

21 THE COURT: An abandonment of an underground  
22 vested water right. So I took that, in the hearing and  
23 in the exhibits you showed, Mr. Taggart, in the hearing,  
24 and -- and, as you called it, stare decisis -- along  
25 with Ninth Circuit court cases, I took that as history

1 to the point where it was only illustrative of, Judge,  
2 this is the first time this has ever happened, see how  
3 wrong it is?

4 Do you see what, do you see what I'm saying?  
5 That's my, that was my conclusion. So, in a sense, I'm  
6 not -- my conclusion of what Mr. Taggart was arguing.  
7 In a sense, I'm not bothered by it. Why is the State  
8 bothered by it? Does it make the State Engineer look  
9 bad or something?

10 Do you see what I'm saying? I'm getting -- I  
11 don't mean to get personal, but I want to know why the  
12 objection's there.

13 MS. CAVIGLIA: I think, there's -- there's a  
14 fine line between the first time in history and the  
15 stare decisis argument. The State Engineer is concerned  
16 about his prior rulings being used against him, because  
17 that's specifically what Desert Irrigation says cannot  
18 be done.

19 So whether the State -- and, I believe, that's  
20 what Mr. Taggart was putting forward was the State  
21 Engineer's prior ruling should be used against him to  
22 show that he was being arbitrary and capricious. And  
23 that is how we read this section, not that this was the  
24 first time this has happened.

25 THE COURT: Okay. All right.

1 MS. CAVIGLIA: And that's how we have taken it.  
2 That's how he's pled it in other cases as well. And  
3 that's where the State Engineer is concerned. Because  
4 Desert Irrigation is very specific. Stare decisis  
5 cannot be used against the State Engineer, not ruling as  
6 we have in prior rulings, is not arbitrary and  
7 capricious. I believe, it's in my objection. And  
8 that's where the fine line is from where using it for  
9 it's never happened before, but, and then switching it  
10 so that the prior rulings of the State Engineer's Office  
11 are now arbitrary and capricious.

12 So that, we took it as the latter, not as how  
13 you've stated it, Your Honor.

14 THE COURT: Interesting. I don't care how you  
15 presented it, Mr. Taggart. You already know how I took  
16 it. But do you have -- I mean I can, I can kind of  
17 understand, if we're setting precedent. It's the first  
18 time in history, right? If we're setting precedent, I  
19 can understand where the State's going if they  
20 interpreted it as being against previous orders.

21 Do you see, do you see what I mean?

22 But it's a conclusion that I came to, based on  
23 all the evidence, and it was not a difficult conclusion.  
24 There was no abandonment.

25 So please help. When I say "help," can you

1 understand the interpretation by the State?

2 MR. TAGGART: No.

3 THE COURT: Okay. Please tell me.

4 MR. TAGGART: I think that the State Engineer,  
5 or his office, knew exactly what the law is, and they  
6 applied it intentionally incorrectly. That's what I  
7 think. And that's why the Ninth Circuit decision was so  
8 important, because they were a party in that case, and  
9 they argued the exact same position we argued in this  
10 case.

11 I think, my client has had to spend --

12 THE COURT: "They" meaning the State?

13 MR. TAGGART: The State Engineer. I think, my  
14 client has had to spend a tremendous amount of money in  
15 this case because the State Engineer did not follow the  
16 law, and the law was absolutely clear. If you remember,  
17 there was this interfarm transfer exception. That does  
18 not apply in this case. And they took that rule, and  
19 they know that rule doesn't apply in general across the  
20 state, and they applied it in this case.

21 I stated during oral argument that stare  
22 decisis does not apply to the State Engineer. I  
23 recognize that. But that doesn't mean the State  
24 Engineer can make decisions one way in one case and  
25 another way in another case without being called to task

1 for it. That means that if he has a history of making  
2 decisions one direction, and he decides to change his  
3 mind, he has to explain it to the court. It doesn't  
4 mean he's bound by his prior precedent. But if he  
5 changes his mind without any reason, that is arbitrary  
6 and capricious.

7 And the Supreme Court of this state has been  
8 very frustrated with the State Engineer's failure to  
9 have regulations and clear direction on how he acts.  
10 And for him to be able to just simply say, "I can do it  
11 however I want, whenever I want. You, Judge, can't look  
12 at my prior decisions to see how I've handled these  
13 situations in the past," that is in -- that's improper.

14 There's no, there's no law books on the wall  
15 that give us history of how the State Engineer has  
16 handled abandonment in the state of Nevada. There's  
17 just one, maybe two cases in the Nevada Supreme Court.  
18 But we have scores of rulings from the State Engineer  
19 over the last 50 years of how the State Engineer's  
20 Office has dealt with it. Why doesn't the State  
21 Engineer want a court to be able to see that? Why don't  
22 they want a court to review that to see how the State  
23 Engineer has applied these same principles in other  
24 cases?

25 And so this notion that somehow stare decisis

1 doesn't apply to the State Engineer, I get that. That's  
2 not what we're talking about. We're talking about  
3 arbitrary and capricious. If you do it one way for an  
4 entire set of decades, and then you decide to change  
5 your mind, I'm entitled to put on that pattern of how  
6 they've done it. Then they have to explain why they've  
7 changed their decision and their path. And if they  
8 can't do that, if they can't establish a reasoned  
9 decision for that, then that's arbitrary and capricious.

10 And that's what we did. And that's why we put  
11 it in the prior rulings. And that's why, that's why we  
12 think the prior rulings are important to support the  
13 decision of this Court.

14 THE COURT: Is there any issue by the State  
15 with Mr. Taggart arguing Ninth Circuit cases, and that  
16 type of thing, any issue with that?

17 MS. CAVIGLIA: Well, the Alpine and Orr Ditch  
18 are slightly different. They are decree cases. They  
19 are handled -- they are surface water cases. They do  
20 require taxes and assessments. Groundwater does not.  
21 So they're slightly different.

22 For example, the surface water, under the  
23 Alpine decree, TCID requires payment of assessments.  
24 That's where that language comes from in abandonment, is  
25 because they are required to pay assessments. So if

1 they don't pay assessments, then it's different than a  
2 groundwater situation. Groundwater, there are no  
3 assessments to pay.

4 So they are slightly different factually than a  
5 traditional underground vested groundwater case. They  
6 are decree cases. They are river cases. They do focus  
7 on Nevada law, but more so for the surface water, less  
8 the groundwater.

9 THE COURT: So you're saying that, that  
10 Mr. Taggart applied surface water cases instead of  
11 groundwater cases in the hearing, or in the evidence?

12 MS. CAVIGLIA: It's a little different.  
13 There's not a lot of case law on this. So the only case  
14 law we have is the surface water cases with the  
15 abandonment. So that's where that language does come  
16 from, is the Ninth Circuit. And Alpine and Orr Ditch  
17 are both surface water decreed cases.

18 THE COURT: Mr. Taggart.

19 MR. TAGGART: Your Honor, those are the cases  
20 they cited to in the ruling. When they ruled that my  
21 client's water right was abandoned, they relied upon the  
22 Ninth Circuit holdings on abandonment and the statements  
23 in those cases about what the law of abandonment is.

24 So we have to be able to explain what the Ninth  
25 Circuit meant when it made those statements.

1           And the fact it's surface water versus  
2 groundwater, that doesn't make a difference. The point  
3 is that you look for facts surrounding the use of the  
4 water over time. And sometimes that's taxes, and  
5 sometimes it's assessments.

6           If there's no assessments because it's not an  
7 irrigation district, fine, that's not an issue. But  
8 taxes are. There was never a finding that this land or  
9 water rights had been -- you know, that someone had  
10 failed to pay taxes. If somebody had failed to pay  
11 taxes, it would show an intent to abandon. The lack of  
12 that type of evidence is part of that surrounding  
13 circumstance.

14           So, again, the Ninth -- what we put in the  
15 request for judicial notice was the State Engineer's  
16 brief to the Ninth Circuit, in the case that they cited  
17 to in the ruling, we put in the ruling on remand that  
18 the State Engineer entered after the Ninth Circuit made  
19 that decision. And then we put in the Ninth Circuit  
20 brief of the State Engineer to defend that ruling on  
21 remand.

22           So there was the State Engineer's brief to the  
23 Ninth Circuit before it made the decision, their ruling  
24 after the decision, and their argument in support of  
25 that ruling on remand. And they all point to what the

1 real meaning of that provision was that they're relying  
2 upon in this ruling.

3 And we ask that you take judicial notice of  
4 that. I thought you did. We were talking about it in  
5 the oral argument. And it was something that I referred  
6 to extensively. I can't even understand how anyone  
7 could argue that it can't be judicial notice. It's an  
8 official document of the Ninth Circuit or the State  
9 Engineer's Office. So.

10 So that's why that was in the proposed order,  
11 because we assume that that was part of the decision  
12 that the Court had made.

13 THE COURT: Throughout the years, just in  
14 regards to that last thing -- I have two things to say,  
15 but the latter is judicial notice, the latter of the two  
16 things I have to say. Did I ever say at any time, "I'll  
17 take judicial notice of that"?

18 MS. CAVIGLIA: Not --

19 THE COURT: I don't think I did.

20 MR. TAGGART: I don't believe so.

21 THE COURT: Okay. I will say it now. I will  
22 take judicial notice of it.

23 And it's interesting, because -- and I'm going  
24 to elucidate. It's interesting, because in 26 years of  
25 being a district court judge, maybe I did it half the

1 time, I'll take judicial notice of that, or it's so  
2 obvious that I took judicial notice of it. So I'm not  
3 bothered with that at all. That's why I said, after the  
4 fact, I'll take judicial notice of the Ninth Circuit  
5 cases.

6           What the other observation -- and, sincerely,  
7 it is an observation. And maybe, Ms. Caviglia, and  
8 maybe, Mr. Taggart, too, maybe you don't know what I'm  
9 talking about. But I hope you know. It's so hard to  
10 prove a negative, Ms. Caviglia.

11           In other words, I can, I can see your fertile  
12 mind, sincerely. Your mind is bringing up these issues  
13 about maybe you're -- I don't think you are. Maybe the  
14 Engineer's offended by the words "arbitrary and  
15 capricious." But to try to explain the difference  
16 between what you're trying to explain to me is almost  
17 trying to prove a negative.

18           MS. CAVIGLIA: Correct, Your Honor. I think --

19           THE COURT: And that's all, I mean it in all --

20           MS. CAVIGLIA: Yeah, and to -- back to the  
21 judicial notice, the part that really upsets, bothered  
22 the State Engineer, it wasn't the cases, it wasn't the  
23 orders, it was the fact that petitioner's using briefs  
24 submitted by attorneys on behalf of the State Engineer.  
25 Those were the pieces of evidence that, had any other

1 case, I'm not sure a brief of the party would ever come  
2 in. The fact that that's what they're using, it's  
3 concerning.

4 THE COURT: Okay.

5 MS. CAVIGLIA: Can the State Engineer ever make  
6 a clear argument with the ability for petitioner to  
7 bring in any brief, in any case, on any factual  
8 scenario, to use it against the State Engineer?

9 THE COURT: I think --

10 MS. CAVIGLIA: And those were the two, those  
11 were the main issues with the judicial notice.

12 THE COURT: And I think that you've mentioned  
13 this. I don't know if it was to me personally or in  
14 writing somewhere or ex-parte; I don't know. But  
15 didn't, have you not represented the State Engineer on  
16 numerous cases, Mr. Taggart?

17 MR. TAGGART: Yes, I have.

18 THE COURT: And aren't some of those cases you  
19 cited your own?

20 MR. TAGGART: They are.

21 THE COURT: I think, that's the answer. And I  
22 understand.

23 Do you remember, both of you, do you remember  
24 when I first, when we first had a pretrial conference?  
25 And I walked into Mr. Taggart's office. You were there,

1 Justina. You were there, Ms. Caviglia. And I said,  
2 "Hey, I'm new to this case. I've had a couple in my  
3 years. But does this have anything to do with Nevada  
4 being an arid state?" in the middle of a -- in the  
5 middle of a trial? Do you remember that? That was  
6 stated in December of last year.

7 And so, in other words, you know, my thinking  
8 as being a very -- I'm going to smile when I say this --  
9 very astute human being of human nature, that's why I  
10 picked up that, is the State Engineer offended by  
11 "arbitrary and capricious"? No, they're just words of  
12 art that are used by -- in the profession in this type  
13 of -- in this type of setting.

14 And so, when you both answered, "No, not to my  
15 knowledge," it -- you know, a new Attorney General,  
16 trying to save water, you know. Do you see what I mean?  
17 As I'm driving down from Reno to that meeting, I'm  
18 thinking, these issues that I -- and as my personality,  
19 I'll bring it all up, so we can get the right decision,  
20 correct decision, right decision. Okay. Good. We got  
21 that one.

22 Anything else on that one I'll call issue to?

23 MS. CAVIGLIA: No, Your Honor.

24 THE COURT: Okay.

25 MS. CAVIGLIA: The other issue was, there's a

1 section on page nine called "The State Engineer  
2 unlawfully impaired St. Clair's water rights by applying  
3 a rule that is stricter than water statutes." In that  
4 section, he talked about how the State Engineer  
5 requires, is required to provide notice on a forfeiture  
6 matter, but he didn't do that here, that how the law is  
7 more restrictive than forfeiture.

8           Although I do believe it is in Mr. Taggart's  
9 argument, I don't believe the Court ruled on that. And  
10 that is why we objected to that section.

11           THE COURT: Okay. Mr. Taggart.

12           MR. TAGGART: Your Honor, our point was that  
13 abandonment and the law of abandonment cannot be as the  
14 State Engineer said, because it would, it would make it  
15 more restrictive, or it would make it easier to abandon  
16 a water right than to forfeit a water right. That was  
17 an argument we made in our brief. We made it in oral  
18 argument. It's just one more reason why it doesn't make  
19 any sense for the State Engineer's conclusion to be  
20 accurate. And so that's why we had it in our argument  
21 and our written brief, we had it in our oral argument,  
22 and we included it in there.

23           I mean what I haven't said is that, you know,  
24 I -- I've practiced for 20 years. And when I'm asked to  
25 prepare an order, I understand that my job is to write

1 an order that will be defensible on appeal.

2 And so we had what we argued in the case in  
3 that order. When the Judge says, "I'm ruling for you,  
4 Mr. Taggart, you're to draft the order," I get the right  
5 to draft the order as if I was the law clerk for the  
6 Judge writing the most defensible order.

7 The Court has the ability to read the order  
8 that I prepare and take anything out that it doesn't  
9 like. But that's been my approach for 20 years. I  
10 think, that's the right, the right way to go about  
11 proposing orders. And that's what we did here.

12 And so that section that we provided there was  
13 in our brief, it was in our argument, and it  
14 demonstrates why the State Engineer's position was  
15 wrong.

16 THE COURT: Do you have any response after  
17 Mr. Taggart, his response, Ms. Caviglia?

18 MS. CAVIGLIA: My biggest response is, for the  
19 last 10 years, prior to coming here, I worked for  
20 Douglas County, and I also prepared numerous orders for  
21 the court. And I would never go against what the court  
22 ruled in the order. I would never include my own  
23 briefs, my own arguments. I would go based off of what  
24 the court ordered at the time of the hearing.

25 So we just have two different styles of how we

1 prepare orders. And I just, I'm not comfortable with  
2 going outside of what this Court actually would have  
3 ruled.

4 THE COURT: Sure. And I respect that. And  
5 your objections do not even attempt to change my mind or  
6 anything on what I thought was the primary issue. And I  
7 respect that.

8 Let me ask this, because this is right off the  
9 top of my head. I just, I remember looking at statutes.  
10 And this one particular statute, abandonment versus  
11 forfeiture, I think, there was one statute ahead of the  
12 other in numerical order. Am I correct in that? I  
13 remember looking at it, but I'm not sure if it was  
14 there.

15 And in a sense, I agreed that abandonment is --  
16 yeah, it's -- well, I don't, I don't want to say the  
17 wrong thing. It is stricter than a forfeiture. Or am I  
18 wrong? I don't want to. My wife says, "Don't think out  
19 loud," and I do all the time. But you --

20 MR. TAGGART: Well, Your Honor, I don't recall  
21 exactly how this happened, but there was, there was a  
22 dialogue during the hearing about the point I made,  
23 which was, if the State Engineer had wanted to forfeit  
24 our water right, he would have had to send out a  
25 four-year letter.