

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-

TRANSCRIBER'S CERTIFICATE

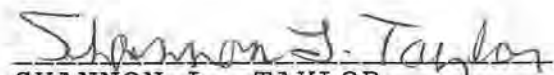
I, SHANNON L. TAYLOR, a Nevada Certified Court Reporter, Nevada CCR #322, do hereby certify:

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**

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

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

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

² SE ROA 0006.

³ SE ROA 004-006.

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

1 with groundwater using drilled wells;

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

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

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

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

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

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

24 ⁵ SE ROA 0037.

25 ⁶ SE ROA 0045.

26 ⁷ SE ROA 0102.

⁸ SE ROA 0038-0066.

⁹ SE ROA 008 – 009.

¹⁰ Petitioner's Reply Brief, Exhibit 1.

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

¹² SE ROA 007- 009.

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

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

5 DISCUSSION

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

13 I. STANDARD OF REVIEW

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

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

25 ¹⁴ SE ROA 005.

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

27 ¹⁶ *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 ¹⁷ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

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

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

of review is de novo.²⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 ²⁴ Petitioner's Appendix at 000030-000037.

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

28 ²⁶ *Alpine*, 291 F.3d at 1072.

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

30 ²⁸ Petitioner's Appendix 000051-000054.

²⁹ *Orr Ditch*, 256 F.3d at 946.

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

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

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

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

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

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

27 ³³ *Id.*

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

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

³⁶ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ⁴⁵ Petitioner's Appendix 000021-000025.

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

⁴⁷ *Id.*

⁴⁸ *Orr Ditch*, 256 F.3d at 945-946.

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

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

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

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

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

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

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

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

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

⁵⁴ *Alpine*, 291 F.3d at 1073-74.

⁵⁵ *Id.*

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

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

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

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

19 **CONCLUSIONS OF LAW**

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

- 23 1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has a
24 vested water right under V-010493;
- 25 2. Ruling 6287 is OVERRULED in part to the extent it declares V-010493 abandoned; and
- 26

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

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

⁵⁸ *Id.*

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

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

IT IS SO ORDERED.

April 11, 2016

Senior District Court Judge

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

2 Sixth Judicial District Court of Nevada, Case No. CV 20,112

3
4 **DECLARATION OF SERVICE**

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

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

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

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

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

20
21 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
22 is true and correct.

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

24 
25 DEPUTY CLERK

Case No. CV 20112

Dept. No. 2

FILED

2016 APR 29 AM 10:38

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

* * *

RODNEY ST. CLAIR.

Petitioner,

vs.

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

Respondent.

NOTICE OF ENTRY OF ORDER

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

///

///

///

///

///


///

AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 27th day of April 2016.

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

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

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

CERTIFICATE OF SERVICE

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

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

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

DATED this 27th day of April 2016.



Employee of TAGGART & TAGGART, LTD.

Case Title: *St. Clair v. King*

Case No.: CV 20112

INDEX OF EXHIBITS

Exhibit No.

Description

1

Order Overruling State Engineer's Ruling 6287

EXHIBIT 1

EXHIBIT 1

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

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

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

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

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

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

5 FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

28 ² SE ROA 0006.

³ SE ROA 004-006.

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

1 with groundwater using drilled wells;

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

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

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

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

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

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

24 ⁵ SE ROA 0037.

25 ⁶ SE ROA 0045.

26 ⁷ SE ROA 0102.

⁸ SE ROA 0038-0066.

⁹ SE ROA 008 - 009.

¹⁰ Petitioner's Reply Brief, Exhibit 1.

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

¹² SE ROA 007-009.

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

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

5 DISCUSSION

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

13 I. STANDARD OF REVIEW

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

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

25 ¹⁴ SE ROA 005.

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

27 ¹⁶ *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").

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

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

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

of review is de novo.²⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 ²⁴ Petitioner's Appendix at 000030-000037.

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

28 ²⁶ *Alpine*, 291 F.3d at 1072.

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

30 ²⁸ Petitioner's Appendix 000051-000054.

²⁹ *Orr Ditch*, 256 F.3d at 946.

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

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

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

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

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

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

26 ³³ *Id.*

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

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

³⁶ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ⁴⁵ Petitioner's Appendix 000021-000025.

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

⁴⁷ *Id.*

⁴⁸ *Orr Ditch*, 256 F.3d at 945-946.

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

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

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

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

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

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

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

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

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

⁵⁴ *Alpine*, 291 F.3d at 1073-74.

⁵⁵ *Id.*

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

⁵⁷ See *Request for Judicial Notice* at 3.

⁵⁸ *Id.*

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

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

IT IS SO ORDERED.

April 11, 2016


Senior District Court Judge

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

4 **DECLARATION OF SERVICE**

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

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

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

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

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

20
21 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
22 is true and correct.

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

24 
25 DEPUTY CLERK
26
27
28

 **COPY**

FILED

2016 MAY 23 PM 1:18

TAMI RAE 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.

NOTICE OF APPEAL

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

///

///

///

///

///

///

AFFIRMATION (Pursuant to NRS 239B.030)

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

DATED this 20th day of May, 2016.

ADAM PAUL LAXALT
Attorney General

By:

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

CERTIFICATE OF SERVICE

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

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

Dorene A. Wright
Dorene A. Wright

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

INDEX OF EXHIBITS

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

EXHIBIT 1

EXHIBIT 1

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)
9)
10)
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

vs.

NOTICE OF ENTRY OF ORDER

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

Respondent.

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

///

///

///

///

///


///

AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 27th day of April 2016.

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

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

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

CERTIFICATE OF SERVICE

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

[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 27th day of April 2016.



Employee of TAGGART & TAGGART, LTD.

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

INDEX OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>
1	Order Overruling State Engineer's Ruling 6287

EXHIBIT 1

EXHIBIT 1

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

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

* * *

RODNEY ST. CLAIR,

Petitioner,

vs

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

Respondent.

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

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

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

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

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

² SE ROA 0006.

³ SE ROA 004-006.

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

1 with groundwater using drilled wells;

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

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

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

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

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

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

24 ⁵ SE ROA 0037.

⁶ SE ROA 0045.

25 ⁷ SE ROA 0102.

⁸ SE ROA 0038-0066

26 ⁹ SE ROA 008 - 009

¹⁰ Petitioner's Reply Brief, Exhibit I

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

¹² SE ROA 007- 009.

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

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

5 DISCUSSION

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

13 I. STANDARD OF REVIEW

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

23 *State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264
24 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).
25 ¹⁴ SE ROA 005.

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

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

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

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

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

of review is de novo.²⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 ²² *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek*,
25 77 Nev. at 354, 364 P.2d at 1075; and *Revert*, 95 Nev. at 786, 603 P.2d at 266.

26 ²³ See Petitioner's Appendix at 00001-0000133.

27 ²⁴ Petitioner's Appendix at 000030-000037.

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

29 ²⁶ *Alpine* 291 F.3d at 1072

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

31 ²⁸ Petitioner's Appendix 000051-000054.

32 ²⁹ *Orr Ditch*, 256 F.3d at 946

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

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

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

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

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

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

26 ³³ *Id.*

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

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

³⁶ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ⁴⁵ Petitioner's Appendix 000021-000025.

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

⁴⁷ *Id.*

⁴⁸ *Orr Ditch*, 256 F.3d at 945-946.

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

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

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

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

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

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

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

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

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

⁵⁴ *Alpine*, 291 F.3d at 1073-74.

⁵⁵ *Id.*

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

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

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

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

19 **CONCLUSIONS OF LAW**

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

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

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

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

28 ⁵⁷ See Request for Judicial Notice at 3.

⁵⁸ *Id.*

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

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89701
(775) 883-9900 - Telephone
(775) 883-9900 - Facsimile

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

IT IS SO ORDERED.

April 11, 2016

Senior District Court Judge

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

4 **DECLARATION OF SERVICE**
5

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

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

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

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

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

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

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

24 
25 DEPUTY CLERK
26
27
28

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)**

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
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

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
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

///

///

///

///

///

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
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

3
4
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 16th day of November, 2015.

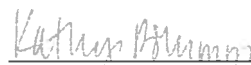
11
12 
13 DISTRICT JUDGE

AFFIDAVIT OF MAILING

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

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

Justina A. Caviglia
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701



KATHY BRUMM
JUDICIAL ASSISTANT

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



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

--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

2015 NOV 19 AM 10:55
JAM RAE SPERO
DIST. COURT CLERK

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: Cherry, Justice

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

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

DECLARATION OF SERVICE

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

Memorandum of Temporary Assignment

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

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

Paul G. Taggart, Esq.
Taggart & Taggart, Ltd
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

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

Executed on November 19, 2015 at Winnemucca, Nevada.



Humboldt County Clerk

1 Case No. CV 20112

2 Dept. No. 2



COPY

FILED

2015 NOV 19 AM 11:34

DIANA RAE SPERO
DIST. COURT CLERK

3
4
5
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
CONSERVATION AND NATURAL
RESOURCES,

15 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

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:

24 JUSTINA A. CAVIGLIA
25 Deputy Attorney General
26 Nevada Bar No. 9999
27 100 North Carson Street
28 Carson City, Nevada 89701-4717
Tel: (775) 684-1222
Fax: (775) 684-1108
Email: jcaviglia@ag.nv.gov
Counsel for Respondent,
Nevada State Engineer

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this this 17th 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:

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


Dorene A. Wright

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

Case No.: CV 20, 112

Dept. No. 2

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 - Telephone
(775)883-9900 - Facsimile
Attorneys for Petitioner

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**

FILED COPY

2015 DEC -1 PM 2:28

W. THE SHERO
DIST. COURT CLERK

TABLE CONTENTS

I.	INTRODUCTION	1
II.	STANDARD OF REVIEW	1
III.	ARGUMENT	2
A.	The State Engineer's Opposition is Untimely and the Arguments Contained Within It Should Be Rejected.	2
B.	This Court Should Take Judicial Notice of the Documents Offered by Petitioner.....	3
	1. All Court Documents and State Engineer Rulings are Subject to Judicial Notice.....	4
	2. State Engineer's July 24, 2002, Answering Brief in <i>Alpine V.</i>	4
	3. Ruling on Remand 5464-K.....	5
	4. State Engineer's November 22, 2006, Answering Brief.....	5
C.	Petitioner's Request for Judicial Notice Does Not Offer New Evidence Because the Request Relates Only to Determining Judicial Precedent.	5
D.	The Document in the Request are Relevant to Determine that the State Engineer Was Arbitrary and Capricious.....	6
E.	Prior Precedent Does Not Support The State Engineer's Opposition.	7
	1. <i>Kent v. Smith</i> , 62 Nev. 30, 140 P.2d 357 (1943).	7
	2. <i>State Engineer v. Curtis Park Manor Water Users Ass'n</i> , 101 Nev. 30, 692 P.2d 495 (1985)	8
	3. <i>Revert v. Ray</i> , 95 Nev. 782, 603 P.2d 262 (1979).	9
	4. <i>Desert Irrigation, Ltd. v. State of Nevada, State Engineer</i> , 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1971).	9
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<i>Autotel v. Bureau of Land Magmt.</i> , 2015 WL 1471518 (D. Nev. Mar. 31, 2015).....	2, 10
<i>Bundorf v. Jewell</i> , 2:13-CV-00616-MMD-PA, 2015 WL 430600 (D. Nev. Feb. 3, 2015).....	2
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council</i> , 467 U.S. 837 (1984).....	10
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800, 96 S.Ct. 1236 (1976).....	8
<i>Desert Irrigation, Ltd. v. State of Nevada, State Engineer</i> , 113 Nev. 1049, 944 P.2d 835 (1971).....	1, 10
<i>Dudum v. Arntz</i> , 640 F.3d 1098 (9th Cir. 2011).....	4
<i>Edwards v. Emperor's Garden Rest.</i> , 122 Nev. 317, 130 P.3d 1280 (2006).....	11
<i>Fence Creek Cattle Co. v. U.S. Forest Serv.</i> , 602 F.3d 1125 (9th Cir. 2010).....	2, 10
<i>Jones v. United States</i> , 11 S.Ct. 80 (1890).....	1
<i>Kent v. Smith</i> , 62 Nev. 30, 140 P.2d 357 (1943).....	1, 7
<i>Lands Council v. Powell</i> , 395 F.3d 1019 (9th Cir. 2004).....	2
<i>Revert v. Ray</i> , 95 Nev. 782, 603 P.2d 262 (1979).....	1, 9
<i>San Luis & Delta-Mendota Water Auth. V. Locke</i> , 776 F.3d 971 (9th Cir. 2014).....	10
<i>State Engineer v. Curtis Park Manor Water Users Ass'n</i> , 101 Nev. 30, 692 P.2d 495 (1985).....	1, 8
<i>State Engineer v. South Fork Band of Te-Moak Tribe</i> , 66 F. Supp. 2d 1163 (D. Nev. 1999).....	8
<i>Sw. Ctr. For Biological Diversity</i> , 100 F.3d 1443 (9th Cir. 2001).....	2
<i>United States v. Alpine Land and Reservoir Co.</i> , 174 F.3d 1007 (9th Cir. 1999).....	7, 8
<i>Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n</i> , 473 F.3d 1239 (D.C. Cir. 2007).....	2

STATUTES

NRCF 1	1, 11
NRCF 11	11
NRS 47.130	1, 4, 10

Taggart & Taggart, Ltd.
108 North Main Street
Carmel, N.Y. 12016
(716) 462-9900 - Telephone
(716) 462-9900 - Facsimile

1	NRS 47.150	1, 5, 10
2	NRS 533.150	9
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

**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.¹ Long standing case law further recognizes that judicial notice may be taken of any public documents or the executive acts of an agency.²

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

¹ NRS 47.130(2)(a)&(b).

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

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.³ 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."⁴ 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.⁵

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 ³ *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); see also *Autotel v. Bureau of Land Mgmt.*,
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).

⁴ *Autotel v. Bureau of Land Mgmt.*, 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).

⁵ *Autotel v. Bureau of Land Mgmt.*, 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).

1 Court on June 3, 2015. An opposition was due no later than June 19, 2015.⁶ 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").⁷ 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 The failure of counsel to properly calendar and timely respond to motions is neither a
20 basis for reconsideration nor a basis to set aside an order. Therefore, the Motion by
21 the State Engineer is denied.⁸

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

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

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

28 ⁶ DCR 13(3); NRCP 6(e).

⁷ See September 9 Order attached hereto as Exhibit 1.

⁸ See Exhibit 1 attached hereto.

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.⁹ Also, all these documents are "capable of accurate and ready determination by resort to sources
14 whose accuracy cannot reasonably be questioned."¹⁰

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.¹¹ 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.¹²
23
24
25

26
27 ⁹ NRCP 11(a).

28 ¹⁰ *Dudum v. Arntz*, 640 F.3d 1098, 1101, n.6 (9th Cir. 2011).

¹¹ NRS 51.155.

¹² NRS 47.130(b).

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

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

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

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

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

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

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

22 The documents that are offered relate to the legal standard that should be applied in this case.
23 The State Engineer is not afforded deference to reinterpret Nevada water law after it has been articulated
24 by the judiciary. Yet, Ruling 6287 represents a sharp departure from judicial precedent and the State
25 Engineer's prior practice. This Court may take judicial notice of the documents offered by Petitioners
26 that best articulate the proper rule of law that should be applied in this case. Precedent is based on
27 judicial decisions and the Court should be afforded the best opportunity to determine judicial precedent
28 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**
15 **Was Arbitrary and Capricious.**

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*.¹³

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 ¹³ NRS 47.130; NRS 47.150; NRS 51.155; *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir.
28 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).

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).¹⁴ 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

25
26
27
28 ¹⁴ *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).

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

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*.¹⁶ 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.¹⁷ In *Kent*, the Nevada Supreme Court concluded the non-decree court did
7 not have jurisdiction over the proceedings.¹⁸ 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.¹⁹ 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.²⁰ 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.

21
22
23
24
25 ¹⁵ See generally *Kent v. Smith*, 62 Nev. 30, 140 P.2d 357 (1943).

26 ¹⁶ *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 ¹⁷ *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 ¹⁸ *Id.*, 62 Nev. at 40, 140 P.2d at 361.

¹⁹ See Opposition at 2:18-20.

²⁰ *Curtis Park*, 101 Nev. at 32, 692 P.2d at 497.

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.²¹ 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. . . ."²² The State Engineer held a hearing on all objections to the Preliminary Order of Determination.²³ 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."²⁴ The Court held that the "State Engineer manifestly abused his discretion."²⁵ 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.²⁶ 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.²⁷ 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.²⁸ The Nevada Supreme Court agreed with the State

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

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

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

²⁴ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

²⁵ *Id.*

²⁶ See *Opposition* at 3:24-25.

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

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

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

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

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


IV. CONCLUSION

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

DATED this 30th day of November, 2015.

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

²⁹ *Id.* 113 Nev. at 1060-61, 944 P.2d at 843.

³⁰ *Id.*

³¹ *Id.* 113 Nev. at 1061, 944 P.2d at 843.

Taggart & Taggart, Ltd.
108 North Meadows Street
Carson City, Nevada 89703
(702) 887-9900 - Telephone
(702) 887-9900 - Facsimile

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER'S REPLY BRIEF, 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, 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 30th 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.

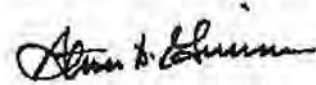
Description

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

1 **ORDR**

2
3
4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**
6

7 **THE MOAPA BAND OF PAIUTE INDIANS,**

8 **Petitioner(s),**

9 **vs.**

10 **STATE ENGINEER, STATE OF NEVADA,**
11 **DEPARTMENT OF CONSERVATION AND**
12 **NATURAL RESOURCES, DIVISION OF**
13 **WATER RESOURCES,**

14 **Respondent(s).**

15 **In re Nevada State Engineer Ruling #6258**

Case No.: A-14-697004-J

Dept. No.: 7

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

19 The State Engineer, through their counsel the Attorney General's Office, filed a
20 motion to set aside the court's order of July 29, 2015. The Court notes the motion sets
21 forth absolutely no authority in support of the request by the State Engineer in violation of
22 EDCR 2.20. The fact that counsel failed to timely oppose the motion does not support
23 reconsideration of the order, and the Court is not inclined to set aside its order granting the
24 Tribe's Motion to Include Documents in the Record. The Motion was filed on July 1, 2015.
25 The Opposition was due on July 20, 2015. No opposition was filed. No motion for
26 extension of time to file an opposition was filed. No stipulation to extend the time to oppose
27 was filed. Any stipulation by the parties to extend time to file an opposition should have
28 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

SEP 03 2015


1 order more than a week after the opposition was due, denying the motion under EDCR
2 2.23.

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

7 The briefing schedule in the July 29, 2015 order will stand: Petitioner's Opening
8 Brief must be filed no later than Tuesday, September 15, 2015. Respondent's Answering
9 Brief must be filed no later than Thursday, October 15, 2015. Any Reply Brief must be filed
10 by Monday, November 2, 2015. Counsel is reminded that the schedule will only be
11 changed in case of extreme emergency. The Court will also not accept a stipulation to
12 modify the briefing schedule. Oral arguments will be heard on November 12, 2015 at
13 9:00 a.m.

14 The September 8, 2015 hearing is vacated.
15
16

17 DATED this 3rd day of September, 2015,
18
19

20 
21 _____
22 LINDA MARIE BELL
23 DISTRICT COURT JUDGE
24
25
26
27
28

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII


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

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.

Case No. CV20-112
Dept. No. 2

ORIGINAL

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

-o0o-

RODNEY ST. CLAIR,)
an individual,)
Petitioner,)
vs.)
JASON KING., P.E., Nevada)
State Engineer, Division of)
Water Resources & Department)
of Conservation and Natural)
Resources,)
Respondents.)

JAVS TRANSCRIPT OF PROCEEDINGS
ORAL ARGUMENT
JANUARY 5, 2016
CARSON CITY, NEVADA

For the Petitioner: Paul Taggart, Esq.

For the Respondents: Justina Caviglia,
Deputy Attorney General

Transcribed by: Capitol Reporters
Nicole Alexander

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

2 -ooo-

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.)

5 -o0o-
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1 STATE OF NEVADA)

2)

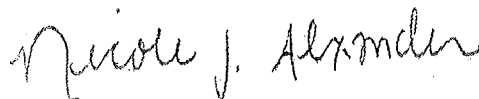
3 CARSON TOWNSHIP)

4
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.

17 

18 Nicole Alexander, Transcriptionist



COPY

FILED

Case No. CV 20112

Dept. No. 2

2016 MAR 21 PM 1:41

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
the owner with the intention to forsake and desert it. Those two
have to coincide. I do not see any abandonment here.

10 Again, totally understanding the State's point of view, I believe the
11 law, is, and I do not mind saying this, the law is that you are not
12 abandoning when you have the intent to revise the claim, when you
13 have the intent to apply for the application, that shows that your
14 intent is not to abandon. So shifting the burden was not, in my
15 opinion, proper. Basically if there is only evidence of non-use, that
16 is not good enough.

17 It has to be shown by clear and convincing evidence, that petition
18 abandoned with intent. No, there is no clear and convincing
19 evidence of that here. That is why I say it was improper to shift the
20 burden.

21 The facts show that the owner filed a change application, filed a
22 conveyance of documents, and reports of conveyance, has the
23 present day intent to use the well...that doesn't show any
24 abandonment according to Nevada law, he has the intent to use
25 that water.

26 I feel very strongly that I am backed by the law. I feel very strongly
27 that this is not a difficult decision for a court to make based on what
28 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 this
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.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

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.

8 ADAM PAUL LAXALT
9 Attorney General

10 By:

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

21 **CERTIFICATE OF SERVICE**

22 I certify that I am an employee of the State of Nevada, Office of the Attorney Genera
23 and that on this 18th day of March, 2015, I served a true and correct copy of the foregoir
24 RESPONDENT'S OBJECTION TO PLAINTIFF'S PROPOSED ORDER, by placing sa
25 document in the U.S. Mail, postage prepaid, addressed to:

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

29 Dorene A. Wright
30 Dorene A. Wright

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

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	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

CONFIDENTIAL AND PRIVILEGED ATTORNEY/CLIENT COMMUNICATION AND WORK PRODUCT: This communication, including attachments, is for the exclusive use of addressee and may contain proprietary, confidential and/or privileged information. If you are not the intended recipient, any use, copying, disclosure, dissemination or distribution is strictly prohibited. If you are not the intended 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.



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

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

JAC:dw
Enclosure

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

Case No.: CV 20, 112

Dept. No. 2

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile
Attorneys for Petitioner

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.

**[PROPOSED] ORDER OVERRULING
STATE ENGINEER'S RULING 6287**

A Proposed Order is attached hereto as Exhibit 1.

///

///

///

///

Affirmation Pursuant to NRS 239B.030

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

TAGGART & TAGGART, LTD.

PAUL G. TAGGART
Nevada State Bar 6136
RACHEL L. WISE
Nevada State Bar 12303
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile
Attorneys for Plaintiffs

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

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

CERTIFICATE OF SERVICE

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

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.

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

FACTS AND PROCEDURAL HISTORY

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

In Ruling 6287, the State Engineer found that St. Clair ~~had presented evidence sufficient to demonstrate a pre-statutory rights to the underground percolating water which were vested prior to March 25, 1939.~~^{2,3} The State Engineer stated that "[t]ogether, these facts evidence that underground waters [V-010493] were appropriated by the drilled well and used beneficially . . . prior to March 25, 1939."⁴ The following facts support the State Engineer's decision:

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

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

(3) Aerial photographs exist for the property for the years 1968, 1975, 1986, 1999, 2006, and 2013;⁵

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

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

² SE ROA 0006.

³ 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.

⁴ SE ROA 004-006.

⁵ 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;⁶

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

9 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933⁸ 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.⁹

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.¹⁰ ~~Notably, this declaration of abandonment was the first time in Nevada's~~
17 ~~history that the State Engineer declared a vested groundwater right abandoned.¹¹~~—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."¹² 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.¹³

23
24 ⁶ SE ROA 0037.

25 ⁷ SE ROA 0045.

26 ⁸ SE ROA 0102.

27 ⁹ SE ROA 0038-0066.

28 ¹⁰ SE ROA 008 – 009.

¹¹ Petitioner's Reply Brief, Exhibit 1.

¹² *Id.* (emphasis in the original) (citing *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)).

¹³ 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.¹⁴ 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 arbitrai
12 capricious, contrary to law and not supported by substantial evidence.¹⁵ 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.¹⁶ 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.¹⁷ A decision is arbitrary and capricious if it

24 ¹⁴ *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
26 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

¹⁵ SE ROA 005.

¹⁶ NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

27 ¹⁷ *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...”¹⁸ 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.¹⁹ Substantial evidence is “that which a ‘reasonable mind might accept as adequate
4 support a conclusion.”²⁰ With regard to purely legal questions, such as statutory construction,
5 standard of review is de novo.²¹

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. (C
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 ¹⁸ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

27 ¹⁹ *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 ²⁰ *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)).

²¹ *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."²² Intent is the necessary element the State Engineer is required
15 prove in abandonment cases.²³ ~~This is the standard the State Engineer has previously relied upon.~~²⁴
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.~~²⁵

19 Abandonment requires a union of facts and intent to determine whether the owner of the water
20 right intended abandonment.²⁶ ~~As intent to abandon is a subjective element, the courts utilize~~
21 ~~surrounding circumstances to determine the intent.~~²⁷ 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

23 ²² *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.

24 ²³ *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*
25 *77 Nev. at 354, 364 P.2d at 1075; and Revert*, 95 Nev. at 786, 603 P.2d at 266.

26 ²⁴ ~~See Petitioner's Appendix at 00001-0000135.~~

27 ²⁵ ~~Petitioner's Appendix at 000030-000037.~~

28 ²⁶ *Revert*, 95 Nev. at 786, 603 P.2d at 264.

²⁷ *Alpine*, 291 F.3d at 1072.

burden because nonuse does not necessarily mean an intent to forsake.²⁸ Thus, if a vested water right holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occur. For this reason, the State Engineer has previously ruled that “bare ground by itself does not constitute abandonment.”²⁹ Also, the Ninth Circuit has upheld the position that bare ground must be coupled with use inconsistent with irrigation to show intent to abandon.³⁰ The standard of proof for demonstration of abandonment is clear and convincing evidence, and the burden of proof is on the party advocating abandonment, which in this case is the State Engineer.³¹

The Ninth Circuit has consistently upheld and endorsed Nevada’s rule of law for abandonment from the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated “from the surrounding circumstances,” and not only non-use evidence.³² The surrounding circumstances testimony, although not exhaustive, has definitively produced one a bright-line rule regarding abandonment of water rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonment. This Court reiterates the canon that a water right may not be abandoned absent the showing of “subjective intent on the part of the holder of a water right to give up that right.”³³

This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and that such, indirect and circumstantial evidence may be used to show intent of abandonment.³⁴ The most consistent element in Nevada water law that applies to abandonment cases is the determination that non-use of the water is not enough to constitute abandonment.³⁵ The Ninth Circuit Appeals Court, while analyzing Nevada case law, has continually recognized that Nevada’s abandonment rules indicate that non-use alone is not enough to constitute abandonment.³⁶ Nevada requires non-use evidence to

²⁸ Petitioner’s Appendix 0000131-0000135; See also Petitioner’s Appendix 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

²⁹ Petitioner’s Appendix 000051-000054.

³⁰ *Orr Ditch*, 256 F.3d at 946.

³¹ *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

³² *Alpine* 291 F.3d at 1072.

³³ *Orr Ditch*, 256 F.3d at 944-45.

³⁴ *Id.*

³⁵ *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.

³⁶ *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.³⁷ This well-develop
2 rule was originally taken from Nevada's mining law.³⁸ The Ninth Circuit, while applying Nevada st
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.³⁹

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.⁴⁰ ~~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.⁴¹ 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..."⁴² 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 ³⁷ *Id.*

26 ³⁸ *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

27 ³⁹ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

28 ⁴⁰ *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.

⁴¹ Petitioner's Appendix at 000084-000090, 000128-0000130; *See also* Petitioner's Appendix .

⁴² Petitioner's Appendix at 0000115-0000121; *See also* Petitioner's Appendix at 000015-000020.

Engineer's office) was necessary to show abandonment.⁴³ None of these facts are present in this case.

The State Engineer's determination of abandonment regarding Proof of Appropriation V-0104 was based only on evidence of non-use. The State Engineer references only evidence that shows non-use such as the decayed condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and the failure of St. Clair to submit evidence of continuous use. Further, there was no field investigation conducted by the State Engineer to show when the water right was last used, or when the pump was removed from the well. In total, the only evidence before the Court was that of non-use. The State Engineer's reliance solely on non-use evidence was improper. Therefore, the State Engineer's conclusion that St. Clair's water right was abandoned is not supported by substantial evidence, and was therefore arbitrary, capricious, and is overruled.

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

Vested water rights are "regarded and protected as property."⁴⁴ The term vested water rights often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment of Nevada's statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed to have been perfected before the current statutory water law, the State Engineer does not have powers to alter vested water rights.⁴⁵ Thus, the State Engineer cannot apply a rule to a vested water right unless that rule existed at common law. The State Engineer has recognized this limitation in the past, holding that applying a rebuttable presumption standard would further undercut the stability and security of pre-existing vested water rights.⁴⁶

Here, the State Engineer applied a more restrictive law of abandonment than existed prior to the adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be shown to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to

⁴³ See Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.

⁴⁴ *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

⁴⁵ *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

⁴⁶ 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.⁴⁷ A water right owner
3 can then cure the forfeiture.⁴⁸ 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.⁴⁹ 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."⁵⁰ Nevada maintains the rule that there
15 is 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.⁵¹

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,"⁵² 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

22
23 ⁴⁷ *Town of Eureka*, 108 Nev. At 168.

24 ⁴⁸ *Id.*

25 ⁴⁹ *Orr Ditch*, 256 F.3d at 945-946.

26 ⁵⁰ *Alpine*, 291 F.3d at 1072, see also *Orr Ditch*, 256 F.3d at 945.

27 ⁵¹ *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).

⁵² SE ROA at 0007; (citing *Franktown Creek*, 77 Nev. at 354).

⁵³ 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."⁵⁴ 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 circumstances
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 1983.⁵⁵ 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."⁵⁶ 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.⁵⁷ 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*

25
26 ⁵⁴ At 5; v. *Alpine*, 291 F.3d at 1077.

27 ⁵⁵ *Alpine*, 291 F.3d at 1073-74.

28 ⁵⁶ *Id.*

⁵⁷ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

~~Decree proceeding that was relied upon by the Court and which recognized the principles of abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents a specialized circumstance.⁵⁸ The State Engineer later demonstrated a keen understanding of the application of the *Alpine Decree* to intrafarm transfers.⁵⁹ Yet, in the current instance, the State Engineer completely changed course without evidence or facts in the record to explain his action.~~

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

CONCLUSIONS OF LAW

This Court, having reviewed the record on appeal,⁶⁰ and having considered the arguments of the parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this matter, hereby ORDERS as follows:

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

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

3. This case is remanded to the State Engineer to process ~~The State Engineer is directed to grant~~ Application No. 83246T.

IT IS SO ORDERED.

Senior District Court Judge

⁵⁸ See Request for Judicial Notice at 3.

⁵⁹ *Id.*

⁶⁰ 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@legalnt.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

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: Paul Taggart
Sent: Wednesday, December 02, 2015 5:06 PM
To: 'Justina A. Caviglia (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
TAGGART & TAGGART, LTD.
108 N. Minnesota St.
Carson City, NV 89703

(775) 882-9900 - Telephone
(775) 883-9900 - Facsimile

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.

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

Case No.: CV 20, 112

Dept. No. 2

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile
Attorneys for Petitioner

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.

**[PROPOSED] ORDER OVERRULING
STATE ENGINEER'S RULING 6287**

A Proposed Order is attached hereto as Exhibit 1.

///

///

///

///

Affirmation Pursuant to NRS 239B.030

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

TAGGART & TAGGART, LTD.

PAUL G. TAGGART
Nevada State Bar 6136
RACHEL L. WISE
Nevada State Bar 12303
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile
Attorneys for Plaintiffs

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

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 ☒

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

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

14 ☐

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

19 ☐

20 By ELECTRONIC DELIVERY, via:

21 DATED this day of _____, 20____.

22 _____
23 Employee of TAGGART & TAGGART, LTD.
24
25
26
27
28

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

EXHIBIT

EXHIBIT

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 Courtroom by stipulation of the parties. Petitioner is represented by Paul G. Taggart, Esq. and Rachel L. Wise, Esq. of Taggart and Taggart, Ltd. Respondent is represented by Attorney General Adam Laxalt and Deputy Attorney General Justina Caviglia.

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

² SE ROA 0006.

³ SE ROA 004-006.

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

(5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa with groundwater using drilled wells;

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

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

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

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

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

St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287

⁵ SE ROA 0037.

⁶ SE ROA 0045.

⁷ SE ROA 0102.

⁸ SE ROA 0038-0066.

⁹ SE ROA 008 – 009.

¹⁰ Petitioner's Reply Brief, Exhibit 1.

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

¹² SE ROA 007- 009.

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ A decision is arbitrary and capricious if i
21 "baseless" or evidences "a sudden turn of mind without apparent motive...."¹⁷ With regard to fact

23 ¹³ *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 10
24 (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
26 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

¹⁴ SE ROA 005.

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

27 ¹⁶ *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").

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

findings, the court must determine whether substantial evidence exists in the record to support the State Engineer's decision.¹⁸ Substantial evidence is "that which a 'reasonable mind might accept as adequate support a conclusion.'"¹⁹ With regard to purely legal questions, such as statutory construction, standard of review is de novo.²⁰

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

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

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

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

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

This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorable Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance of impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition

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

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

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

Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judicial Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility of the documents included in the Petitioner's Appendix. Also, the State Engineer did not oppose that fact that the documents included in the Request for Judicial Notice exist or are public documents.

The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court further finds that all documents submitted are public documents capable of accurate and ready determination without resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that the documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are entered onto the record of this Court for this case pursuant to NRS 47.130-150.

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

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

Abandonment requires a union of facts and intent to determine whether the owner of the water right intended abandonment.²⁵ As intent to abandon is a subjective element, the courts utilize the surrounding circumstances to determine the intent.²⁶ Because subjective intent to abandon is a necessary element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer's burden because nonuse does not necessarily mean an intent to forsake.²⁷ Thus, if a vested water right

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

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

²³ See Petitioner's Appendix at 00001-0000135.

²⁴ Petitioner's Appendix at 000030-000037.

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

²⁶ *Alpine*, 291 F.3d at 1072.

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

holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occur. For this reason, the State Engineer has previously ruled that “bare ground by itself does not constitute abandonment.”²⁸ Also, the Ninth Circuit has upheld the position that bare ground must be coupled with non-use inconsistent with irrigation to show intent to abandon.²⁹ The standard of proof for demonstrating abandonment is clear and convincing evidence, and the burden of proof is on the party advocating abandonment, which in this case is the State Engineer.³⁰

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

This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and such, indirect and circumstantial evidence may be used to show intent of abandonment.³³ The most consistent element in Nevada water law that applies to abandonment cases is the determination that non-use of the water is not enough to constitute abandonment.³⁴ The Ninth Circuit Appeals Court, while analyzing Nevada case law, has continually recognized that Nevada’s abandonment rules indicate that non-use alone is not enough to constitute abandonment.³⁵ Nevada requires non-use evidence to be coupled with other evidence to determine the subjective intent of the water user.³⁶ This well-developed rule was originally taken from Nevada’s mining law.³⁷ The Ninth Circuit, while applying Nevada state

²⁸ Petitioner’s Appendix 000051-000054.

²⁹ *Orr Ditch*, 256 F.3d at 946.

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

³¹ *Alpine* 291 F.3d at 1072.

³² *Orr Ditch*, 256 F.3d at 944-45.

³³ *Id.*

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

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

³⁶ *Id.*

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

law, has held that the following factors should be considered to determine whether a water owner had the intent to abandon a water right: (1) substantial periods of non-use, (2) evidence of improvements inconsistent with irrigation, and (3) payment of taxes and assessments.³⁸

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

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

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

The State Engineer’s determination of abandonment regarding Proof of Appropriation V-0104 was based only on evidence of non-use. The State Engineer references only evidence that shows non-

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

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

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

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

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

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."⁴³ 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.⁴⁴ Thus, the State Engineer cannot apply a rule to a vested water right unless tl
15 rule existed at common law. The State Engineer has recognized this limitation in the past, holding tl
16 applying a rebuttable presumption standard would further undercut the stability and security of pre-19
17 vested water rights.⁴⁵

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 sho
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.⁴⁶ A water right ow
23 can then cure the forfeiture.⁴⁷ Yet here, the State Engineer did not give St. Clair any notice of forfeitu

24
25
26 ⁴³ *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

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

28 ⁴⁵ Petitioner's Appendix 000021-000025.

⁴⁶ *Town of Eureka*, 108 Nev. At 168.

⁴⁷ *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.⁴⁸ 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."⁴⁹ 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.⁵⁰

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,"⁵¹ 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."⁵³ The State Engineer hinged his abandonment determination of th
21 misstatement of law.

22
23 ⁴⁸ *Orr Ditch*, 256 F.3d at 945-946.

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

25 ⁵⁰ *Id.* *See also In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316.; *United States v. Alpine Land and Reservoir Co.*, 27
26 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).

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

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

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

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

The State Engineer's actions in the current action clearly demonstrate an attempt by the State Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burden shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies on the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The State Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of the burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

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

This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudden turn of mind without apparent motive demonstrates the State Engineer's decision is arbitrary and capricious.⁵⁶ Previously, the State Engineer continually upheld the standards for abandonment that were established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpine Decree* proceeding that was relied upon by the Court and which recognized the principles of abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents a specialized circumstance.⁵⁷ The State Engineer later demonstrated a keen understanding of the

⁵⁴ *Alpine*, 291 F.3d at 1073-74.

⁵⁵ *Id.*

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

⁵⁷ *See Request for Judicial Notice* at 3.

1 application of the *Alpine Decree* to intrafarm transfers.⁵⁸ 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,⁵⁹ 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

20

21

22

23

24

25

26

Senior District Court Judge

27 ⁵⁸ *Id.*

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

Affirmation Pursuant to NRS 239B.030

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

TAGGART & TAGGART, LTD.

PAUL G. TAGGART
Nevada State Bar 6136
RACHEL L. WISE
Nevada State Bar 12303
TAGGART & TAGGART, LTD.
108 North Minnesota Street
Carson City, Nevada 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile
Attorneys for Plaintiffs

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

CERTIFICATE OF SERVICE

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

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.

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

FACTS AND PROCEDURAL HISTORY

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

In Ruling 6287, the State Engineer found that St. Clair ~~had presented evidence sufficient to demonstrate a pre-statutory rights to the underground percolating water which were vested prior to March 25, 1939.~~^{2,3} The State Engineer stated that "[t]ogether, these facts evidence that underground waters [V-010493] were appropriated by the drilled well and used beneficially . . . prior to March 25, 1939."⁴ The following facts support the State Engineer's decision:

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

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

(3) Aerial photographs exist for the property for the years 1968, 1975, 1986, 1999, 2006, and 2013;⁵

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

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

² SE ROA 0006.

³ 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.

⁴ SE ROA 004-006.

⁵ 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;⁶

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

9 (8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933⁸ 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.⁹

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.¹⁰ ~~Notably, this declaration of abandonment was the first time in Nevada's~~
17 ~~history that the State Engineer declared a vested groundwater right abandoned.~~¹¹ 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."¹² 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.¹³

23
24 ⁶ SE ROA 0037.

25 ⁷ SE ROA 0045.

26 ⁸ SE ROA 0102.

27 ⁹ SE ROA 0038-0066.

28 ¹⁰ SE ROA 008 - 009.

¹¹ ~~Petitioner's Reply Brief, Exhibit 1.~~

¹² *Id.* (emphasis in the original) (citing *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)).

¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ A decision is arbitrary and capricious if it is

22
23
24 ¹⁴ *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 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).

26 ¹⁵ SE ROA 005.

26 ¹⁶ NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

27 ¹⁷ *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....”¹⁸ 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.¹⁹ Substantial evidence is “that which a ‘reasonable mind might accept as adequate t
4 support a conclusion.”²⁰ With regard to purely legal questions, such as statutory construction, th
5 standard of review is de novo.²¹

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 ¹⁸ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

27 ¹⁹ *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 ²⁰ *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)).

²¹ *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 ~~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 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."²² Intent is the necessary element the State Engineer is required to
15 prove in abandonment cases.²³ ~~This is the standard the State Engineer has previously relied upon.~~²⁴ ~~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.~~²⁵

19 Abandonment requires a union of facts and intent to determine whether the owner of the water
20 right intended abandonment.²⁶ ~~As intent to abandon is a subjective element, The courts utilize all~~
21 ~~surrounding circumstances to determine the intent.~~²⁷ ~~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~~

23
24
25 ²² *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.

26 ²³ *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 ²⁴ ~~See Petitioner's Appendix at 00001-0000135.~~

28 ²⁵ ~~Petitioner's Appendix at 000030-000037.~~

²⁶ *Revert*, 95 Nev. at 786, 603 P.2d at 264.

²⁷ *Alpine*, 291 F.3d at 1072.

burden because nonuse does not necessarily mean an intent to forsake.²⁸ Thus, if a vested water right holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occur. For this reason, the State Engineer has previously ruled that “bare ground by itself does not constitute abandonment.”²⁹ Also, the Ninth Circuit has upheld the position that bare ground must be coupled with a use inconsistent with irrigation to show intent to abandon.³⁰ The standard of proof for demonstrating abandonment is clear and convincing evidence, and the burden of proof is on the party advocating abandonment, which in this case is the State Engineer.³¹

The Ninth Circuit has consistently upheld and endorsed Nevada’s rule of law for abandonment in the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated “from all surrounding circumstances,” and not only non-use evidence.³² The surrounding circumstances test, although not exhaustive, has definitively produced one a bright-line rule regarding abandonment of water rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonment. This Court reiterates the canon that a water right may not be abandoned absent the showing of “subjective intent on the part of the holder of a water right to give up that right.”³³

This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and as such, indirect and circumstantial evidence may be used to show intent of abandonment.³⁴ The most consistent element in Nevada water law that applies to abandonment cases is the determination that non-use of the water is not enough to constitute abandonment.³⁵ The Ninth Circuit Appeals Court, when analyzing Nevada case law, has continually recognized that Nevada’s abandonment rules indicate that non-use alone is not enough to constitute abandonment.³⁶ Nevada requires non-use evidence to be

²⁸ Petitioner’s Appendix 0000131-0000135; See also Petitioner’s Appendix 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

²⁹ Petitioner’s Appendix 000051-000054.

³⁰ *Orr Ditch*, 256 F.3d at 946.

³¹ *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

³² *Alpine* 291 F.3d at 1072.

³³ *Orr Ditch*, 256 F.3d at 944-45.

³⁴ *Id.*

³⁵ *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.

³⁶ *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.³⁷ This well-developed
2 rule was originally taken from Nevada's mining law.³⁸ 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.³⁹

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 o
14 the subjective water right owner to abandon the water right.⁴⁰ ~~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.⁴¹ 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..."⁴² 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~~

23
24
25 ³⁷ *Id.*

26 ³⁸ *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

27 ³⁹ *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

28 ⁴⁰ *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F.3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.

⁴¹ Petitioner's Appendix at 000084-000090, 000128-0000130; See also Petitioner's Appendix .

⁴² Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.

Engineer's office) was necessary to show abandonment.⁴³ None of these facts are present in this case.

The State Engineer's determination of abandonment regarding Proof of Appropriation V-01049 was based only on evidence of non-use. The State Engineer references only evidence that shows non-use such as the decayed condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and the failure of St. Clair to submit evidence of continuous use. Further, there was no field investigation conducted by the State Engineer to show when the water right was last used, or when the pump was removed from the well. In total, the only evidence before the Court was that of non-use. The State Engineer's reliance solely on non-use evidence was improper. Therefore, the State Engineer's conclusion that St. Clair's water right was abandoned is not supported by substantial evidence, and was therefore arbitrary, capricious, and is overruled.

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

Vested water rights are "regarded and protected as property."⁴⁴ The term vested water rights is often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment of Nevada's statutory appropriation system. *Id.*, NRS 533.085. Because a vested water right is deemed to have been perfected before the current statutory water law, the State Engineer does not have powers to alter vested water rights.⁴⁵ Thus, the State Engineer cannot apply a rule to a vested water right unless that rule existed at common law. The State Engineer has recognized this limitation in the past, holding that applying a rebuttable presumption standard would further undercut the stability and security of pre-1913 vested water rights.⁴⁶

Here, the State Engineer applied a more restrictive law of abandonment than existed prior to the adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be shown to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to St

⁴³ See Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.

⁴⁴ *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

⁴⁵ *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).

⁴⁶ 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.⁴⁷ A water right owner
3 can then cure the forfeiture.⁴⁸ 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.⁴⁹ 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."⁵⁰ 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.⁵¹

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,"⁵² and the State Engineer correctly
20 stated that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."⁵³
21 However, in the very next sentence, the State Engineer mischaracterized the leading case law on point

22
23 ⁴⁷ *Town of Eureka*, 108 Nev. At 168.

24 ⁴⁸ *Id.*

25 ⁴⁹ *Orr Ditch*, 256 F.3d at 945-946.

26 ⁵⁰ *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

27 ⁵¹ *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).

⁵² SE ROA at 0007; (*citing Franktown Creek*, 77 Nev. at 354).

⁵³ 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."⁵⁴ 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 1983.⁵⁵ 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."⁵⁶ 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.⁵⁷ 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*

25
26 ⁵⁴ At 5; v. *Alpine*, 291 F.3d at 1077.

27 ⁵⁵ *Alpine*, 291 F.3d at 1073-74.

28 ⁵⁶ *Id.*

⁵⁷ *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

~~Decree proceeding that was relied upon by the Court and which recognized the principles of abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents a specialized circumstance.⁵⁸ The State Engineer later demonstrated a keen understanding of the application of the *Alpine Decree* to intrafarm transfers.⁵⁹ Yet, in the current instance, the State Engineer completely changed course without evidence or facts in the record to explain his action.~~

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

CONCLUSIONS OF LAW

This Court, having reviewed the record on appeal,⁶⁰ and having considered the arguments of the parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in this matter, hereby ORDERS as follows:

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

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

3. This case is remanded to the State Engineer to process ~~The State Engineer is directed to grant~~ Application No. 83246T.

IT IS SO ORDERED.

Senior District Court Judge

⁵⁸ See Request for Judicial Notice at 3.

⁵⁹ *Id.*

⁶⁰ 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@legaltn.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

CONFIDENTIAL AND PRIVILEGED ATTORNEY/CLIENT COMMUNICATION AND WORK PRODUCT: This communication, including attachments, is for the exclusive use of addressee and may contain proprietary, confidential and/or privileged information. If you are not the intended recipient, any use, copying, disclosure, dissemination or distribution is strictly prohibited. If you are not the intended

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

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:ldo

EXHIBIT 4

EXHIBIT 4

...erk of Carson City, State
...io Clerk of the District Court, in and to
...e 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 T
D RECORDING IS FOR ATTORNEYS AND CLIENTS AND IS PROHIBITED FR
JG PUBLISHED OR SOLD. YOU MAY BE FOUND IN CONTEMPT OF C
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
4
5
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
CONSERVATION AND NATURAL
RESOURCES,

15 Respondent.

ORDER GRANTING
PETITION FOR JUDICIAL REVIEW OF
STATE ENGINEER'S RULING 6287

16 THIS MATTER was heard by the Court on January 5, 2016, in the First Judicial District
17 Courthouse upon Petitioner RODNEY ST. CLAIR's (hereinafter "Petitioner") Petition for
18 Judicial Review of State Engineer's Ruling 6287. Petitioner was represented by Paul C
19 Taggart, Esq. and Rachel L. Wise, Esq. of Taggart and Taggart, Ltd., and Respondent
20 JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES
21 DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "State
22 Engineer"), was represented by Attorney General Adam Laxalt and Deputy Attorney General
23 Justina Caviglia. This Court, having reviewed the record on appeal, and having considered
24 the arguments of the parties and all pleadings and papers on file in this matter, hereby
25 **GRANTS THE PETITION FOR JUDICIAL REVIEW OF RULING 6287.**

26 ///

27 ///

28 ///

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 to
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, 2015.¹

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.² 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, 314
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 ¹ The Request for Judicial Notice and its opposition were not addressed by this Court during the January 5, 2015
hearing.

28 ² 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.

262, 264 (1979). Non-use of a water right provides inferential evidence of an intent to abandon that right. *Franktown Creek Irr. Co., Inc. v. Marlette Lake Co.*, 77 Nev. 348, 35 (1961). Prolonged non-use of a water right does not, by itself, create a presumption of abandonment. *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935 (9th Cir. 2001). Nonetheless, the Ninth Circuit has held that "proof of continuous use of the water rights should be required to support a finding of lack of intent to abandon." *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062 (2002) ("*Alpine V*"). The subjective intent of abandonment is difficult to demonstrate and as such, indirect and circumstantial evidence may be used to show intent of abandonment. *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935 (9th Cir. 2001).

In Ruling 6287, the State Engineer based his finding that the Proof of Appropriation V 010493 was abandoned on evidence of non-use. This evidence included the photograph of the condition of the well, the lack of a pump on the well, and the failure of Petitioner to submit evidence of continuous use as requested by the State Engineer in his December 2013, letter. ROA 7-8. However, the State Engineer was not able to show that Petitioner intended to abandon Proof of Appropriation V-010493.

Furthermore, the State Engineer incorrectly shifted the burden on Petitioner to show that he did not intend to abandon Proof of Appropriation V-010493. Petitioner clearly has present-day intent to use the water right, as indicated by the filing of their change application and reports of conveyance documents. The State Engineer has not provided clear and convincing evidence of an intent by Petitioner to abandon his water rights, the shifting of the burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

///

///

///

///

///

///

///

1 CONCLUSIONS OF LAW

2 This Court, having reviewed the record on appeal, and having considered the
3 arguments of the parties, the applicable law, and all pleadings and papers on file in the
4 matter, hereby ORDERS as follows:

5 1. Based upon the non-opposition by either party, the portion of Ruling 6287
6 which found that Petitioner has a vested water right under Proof of Appropriation V-010493,
7 AFFIRMED;

8 2. The Petition for Judicial Review of the portion of Ruling 6287 which declares
9 V-010493 abandoned is GRANTED; and therefore

10 3. This case is remanded to the State Engineer to process Application 83246T.
11 IT IS SO ORDERED.

12 DATED this _____ day of _____, 2016.

13
14 HONORABLE STEVEN R. KOSACH
15 SENIOR DISTRICT COURT JUDGE
16
17
18
19
20
21
22

23 RESPECTFULLY SUBMITTED BY:

24 ADAM PAUL LAXALT
25 Attorney General
26 JUSTINA A. CAVIGLIA
27 Deputy Attorney General
28 100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1222
E: jcaviglia@ag.nv.gov
Attorney for Respondent

1 Case No. CV 20112

2 Dept. No. 2

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 Petitioner, RODNEY ST. CLAIR (hereinafter "Petitioner", by and through his attorneys of record,
16 PAUL G. TAGGART, ESQ. and RACHEL L. WISE, ESQ., of the law firm TAGGART & TAGGART,
17 LTD., hereby responds to Respondent, JASON KING, P.E., the State Engineer's Objection to Petitioner's
18 Proposed Order ("Objection") submitted on or around March 18, 2015 ("Response"). This Response is
19 based upon the attached Points and Authorities and the pleadings and papers on file herein.
20
21
22
23
24
25
26
27
28

POINTS AND AUTHORITIES

The State Engineer correctly identifies that Petitioner did not alter their original proposed order after receiving the State Engineer's requested changes. The simple reason behind this is that Petitioner believes the State Engineer is incorrect with regards to the process for proposing an order. As shown in Exhibit 1 of Respondent's Objection to Petitioner's Proposed Orders, Petitioner included in the Proposed Order both the basis and rational 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.

Petitioner prudently included 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 its final order. The Court specifically directed that Petitioner draft an order that includes the evidence heard at argument, findings of fact, and conclusions of law, and then submit it to the State for comment. 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.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Petitioner submitted the Petitioner's Appendix on February 27, 2015 ("Petitioner's Appendix"). The State Engineer never objected to this submission. On June 2, 2015, Petitioner submitted their request for judicial notice in support of Petitioner's Reply Brief ("Request for Judicial Notice"). Respondent, State Engineer, waited five (5) months to oppose Petitioner's Request for Judicial Notice ("Opposition to Judicial Notice"). Furthermore, the State Engineer's Objection to Judicial Notice was only filed after the November 16, 2015 Order of Recusal entered by the Honorable Judge Montero.¹ Petitioner timely replied to the State Engineer's November 17, 2015 Opposition to Judicial Notice. The State Engineer objected to both: the Petitioner's Appendix and the Petitioner's Request for Judicial notice.²

During oral argument, Petitioner also presented the PowerPoint presentation attached hereto as Exhibit 1. During the hearing, the Honorable Judge Kosach issued an order from the bench, based on all

¹ See November 16, 2016 Order of Recusal.

² 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.³

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.”⁴ 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.”⁵ 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 ³See 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”).

⁴ Respondent’s Objection to Petitioner’s Proposed at 3.

⁵ *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.⁶
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.⁷

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.⁸

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."⁹ The Court was clear. The State Engineer's
21 ruling is overturned.¹⁰ To enter a proper order, the Petitioner had a duty to present the Court with an
22
23

24 ⁶ See November 16, 2016 Order of Recusal.

25 ⁷ See Respondent's Objection to Petitioner's Proposed Order at 3:11-15.

26 ⁸ 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").

⁹ See Oral Argument hearing video at 2:01 p.m – 2:03 p.m.

¹⁰ See Oral Argument hearing video at 2:01 p.m – 2:03 p.m.

1 analysis of laws and facts that supported the Court's ultimate conclusion.¹¹ 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**

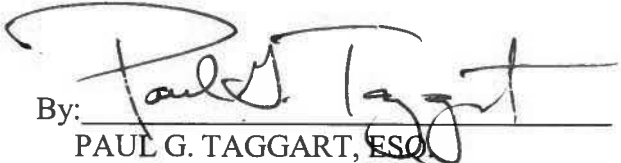
8 For the reasons stated above, Petitioner request this Court adopt the proposed order that was
9 submitted by Petitioner on or around March 16, 2016.

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 29th day of March, 2016.

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

19
20 By: 
21 PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
22 RACHEL L. WISE, ESQ.
Nevada State Bar No. 12303
23 Attorneys for Petitioners
24
25
26
27
28

¹¹ *Bogan*, 65 F.2d at 526 (9th Cir. 1933).

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 28th day of March, 20 16.



Employee of TAGGART & TAGGART, LTD.

1 SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
2 IN AND FOR THE COUNTY OF HUMBOLDT
3 BEFORE THE HONORABLE STEVEN R. KOSACH,
4 SENIOR DISTRICT COURT JUDGE

5 -oOo-

6
7 RODNEY ST. CLAIR, Case No. CV 20112
8 Petitioner, Dept. No. 2
9 vs.

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

13 Respondent.

CERTIFIED COPY

14 =====

15
16 TRANSCRIPT OF HEARING

17
18 Monday, April 11, 2016

19 (Humboldt County case, held in Carson City, Nevada)
20
21
22

23 TRANSCRIPT PREPARED BY:
24 SHANNON L. TAYLOR, CCR, CSR, RMR
Certified Court/Shorthand and Registered Merit Reporter
Nevada CCR #322
25 (775) 887-0472

A P P E A R A N C E S

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.