Case No. 70458

In the Supreme Court of Nevada

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

APPELLANT,

vs.

RODNEY ST. CLAIR,

RESPONDENT.

RESPONDENT RODNEY ST. CLAIR'S ANSWERING BRIEF

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that Respondent, Rodney St. Clair, is an individual. He does not have a parent corporation and there is not a publically held company that owns ten percent or more of the party's stock. Mr. St. Clair does own Jungo Ranch in Orovada, Nevada. Taggart and Taggart, LTD. is the only law firm whose partners or associates have appeared for the party in this action. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

DATED this 23rd day of January, 2017.

Respectfully submitted by:

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3. Whether the district court properly required the State Engineer to grant St. Clair's application to pump his vested water right from an existing well.

4. Whether the district court's findings were sufficient, complete and made after careful deliberation and consideration of each party's oral and written arguments.

5. Whether the district court properly took judicial notice of prior inconsistent arguments by the State Engineer, and did not rely on extra-record evidence.

STATEMENT OF THE CASE

The threshold issue in this appeal is whether the State Engineer misapplied the legal test for the abandonment of water rights in Nevada. Without an evidentiary proceeding, the State Engineer issued Ruling 6287. The State Engineer ruled that

Rodney St. Clair ("St. Clair") owns a vested water right. The district court upheld this holding. The State Engineer then erroneously declared that St. Clair's vested water right was abandoned. The State Engineer then denied a change application that St. Clair filed on his vested water right to pump his water from a different well. The district court overruled the State Engineer and directed the State Engineer to approve that application. The district court overruled the State Engineer because he misapplied the law of abandonment.

STATEMENT OF FACTS

St. Clair owns real property in Humboldt County, Nevada, that was purchased in August, 2013. JA 044, 073-077. St. Clair filed a Proof of Appropriation (V-010493) to prove a vested water right exists on the property for groundwater to irrigate 160 acres of land.[1] JA 130-197. On November 8, 2013, St. Clair filed a

[1] The State Engineer has not initiated a calling for proofs in the Quinn River Valley Basin, Orvada sub-basin (Basin 033A). NRS 533.090, NRS 533.125. Even when the State Engineer has not commenced the taking of proofs for the identification of pre-statutory vested water rights, proofs may be filed at any time by individual water holders. Further, until the State Engineer has commenced the taking of proofs, a vested right owner is not required to file a proof or any paperwork with the State Engineer in order to use the vested water right.

change application (83246T) to change of the point of diversion of the vested water right to a new well. JA 038-039.

Both parties concede that St. Clair has a valid pre-statutory vested water right that is identified as Proof V-010493. JA 017. Proof V-010493 is a water right that was established under Nevada's prior appropriation system prior to the adoption of Nevada's statutory groundwater appropriation system, or the creation of the State Engineer's office. The vested water right was historically pumped from a well on St. Clair's property and was used for irrigation on that property. The district court and the State Engineer agree that St. Clair's vested water right - V-010493 - is a valid pre-statutory vested water right. JA 802. This fact has never been in dispute. JA 001-02, 006, 017-21, 049-54, 79-80, and 203.

On July 25, 2014, the State Engineer denied St. Clair's change application. JA 023. In Ruling 6287, the State Engineer ruled on that change application without holding a hearing. JA 015-021. The State Engineer found that St. Clair established that a vested water right existed on his property before 1939. JA 017. But then the State Engineer found that the vested water right was abandoned based on non-use. JA 019, 021. While the State Engineer asked St. Clair for information regarding the

use of the vested claim, the State Engineer did not alert St. Clair to the fact the evidence would be used by the State Engineer in an abandonment analysis.[2]

The State Engineer raised the abandonment issue *sua sponte*, without notice to St. Clair, and did not give St. Clair an opportunity to be heard regarding the abandonment claim. JA 206. In Ruling 6287, the State Engineer improperly shifted the burden of proof to St. Clair by requiring St. Clair to prove a *lack* of intent to abandon. JA 019 (emphasis in original). After improperly shifting the burden of proof, the State Engineer held that St. Clair failed show evidence of when the water rights were recently used to support his finding of abandonment.

St. Clair appealed Ruling 6287. Oral arguments were held on January 5, 2016. At the end of the January 5, 2016, hearing, the district court orally ruled for St. Clair, and St. Clair was directed to submit a proposed order to the court. On March 7, 2016, a proposed order was provided to counsel for the State Engineer. On March 11, 2016, St. Clair received comments and revisions to the proposed order from the

[2] The State Engineer only mentioned forfeiture, not abandonment, in his office's letter to St. Clair that asked for information regarding use of the water right. But forfeiture does not involve a mental element (i.e. *mens rea*).

State Engineer. On March 14, 2016, the original proposed order and the revised order from the State Engineer were sent to the court.

On March 18, 2016, the State Engineer objected to the proposed order. On March 29, 2016, St. Clair responded to the objection. On April 11, 2016, oral arguments were held regarding the State Engineer's objections to the proposed order. On April 22, 2016, the district court entered its Order Overruling State Engineer's Ruling 6287 ("Order"). The notice of entry of order was filed on April 29, 2016, and the State Engineer filed an appeal on May 20, 2016.

SUMMARY OF ARGUMENT

In Nevada, a water right can only be declared abandoned based on a union of facts that prove the water right owner had the intent to abandon the water right. Nonuse evidence cannot be used to prove abandonment, or shift the burden of proof to the water right owner that he/she did not intend to abandon a water right.

The State Engineer relied on only evidence of nonuse to conclude St. Clair's vested water right was abandon. The State Engineer also required St. Clair to prove lack of intent to abandon. This was a sharp departure from the State Engineer's prior application of the law of abandonment. The district court appropriately held that each of these actions by the State Engineer misapplied the law of abonnement and

were, therefore, arbitrary and capricious. The district court also properly held that Nevada's proper test for abandonment, substantial evidence does not exist to support a finding of abandonment in this case.

Based on the district court's findings and conclusions, it overturned Ruling 6287 and properly required the State Engineer to grant St. Clair's application to pump his vested water right from a different existing well. The district court's findings were sufficient, complete and were made after careful deliberation and consideration of each party's oral and written arguments. The district court made its order after properly taking judicial notice of prior inconsistent arguments by the State Engineer, and without relying on extra-record evidence.

STANDARD OF REVIEW

The State Engineer is responsible for administering the appropriation and management of Nevada's public waters pursuant to the provisions of Nevada Revised Statutes ("NRS") chapter 533 and 534. As part of that responsibility, the State Engineer must approve water right applications that are submitted in proper form if the statutory criteria in the Nevada water law are satisfied. NRS 533.370.

The Nevada Supreme Court applies the same standard of review as the lower court. *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 525, 245 P.3d

1145, 1148 (2010). The role of the reviewing court is to determine if a decision was arbitrary or capricious and thus an abuse of discretion, or if it was otherwise affected by prejudicial legal error. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), citing *Shetakis Dist. v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992) ("[a]s a general rule, a decision of an administrative agency will not be disturbed unless it is arbitrary and capricious")). A decision is arbitrary and capricious if it is contrary to law, is "'baseless'" or evidences "a sudden turn of mind without apparent motive…." *Id.; City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

Factual findings of the State Engineer must be overturned if they are not supported by substantial evidence. *Id., State Eng'r v. Morris*, 107 Nev. 699, 701, 703, 819 P.2d 203, 205 (1991); *Revert v Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264. Substantial evidence is "that which a 'reasonable mind might accept as adequate to support a conclusion.'" *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)).

With regard to purely legal questions, such as statutory construction or determining legal precedent, the standard of review is de novo. *In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. Adv. Op. 22, 277 P.3d 449 (2012).

ARGUMENT

I. The State Engineer's Decision in Ruling 6287 Was Arbitrary and Capricious Because He Applied the Wrong Legal Standard Regarding Abandonment.

A. Nevada's Legal Standard for Abandonment

The question of "abandonment" is not an issue of first impression, and has been encountered in Nevada so often that there are clear cut rules for determining and analyzing the abandonment of water rights. Abandonment is the relinquishment of the right by the owner *with the intent* to "forsake and desert it." *In re Manse Spring*, 60 Nev. 280, 288, 108 P.2d 311, 317 (1940) (emphasis added). Intent is the necessary element the State Engineer, or any party alleging abandonment, is required to prove in abandonment cases. *Id.; See United States of America v. Orr Water Ditch Co, et. al.*, 256 F.3d 935 (2001) at 941; *see also United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002); *Det. Of Relative Rights in and to the Waters of Franktown Creek v. Marlett Lake Co.*, 77 Nev. 348, 354, 364 P.2d 1069, 1072 (1961); and *Revert*, 95 Nev. at 786, 603 P.2d at 264.

The most consistent element throughout the Nevada case law is that evidence of nonuse alone cannot constitute abandonment. *Manse* at 288, *Orr Ditch* at 941, *Alpine Land* at 1072, *Franktown* at 354, *Revert* at 786. Abandonment requires a union of acts and intent to determine whether the owner of the water rights intended abandonment. *Revert* at 786. As intent to abandon is a subjective question, courts utilize all surrounding circumstances to determine intent. *Alpine* at 1072.

The Ninth Circuit previously rejected the assertion that abandonment in Nevada can be proven with nonuse evidence, or that a rebuttable presumption of abandonment can shift the burden of proof to the water right owner. *Orr Ditch* at 945-946. The Ninth Circuit analyzed this Court's case law, ascertained that abandonment is determined "from all surrounding circumstances," and held "those circumstances certainly include the payment of assessments and taxes." *Id.* (quoting *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262, 264 (1979)) (further citations omitted). The Ninth Circuit concluded when determining whether abandonment has occurred based on a substantial period of nonuse, the advocate of abandonment must couple nonuse evidence with evidence that structures were built that are incompatible with irrigation, and the water right owner did not pay taxes or assessments. *Id*.

In *United States of America v. Alpine Land & Reservoir Co., et. al.*, 291 F.3d 1062 (2002) ("*Alpine V"*), the Ninth Circuit upheld the ruling in *Orr Ditch*, reasserting, "although a prolonged period of non-use may raise an inference of intent to abandon, it does not create a rebuttable presumption." *Alpine* at 1072, *see also Orr Ditch* at 945. The *Alpine V* court also endorsed the ruling in *Orr Ditch* by holding that abandonment can be shown "from all surrounding circumstances," but not only nonuse evidence. *Alpine* at 1072.

B. The Legal Standard the State Engineer Applied to Abandonment in Ruling 6287 Improperly Relied on Nonuse Evidence and Shifted the Burden of Proof to St. Clair to Disprove the Intent to Abandon.

Now the State Engineer turns *Alpine V* and *Orr Ditch* upside down. He claims Nevada law requires a water right owner to defend a claim of abandonment by asserting that "[a]t a minimum, proof of continuous use of the water right should be required to support a finding of lack of intent to abandoning." JA 18.

But the portion of *Alpine V* that the State Engineer relied on for his analysis falls under the heading "Equitable Relief for Intrafarm Transfers," and only applies narrowly to the completely separate issue of intrafarm transfers. *Alpine V,* 291 F.3d at 1073. This is not at issue in this case, and this rule is not consistent with Nevada law. *Id*.

In *Alpine V*, through its order of remand, the court ordered further investigation by the State Engineer or the district court of intrafarm transfers. *Alpine V*, 291 F.3d at 1076-77. Infrafarm transfers involved claims by water rights owners that even though evidence of forfeiture existed at the place of use of their water right, they had actually used the water on another part of their farm. The court created the intrafarm transfer defense to abandonment as equitable relief to prevent the loss of water rights. *Alpine V*, 291 F.3d at 1078. The Court ruled that "[a]t a minimum, proof of continuous use of water should be required to support a finding of the lack of intent to abandon," in order to qualify for the intrafarm transfer relief. *Orr Ditch*, 256 F.3d at 945-46. The State Engineer's claim that Nevada law requires this rule wholesale to avoid abandonment is simply not supported in practice or the law, and is in direct conflict with the actual holding in *Alpine V* and *Orr Ditch*.

The State Engineer then focused the abandonment analysis on St. Clair's alleged failure to prove lack of intent. The State Engineer continually referenced St. Clair's need to "overcome" a finding of abandonment as well as prove their own

"lack of intent" to abandon their water rights.[3] JA 19. The State Engineer also introduced and used his own photographs to review St. Clair's application that were neither provided to the district court in the record on appeal, nor provided to St. Clair. *Id*.

When the State Engineer demanded proof of water use, he shifted the burden of proof requirement to St. Clair. Yet, the repeated theme in Nevada long standing case law is that the State Engineer may not shift the burden of proof to St. Clair.[4] Under current Nevada law, the State Engineer has always maintained the burden of

[3] When reviewing the aerial photographs provided by St. Clair, the State Engineer concluded, "[t]he State Engineer finds no evidence pointing to a *lack* of prior owner's intent to abandon the water right." *Id*. (emphasis added); *see* JA 18 ("the newspaper articles do not directly or even inferentially demonstrate continuous use of the water on the property . . . [t]hus, the newspaper articles are insufficient to prove continued irrigation was occurring in the NW ¼ of Section 8"); JA 19 (stating, "the 1954 aerial photograph for the quarter-quarter depicted, this singular piece of evidence to suggest continued beneficial use of the water is insufficient to overcome a finding of abandonment").

[4] *Orr Ditch* at 945, *Alpine V* at 1072.

proving abandonment by clear and convincing evidence.[5] But here, the State Engineer directed St. Clair to prove he lacked intent to abandon the water right.

Accordingly, the district court properly ruled that the State Engineer applied the wrong rule of law and Ruling 6287 was, therefore, arbitrary and capricious. JA 668, 802.

C. Colorado's Law of Abandonment Does Not Apply in Nevada.

Rather than explain why the State Engineer misapplied the intrafarm transfer exception in *Alpine V* in this case, the State Engineer now relies on Colorado law to defend Ruling 6287. Specifically, the State Engineer claims that Colorado law limits the abandonment inquiry to look at the intent of historic owners and not the current owner. This approach should be rejected for the following five reasons.

1. The State Engineer's Past Practice is Inconsistent with the Position Taken Here.

The State Engineer has continuously, until now, taken the position that the present day intent of a water right owner can demonstrate the lack of intent to abandon a water right. The State Engineer has held that investigation of whether an

[5] *Kogan v. Silver King Mines, Inc.*, 108 Nev. 446, 833 P.2d 1141 (1992).

owner intended abandonment is a fact by fact analysis, stating,"[o]ne owner may have intended to abandon a water right and forsake the use of that water forever while another owner may not have the same intent." JA 428. Also, in 2011, the State Engineer relied on the present owner's intent to use a water right to overcome a claim that the water right was abandon. JA 370. Specifically, the State Engineer found:

> The abandonment of a water right in Nevada is the relinquishment of a right with the intention to forsake it. Within the meaning of the term abandonment an intent to abandon is a necessary element. Non-use of a water right *is only some evidence* of an intent to abandon the right and does not create a rebuttable presumption of abandonment under Nevada law.
>
> The State Engineer finds that Permit 12544 is in good standing and that the *[current] owner* of record Connolly has shown no intent to abandon the water right.
>
> *Id.* (Emphasis added)

a. <u>Filing Change Applications</u>

The State Engineer has relied on the act of filing a change application by the current water right owner is evidence of the lack of intent to abandon a water right. In 2011, the State Engineer issued Ruling 6177 and declined to declare a water right abandoned because:

> The Applicant has filed a change application to move the point of diversion to a well located on the Applicant's property to allow for easier access to the water. This is evidence that the Applicant does not intend to abandon its water right and seeks to ensure that the water can be placed to beneficial use as needed to supplement its surface water.
>
> JA 399.

Also, in 2011, the State Engineer relied on the filing of a change application to reject a protestant's claim that nonuse of a water right since 1956 constitutes intent to abandon. JA 388. In that case, the sole evidence the State Engineer relied on to find lack of intent to abandon was that the applicant had filed change applications on the water right in 2011. Specifically, the State Engineer found "the Applicant's intent to place the water to beneficial use is evidence[d] by the filing of Applications 80453, 80454, 80455 and 80456 [sic]." *Id.* at 7; *see* JA 329-42 (finding that filing of extension of time evidenced an intent not to abandon a water right); JA 326 (same).

b. <u>Filing Title Document and Communicating with State Engineer's Office</u>

The State Engineer has historically found that the recordation of ownership of a water right is evidence of the lack of intent to abandon a water right. In Ruling 6191, the State Engineer relied on the lack title evidence to declare a water right abandoned. In that case, the State Engineer found that nonuse evidence, coupled with the fact that no conveyance documents or reports of conveyance had been filed

on that water right, demonstrated intent to abandon. In Ruling 6191, the State Engineer also relied on the fact the record owner of the right had not communicated with the State Engineer for over 16 years. JA 411. *See* JA 383 (finding abandonment based on nonuse *plus* the fact "no entity or person has requested conveyance of the water right into the name of another water right holder in nearly 60 years" demonstrated an intent to abandon the water right); JA 373-76 (finding lack of report of conveyance transferring ownership of water rights for 20 years to be evidence of intent to abandon); JA 354-56 (same).

c. Improvements to Wells

In 1992, the State Engineer entered Ruling 3885 in which he rejected an abandonment claim because, despite an alleged period of nonuse from 1951 to 1973, the "[r]ecord further reflects the present owner of the permit attempted to replace the well in 1982 or '83 which further shows at least he never intended to abandon the right." JA 279.

Similarly, in 2010, the State Engineer declined to rely on the disrepair of works of diversion, as he did here, to find that abandonment had occurred because the water right owner expressed its intent to use the water to a State Engineer's employee during a 2009 field investigation. Specifically, the State Engineer stated:

> The protest requests the State Engineer declare Permit 10105, Certificate 2695, abandoned. The abandonment of a surface water right in Nevada is the relinquishment of a right with the intention to forsake it. Within the meaning of the term abandonment an intent to abandon is a necessary element. Nonuse of a water right *is only some* evidence of an intent to abandon the right and does not create a rebuttable presumption of abandonment under Nevada law. At the field investigation, *permittee Lincoln expressed a continued interest in returning the pipeline or other works of diversion to operating condition*.
>
> JA 360.

In Ruling 6083, the State Engineer had evidence that the works of diversion for the subject water had fallen into disrepair. But this evidence alone was not sufficient to make a finding of intent to abandon. In a sharp reverse of course, in this case the State Engineer relied heavily on the rusted condition of Jungo Ranch's well to infer the intended abandon.

Here, just as in Ruling 6083, the State Engineer should have concluded that in determining whether intent to abandon exists, a water right user's present day intent outweighs physical evidence related to the condition of the works of diversion. St. Clair filed the present applications and thereby evidenced a lack of intent to abandon these water rights. The State Engineer had evidence that title documents and reports of conveyance had been filed by the current owner, and that owner has had recent

communications with the State Engineer's office. Therefore, the State Engineer's departure from past practice should be rejected because the present intent of a water right owner has always been relevant in Nevada for an abandonment determination.

2. St. Clair is Not Reviving a Water Right.

The Colorado law the State Engineer relies on applies when a water right owner tries to revive a water right. The State Engineer then claims the district court made a factual finding that St. Clair was reviving a water right. This claim is a complete fabrication.

The State Engineer argues "[t]he district court ruled that '[t]he law is that you are not abandoning when you have the intent to revise [sic] the claim, when you have the intent to apply for the application, that shows that your intent is not to abandon.' JA 667" Appellant's Opening Br. at 15. The district court never used the word revive and the transcript does not contain the word revive. The district court used the word *revise* which fits the context of the statement. On November 8, 2013, St. Clair filed a change application to change of the point of diversion of his vested water right. JA 038-039. The change application seeks to change, or *revise*, the existing right and move the point of diversion from the vested well to a nearby existing well. Also, the vested claim was later amended, or *revised* on December 6, 2013. JA 043-

115. The State Engineer's argument that relies on an altercation of the district court judge's words from the transcript (by using [sic]) should be stricken or disregarded.

Further, the State Engineer had thirty (30) days to review the district court transcript and suggest any changes at that time. *See e.g.* Nevada Rules of Civil Procedure 30(e). The State Engineer waived any right to contest the accuracy of the transcript at this time. *See e.g.* NRCP 32(d)(4), NRCP 80(c). The court reporter has already delivered certified copies of the transcript pursuant to Nevada Rules of Appellate Procedure 9(c)(3).

3. Nevada Water Law is more Protective of Vested Water Rights than Colorado Law.

The Ninth Circuit, while applying Nevada law, found that Nevada is the only western state to maintain the position that there is no rebuttable presumption regarding the intent to abandon a vested right, and that Nevada has the right to assert this rule under the federal system. *Id.* The Ninth Circuit reviewed Nevada's 1999 amendment to NRS § 533.060(4) and stated, "Nevada has recently reaffirmed its commitment to a limited view of the law of abandonment." *Id.* Nevada's statutory clauses, coupled with long standing case law, led the Ninth Circuit to conclude that

no burden shifting exists under Nevada law when specifically applied to the intent element of abandonment. *Id.*

4. Even If Colorado Applies, The State Engineer Has Interpreted It Incorrectly and it Should not Apply in Nevada.

The State Engineer relies heavily on *Haystack Ranch*. Appellant's Opening Br. at 11, 16, 17. The Colorado Supreme Court continually discusses an "abandonment list" in *Haystack*. *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548 (Colo 2000). This is a list or tabulation of all water rights and conditional water rights in the state that the Colorado State Engineer has reviewed and may abandon after the passage of a ten year period. Colorado Revised Statutes ("CRS") § 37-92-401, 402. In addition to the tabulation of all the water rights in the state, CRS § 37-92-402(1)(a) requires that a division engineer prepare a separate list tabulating the water rights which have been abandoned in whole or in part. *Id*. The abandonment list is required to be available at the Colorado State Engineer's office and on the Colorado State Engineer's website. CRS § 37-92-401(2)(a). There are specific criteria the Colorado State Engineer is required to follow when adding a water right to the abandonment list. CRS § 37-92-402(11). Furthermore, the Colorado State Engineer is required to send, via certified mail, the abandonment list to the last-

known owner or claimant. CRS § 37-92-401(2)(b). For one decade after the mailing of the abandonment list, any party wishing to object to the tabulation of a water right on the abandonment list may object. CRS § 37-92-401(3). Parties may also protest an inclusion of their water right on the abonnement list. CRS § 37-92-401(5)(a). Only after one decade has past, and after notice, mailing, and review by the State Engineer, may the State Engineer then determine that a water right in Colorado is abandoned. CRS § 37-92-401(4). If a party protests or objects to the inclusion of their water right on the abandonment list, the water court is required to hold a hearing regarding the inclusion of the water right on the abandonment list. CRS § 37-92-401(6).[6]

Notably, Colorado statutory law also codifies the theory that a period of ten years of nonuse creates a rebuttable presumption of abandonment for the purposes of creating the division engineer's abandonment list. CRS § 37-92-402(11).[7] This is entirely different from Nevada law. Clearly, there are constitutional reasons for this

[6] Colorado has a specialized water court, unlike Nevada.

[7] Compare to Nevada law, which distinctly states no rebuttable presumption exists re: non-use and abandonment of a water right.

extensive legislation regarding water rights in Colorado. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). In Nevada, the legislature has not created a similarly compliant standard for the type of abandonment that the State Engineer is now requesting this Court to condone.

Clearly, pursuant to Colorado's extensive legislation, any subsequent purchaser of a water right is on constructive notice if a water right is on the abandonment list. This clear method, created by Colorado's legislature, helps protect real property water rights in the state. Nothing similar to the Colorado standards exists in Nevada. However, the State Engineer is now requesting this Court to adopt the consequences of Colorado's legislation without allowing for basic constitutional protections. Obviously, if Nevada's legislature wanted to implement the suggestions the State Engineer now proposes, it would have. Since the legislature did not adopt the same law as Colorado, this Court should reject the State Engineer's request to adopt Colorado's law.

Not only is the State Engineer's proposal to utilize Colorado law constitutionally improper, the proposal is not supported by public policy. First, the *sua sponte* application of Colorado law punishes a bona-fide third party purchaser of real property in Nevada. There is no abandonment list in this state. There is no

method for a subsequent or third party bona-fide purchases to be placed on notice regarding the possible abandonment status of the water rights appurtenant to real property. Presumably, the State Engineer's radical suggestion would affect the worth of the real property during appraisal and sale. Essentially, the State Engineer proposes that regardless of the third party bona-fide purchaser's intention, he now has the right to deprive the current owner of a real property right without hearing or notice.

The State Engineer also requests that this Court grant him the authority to abandon water rights after a water owner has paid the statutory fees to the State Engineer to prove the vested water right, or to move a water right. This is inherently improper. The State Engineer's proposed change in law would eviscerate due process rights regarding water rights; disrupt the current free market purchase and sale of water rights; possibly create in improper cloud on title, as no party would know if their water rights were in good standing; allow the State Engineer to stand in the place of legislature; and grant the State Engineer carte blanche to abandon water rights without review, checks or balances.

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5. The State Engineer's Reliance on Colorado law is a Post-hoc Rationalization.

Any decision by the State Engineer must be defended based only on the evidence that he or his office relied on before the decision at issue was made. This principle was made clear by the Supreme Court in *Revert v. Ray*. *Revert*, 95 nev. At 787, 603 P.2d at 265. In *Revert*, the Court found fault with a district court that allowed the State Engineer to provide a "post hoc rationalization" of the decision that was under review. In *Revert*, the district court "looked to a post-review brief filed by the State Engineer to supply the missing findings." *Id*. This Court concluded "the [State Engineer's] brief, in short, was not a part of the record and, thus, should not have been considered [as such] by the district court." *Id*.

At no time, until now, has the State Engineer relied on Colorado law to support Ruling 6287. The State Engineer relied solely on Nevada law to support Ruling 6287 in that decision and in the briefs to the district court. The State Engineer's new attempt to apply Colorado law is a post hoc rationalization of his previous ruling and should be rejected.

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II. When the Proper Legal Standard for Abandonment is Applied, Substantial Evidence Does Not Support the State Engineer's Declaration of Abandonment.

A. The State Engineer Only Relied on Nonuse Evidence.

As the State Engineer properly identified in Ruling 6287, abandonment may not be shown through nonuse alone.[8] However, that is the only evidence that the State Engineer relied on when he reached his conclusion that St. Clair's water right was abandoned.[9] St. Clair provided the State Engineer with voluminous evidence recording the water right since 1924. This began with the acquisition of the land and water by George J. Crossley in 1924 through the Federal Homestead Act. St. Clair further provided newspaper articles, probate orders regarding the water rights, photographs of well casing, a history of steel water pipe fabrication and design, and aerial photographs from 1954, 1968, 1975, 1986, 1999, and 2013 ("Aerial Photographs").

The State Engineer noted that the Aerial Photographs did not show any surface disturbance or development.[10] This statement bolsters St. Clair's position. The

[8] *Orr Ditch*, 256 F.3d at 945.

[9] JA 18-19.

[10] JA 19.

Alpine V test requires a showing of a structure incompatible with irrigation or the stated use of the water right.[11] By acknowledging that the Aerial Photographs only showed bare ground, the State Engineer conceded that those photographs only showed nonuse, nothing more.[12]

B. Evidence of Intent

The State Engineer relied heavily on the rusted condition of St. Clair's well to infer the intent to abandon. After a review of the briefing and oral arguments, the district court properly concluded that in determining whether intent to abandon exists, a water right user's present day intent outweighs physical evidence related to the condition of the works of diversion.

St. Clair's intent to use the water right distinguishes this case from *Revert v. Ray*. In *Revert*, the record owner of the water right was a corporation that no longer existed. This reasoning was properly used in 2011 by the State Engineer in Ruling 6137. There, the water right owner was a mining corporation that no longer existed and no communication from that owner, or any successor in interest, existed in the

[11] *Alpine*, 291 F.3d at 1071.

[12] *Id*.

State Engineer's files. The opposite is true here. Jungo Ranch acquired the subject water rights and presented clear evidence that it does not intend to abandon those water rights.

III. The District Court Did Not Usurp the State Engineer's Powers by Ordering his Office to Grant St. Clair's Application.

The State Engineer argues that the district court improperly ordered his office to grant St. Clair the application which the State Engineer denied in Ruling 6287. This argument is without merit.

The district court properly applied de novo review to the legal conclusions in Ruling 6287. *In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. Adv. Op. 22, 277 P.3d 449 (2012). The district court could not support the State Engineer's denial of St. Clair's application because an appellate court shall not support an agency decision if the agency's statutory interpretation exceeds the statutory authority of the agency. *Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n*, 126 Nev. 74, 83, 225 P.3d 1265, 1271 (2010). When an administrative agency contradicts a statute that it is designed to implement, the district court's duty is to properly apply the law. *Id.*

Here, the district court's instructions to the State Engineer were based upon its decision that the State Engineer did not properly apply the law, and that the facts do not support the State Engineer's decision to deny the water right application at issue. When a reviewing court determines the issues on appeal and reverses the judgment, it can specifically direct the lower tribunal with respect to particular issues, and that lower tribunal has no discretion to interpret the reviewing court's order. *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263, 71 P.3d 1258, 1260 (2003). Rather, the lower tribunal is bound to specifically carry out the reviewing court's instructions. *Id.*

District courts are also bound to protect vested water rights from inappropriate regulation by the State Engineer. The district court's authority to protect water rights as real property has continually been confirmed by this Court. *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803, 811 (1914), *Howell v. Ricci*, 124 Nev. 1222, 1231, 197 P.3d 1044, 1050 (2008), *Vineyard Land & Stock Co. v. Dist. Court of Fourth Judicial Dist. of Nevada in & for Elko County*, 42 Nev. 1, 171 P. 166, 177 (1918). In *Ormsby*, the Nevada Supreme Court specifically held that the State Engineer is not authorized to make final determinations regarding vested water rights because those water rights came into being prior to the creation of the State

Engineer's office. *Id.* Only a court can make final determinations regarding vested water rights. *Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 192-193, 179 P.3d 1201, 1207 (2008).

Also, the Legislature has granted only the district court the authority to make decisions based upon title or right of possession to real property.[13] Nev. Const. Art. 3 § 1, Art. 4 §§ 1 and 6 ("the district courts have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of real property"), Art. 6 § 6.

Further, the State Engineer does not have the authority to resolve title questions regarding real property or water rights. *Howell v. Ricci*, 124 Nev. 1222, 1231, 197 P.3d 1044, 1050 (2008). As the *Vineyard* court held, "[d]ue process of law as affecting real property under our Constitution (article 6, § 6) placed the power of original trial and final determination in the district court; the whole matter was one for the judicial branch of the government only." *Vineyard Land*, 42 Nev. 1 at 15, 171 P. at 180 (1918). While the State Engineer may hold proceedings relating to the securing water rights, the district court has original jurisdiction in all cases which

[13] Water rights are real property rights.

involve, "title, or right of possession to, or possession of, real property, even though a water right is real estate." *Id.*

Finally, to the extent the State Engineer claims he retained some discretion over the granting of the St. Clair application that he previously denied, that discretion is limited to determining whether St. Clair's new well would impact other water rights. But the district court understood, and the State Engineer knows, that St. Clair is the only person who owns water rights in the area of that well, and that he is currently using the well to pump water to irrigate other lands. As such, when the State Engineer issued Permit 83246T, and stated, "[t]his temporary permit . . . is issued . . . with the understanding that no other rights on the source will be affected by the change proposed herein." *See* Permit 83246T. Therefore, the State Engineer has already identified that there is no impact by St. Clair's water rights to another water user.

Given these broad powers of the district court, in this case, the district court properly directed the State Engineer to grant the St. Clair application that the State

Engineer previously denied in Ruling 6287.[14] Otherwise, St. Clair would have waited years to get a decision on remand from the administrative agency that may not, given this litigation, consider his application in an unbiased manner.

IV. The District Court Sufficiently Stated Its Findings and Conclusions in Its Order.

A. The District Court Properly Complied with NRCP 52.

The State Engineer argues that the district court judge's ruling from the bench was insufficient due to the lack of inclusion of findings of facts. Appellant Opening Br. at 26. This argument is without merit.

NRCP 52 states:

> It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence *or appear in an opinion or memorandum of decision filed by the court*.
>
> (Emphasis added).[15]

[14] Importantly, the application that the State Engineer was order to grant was a temporary application (83246T) that is valid for one year. That application was granted on June 10, 2016, and will expire on June 10, 2017. Accordingly, when that application expires, this issue will become moot.

[15] Federal Rules of Civil Procedure ("FRCP") 52 (a)(1) contains similar language, stating "[t]he findings and conclusions may be stated on the record after the close of

The State Engineer's argument is based upon the incomplete reading of NRCP 52. The State Engineer focuses on the portion of the Nevada rule that addresses oral rulings, but fails to mention the following provision that expressly authorizes a court to include findings and conclusions in a written decision. In this case, the district court stated on the record that it would file a written memorandum based on a draft order that was written by the prevailing party. JA 587, 669.[16] The district court was not required to immediately issue an oral rendition of the findings of facts and conclusions of law. Instead, the court was authorized to make oral findings and conclusions, but then to finalize its findings and conclusions in a written order. The court also followed common practice by asking for a proposed order from the prevailing party to assist it in making the written decision. Then the court had the benefit of proposed orders from both sides. Accordingly, the district court properly complied with NRCP 52.

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the evidence *or may appear in an opinion or a memorandum of decision filed by the court.*" Emphasis added.

[16] The district judge stated, "I'm going to ask Mr. Taggart to [draft an order] . . . according to this decision and the evidence that's in, . . . [and] run it by the state. You can include findings of fact, you can include conclusions of law." JA at 668-69.

The district court did not, as the State Engineer alleges, simply adopt St. Clair's proposed order, and certainly did not delegate its judicial duty to St. Clair. The district court considered the written arguments of the parties and oral presentations of their positions. Based on that information, the Court agreed with St. Clair's legal position. Then the court deliberated over the proposed orders and filed its own order.

The State Engineer cites to *United States v. Forness* as support for their argument. Appellant Opening Br. at 25. However, *Forness* supports the practice that was used by the district court in this case. In *Forness*, the Second Circuit Court of Appeals addressed the care and importance that a district court must take when ascertaining the facts of a case to issue the findings of fact and conclusions of law. *United States v. Forness*, 125 F.2d 928, 943 (2d Cir. 1942). The Second Circuit stressed the importance of a district court conducting a complete fact finding of the issues before it. *Id*. Further, the *Forness* court focused on the necessity that all pertinent facts be included in an order. *Id.* The district court's order complies with *Forness* because it includes findings of fact and conclusions of law on all pertinent matters.

Further, in *Forness*, some of the lower court's findings were unsupported by evidence. *Id.* Here, evidence supports each of the district court's findings and conclusions, and the district court held a hearing on the proposed order. JA 756-791. The State Engineer was granted an opportunity to review St. Clair's proposed order and present objections to the proposed order. *Id*. As such, the district court did not mechanically adopt an argumentative proposed order. Rather, the proposed order was carefully reviewed and analyzed by the district court before an order was filed.

B. St. Clair did not expand the district court's order.

The State Engineer incorrectly states that St. Clair expanded the district court's oral ruling. Appellant Opening Br. at 26. The district court ordered St. Clair to draft a proposed order. JA 587, 669. The district court informed St. Clair's counsel that he could include a findings of a fact and conclusions of law. *Id*. The district court then stated he would hold a hearing if there was a disagreement over the proposed order. JA 669. The district court then stood in recess. JA 670. The district court's

oral ruling from the bench was never intended to be its final order. If it had, no appeal could have been filed.[17]

Also, the district court relied on the briefs and oral arguments as the foundation for its order. Every finding and conclusion in the order is supported by evidence in the record, legal precedent and the arguments that were presented by the parties. Therefore, neither the district court's order, nor St. Clair's proposed order was an improper expansion of the record.

C. The District Court did not improperly delegate his authority.

The State Engineer's argues that the district court inappropriately delegated its authority. Appellant Opening Br. at 27. This claim is unsupported. The district court reviewed St. Clair's proposed order, the State Engineer's objections, and held a hearing on the matter. The State Engineer was granted an opportunity to raise any objection at a hearing. Rather than accept that the district court disagrees with the State Engineer's arguments, the State Engineer produces a blanket statement that St.

[17] NRAP 4(a)(1) states "a notice of appeal must be filed after entry of a written judgment or order," and an appeal may only be brought once notice of the entry of a written judgment or an order is served.

Clair's proposed order is argumentative and claims St. Clair acted as the final judge in this matter. These claims that the district court abrogated its duty to make its own decision are simply unsupported and offensive, and should therefore be rejected.

V. The District Court Did Not Expand The Administrative Record.

The State Engineer argues that the district court improperly expanded the administrative record. This argument is without merit.

A. Documents in St. Clair's Request for Judicial Notice.

1. State Engineer's 2002 Answering Brief Regarding Abandonment.

The first document that was included in St. Clair's request for judicial notice was the State Engineer's June 24, 2002, Answering Brief in *Alpine V*. The State Engineer previously made argument on the exact issue that is raised here at the Ninth Circuit, and the Ninth Circuit has already ruled on this exact argument. NRS 47.140 allows the courts to take judicial notice of matters of law.

The June 24, 2002 Answering Brief is an official court document and there are no circumstances that indicate a lack of trustworthiness. The June 24, 2002, Answering Brief is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned – the Ninth Circuit Court's online

docket. The fact that the State Engineer entered and argued an answering brief in the *Alpine* court on June 24, 2002, is not in dispute.

2. State Engineer Ruling 5464-K

The second document in St. Clair's request for judicial review was State Engineer Ruling 5464-K. This ruling is a public document and the accuracy is not in question. This document shows that the State Engineer understood in Ruling 5464-K that the law of abandonment in Nevada is completely different than what his office tried to apply in the present case, and is arguing now before this Court.

3. State Engineer's 2006 Answering Brief

The last document in St. Clair's request for judicial review was a 2006 Answering Brief that was filed by the State Engineer in Nevada's federal district court. The 2006 Answering Brief was filed on behalf of the State Engineer, is an official court document, and its authenticity is not challenged. This answering brief also relates to application of the Ninth Circuit's holding on the rule of abandonment.

The fact the State Engineer made arguments to the Ninth Circuit or a ruling on based on the Ninth Circuit remand, cannot be disputed.[18]

B. The District Court Properly Granted St. Clair's Request for Judicial Notice.

1. State Engineer's Opposition was Untimely.

On June 3, 2015, St. Clair filed in the district court a request for judicial notice. The State Engineer did not file a timely objection to St. Clair's request. JA 430-556, 532-66. The State Engineer thereby failed to preserve his office's right to appeal the granting of St. Clair's request for judicial notice. District Court Rule ("DCR") 13(3), *Leonard v. State*, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

However, five months later, on November 11, 2015, the State Engineer filed an untimely opposition to St. Clair's request for judicial notice. JA 562-66. The

[18] In his answering brief in this case, the State Engineer incorrectly claims that the judicial notice documents were written by counsel for St. Clair when he represented the State Engineer. The 2002 and 2006 State Engineer answering briefs clearly indicate they were written by Deputy Attorney General Michael L. Wolz, and there is no indication that a deputy from the Attorney General's office wrote State Engineer Ruling 5464-K.

district court properly denied the State Engineer's request because it was untimely. JA 759, 796.

2. St. Clair's Request for Judicial Notice Complied with Nevada law.

The district court also ruled that St. Clair's request for judicial review should be granted because the request complied with NRS 47.130 and NRS 47.150. JA 796-97. Courts are empowered by NRS 47.130 and NRS 47.150 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. Case law further recognizes that judicial notice may be taken of any public documents or the executive acts of an agency. *Jones v. United States*, 137 U.S. 202, 212-13 (1890).

Here, St. Clair's request only involved three documents, all of which are either court documents or public records of the State Engineer's office.[19] The documents

[19] The State Engineer did not challenge any other document that was relied on by the district court, and thereby waived his office's right, if any, to raise such a challenge in this appeal.

are relevant to explaining the law of abandonment, and do not involve facts. The documents explain the Ninth Circuit's holding in *Alpine V* that the State Engineer relied on in Ruling 6287, and show that the State Engineer knowingly misapplied the *Alpine V* holding in this case. Therefore, the district court properly took judicial notice of these three documents.

C. Court Documents and Public Records from the State Engineer's Office are not New Evidence and Should Not be Hidden from Judicial Review.

The State Engineer incorrectly argues that the district court expanded the administrative record by taking judicial notice of these documents. These documents were used by the district court to inform its *de novo* review of the legal standard that the State Engineer applied for abandonment. Each document in the request for judicial review related to the proper legal standard for this case. These documents do not constitute new evidence.[20]

[20] Even if new evidence is offered to expand an administrative record, however, a court may allow such evidence if (1) the supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) the supplementation is needed to explain technical terms or complex subjects; and (4) the plaintiffs have shown bad faith on

While a court is limited in its consideration of evidence, it is certainly not "contrary to law" for the Court to consider documents that reflect proper legal standard that should be applied. Neither precedent, nor the State Engineer's prior position, should be ignored or hidden from a court. The district court, and this court, should have the opportunity to review these documents to apply the proper legal standard before reviewing the evidence or judging the soundness of Ruling 6287.

In Ruling 6287, the State Engineer's office applied a legal standard when it stated that "[a]t a minimum, then, proof of continuous use of the water right should be required to support a finding of *lack* of intent to abandon." JA 18. For this proposition, the State Engineer's office cited to the Ninth Circuit's decision in *Alpine V*. *Id.* But that proposition was contained in a specific section of the *Alpine V* ruling

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the part of the agency. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010); see also *Autotel v. Bureau of Land Management*., 25 2:12-CV-00164-RFB, 2015 WL 1471518, at *1 (D. Nev. Mar. 31, 2015) (allowing petitioner to supplement the record on appeal with files relating to the action); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) (quoting *Sw. Ctr. For 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).

that applies only to intrafarm transfers. Other portions of *Alpine V* make it clear that this standard does not apply, except in intrafarm transfers, which is a unique fact pattern in the federal reclamation project in Fallon, Nevada (the Newlands Project). The documents offered in St. Clair's request for judicial notice demonstrate that the State Engineer misapplied the intrafarm transfer rule to the facts of this case.

The documents offered by St. Clair relate specifically to the legal standard that was misapplied in this case by the State Engineer's office. The State Engineer is not afforded deference to reinterpret Nevada water law after it has been articulated by the judiciary. Yet, Ruling 6287 represents a sharp departure from judicial precedent and the State Engineer's prior practice. Courts should take judicial notice of public records or court documents that best articulate the proper rule of law. Precedent is based on judicial decisions and the Court should be afforded the best opportunity to determine judicial precedent. State Engineer arguments in *Alpine V*, after *Alpine V*, and the administrative order that applied the *Alpine V* holding, certainly are informative when reviewing whether the State Engineer misapplied the rule of law in this case.

Since Ruling 6287 represents a sharp departure from judicial precedent and the State Engineer's prior practice, the district court was proper in taking judicial notice

of the documents offered by St. Clair that best articulate the proper rule of law that should be applied in this case. Therefore, the district court properly granted St. Clair's request for judicial notice.

D. The District Court Properly Ruling on St. Clair's Request for Judicial Review in Its Written Order.

The State Engineer asserts the district court committed error by not orally ruling on the request for judicial review, but then ruling on that matter in it written order. Answering Brief at 31. This claim is without merit.

The district court heard arguments that considered the request for judicial notice at the hearing on January 5, 2015. The State Engineer had an opportunity to challenge the request for judicial notice and did not. After the hearing, the court directed St. Clair to prepare a proposed order.

Certainly this Court is entitled to review documents that demonstrate the State Engineer's was arbitrary and capricious in the issuance of Ruling 6287. If the State Engineer applied to wrong rule of law, that is clearly arbitrary and capricious. If the State Engineer made prior arguments to a judicial tribunal and entered official decisions that espoused a position contrary to the position he espouses now, that is clearly relevant to a determination of whether the State Engineer is currently acting in

an arbitrary and capricious fashion. At a minimum, the State Engineer should have to explain to this Court why he has applied the rule of law he chose in Ruling 6287, despite his contrary positions in official court records and rulings. Accordingly, the district court properly took judicial notice of these documents based on NRS 47.130.

CONCLUSION

For the foregoing reasons, St. Clair respectfully requests the Court to affirm the district court's Order Overruling State Engineer's Ruling 6287.

DATED this 23rd day of January, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font and Times New Roman type style.

2. I certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 10,785 words and 1,086 lines.

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

event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I hereby certify that I am an employee of TAGGART & TAGGART, LTD, and that on this date, I caused the foregoing document to be served on all parties to this action by electronic filing to:

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