

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

JASON KING, P.E., NEVADA STATE  
ENGINEER, et al.,  
Appellant,  
vs.  
RODNEY ST. CLAIR,  
Respondent,

No. 77651

DOCKETING  
CIVIL APPEALS

Electronically Filed  
Dec 24 2018 09:45 a.m.  
Elizabeth N. Brown  
Clerk of Supreme Court

## GENERAL INFORMATION

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

## WARNING

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

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

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

1. Judicial District Sixth Department 2

County Humboldt Judge Steven R. Kosach

District Ct. Case No. 20,112

**2. Attorney filing this docketing statement:**

Attorney James N. Bolotin, Esq. Telephone (775) 684-1231

Firm Office of the Nevada State Attorney General

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

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

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

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

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

Firm Taggart & Taggart, Ltd.

Address 108 North Minnesota Street  
Carson City, Nevada 89703

Client(s) Respondent, Rodney St. Clair

Attorney Timothy D. O'Connor, Esq. Telephone (775) 882-9900

Firm Taggart & Taggart, Ltd.

Address 108 North Minnesota Street  
Carson City, Nevada 89703

Client(s) Respondent, Rodney St. Clair

(List additional counsel on separate sheet if necessary)

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

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

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

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

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

Jason King, P.E., Nevada State Engineer, et al., v. Rodney St. Clair -  
Nevada Supreme Court Case No. 70458

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:  
None.

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

The State Engineer is appealing the district court's decision to grant Rodney St. Clair's Motion for Attorneys' Fees in the amount of \$50,025.00. Following the District Court's decision granting Rodney St. Clair's Petition for Judicial Review, with Notice of Entry of Order served and filed on or about April 27, 2016, and following the Supreme Court's affirmance of the District Court's order, with Remittitur served and filed on or about May 4, 2018, Rodney St. Clair served and filed his Motion for Attorneys' Fees on or about June 28, 2018. Following a full briefing on the issue from both parties, and oral argument held October 19, 2018, the District Court ruled from the bench, granting Rodney St. Clair's Motion for Attorneys' Fees, including the additional fees incurred preparing and arguing the Motion for Attorneys' Fees. The district court filed the written order on November 26, 2018, with Notice of Entry of Order served on December 3, 2018. This order is being appealed by the State Engineer.

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

1. Whether the State Engineer, through actions brought under NRS 533.450, is subject to attorneys' fees under NRS 18.010(2)(b)?
2. Whether the 20 day deadline to file a motion for attorneys' fees in NRCP 54(d)(2)(B) applies to motions brought under NRS 18.010(2)(b)?
3. Whether St. Clair's Motion for Attorneys' Fees was untimely as it was filed over 2 years after the Notice of Entry of Order in the underlying case?
4. Whether the district court has authority to grant attorneys' fees incurred at the Nevada Supreme Court?
5. Whether the State Engineer maintained his defense "without reasonable ground," as required for attorneys' fees under NRS 18.010(2)(b)?

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

Counsel is unaware of any proceedings presently pending before this court raising the same or similar issues.



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

☒ N/A

☐ Yes

☐ No

If not, explain:

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

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

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

☒ A substantial issue of first impression

☒ An issue of public policy

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

☐ A ballot question

If so, explain: As far as counsel is aware, this is the first time that a district court has granted attorneys' fees against the State Engineer in an action under NRS 533.450. The Nevada Supreme Court has held previously that district courts are not authorized to award attorneys' fees against State agencies in actions under NRS 233B.130. *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 785 (1993). There are also questions re: the application of the NRCP 54(d)(2)(B) 20-day deadline to NRS 18.010(2)(b) motions and whether the district court has authority to award fees incurred on appeal at the Nevada Supreme Court.

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

This matter is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9) as an administrative agency appeal involving a water determination. While counsel is aware that appeals from attorneys' fees judgments of \$250,000 or less in tort cases are assigned to the Court of Appeals pursuant to NRAP 17(b)(5), this case is not a tort case and provides a unique situation concerning a State agency such that it warrants the Supreme Court retaining this case.

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

Was it a bench or jury trial? \_\_\_\_\_

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?  
No.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** Nov 26, 2018

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

**17. Date written notice of entry of judgment or order was served** Dec 3, 2018

Was service by:

☐ Delivery

☒ Mail/electronic/fax

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

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

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59      Date of filing \_\_\_\_\_

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

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

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

Was service by:

☐ Delivery

☐ Mail

**19. Date notice of appeal filed** Dec 6, 2018

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

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

NRAP 4(a)(1)

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**SUBSTANTIVE APPEALABILITY**

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

(a)

- |   |                                       |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1)                         | <input type="checkbox"/> NRS 38.205   |
| <input type="checkbox"/> NRAP 3A(b)(2)                                    | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3)                                    | <input type="checkbox"/> NRS 703.376  |
| <input checked="" type="checkbox"/> Other (specify) <u>NRS 533.450(9)</u> |                                       |
- 

(b) Explain how each authority provides a basis for appeal from the judgment or order: This is an appeal from a final decision of the Sixth Judicial District Court based upon a motion for attorneys' fees commenced before the court where the judgment on the attorneys' fees motion was rendered. The litigation regarding the attorneys' fees motion occurred following the resolution of the case on the merits at the Nevada Supreme Court in Case No. 70458.

Further, pursuant to NRS 533.450(9), this appeal originated from a case brought pursuant to NRS 533.450 and therefore an appeal may be taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from the judgment of the district court in the same manner as in other civil cases.

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

(a) Parties:

RODNEY ST. CLAIR, Petitioner

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

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

N/A

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

Following the conclusion of the Supreme Court litigation, Rodney St. Clair caused to be filed a motion for attorneys' fees pursuant to NRS 18.010(2)(b) on or about June 28, 2018.

On November 26, 2018, the district court entered a written order granting the motion.

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

☒ Yes

☐ No

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

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

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

☐ Yes

☐ No

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

☐ Yes

☐ No

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

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

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

## VERIFICATION

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

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

James N. Bolotin, Esq.  
Name of counsel of record

December 21, 2018  
Date

/s/ James N. Bolotin, Deputy AG  
Signature of counsel of record

Carson City, Nevada  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 21st day of December, 2018, I served a copy of this completed docketing statement upon all counsel of record:

☒ By personally serving it upon him/her; or

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

Paul G. Taggart, Esq.  
Timothy D. O'Connor, Esq.  
TAGGART & TAGGART, LTD.  
108 North Minnesota Street  
Carson City, NV 89703

Dated this 21st day of December, 2018

/s/ Dorene A. Wright  
Signature

## INDEX OF ATTACHMENTS

No.	ATTACHMENT DESCRIPTION	NUMBER OF PAGES
1.	Petitioner's Notice of Motion and Motion for Attorneys' Fees filed 07/02/18	16
2.	Opposition to Motion for Attorneys' Fees filed 07/16/18	14
3.	Reply in Support of Motion for Attorneys' Fees filed 07/23/18	15
4.	Order Granting Motion for Attorneys' Fees filed 11/25/18	11
5.	Notice of Entry of Order filed December 3, 2018	16



**ATTACHMENT 1**

**ATTACHMENT 1**

FILED

2018 JUL -2 PM 12: 22

TAMI RAE SPERO  
DIST. COURT CLERK

1 CASE NO.: CV 20, 112

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 Engineer,  
13 DIVISION OF WATER RESOURCES,  
14 DEPARTMENT OF CONSERVATION AND  
15 NATURAL RESOURCES,

16 Respondent.

**PETITIONER'S NOTICE OF MOTION  
AND MOTION FOR ATTORNEYS' FEES**

17 COMES NOW, Petitioner, RODNEY ST. CLAIR ("St. Clair"), by and through his counsel of  
18 record, PAUL G. TAGGART, ESQ. and TIMOTHY D. O'CONNOR, ESQ., of the law firm of  
19 TAGGART & TAGGART, LTD., and hereby respectfully submits this Motion for Attorneys' Fees  
20 ("Motion"). In this Motion, St. Clair requests that the district court award him attorneys' fees in the  
21 amount of forty-one thousand eight hundred eighty-one dollars and twenty-five cents (\$41,881.25) to  
22 reimburse St. Clair for all attorneys' fees incurred while appealing State Engineer Ruling 6287 to the  
23 district court and, subsequently, the State Engineer's appeal of the district court's order to the Nevada  
24 Supreme Court. St. Clair was successful at both levels. This Motion is based on the attached  
25 Memorandum of Points and Authorities, all pleadings and paper on file herein, and any oral argument  
26 the Court may allow.

27 ///

## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

Had the State Engineer not ignored Nevada's water law and Rules of Civil Procedure, St. Clair would not have needed to incur the above-calculated attorneys' fees. Requiring private citizens to bear the significant costs associated with correcting blatantly arbitrary and capricious State Engineer actions, in which he deprives those citizens of fundamental property rights, is profoundly unfair and unjust. In defending his rulings, the State Engineer has available to him, at no cost, the Attorney General's virtually unlimited monetary resources. By contrast, those harmed by his rulings must pay their own litigation costs out-of-pocket, or give up their water rights. This creates an uneven playing field and an incentive for the State Engineer to take litigation stances which would not otherwise be taken by a private party. Accordingly, the only effective deterrent to the issuance of improper State Engineer filings and arguments is the possibility that the State Engineer will be required to pay the attorneys' fees of those harmed by his actions. Had a private party taken these actions, a court would likely grant St. Clair relief in the form of attorneys' fees. The State Engineer should be held to the same standard.

### BACKGROUND

St. Clair owns real property in Humboldt County, Nevada, that was purchased in August 2013. St. Clair filed a Proof of Appropriation to prove that he owned a vested groundwater right which existed on his property when he purchased the property (V-010493). The vested right was for irrigation of 160 acres of land. On November 8, 2013, St. Clair filed a change application to change the point of diversion of the vested water right to a new well. The State Engineer conceded that V-010493 is a valid, vested water right and did exist on St. Clair's property.<sup>1</sup>

On July 25, 2014, the State Engineer, without holding a hearing, issued Ruling 6287 ("Ruling"). In the Ruling, the State Engineer established that V-010493 did exist on St. Clair's property before 1939, but incorrectly concluded that V-010493 was abandoned based on nonuse. The State Engineer raised the abandonment issue *sua sponte* in the Ruling, without notice to St. Clair, and without giving St. Clair an opportunity to show the State Engineer the error he made in Ruling 6287. In the Ruling, the State

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<sup>1</sup> Ruling 6287.

1 Engineer improperly shifted the burden to St. Clair, requiring him to show a lack of intent to abandon  
2 V-010493.

3 St. Clair appealed the Ruling. On July 3, 2015, after the case was briefed, St. Clair filed a  
4 Request for Judicial Notice with the district court, requesting that the district court review legal briefs  
5 and prior State Engineer decisions. The State Engineer filed an opposition to this request five months  
6 after the request was made, in clear violation of District Court Rule (“DCR”) 13(3). Oral arguments  
7 were held on January 5, 2016. St. Clair pointed out the State Engineer’s failure to timely file the  
8 opposition during the oral arguments, and St. Clair requested that the opposition be denied for being  
9 untimely.

10 After oral arguments, the district court ruled from the bench for St. Clair, noting that  
11 “abandonment in Nevada is defined as the relinquishment of the right by the owner with the intention  
12 to forsake and desert it.”<sup>2</sup> The Court further noted that a water right owner does not have the intent to  
13 abandon a vested right “when you have the intent to revise the claim, when you have the intent to apply  
14 for the [change] application.”<sup>3</sup> The district court explained that “if there’s only evidence of non-use,  
15 that’s not good enough.”<sup>4</sup> The district court then concluded by stating that “[it] feels very strongly that  
16 [it’s] backed by the law. [It] feels very strongly that this is not a difficult decision for a court to make  
17 based on what was presented.”<sup>5</sup> The district court also denied the State Engineer’s opposition to St.  
18 Clair’s Request for Judicial Notice because it was untimely.

19 The district court ordered St. Clair to draft a proposed order and confer with the State Engineer  
20 to ensure its accuracy. St. Clair drafted the proposed order and provided it to the State Engineer on  
21 March 7, 2016. The State Engineer then provided St. Clair with his comments and revisions to the  
22 proposed order. St. Clair sent both his draft, and the State Engineer’s proposed changes, to the district  
23 court. The State Engineer then objected to the proposed order, filing a 78-page, six-exhibit document  
24 with the district court. Though St. Clair had followed the district court’s instructions regarding the  
25 proposed order, St. Clair was forced to file a response to the State Engineer’s objection to the proposed  
26 order, and appear and argue against the motion, which cost St. Clair further unnecessary attorneys’ fees.

27 <sup>2</sup> January 5, 2016, Hearing Transcript, p. 79:21-23.

28 <sup>3</sup> *Id.*, p. 80:15-17.

<sup>4</sup> *Id.*, p. 80:20-21.

<sup>5</sup> *Id.*, p. 82:17-20.

1 The district court held a hearing to consider the State Engineer’s objections, and ultimately found that  
2 St. Clair had accurately reflected the district court’s findings in his order and signed St. Clair’s order on  
3 April 11, 2016.

4 Despite the district court’s clear and simple order, the State Engineer appealed the order to the  
5 Nevada Supreme Court. The State Engineer again argued that V-010493 was abandoned because St.  
6 Clair could not show an intent not to abandon the water right. The Nevada Supreme Court agreed with  
7 the district court, finding that “there is not clear and convincing evidence” that V-010493 was ever  
8 abandoned.<sup>6</sup> The Nevada Supreme Court concluded that “the State Engineer misapplied Nevada law by  
9 presuming abandonment based on nonuse evidence alone” just as the district court had explained to the  
10 State Engineer.<sup>7</sup>

11 The State Engineer also argued that the district court abused its discretion by expanding the  
12 record on review through judicial notice, though the State Engineer did not object to the request for  
13 judicial notice until five months after it was filed. The Nevada Supreme Court ruled that “the State  
14 Engineer failed to preserve [the objection] with its opposition filed five months after St. Clair’s request  
15 for judicial notice.”<sup>8</sup> Lastly, the State Engineer argued that the district court violated NRCP 52 by  
16 adopting St. Clair’s proposed order and, in doing so, neglected its duties to make its own factual findings.  
17 The Nevada Supreme Court stated that the district court had a hearing on the issue, after which “the  
18 district court found [the State Engineer’s] objections unpersuasive.”<sup>9</sup> The Nevada Supreme Court noted  
19 that the district court did not “neglect[ ] its duty to make factual findings.”<sup>10</sup> The Nevada Supreme Court  
20 then explained that “it is common practice for Clark County district courts to direct the prevailing party  
21 to draft the court’s order.”<sup>11</sup> Ultimately, the Nevada Supreme Court affirmed the district court’s  
22 decision.<sup>12</sup>

23 St. Clair has spent tens of thousands of dollars litigating this case against the State Engineer, at  
24 both the district court and Supreme Court levels. The State Engineer’s meritless motions and objections  
25

26 <sup>6</sup> *King v. St. Clair*, 134 Nev. Adv. Op. 18, 7, 414 P.3d 314, 317 (2018).

27 <sup>7</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.

28 <sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, 134 Nev. Adv. Op. 18 at 9, 414 P.3d at 318.

1 have added to the cost of the litigation, and St. Clair should not be the one to suffer the burden of that  
2 cost. If fees are not awarded, the State Engineer is ultimately without reprimand from his meritless  
3 litigation actions. Here, fees are merited due to the many hoops the State Engineer forced St. Clair to  
4 jump through to access his valid, vested water right.

### 5 STANDARD OF REVIEW

6 Under NRS 18.010(2)(b) a district court is authorized to award a party attorney's fees in cases  
7 where the opposing party has advanced claims or defenses that are "brought or maintained without  
8 reasonable ground or to harass the prevailing party." The statute further declares that the Court "shall  
9 liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate  
10 situations."<sup>13</sup> The purpose for the liberal construction of the provisions of NRS 18.010(2)(b) is "to  
11 punish for and deter frivolous or vexatious claims and defenses because such claims and defenses  
12 overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase  
13 the costs of engaging in business and providing professional services to the public."

14 The Nevada Supreme Court has read NRS 18.010(2)(b) as authorizing a district court to grant  
15 an award of attorney's fees as a sanction against a party who advances a claim or defense without  
16 reasonable grounds.<sup>14</sup> In addition, "[t]he decision to award attorney fees is within the [district court's]  
17 sound discretion . . . and will not be overturned absent a manifest abuse of discretion."<sup>15</sup>

### 18 ARGUMENT

#### 19 I. St. Clair Should Be Awarded Attorneys' Fees From The State Engineer's Untimely 20 Opposition And Meritless Objection.

21 St. Clair should be compensated for the funds he spent on attorneys' fees in light of the State  
22 Engineer's litigation actions. First, the State Engineer filed a grossly untimely opposition to St. Clair's  
23 request for judicial notice of public documents in violation of DCR 13, without first requesting  
24 permission from the district court. Second, the State Engineer made meritless objections to St. Clair's  
25 proposed order. These actions were baseless and ultimately cost St. Clair thousands of dollars in  
26 otherwise unnecessary attorneys' fees which should be remitted back to St. Clair.

27  
28 <sup>13</sup> NRS 18.010(2)(b).

<sup>14</sup> *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006).

<sup>15</sup> *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005) (internal quotations omitted).

1 While attorneys' fees for appeals from agency decisions pursuant to NRS Chapter 233B are not  
2 permitted through statute, the State Engineer is specifically exempt from the 233B provisions.<sup>16</sup>  
3 Additionally, appeals under NRS Chapter 533 have not been limited like those under NRS Chapter  
4 233B. The Nevada Supreme Court in *State, Dep't. of Human Res. v. Fowler*<sup>17</sup> and *Zenor v. State, Dep't*  
5 *of Transportation*<sup>18</sup> explained that the language of Chapter 233B does not permit awards of attorney's  
6 fees. No attorney's fees are allowed for NRS 233B appeals because NRS 233B.130(6) states that "the  
7 provisions of this chapter are the *exclusive* means of judicial review . . ."<sup>19</sup> These limitations are not  
8 applicable to appeals from State Engineer decisions because there is no "exclusive means" language in  
9 NRS Chapter 533 like that which the Nevada Supreme Court relied on in *Fowler* and *Zenor*. As such,  
10 the Court has the authority to award St. Clair his deserved attorneys' fees.

11 A. **The State Engineer's untimely opposition to the request for judicial notice was filed**  
12 **without reasonable grounds, so St. Clair should be compensated for attorneys' fees**  
**incurred from responding to the opposition.**

13 St. Clair requests that the Court award him attorneys' fees in the amount of two thousand six  
14 hundred seventy-two dollars and fifty cents (\$2,672.50) for fees incurred as a result of the State  
15 Engineer's untimely objection to St. Clair's request for judicial notice. St. Clair requested that the  
16 district court take judicial notice of several public documents, including past State Engineer rulings, on  
17 June 2, 2015. Under DCR 13(3), an opposing party is required to serve and file a written opposition  
18 within 10 days after service of a motion. The State Engineer did not file an opposition to that request  
19 until five (5) months after St. Clair's judicial notice request was filed. St. Clair was then obligated to  
20 file a reply to the State Engineer's untimely opposition. The district court then denied the State  
21 Engineer's opposition as untimely. The State Engineer brought this issue up again in the Nevada  
22 Supreme Court, and the Supreme Court confirmed the district court's ruling, stating "the State Engineer  
23 failed to preserve it with its opposition filed five months after St. Clair's request for judicial notice."<sup>20</sup>

24 The State Engineer did not have reasonable grounds to file his opposition *five months* after St.  
25 Clair filed the request with the district court. The State Engineer did not include any authority suggesting  
26

27 <sup>16</sup> NRS 233B.039(j).

<sup>17</sup> 109 Nev. 782, 858 P.2d 375 (1993).

<sup>18</sup> 134 Nev. Adv. Op. 14, 412 P.3d 28 (2018).

<sup>19</sup> *Id.* (citing NRS 533B.130(6)).

<sup>20</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.

1 that he could bypass DCR 13(3) and file an untimely opposition. The rules limiting time to file  
2 oppositions to requests are generally universal throughout the United States, and it is a well-understood  
3 rule that oppositions must be timely or permission must first be sought from the Court.<sup>21</sup> Because St.  
4 Clair expended funds on attorneys' fees totaling two thousand six hundred seventy-two dollars and fifty  
5 cents (\$2,672.50) to respond to this untimely opposition, the State Engineer should remit those  
6 attorneys' fees to St. Clair.

7 **B. The State Engineer's objections to the proposed order were meritless.**

8 St. Clair requests that the Court also award him attorneys' fees relating to the State Engineer's  
9 meritless objections to the Court's proposed order request, which cost St. Clair one thousand eight  
10 hundred forty-seven dollars and fifty cents (\$1,847.50). After ruling in St. Clair's favor at the district  
11 court hearing, the district court requested that St. Clair prepare an order for the Court.<sup>22</sup> St. Clair drafted  
12 the proposed order and provided it to the State Engineer on March 7, 2016. The State Engineer objected  
13 to the district court's routine request that the prevailing party prepare the order for the district court,  
14 even though the State Engineer had an opportunity to review the proposed order and St. Clair provided  
15 the Court with both versions of the proposed order.<sup>23</sup> Both parties were involved in drafting the proposed  
16 order, and both parties' versions of the proposed order were sent to the district court. The district court  
17 held a hearing to discuss the discrepancies between the two proposed orders and, after hearing the State  
18 Engineer's arguments, was unpersuaded to alter St. Clair's proposed order. The district court ultimately  
19 explained why each of the State Engineer's objections to St. Clair's proposed order were unfounded,<sup>24</sup>  
20 and signed St. Clair's proposed order.

21 Despite this hearing, the State Engineer appealed the district court's order to the Nevada  
22 Supreme Court, claiming the district court "violated NRCP 52 by adopting in full an order drafted by  
23 St. Clair."<sup>25</sup> Upon review, the Nevada Supreme Court discarded the State Engineer's argument, stating  
24 "[t]hat the district court found those objections unpersuasive does not mean that the court neglected its  
25  
26

---

27 <sup>21</sup> See DCR 13.

<sup>22</sup> January 5, 2016, Transcript, pp. 81:23-24 – 82:1-4.

<sup>23</sup> See EDCR 1.90(a)(5); see also *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.

<sup>24</sup> April 4, 2016, Hearing Transcript, pp. 33:16 – 34:10.

<sup>25</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.



1 duty to make factual findings.”<sup>26</sup> Because it is common practice for district courts to request the  
2 prevailing party to draft a proposed order for the court, the State Engineer’s objection to such a request  
3 was without reasonable grounds. As such, and in line with NRS 18.010’s direction to “be liberally  
4 construe[d] . . . in favor of awarding attorney’s fees in all appropriate situations,” St. Clair should be  
5 reimbursed for reasonable attorneys’ fees totaling one thousand eight hundred forty-seven dollars and  
6 fifty cents (\$1,847.50) associated with responding to the State Engineer’s objections to the district  
7 court’s common request.

8 **II. St. Clair Should Be Awarded Attorneys’ Fees For The Funds Spent On The State**  
9 **Engineer’s Appeal To The Supreme Court.**

10 The Nevada Supreme Court held that “the State Engineer misapplied Nevada law by presuming  
11 abandonment based on nonuse evidence alone. In so doing, the State Engineer acted arbitrarily and  
12 capriciously.”<sup>27</sup> The Ruling was an unabashed deviation from the State Engineer’s past – and proper –  
13 application of the abandonment law. The State Engineer had previously enforced the clear and  
14 unambiguous law of abandonment of vested rights the same way for decades.<sup>28</sup> Indeed, only three years  
15 prior to the State Engineer issuing the Ruling, the State Engineer issued Ruling 6201. In Ruling 6201,  
16 evidence existed of a long period of nonuse, but the State Engineer understood that such evidence was  
17 not sufficient to establish abandonment. The State Engineer ruled, “not only does each of these permits  
18 have an extensive history of nonuse, *but the required intent to voluntarily relinquish the water rights*  
19 *also exists.*”<sup>29</sup>

20 Here, however, the State Engineer opted to forego that well-settled principle of intent to abandon  
21 and require that St. Clair prove his and his predecessor’s intent *not* to abandon.<sup>30</sup> In doing so, the State  
22 Engineer improperly shifted the burden to St. Clair.<sup>31</sup> The district court noted the State Engineer’s clear  
23 error during the district court hearing. The district court stated that “[it] feels very strongly that [it’s]

24  
25 <sup>26</sup> *Id.*

26 <sup>27</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at 317.

27 <sup>28</sup> See e.g., Ruling 6032 (finding intent to abandon based on loss of grazing rights and failure to respond to State Engineer  
28 inquiries); Ruling 5898 (same); see also Ruling 6131, p. 3 (finding voluntary intent to abandon based on failure of owner to  
29 have valid corporation filed with Secretary of State, and failure to communicate with State Engineer’s office for over 60  
30 years); Ruling 6152 (same); Ruling 6081 (same).

31 <sup>29</sup> Ruling 6201, p. 3.

<sup>30</sup> *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314.

<sup>31</sup> *Id.*

1 backed by the law. [It] feels very strongly that this is not a difficult decision for a court to make based  
2 on what was presented.”<sup>32</sup> The State Engineer made the Ruling without reasonable grounds and the  
3 Ruling should have been reversed when the petition for judicial review was filed or, at the latest, when  
4 the district court overturned the Ruling. The State Engineer’s decision to maintain the suit, rather than  
5 reverse the incorrect Ruling, was without reasonable grounds and was contrary to established law.  
6 Accordingly, as the district court “shall liberally construe the provisions of [NRS 18.010] in favor of  
7 awarding attorney’s fees in all appropriate situations,”<sup>33</sup> the district court should award St. Clair the  
8 attorneys’ fees associated with these appeals and outlined in the affidavit attached as Exhibit 1.

9 Once the State Engineer realized he had violated this bright-line rule of law, he should have  
10 permitted St. Clair to move forward and simply put his water to beneficial use. However, the State  
11 Engineer chose to appeal the district court’s order to the Nevada Supreme Court.

12 St. Clair was forced to spend thirty-seven thousand three hundred sixty-one dollars and twenty-  
13 five cents (\$37,361.25) on Nevada Supreme Court litigation of an already clear and unambiguous law  
14 in order to retain his vested water right. Unlike many other appeals to the Nevada Supreme Court that  
15 the State Engineer has participated in previously, there existed no controversy of law in the present case.  
16 As explained above, the State Engineer had previously clarified the law in his own rulings, and simply  
17 deviated from that practice in the instant case. The Nevada Supreme Court explained that a litany of  
18 cases, both state and federal, have long held that nonuse evidence alone is not enough to show  
19 abandonment of a water right.<sup>34</sup> Despite the fact that his office is charged with administering the laws  
20 of Nevada, and the fact that the law states that nonuse evidence alone is not enough to claim  
21 abandonment, the State Engineer decided to proceed with only nonuse evidence to try to prove  
22 abandonment of St. Clair’s claims. As such, the State Engineer maintained the suit without reasonable  
23 grounds, and therefore St. Clair is entitled to attorneys’ fees.

24 ///

26 <sup>32</sup> January 5, 2016, Hearing Transcript, p. 82:17-20.

27 <sup>33</sup> NRS 18.010(2)(b).

28 <sup>34</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 6, 414 P.3d at 317 (citing *United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035, 1038 (2007); *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *Franktown Creek Irrigation Co., Inc. v. Marlette Lake Co.*, 77 Nev. 348, 354, 364 P.2d 1069, 1072 (1961); *Barry v. Merickel Holding Corp.*, 60 Nev. 280, 290, 108 P.2d 311, 316 (1940)).

**CONCLUSION**


For the foregoing reasons, St. Clair requests attorneys' fees in the amount of forty-one thousand eight hundred eighty-one dollars and twenty-five cents (\$41,881.25).

**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 28 day of June, 2018.

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  
TIMOTHY D. O'CONNOR, ESQ.  
Nevada State Bar No. 14098  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), 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**, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

James N. Bolotin, Esq.  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, Nevada 89701  
Attorney for Respondent

DATED this 28<sup>th</sup> day of June, 2018.

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

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

EXHIBIT INDEX

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<u>Exhibit Number</u>	<u>Description</u>	<u>Page Count</u>
1.	Affidavit of Timothy D. O'Connor, Esq. in Support of Petitioner's Motion for Attorneys' Fees	2

# **EXHIBIT 1**

# **EXHIBIT 1**

1 CASE NO.: CV 20, 112

2 DEPT. NO.: 2

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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 Engineer,  
13 DIVISION OF WATER RESOURCES,  
14 DEPARTMENT OF CONSERVATION AND  
15 NATURAL RESOURCES,

16 Respondent.

**AFFIDAVIT OF**  
**TIMOTHY D. O'CONNOR, ESQ.**  
**IN SUPPORT OF**  
**PETITIONER'S NOTICE OF MOTION**  
**AND MOTION FOR ATTORNEYS' FEES**

17 STATE OF NEVADA )  
18 ) :ss.  
19 COUNTY OF CARSON CITY )

20 I, TIMOTHY D. O'CONNOR, ESQ., do hereby swear under penalty of perjury under the laws  
21 of the State of Nevada that the following assertions are true and correct to the best of my knowledge,  
22 information, and belief:

- 23 1. I am over the age of eighteen (18) and of sound mind.
- 24 2. I am making this affidavit in support of Petitioner's Notice of Motion and Motion for  
25 Attorneys' Fees filed in the above entitled action.
- 26 3. I am an attorney of record for Petitioner, RODNEY ST. CLAIR, and have, along with  
27 other members of TAGGART & TAGGART, LTD., at all relevant times, provided valuable and  
28 necessary services on behalf of RODNEY ST. CLAIR for which he is requesting compensation.

1           4.       That the legal services provided were actually and necessarily incurred and were  
2 reasonable under the circumstances.

3           5.       RODNEY ST. CLAIR is requesting an award of attorneys' fees in the amount of  
4 \$41,881.25. The amount of fees is calculated based on the hours billed for services related to this case  
5 and the hourly rates charged by TAGGART & TAGGART, LTD. as follows:

6                   Senior Partner hourly rate:       \$325.00  
7                   Associate Attorney hourly rate:   \$150.00-175.00  
8                   Paralegal hourly rate:           \$120.00

9           6.       The hourly rates reflected above are reasonable and customary given the novelty and  
10 difficulty of the questions involved in this litigation, the skill requisite to perform the legal services, and  
11 considering the experience, reputation, and ability of the persons performing the services.

12           7.       St. Clair spent \$2,672.50 to respond to the State Engineer's untimely opposition to the  
13 Request for Judicial Notice. This amount was calculated by the following:

14                   Senior Partner Attorney time:       4.25 hours  
15                   Associate Attorney time:           4 hours  
16                   Paralegal time:                   4.25 hours

17           8.       St. Clair spent \$1,847.50 to respond to the State Engineer's meritless objections to the  
18 proposed order. This amount was calculated by the following:

19                   Senior Partner Attorney time:       4 hours  
20                   Associate Attorney time:           7.8 hours  
21                   Paralegal time:                   .75 hours

22 ///

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1           9.       St. Clair spent \$37,361.25 on Nevada Supreme Court litigation that the State Engineer  
2 initiated to overturn the district court's ruling. This amount was calculated by the following:

3                   Senior Partner Attorney time:       42.25 hours

4                   Associate Attorney time:       111.85 hours

5                   Paralegal time:       57 hours

6           FURTHER AFFIANT SAYETH NAUGHT.

7           DATED this 28 day of June, 2018.

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TIMOTHY D. O'CONNOR, ESQ.

SUBSCRIBED and SWORN to  
before me this 28th day of June, 2018,  
by TIMOTHY D. O'CONNOR.



NOTARY PUBLIC



**ATTACHMENT 2**

**ATTACHMENT 2**



COPY

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DIST. COURT CLERK

Case No. CV 20,112

Dept. No. 2

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JUL 18 2018

Nevada Attorney General's Office  
Bureau of Government Affairs

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.

**OPPOSITION TO MOTION FOR  
ATTORNEYS' FEES**

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 (hereafter "State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General James N. Bolotin, hereby files this Opposition to Motion for Attorneys' Fees. This Opposition is based upon the attached Points and Authorities and the pleadings and papers on file herein.

**POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Petitioner Rodney St. Clair's (hereafter "St. Clair") Motion for Attorneys' Fees (hereafter "Motion") is untimely. The practice in civil cases applies to the proceedings seeking judicial review of decisions or orders of the State Engineer. NRS 533.450(8). NRCP 54(d)(2) requires claims for attorney fees to be made by motion. NRCP 54(d)(2)(A).

1 A motion for attorneys' fees may be decided by the district court "despite the existence of  
2 a pending appeal from the underlying final judgment." *Id.* Unless otherwise provided by  
3 statute, a motion for attorney fees "must be filed *no later than 20 days after notice of entry*  
4 *of judgment is served,*" and this deadline *may not be extended* by the court after it has  
5 expired. NRCP 54(d)(2)(B) (emphasis added). St. Clair's Motion was served on the State  
6 Engineer on or about June 28, 2018, more than two years after the Notice of Entry of  
7 Order was filed on April 29, 2016. There is simply not a calculation of time that makes  
8 the motion timely under NRCP 54(d)(2)(B).

9 Yet, even if St. Clair was somehow entitled to recover attorney's fees for the  
10 proceedings before the Nevada Supreme Court, and therefore the clock started running  
11 later, his Motion is still untimely. The Nevada Supreme Court issued its opinion and  
12 judgment affirming this Court's Order on March 28, 2018, issuing its Remittitur on  
13 April 24, 2018, and filing the same on May 4, 2018. Yet the Motion was served 56 days  
14 after the Nevada Supreme Court filed its Remittitur. There is absolutely no calculation  
15 whereby St. Clair timely filed his Motion. Based on the fact the Motion is more than  
16 two (2) years late based on the plain reading of NRCP 54(d)(2)(B), and was served nearly  
17 two (2) months after the proceedings concluded at the Nevada Supreme Court, St. Clair's  
18 Motion should be denied.

19 Not only is St. Clair's motion untimely, but it is without legal foundation. Nevada  
20 Supreme Court precedence clearly states that attorney fees are not available under  
21 NRS 18.010(2)(a) in a petition for judicial review that does not include monetary recovery.  
22 *State, Dep't of Human Res. v. Fowler*, 109 Nev. 782, 786, 858 P.2d 375, 377 (1993).  
23 St. Clair, by means of his petition for judicial review brought pursuant to NRS 533.450,  
24 did not seek or recover monetary damages. Accordingly, St. Clair is not entitled to  
25 attorneys' fees in this action.

26 The limitation on an award of attorney fees under NRS 18.010(2) was recently  
27 addressed in *Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28, 29  
28 (2018), where the Nevada Supreme Court found that attorney fees in petitions for judicial

1 review of an agency determination are prohibited under NRS 18.010(2)(b). Most  
2 significantly, the Nevada Supreme Court in *Rand Prop., LLC v. Filippini*, 66933,  
3 2016 WL 1619306 (Nev. Apr. 21, 2016),<sup>1</sup> found that the statutes governing award of costs  
4 in water rights cases do not authorize award of attorney fees as attorney fees are not  
5 costs, and attorney fees are not specifically referenced anywhere in the water statutes.  
6 Appeals of decisions of the State Engineer brought under NRS 533.450 are expressly  
7 “in the nature of an appeal,” and the this statute does not allow for St. Clair’s requested  
8 recovery in such an action, as NRS 533.450(7) limits any award to cost and limits receipt  
9 of such an award to only the State Engineer or the State. As such, St. Clair’s attempt to  
10 recover attorneys’ fees from the State Engineer is not permitted.

11 Further, St. Clair’s Motion under NRS 18.010(2)(b) is unwarranted. The district  
12 court has discretion under NRS 18.010(2) to award attorney fees upon a finding that the  
13 opposing party brought or maintained its claims without reasonable grounds or to harass  
14 the prevailing party. Such is not the case here. The State Engineer maintained his  
15 defense of Ruling No. 6287 in good faith and that defense was reasonable based upon his  
16 interpretation of Nevada law and the facts of the case. There is simply no good faith  
17 argument that the State Engineer’s efforts to defend its decision in this case was brought  
18 for the purpose of harassing St. Clair.

19 St. Clair’s Motion is not proper here. The Motion is untimely, attorney fees in  
20 petitions for judicial review of an agency determination are prohibited under  
21 NRS 18.010(2)(b), and NRS 533.450 does not provide for a basis to award attorneys’ fees  
22 to St. Clair. For these reasons, it is proper for the Court to deny St. Clair’s Motion.

## 23 II. BACKGROUND

24 On July 25, 2014, the State Engineer issued Ruling No. 6287, declaring Proof of  
25 Appropriation V-010493 abandoned, and therefore denying Application No. 83246T as  
26 there was no unappropriated water available under the water right associated with  
27 Application 83246T and that granting a change application based on an abandoned water  
28

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<sup>1</sup> Citing *Smith v. Crown Fin. Serv. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).



1 right would threaten to prove detrimental to the public interest. SE ROA 0004-0010. On  
2 August 21, 2014, St. Clair filed and served his Petition for Judicial Review (hereafter  
3 "Petition") and Notice of Appeal, seeking judicial review and ultimately remand of the  
4 State Engineer's Ruling No. 6287 to reverse the finding of abandonment and grant  
5 Application No. 83246T. *See* Petition; *see also* Notice of Appeal.

6 After full briefing, the Court held oral arguments on this matter on January 5,  
7 2016. *See* Sixth Judicial District Court Minutes for January 5, 2016. Following  
8 arguments from both parties, the Court affirmed the State Engineer's Ruling No. 6287 to  
9 the extent he determined that St. Clair had a vested water right under V-010493, but  
10 overruled Ruling No. 6287 to the extent he declared V-010493 abandoned and ordered the  
11 State Engineer to grant Application No. 83246T. *See* Order Overruling State Engineer's  
12 Ruling 6287. The Court signed the Order on April 22, 2016, and St. Clair filed the Notice  
13 of Entry of Order on April 29, 2016. *See id.*; *see also* Notice of Entry of Order. The State  
14 Engineer appealed this Order on May 23, 2016. *See* Notice of Appeal.

15 On appeal, following a full briefing and oral argument, the Nevada Supreme Court  
16 issued its Opinion affirming the District Court's Order Overruling State Engineer's  
17 Ruling No. 6287 on March 29, 2018. *King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314  
18 (2018). The Court issued its Remittitur affirming the District Court's Order on April 24,  
19 2018, which was returned by the District Court clerk and filed with the Nevada Supreme  
20 Court on May 4, 2018. *See* Remittitur.

21 On June 28, 2018, St. Clair filed his Notice of Motion and Motion for Attorneys'  
22 Fees pursuant NRS 18.010(2)(b). *See* Motion. The State Engineer now timely opposes.

### 23 **III. ARGUMENT**

#### 24 **A. St. Clair's Motion is Untimely**

25 NRCP 54(d) governs claims for attorneys' fees. Per this rule, a claim for attorneys'  
26 fees must be made by motion and the "district court may decide the motion despite the  
27 existence of a pending appeal from the underlying final judgment." NRCP 54(d)(2)(A).  
28 Unless provided otherwise by statute, such a motion "must be filed no later than 20 days

1 after notice of entry of judgment is served; specify the judgment and the statute, rule, or  
2 other grounds entitling the movant to the award; state the amount sought or provide a  
3 fair estimate of it; and be supported by counsel's affidavit." NRCP 54(d)(2)(B).  
4 Importantly, a district court is prohibited from extending the time for filing a motion for  
5 attorney fees after the 20 days has expired. *See id.* The only exception to this rule is it  
6 does not apply to "claims for fees and expenses as sanctions pursuant to a rule or statute,  
7 or when the applicable substantive law required attorney fees to be proved at trial as an  
8 element of damages." NRCP 54(d)(2)(C).

9 In this case, there is absolutely no calculation of time whereby St. Clair's Motion is  
10 timely pursuant to this rule. St. Clair's Motion was served on or about June 28, 2018,  
11 and presumably filed after that date. *See* Motion. The plain reading of NRCP 54(d)(2)(B)  
12 mandated that St. Clair's Motion be filed "no later than 20 days after notice of entry of  
13 judgment [was] served," or May 17, 2016.<sup>2</sup> More than two (2) full years have passed since  
14 St. Clair served the notice of entry of judgment, far exceeding the 20-day time period  
15 provided by NRCP 54(d)(2)(B), making the Motion untimely. Because the district court is  
16 not permitted to extend the time, the Motion must be denied on that basis.

17 Further, the State Engineer's appeal did not toll the 20-day time period for  
18 St. Clair to file his motion for attorneys' fees. NRCP 54(d)(2)(A) is explicit in that a  
19 motion for attorney fees may be decided by a district court "despite the existence of a  
20 pending appeal from the underlying final judgment." Reading NRCP 54(d)(2)(A) and  
21 NRCP 54(d)(2)(B) together, it is clear that a motion for attorneys' fees *must* be filed  
22 within 20 days of service of the notice of entry of judgment, and a pending appeal does not  
23 toll or otherwise have any effect on this deadline. In this case, this is especially true as  
24 the State Engineer's Notice of Appeal was filed on May 23, 2016, and was therefore filed  
25 *after* St. Clair's 20-day deadline to file a motion for attorneys' fees had passed. This Court  
26 may not extend this deadline. As the time period to seek recovery of any attorneys' fees

27  
28 <sup>2</sup> St. Clair served the Notice of Entry of Order on the State Engineer on April 27, 2016. *See* Notice  
of Entry of Order. Adding 20 days to April 27, 2016, established the deadline to file his Motion as May 17,  
2016.

1 passed more than two (2) full years ago, St. Clair's Motion is untimely and must  
2 be denied.

3 Moreover, there is no authority supporting St. Clair's assertion that, following an  
4 appeal, he is entitled to attorneys' fees from proceedings before this Court and the Nevada  
5 Supreme Court. A party is not entitled to fees on appeal absent a showing of frivolity,  
6 and the district court lacks authority to award attorneys' fees incurred on appeal.  
7 See NRAP 38; see also *Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288,  
8 994 P.2d 1149, 1150 (2000). Assuming *arguendo*, there was some authority to this effect,  
9 St. Clair has still exceeded the 20-day time period contemplated by NRCP 54(d)(2)(B).  
10 The Nevada Supreme Court issued its Opinion affirming the District Court's Order on  
11 March 29, 2018, with the Remittitur subsequently being issued on April 24, 2018, and  
12 returned by the District Court clerk and filed with the Nevada Supreme Court on May 4,  
13 2018. See *King*, 134 Nev. Adv. Op. 18, 414 P.3d 314; see also Remittitur. St. Clair served  
14 his Motion for Attorneys' Fees on June 28, 2018, more than 50 days after the filing of the  
15 Remittitur. See Motion. St. Clair's Motion was filed more than 20 days after the last  
16 conceivable date, making St. Clair's Motion untimely under any calculation or analysis.  
17 Because St. Clair's Motion is untimely pursuant to NRCP 54(d)(2)(B), and this Court may  
18 not extend that deadline, St. Clair's Motion must be denied.

19 **B. Pursuant to the Nevada Supreme Court's Findings in *Fowler*, *Zenor*,**  
20 **and *Rand*, St. Clair is Not Entitled to Attorneys' Fees**

21 NRS 533.450 provides the exclusive means for appeal of an order or decision of the  
22 State Engineer and it does not include a provision for awarding attorney fees. See  
23 NRS 533.450. The district court "may not award attorney's fees unless authorized by  
24 statute, rule or contract." *Fowler*, 109 Nev. at 784, 858 P.2d at 376 (citing *Nev. Bd. of*  
25 *Osteopathic Med. v. Graham*, 98 Nev. 174, 175, 643 P.2d 1222, 1223 (1982)). The Nevada  
26 Supreme Court in *Fowler* noted that "NRS 233B.130 does not contain any specific  
27 language authorizing the award of attorney's fees in actions involving petitions for  
28 judicial review of agency action." 109 Nev. at 785, 858 P.2d at 377. As such, *Fowler* has



1 been interpreted to mean that NRS 233B.130 precluded attorney fees in such matters.<sup>3</sup>  
2 *Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28, 30 (2018). The  
3 Nevada Supreme Court has "repeatedly refused to imply provisions not expressly  
4 included in the legislative scheme." *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539,  
5 762 P.2d 884, 886 (1988). For example, in *Wrenn*, the Court declined to award attorney  
6 fees because "the legislature has not expressly authorized an award of attorney's fees in  
7 worker's compensation cases. . . . [and] we decline to allow a claimant recovery of  
8 attorney's fees in a worker's compensation case absent express statutory authorization."  
9 *Id.*; see also *Rand Props., LLC v. Filippini*, Docket No. 66933, 2016 WL 1619306 (Order of  
10 Reversal and Remand, Apr. 21, 2016) (declining to award attorney fees under  
11 NRS 533.190(1) and NRS 533.240(3), in part, because "attorney fees are not mentioned  
12 anywhere in the statute."). "[I]t is not the business of this court to fill in alleged  
13 legislative omissions based on conjecture as to what the legislature would or should have  
14 done." *McKay v. Bd. of Cnty. Comm'rs of Douglas Cnty.*, 103 Nev. 490, 492, 746 P.2d 124,  
15 125 (1987).

16 NRS 533.450 permits "any person feeling aggrieved by any order or decision of the  
17 State Engineer" to petition the court for judicial review. Further, NRS 533.450(7)  
18 provides for the payment of costs, by parties *other than* the State Engineer.  
19 NRS 533.450(7) ("Costs must be paid as in civil cases brought in the district court, *except*  
20 *by the State Engineer or the State.*" (Emphasis added)). It is significant that NRS 533.450  
21 does not include a provision for awarding attorney fees, but includes a provision  
22 regarding the recovery of costs, as in civil cases. Similarly, the pertinent statutes  
23 involving petitions for judicial review of other state agency decisions under the Nevada  
24 Administrative Procedure Act ("APA") does not include a provision for awarding attorney  
25 fees. NRS 233B.130. To the contrary, the Nevada Legislature has enacted statutes  
26

27 <sup>3</sup> While pursuant to NRS 233B.039(j), the State Engineer is expressly excluded from the Nevada  
28 Administrative Procedures Act, the Nevada Supreme Court's legal analysis of NRS 233B.130 governing  
judicial review of an agency decision is applicable to the analysis demonstrating that an award of attorney  
fees in a petition brought pursuant to NRS 533.450 is not authorized.

1 authorizing the payment of attorney fees only under certain, and limited, circumstances.  
2 For example, the Legislature has authorized the district court to order costs and fees for  
3 filing a frivolous petition of hearing officer decisions involving industrial injuries. See  
4 NRS 616C.385.

5 Nowhere in Chapter 533 or 534 of the NRS is there any provision for the award of  
6 attorneys' fees. Further, NRS 533.450, which does specifically provide for the recovery of  
7 costs, does not contain any language authorizing the award of attorney fees in appeals of  
8 the decision of the State Engineer. Under Nevada law, even if a statute that specifically  
9 provides for an award of costs, attorney fees do not automatically apply. "Attorney fees  
10 are not considered costs." *Smith v. Crown Fin. Serv. of Am.*, 111 Nev. 277, 287, 890 P.2d  
11 769, 776 (1995) ("Although we affirm the award of costs, we must remand the case  
12 because the district court did not segregate the amount awarded as costs from the amount  
13 awarded as attorney fees.").

14 NRS 533.450(7) provides that "[c]osts must be paid as in civil cases brought in the  
15 district court, except by the State Engineer or the State." Attorney fees are not  
16 mentioned here, or elsewhere in NRS 533.450. Certainly, if the Legislature found it  
17 appropriate to address the recovery of costs and if it intended to extend that to the  
18 recovery of attorney's fees, it would have included such in the statute. See generally  
19 *Rand*, 2016 WL 1619306, at \*6.

20 Awarding attorney fees in this case conflicts with the plain language and reading of  
21 NRS 533.450 and runs counter to Nevada Supreme Court precedence established in  
22 *Fowler*, *Wrenn*, *Zenor*, and *Rand* because the Court "does not imply provisions not  
23 expressly included in the legislative scheme" and attorney fees are not mentioned  
24 anywhere in the statute. See *Wrenn*, 104 Nev. at 539, 762 P.2d at 886; *Fowler*, 109 Nev.  
25 at 784, 858 P.2d at 376; *Rand*, 2016 WL 1619306, at \*6. There is no statute, rule, or  
26 contract permitting the Court to issue attorney fees in this matter. Consequently,  
27 attorneys' fees are clearly not authorized in this proceeding and the State Engineer  
28 respectfully requests that this Court deny St. Clair's motion for attorneys' fees.

1           **C.     St. Clair is Not Entitled to Attorneys' Fees Under NRS 18.010(2)(B)**

2           Despite Nevada legal precedence and NRS 533.450 excluding the award of attorney  
3 fees in this proceeding, St. Clair brings its motion for attorneys' fees under  
4 NRS 18.010(2)(b). NRS 18.010(2)(b) allows a court to award attorney fees to the  
5 "prevailing party" if the court finds the "claim, counterclaim, cross-claim, or third-party  
6 complaint or defense of the opposing party was brought or maintained without reasonable  
7 ground or to harass the prevailing party." NRS 18.010(2)(b).

8           In *Fowler*, the Nevada Supreme Court held that NRS 18.010 does not apply to  
9 petitions for judicial review because such actions are not actions for money damages.  
10 *Fowler*, 109 Nev. at 786, 858 P.2d at 377. While it is true that *Fowler* involved  
11 NRS 18.010(2)(a), and St. Clair argues that he is entitled to fees per NRS 18.010(2)(b), the  
12 *Fowler* decision still precludes recovery of attorney fees in this case. Specifically, the  
13 *Fowler* Court clearly stated that "NRS 18.010" does not apply when a party does not  
14 request money damages and it did not distinguish between NRS 18.010(2)(a) and  
15 NRS 18.010(2)(b) in its holding. *See Fowler*, 109 Nev. at 786, 858 P.2d at 377. St. Clair  
16 cites no authority or cases to suggest that the Supreme Court treats NRS 18.010(2)(a)  
17 differently from NRS 18.010(2)(b) in petitions for judicial review, and in fact St. Clair  
18 makes no mention of NRS 18.010(2)(a) at all. Simply stated, there is no authority to  
19 support an award of attorney fees under NRS 18.010(2)(b) in the context of a petition for  
20 judicial review of a decision of the State Engineer. As discussed above, NRS 533.450 is  
21 the exclusive authority for judicial relief in a petition for judicial review of decisions of the  
22 State Engineer. St. Clair's argument regarding the absence of the words "exclusive  
23 means" in NRS 533.450 is a nonstarter. *See Motion*, p. 6.

24           Even if NRS 18.010(2)(b) extends to parties seeking judicial review pursuant to  
25 NRS 533.450, Petitioner is not entitled to attorneys' fees because the State Engineer  
26 acted reasonably and in good faith. A district court can use its discretion to award  
27 attorney fees under NRS 18.010(2)(b) in limited circumstances. NRS 18.010(2)(b) allows a  
28 court to award attorney fees to the "prevailing party" if the court finds the "claim,

1 counterclaim, cross-claim, or third-party complaint or defense of the opposing party was  
2 brought or maintained without reasonable grounds or to harass the prevailing party.”  
3 NRS 18.010(2)(b). The court may pronounce its decision on the fees after the trial or  
4 special proceeding concludes. NRS 18.010(3). An award of attorney fees under  
5 NRS 18.010(2)(b) is discretionary with the district court. *Semenza v. Caughlin Crafted*  
6 *Homes*, 111 Nev. 1095, 901 P.2d 687 (1995); *Foley v. Morse & Mowbray*, 109 Nev. 116,  
7 124, 848 P.2d 519, 524 (1993).

8 To support an award under NRS 18.010(2)(b), “there must be evidence in the record  
9 supporting the proposition that the complaint was brought without reasonable grounds or  
10 to harass the other party.” *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486, 851 P.2d 459,  
11 464 (1993). A claim is groundless if allegations in the complaint are not supported by any  
12 credible evidence at trial, it is brought in bad faith, or it is fraudulent. *Semenza*, 111 Nev.  
13 at 1095, 901 P.2d at 688 (citation omitted). Such an analysis depends upon the actual  
14 circumstances of the case rather than a hypothetical set of facts favoring plaintiff’s  
15 averments. *Id.* The State Engineer, though ultimately not the prevailing party,  
16 maintained both his defense of Ruling No. 6287 and his appeal of the District Court’s  
17 Order in good faith and based on his reasonable interpretation of the law and facts.

18 Further, St. Clair has not specifically claimed he was seeking attorneys’ fees under  
19 NRAP 38, which is based upon frivolity. NRS 533.450 provides that petitions for judicial  
20 review of orders and decisions of the State Engineer are in the nature of an appeal. The  
21 text of NRS 18.010 is silent with respect to attorney fees on appeal. Pursuant to  
22 NRAP 38, attorney fees and costs on appeal are permitted only in those contexts where  
23 “an appeal has frivolously been taken or been processed in a frivolous manner.” Neither  
24 the District Court nor the Nevada Supreme Court found that the State Engineer  
25 maintained his defense of Ruling No. 6287 in a frivolous nature. While the Nevada  
26 Supreme Court found that the State Engineer acted arbitrarily and capriciously as his  
27 decision was not supported by substantial evidence, this is the standard that is required  
28 to overturn agency decisions. *See King*, 134 Nev. Adv. Op. at 18, 414 P.3d at 316, 318



1 (citing *Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 751,  
2 918 P.2d 697, 702 (1996)). This is not the same as a finding of frivolity, and at all times  
3 the State Engineer has proceeded in good faith based on a reasonable, albeit unsuccessful,  
4 view of the facts and the law.

5       Additionally, St. Clair's attempt to argue that the District Court should award him  
6 attorneys' fees based on the State Engineer's appeal to the Nevada Supreme Court is  
7 meritless and unsupported by any known legal authority. As previously mentioned,  
8 NRAP 38 only supports an award of attorneys' fees in the event that "an appeal has  
9 frivolously been taken or been processed in a frivolous manner, when circumstances  
10 indicate that an appeal has been taken or processed solely for purposes of delay, when an  
11 appeal has been occasioned through respondent's imposition on the court below, or  
12 whenever the appellate processes of the court have otherwise been misused."  
13 NRAP 38(b). The Nevada Supreme Court, while ruling in favor of St. Clair, made no  
14 findings that the State Engineer's appeal was pursued frivolously, for purposes of delay,  
15 was based on imposition on the District Court, or otherwise misused the appellate  
16 processes. See *King*, 134 Nev. Adv. Op. 18, 414 P.3d 314. Rather, the Nevada Supreme  
17 Court found only that there was "not clear and convincing evidence that St. Clair's  
18 predecessor intended to abandon the water right," and that the State Engineer's other  
19 arguments on appeal lacked merit for varying reasons. See *King*, 134 Nev. Adv. Op.  
20 at 18, 414 P.3d at 317-18.

21       Furthermore, the Nevada Supreme Court has ruled that "NRS 18.010 does not  
22 explicitly authorize attorney's fees on appeal, and . . . NRAP 38(b) limits attorney's fees on  
23 appeal to those instances where an appeal has been taken in a frivolous manner." *Bobby*  
24 *Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356-57,  
25 971 P.2d 383, 388 (1998). The Supreme Court did not issue any findings consistent with  
26 the nefarious intent required for attorneys' fees under NRAP 38 in this matter. While the  
27 Court and the State Engineer disagreed as to the question of whether or not St. Clair's  
28 ///

predecessor in interest intended to abandon the water right, that disagreement does not rise to the bad faith or frivolity necessary to support the award of attorneys' fees.

Lastly, the District Court has no power to award attorney fees incurred on appeal. Attorney fees cannot be recovered "absent a statute, rule, or contractual provision to the contrary." *Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000) (citing *Rowland v. Lepire*, 99 Nev. 308, 315, 662, P.2d 1332, 1336 (1983)). The Supreme Court has held that there is no provision in the statutes authorizing the district court to award attorney fees incurred on appeal and "NRAP 38(b) authorizes only [the Nevada Supreme Court and the Nevada Court of Appeals] to make such an award if it determines that the appeals process has been misused." *Bd. of Gallery of History, Inc.*, 116 Nev. at 288, 994 P.2d at 1150. This provides yet another justification for why this Court should deny the Motion, particularly in regards to the alleged costs associated with the appeal to the Nevada Supreme Court.

**D. St. Clair's Affidavit Does Not Support its Request for \$41,881.25**

St. Clair's requested attorneys' fees are not supported by the affidavit submitted in support of his Motion. Upon review, the total dollar amounts requested are inconsistent. For example, looking at the alleged fees regarding the State Engineer's Opposition to the Request for Judicial Notice, assuming that all associate hours were billed at the higher figure of \$175.00 per hour, the total is \$2,591.25, not \$2,672.50.

	Hours	Rate	Total
<b>Opposition to the Request for Judicial Notice</b>			
Senior Partner	4.25	\$ 325.00	\$ 1,381.25
Associate Attorney	4	\$ 175.00	\$ 700.00
Paralegal	4.25	\$ 120.00	\$ 510.00
<b>SUBTOTAL</b>			<b>\$ 2,591.25</b>

///

1 Further, St. Clair has failed to provide any billing statements demonstrating whether the  
2 work performed was reasonable and performed in this particular case. In the event this  
3 Court does find that St. Clair is entitled to attorneys' fees, the State Engineer objects to  
4 the amount claimed by St. Clair, as it lacks any supporting evidence or foundation.

### 5 III. CONCLUSION

6 Nevada law does not support St. Clair's request for attorneys' fees, regardless of  
7 whether the Court examines NRS 533.450, 18.010(2)(a), 18.010(2)(b), NRAP 38, or  
8 NRCP 54(d). First and foremost, St. Clair's Motion is untimely. NRCP 54(d)(2)(A) clearly  
9 establishes a 20-day time period within which a party may move the Court for recovery of  
10 their reasonably incurred attorneys' fees. That time period expired more than two years  
11 ago. Therefore, the motion must be denied on this basis alone.

12 Further, the law clearly demonstrates that St. Clair's motion is without legal  
13 foundation. St. Clair is not entitled to recovery of any of the attorneys' fees incurred in  
14 this matter. The State Engineer's defense of the Petition, and subsequent appeal, was  
15 reasonable, in good faith, and was not frivolous. Further, St. Clair fails to provide any  
16 statutory or other legal authority authorizing the District Court to award attorneys' fees  
17 incurred on appeal; rather, NRAP 38 and established case law specifically circumvents  
18 such an argument. For these and the foregoing reasons, the State Engineer respectfully  
19 requests that this Court deny St. Clair's Motion for Attorneys' Fees.

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AFFIRMATION

The undersigned does hereby affirm that the preceding Opposition to Motion for Attorneys' Fees does not contain the social security number of any person.

DATED this 13<sup>th</sup> day of July, 2018.

ADAM PAUL LAXALT  
Attorney General

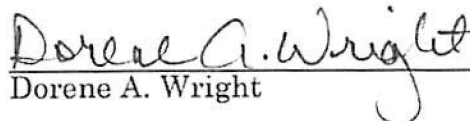
By:

  
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*Attorney for Respondent,  
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 13<sup>th</sup> day of July, 2018, I served a true and correct copy of the foregoing OPPOSITION TO MOTION FOR ATTORNEYS' FEES, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Paul G. Taggart, Esq.  
Timothy D. O'Connor, Esq.  
TAGGART & TAGGART LTD  
108 North Minnesota Street  
Carson City, Nevada 89703

  
Dorene A. Wright



**ATTACHMENT 3**

**ATTACHMENT 3**

FILED

2018 JUL 23 PM 2:35

TAMI RAE SPERO  
DIST. COURT CLERK

1 CASE NO.: CV 20, 112

2 DEPT. NO.: 2

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 Engineer,  
13 DIVISION OF WATER RESOURCES,  
14 DEPARTMENT OF CONSERVATION AND  
15 NATURAL RESOURCES,

16 Respondent.

**REPLY IN SUPPORT OF MOTION FOR**  
**ATTORNEYS' FEES**

17 COMES NOW, Petitioner, RODNEY ST. CLAIR ("St. Clair"), by and through his counsel of  
18 record, PAUL G. TAGGART, ESQ. and TIMOTHY D. O'CONNOR, ESQ., of the law firm of  
19 TAGGART & TAGGART, LTD., and hereby respectfully submits his Reply in Support of Motion for  
20 Attorneys' Fees. This reply is based on the attached Memorandum of Points and Authorities, all  
21 pleadings and paper on file herein, and any oral argument the Court may allow.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

St. Clair has been forced to spend tens of thousands of dollars to protect property that was rightfully his against the State Engineer's unfounded and incorrect claims of abandonment. The State Engineer took various baseless positions throughout the litigation that caused the fees associated with the above-captioned case to be higher than necessary. St. Clair was put in an unfair position, and the State Engineer should compensate him for the attorneys' fees spent on countering the State Engineer's groundless arguments. The State Engineer, in his Opposition to Motion for Attorneys' Fees, made multiple meritless arguments as to why his office should not be liable to pay St. Clair's attorneys' fees pursuant to NRS 18.010(2)(b).

First, the State Engineer argued that NRS 18.010(2)(b) does not permit attorneys' fees because the State Engineer argued in good faith and did not intend to harass St. Clair. This argument fails because a groundless claim is one which is "not supported by any credible evidence"<sup>1</sup> and both the district court and Nevada Supreme Court found that the State Engineer's abandonment claim had no supporting evidence.

Second, the State Engineer argued that NRS 533.450(7) prohibits attorneys' fees from being levied against the State Engineer. But NRS 533.450(7) is limited to costs, not attorneys' fees. Alongside that same argument, the Legislature's inclusion of immunity to costs implicitly recognizes that the State Engineer may be liable for attorneys' fees, as no immunity for attorneys' fees was included.

Third, the State Engineer argues that cases interpreting subsection (a) of NRS 18.010(2) limit the Court's ability to reward attorneys' fees. However, St. Clair requested fees under subsection (b) of NRS 18.010(2), which contains different rules and analysis and therefore is not limited by case law interpreting NRS 18.010(2)(a).

Fourth, the State Engineer claims that the "exclusive remedy" language embedded in NRS 233B prevents attorneys' fees – but the State Engineer is specifically exempt from NRS 233B.<sup>2</sup>

<sup>1</sup> *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).

<sup>2</sup> NRS 233B.130(12).

1 Unlike NRS 233B, NRS 533.450 does not contain any “exclusive remedy” language, and therefore  
2 this argument fails.

3 Last, the State Engineer’s argument that St. Clair’s Motion for Attorneys’ Fees (“Motion”) is  
4 untimely fails because the Nevada Supreme Court has found that “the timeliness of such requests, we  
5 conclude, is a matter left to the discretion of the trial court”<sup>3</sup> as NRS 18.010 contains no provisions of  
6 deadlines. St. Clair filed his Motion within a reasonable time and therefore it is within the Court’s  
7 discretion.

8 The playing field between a water rights holder and the State Engineer is uneven. The State  
9 Engineer has at his disposal nearly unlimited litigation resources while a water rights holder is left to  
10 pay all costs to defend an improper order out of his own pocket. The State Engineer is required to pay  
11 the attorneys’ fees for groundless claims and arguments, just as any private party would be. The Court  
12 should find that St. Clair should not be liable for these unnecessary attorneys’ fees, and grant St.  
13 Clair’s Motion.

#### 14 ARGUMENT

##### 15 I. Attorneys’ Fees Are Permitted Under NRS 18.010(2)(b).

##### 16 A. As demonstrated under NRS 18.010(2)(b)’s plain language, attorneys’ fees are available when the State Engineer maintains a claim without reasonable grounds.

17 The Nevada Supreme Court has explained that “for purposes of an award of attorney’s fees  
18 pursuant to NRS 18.010(2)(b), a claim is groundless if the allegations in the complaint . . . are not  
19 supported by any credible evidence at trial.”<sup>4</sup> “The practice in civil cases applies to” judicial review  
20 actions through NRS 533.450.<sup>5</sup> The State Engineer’s claims were maintained without a reasonable  
21 ground in this matter, and therefore St. Clair is entitled to attorneys’ fees. The Legislature was  
22 unmistakably clear stating that NRS 18.010(2)(b) be liberally construed in favor of granting attorney’s  
23 fees when necessary.<sup>6</sup>

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27 <sup>3</sup> *Farmers Ins. Exchange v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988).

28 <sup>4</sup> *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.

<sup>5</sup> NRS 533.450(8).

<sup>6</sup> NRS 18.010(2)(b).

1                   1.     **The State Engineer’s claim of abandonment was groundless as there was**  
2                                   **no evidence to support it.**

3             St. Clair argued, and prevailed, on the grounds that the State Engineer unreasonably claimed  
4             that St. Clair had abandoned his vested water right. St. Clair demonstrated that Nevada law was clear  
5             that non-use of a vested water right was not enough for the State Engineer to claim abandonment.<sup>7</sup>  
6             The State Engineer’s position of intent to abandon was groundless because it was not supported by any  
7             evidence in the record.<sup>8</sup>

8             The district court agreed, finding “[t]he State Engineer’s determination of abandonment  
9             regarding [the vested water right] was based only on evidence of non-use.”<sup>9</sup> The Nevada Supreme  
10            Court also agreed, stating “[w]e find no such evidence in this record”<sup>10</sup> referring to evidence of intent  
11            to abandon the water right. The claim of abandonment was maintained without reasonable ground  
12            because it cut directly against the bright-line rule that “Nevada law does not presume abandonment of  
13            a water right from nonuse alone.”<sup>11</sup> This unreasonable stance opens up the State Engineer to St.  
14            Clair’s reasonable attorneys’ fees.

15                   2.     **The State Engineer’s opposition to St. Clair’s request for judicial notice**  
16                                   **was groundless.**

17            The State Engineer also took a position that was maintained without reasonable ground when  
18            he objected *five months late* to St. Clair’s request for judicial notice. The State Engineer ignores this  
19            fact in his opposition to the Motion. Under DCR 13(3), any party opposing a motion is required to file  
20            and serve the opposition within 10 days after service of the motion. On June 2, 2015, St. Clair  
21            requested that the district court take notice of several public documents. Five months later, on  
22            November 17, 2015, the State Engineer filed an opposition. The opposition was therefore groundless,  
23            and St. Clair should be reimbursed for attorneys’ fees associated with the late opposition.

24                   3.     **The State Engineer’s objection to St. Clair’s proposed order was**  
25                                   **groundless.**

26                   <sup>7</sup> Opening Brief at 5-8.

27                   <sup>8</sup> See *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.

28                   <sup>9</sup> April 22, 2016, Order Overruling State Engineer’s Ruling 6287, CV 20, 112, at 12:13-14.

<sup>10</sup> *King v. St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d 314, 317 (2018).

<sup>11</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 6, 414 P.3d at 317 (quoting *United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035, 1038 (9th Cir. 2007)).

1 After St. Clair prevailed at the district court, the district court ordered St. Clair to draft a  
2 proposed order for review. Requesting draft orders from the prevailing party is a “common practice  
3 for Clark County district courts.”<sup>12</sup> Nevertheless, the State Engineer objected to the Court’s adoption  
4 of St. Clair’s draft order. The parties returned to the district court for another hearing, in which the  
5 district court found the State Engineer’s arguments unpersuasive.<sup>13</sup>

6 From a policy perspective, St. Clair had to pay tens of thousands of dollars to retain his vested  
7 water right because the State Engineer proceeded with the underlying case without regard to clear,  
8 applicable law and his own past rulings. There was no doubt prior to this case that abandonment  
9 required the owner’s intent.<sup>14</sup> Evidence of non-use alone is not enough to proceed with an  
10 abandonment claim.<sup>15</sup> Nevertheless, the State Engineer, with no evidence of intent to abandon, and  
11 armed only with non-use evidence, declared St. Clair’s water right abandoned.<sup>16</sup> St. Clair’s only  
12 options were to hire counsel or give up a valuable water right. St. Clair should not be required to pay  
13 all of his own attorneys’ fees to protect his property from the State Engineer’s unreasonable claims  
14 that he maintained.

15 The State Engineer’s argument that the Court is required to invoke the frivolity standards of  
16 NRAP 38 is wrong: NRAP 38 is a tool used for frivolous appeals taken from a district court’s order  
17 with the intention of misusing the appellate process.<sup>17</sup> St. Clair requested attorneys’ fees under NRS  
18 18.010(2)(b), which is separate and apart from frivolity sanctions under NRAP 38. As stated above,  
19 NRS 18.010(2)(b) is “[i]n addition to the cases where an allowance is authorized by specific statute”  
20 and therefore stands alone.<sup>18</sup>

21  
22 <sup>12</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318 (citing EDCR 1.90(a)(5) (“[A] judge or other judicial officer shall  
order the prevailing party to prepare a written judgment and findings of fact and conclusions of law.”)).

23 <sup>13</sup> *Id.*

24 <sup>14</sup> *United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035, 1038 (9th Cir. 2007); *see also Revert v. Ray*, 95 Nev. 782,  
786, 603 P.2d 262, 264 (1979) (“Abandonment, requiring a union of acts and intent, is a question of fact to be determined  
25 from all the surrounding circumstances.”); *Franktown Creek Irrigation Co., Inc. v. Marlette Lake Co.*, 77 Nev. 348, 354,  
364 P.2d 1069, 1072 (1961) (“[I]t is necessary to establish the owner’s intention to abandon and relinquish such right  
before an abandonment can be found.”); *Barry v. Merickel Holding Corp.*, 60 Nev. 280, 290, 108 P.2d 311, 316 (1940)  
26 (“[I]n abandonment the intent of the water user is controlling. To substitute and enlarge upon that by saying that the water  
user shall lose the water by failure to use it for a period of five years, irrespective of the intent, certainly takes away much  
27 of the stability and security of the right to the continued use of such water.”).

28 <sup>15</sup> *Id.*

<sup>16</sup> *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d at 317.

<sup>17</sup> *See* NRAP 38.

<sup>18</sup> NRS 18.010(2)(b) (emphasis added).

1           **B. The State Engineer's NRS 533.450(7) argument is irrelevant as costs are**  
2           **prohibited under NRS 533.450(7).**

3           The State Engineer argues that the Court cannot “imply provisions not expressly included in  
4 the legislative scheme.”<sup>19</sup> The State Engineer cites to NRS 533.450(7), which states that “[c]osts must  
5 be paid as in civil cases brought in the district court, except by the State Engineer or the State.”<sup>20</sup>  
6 However, costs and attorneys’ fees are different.

7           The Nevada Supreme Court has recently reaffirmed that under “the principle of statutory  
8 construction [i]‘the mention of one thing implies the exclusion of another.’”<sup>21</sup> The Nevada Supreme  
9 Court has explained “it is fair to assume that, when the [L]egislature enumerates certain instances in  
10 which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it  
11 contemplates.”<sup>22</sup> The State Engineer concedes that “[i]t is significant that NRS 533.450 *does not*  
12 *include a provision for awarding attorney fees, but includes a provision regarding the recovery of*  
13 *costs, as in civil cases.*”<sup>23</sup> This is significant because the inclusion of one implies the exclusion of  
14 another. The Legislature’s choice of words has meaning in statutory interpretation.

15           Here, the Legislature awarded immunity to the State Engineer for costs associated with  
16 litigation through NRS 533.450(7). However, no such immunity was granted for attorneys’ fees  
17 anywhere within NRS 533.450. Contrary to the State Engineer’s argument, the inclusion of an  
18 immunity for litigation costs implies the exclusion of an immunity for attorneys’ fees. As such, NRS  
19 18.010(2)(b) permits the district court to award proper attorneys’ fees to St. Clair.

20           The difference between the cases the State Engineer cited and this case, is that the State  
21 Engineer’s citations include no mention of attorneys’ fees or costs *whatsoever*, meaning the courts in  
22 those cases found that the Legislature did not consider these sanctions when drafting the law. On the  
23 other hand, NRS 533.450 *does consider costs*, and therefore cannot be said to fit within the reasoning  
24 the State Engineer cited. Because the Legislature considered these sanction remedies, but chose to  
25

26           <sup>19</sup> Opposition to Motion for Attorneys’ Fees at 7:2-4.

27           <sup>20</sup> NRS 533.450(7) (emphasis added).

28           <sup>21</sup> *Rural Telephone Company v. Public Utilities Commission*, 133 Nev. Adv. Op. 53 at 5, 398 P.3d 909, 911 (2017)  
(quoting *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009)).

<sup>22</sup> *Id.* (quoting *Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920)).

<sup>23</sup> Opposition to Motion for Attorneys’ Fees at 7:20-22 (emphasis added).

1 implicitly permit attorneys' fees by explicitly prohibiting costs, NRS 18.010(2)(b) attorneys' fees  
2 requests are available for matters brought under NRS 533.450.

3 **C. Limitations on NRS 18.010(2)(a) are irrelevant to St. Clair's Motion.**

4 St. Clair filed a motion for attorneys' fees pursuant to the broad discretion provided by NRS  
5 18.010(2)(b). The State Engineer cites to a litany of cases which interpret the provisions of NRS  
6 18.010(2)(a), which has different rules and applications. The State Engineer's argument that the  
7 *Fowler* Court "did not distinguish between NRS 18.010(2)(a) and NRS 18.010(2)(b) in its holding"<sup>24</sup>  
8 is meritless, as the Court was not asked to distinguish NRS 18.010(2)(b). As such, the State  
9 Engineer's arguments are irrelevant to St. Clair's Motion.

10 Additionally, the State Engineer's arguments relating to the fact that St. Clair's claims were not  
11 monetary do not have any impact on recovery under NRS 18.010(2)(b). The State Engineer  
12 recognizes that monetary awards are required under NRS 18.010(2)(a).<sup>25</sup> But NRS 18.010(2)(b) is  
13 clear that attorneys' fees can be granted "[w]ithout regard to the recovery sought . . ." and therefore a  
14 monetary recovery is not a prerequisite. The Nevada Supreme Court has also visited this question and  
15 came to the conclusion that subsection (b) did allow for attorneys' fees for nonmonetary judgments.<sup>26</sup>  
16 The Court should disregard the State Engineer's contention that a monetary judgment is a prerequisite  
17 for attorneys' fees under NRS 18.010(2)(b).

18 **D. Limitations on fees from agencies bound by NRS 233B are irrelevant.**

19 The State Engineer argues that *Fowler*, *Zenor*, and *Rand* stand for the proposition that  
20 attorneys' fees are prohibited under NRS 533.450.<sup>27</sup> However, as the State Engineer noted, *Fowler*  
21 and its progeny were cases interpreting the specific language of NRS 233B.130 appeals under NRS  
22 233B – and did not deal at all with NRS chapter 533. *Fowler* is completely irrelevant to NRS 533.450  
23 appeals, as the language the Nevada Supreme Court relied on in *Fowler* does not exist in NRS  
24 533.450. Also, the State Engineer is specifically exempt from NRS 233B.

27 <sup>24</sup> Opposition to Motion for Attorneys' Fees at 9:14-15.

28 <sup>25</sup> *Id.* at 2:19-25.

<sup>26</sup> *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990).

<sup>27</sup> Opposition to Motion for Attorneys' Fees at 6:21-25.



Specific agency actions and immunities are governed under NRS 233B.130. The Legislature chose specific language for NRS 233B to govern those agencies. In *Fowler*, the Nevada Supreme Court relied on such specific language to find that NRS 233B does not permit awards of attorneys' fees.<sup>28</sup> The Nevada Supreme Court found that NRS 233B.130(6) states that "the provisions of this chapter are the *exclusive* means of judicial review . . ."<sup>29</sup> Ultimately, the Nevada Supreme Court found that that *exclusive* language prohibited the attorneys' fees from being levied.<sup>30</sup>

Because the State Engineer is specifically exempt from the provisions of NRS 233B, NRS 533.450 governs judicial reviews from the State Engineer's office. Notably, NRS 533.450 does not include the exclusive language which the Nevada Supreme Court relied upon in *Fowler* to find that attorneys' fees are not available. Additionally, as explained above, the Legislature did contemplate costs, and exempted the State Engineer from paying costs.<sup>31</sup> The Legislature gave no such immunity to the State Engineer for attorneys' fees. As such, the reasoning in *Fowler* and its progeny do not logically carry forward to the case at hand.

## **II. St. Clair's Motion Was Timely, As The Nevada Supreme Court Has Clearly Explained.**

No deadline for filing a motion for attorneys' fees before a district court is given under NRS 18.010(2)(b).<sup>32</sup> In reviewing this statute, the Nevada Supreme Court held that "NRS 18.010 provides no time limits for motions for attorney's fees. Absent a specific statutory provision governing the time frame in which a party must request attorney's fees, the timeliness of such requests, we conclude, is a matter left to the discretion of the trial court."<sup>33</sup> As such, district courts have discretion to determine "[w]hether a motion for attorney's fees is timely."<sup>34</sup>

In *Pickering*, the Nevada Supreme Court found that "Pickering was diligent in seeking fees. His request was made immediately upon completion of the appellate process—as soon as he was assured that he was the prevailing party within the meaning of NRS 18.010(2)."<sup>35</sup> Here, St. Clair was also diligent in seeking his fees upon completion of the appellate process. St. Clair filed his Motion

<sup>28</sup> *State, Dep't of Human Resources, Welfare Division v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993).

<sup>29</sup> *Id.*, 109 Nev. at 785, 858 P.2d at 377 (emphasis added).

<sup>30</sup> *Id.*, 109 Nev. 782, 858 P.2d 375.

<sup>31</sup> NRS 533.450(7).

<sup>32</sup> NRS 18.010(2)(b).

<sup>33</sup> *Pickering*, 104 Nev. 662, 765 P.2d 182.

<sup>34</sup> *Davidsohn v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).

<sup>35</sup> *Pickering*, 104 Nev. at 662, 765 P.2d at 182.

1 for Attorneys' Fees on July 2, 2018. During the brief time between the remittitur, issued on May 4,  
2 2018, and the Motion for Attorneys' Fees, St. Clair began researching and drafting the Motion for  
3 Attorneys' Fees. Further, the State Engineer has not claimed that the Motion has prejudiced or  
4 unfairly surprised him. These findings would be necessary for the Court to deny the Motion as  
5 untimely.<sup>36</sup>

6 The State Engineer erroneously cites to NRCP 54(d)(2) for his argument that St. Clair's  
7 Motion was untimely.<sup>37</sup> This citation is meritless for three reasons. First, NRCP 54(d)(2)(b) states  
8 that "[u]nless a statute provides otherwise, the motion must be filed no later than 20 days after notice  
9 of entry of judgment is served."<sup>38</sup> St. Clair made his Motion pursuant to NRS 18.010(2)(b), which the  
10 Supreme Court determined is not bound by strict time deadlines.<sup>39</sup> Second, NRCP 54(d)(2)(c)  
11 explains that the 20-day timeline does not apply to fees being sought as sanctions; NRS 18.010(2)(b) is  
12 a sanctions statute. "It is the intent of the Legislature that the court award attorney's fees pursuant to  
13 this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all  
14 appropriate situations."<sup>40</sup> Third, the Nevada Supreme Court in *Pickering* rejected the argument that a  
15 10-day time limit under NRCP 59 should restrict an NRS 18.010 motion for attorneys' fees,<sup>41</sup> and the  
16 State Engineer's argument for 20 days under NRCP 54 has no material differences. As such, St.  
17 Clair's Motion was submitted timely and should be considered as such.

18 **III. The Affidavit Contained An Error Regarding The Attorney's Fees Request Associated**  
19 **With The State Engineer's Opposition To The Request For Judicial Notice.**

20 The State Engineer points out an error contained in the Affidavit of Timothy D. O'Connor,  
21 Esq., attached to the Motion as Exhibit 1, which led to understandable confusion. The "Senior  
22 Partner" time allotted to this portion of the matter should have read "4.5" hours and inadvertently read  
23 "4.25" hours. While the hour listings were incorrect in the affidavit, the total requested fees were  
24 calculated and listed correctly. An amended affidavit is attached hereto as Exhibit 1.

25 ///

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

27 <sup>37</sup> Opposition to Motion for Attorneys' Fees at 4-6.

28 <sup>38</sup> NRCP 54(d)(2)(b) (emphasis added).

<sup>39</sup> *Pickering*, 104 Nev. 662, 765 P.2d at 182.

<sup>40</sup> NRS 18.010(2)(b).

<sup>41</sup> *Pickering*, 104 Nev. 660, 765 P.2d 181.

**CONCLUSION**

For the foregoing reasons, St. Clair respectfully requests that the Court grant his Motion for Attorneys' Fees.

**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 20 day of July, 2018.

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  
TIMOTHY D. O'CONNOR, ESQ.  
Nevada State Bar No. 14098  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), 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, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

James N. Bolotin, Esq.  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, Nevada 89701  
Attorney for Respondent

DATED this 20 day of July, 2018.

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

EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>	<u>Page Count</u>
1.	Amended Affidavit of Timothy D. O'Connor, Esq. in Support of Motion for Attorney's Fees	3

1 CASE NO.: CV 20, 112

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 Engineer,  
13 DIVISION OF WATER RESOURCES,  
14 DEPARTMENT OF CONSERVATION AND  
NATURAL RESOURCES,

15 Respondent.

**AMENDED AFFIDAVIT OF**  
**TIMOTHY D. O'CONNOR, ESQ.**  
**IN SUPPORT OF**  
**PETITIONER'S NOTICE OF MOTION**  
**AND MOTION FOR ATTORNEYS' FEES**

16  
17 STATE OF NEVADA )  
):ss.  
18 COUNTY OF CARSON CITY )

19 I, TIMOTHY D. O'CONNOR, ESQ., do hereby swear under penalty of perjury under the laws  
20 of the State of Nevada that the following assertions are true and correct to the best of my knowledge,  
21 information, and belief:

- 22 1. I am over the age of eighteen (18) and of sound mind.
- 23 2. I am making this affidavit in support of Petitioner's Notice of Motion and Motion for  
24 Attorneys' Fees filed in the above entitled action.
- 25 3. I am an attorney of record for Petitioner, RODNEY ST. CLAIR, and have, along with  
26 other members of TAGGART & TAGGART, LTD., at all relevant times, provided valuable and  
27 necessary services on behalf of RODNEY ST. CLAIR for which he is requesting compensation.

1           4.       That the legal services provided were actually and necessarily incurred and were  
2 reasonable under the circumstances.

3           5.       RODNEY ST. CLAIR is requesting an award of attorneys' fees in the amount of  
4 \$41,881.25. The amount of fees is calculated based on the hours billed for services related to this case  
5 and the hourly rates charged by TAGGART & TAGGART, LTD. as follows:

6                   Senior Partner hourly rate:	<u>\$325.00</u>
7                   Associate Attorney hourly rate:	<u>\$150.00-175.00</u>
8                   Paralegal hourly rate:	<u>\$120.00</u>

9           6.       The hourly rates reflected above are reasonable and customary given the novelty and  
10 difficulty of the questions involved in this litigation, the skill requisite to perform the legal services, and  
11 considering the experience, reputation, and ability of the persons performing the services.

12           7.       St. Clair spent \$2,672.50 to respond to the State Engineer's untimely opposition to the  
13 Request for Judicial Notice. This amount was calculated by the following:

14                   Senior Partner Attorney time:	4.5 hours
15                   Associate Attorney time:	4 hours
16                   Paralegal time:	4.25 hours

17           8.       St. Clair spent \$1,847.50 to respond to the State Engineer's meritless objections to the  
18 proposed order. This amount was calculated by the following:

19                   Senior Partner Attorney time:	4 hours
20                   Associate Attorney time:	7.8 hours
21                   Paralegal time:	.75 hours

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1           9.       St. Clair spent \$37,361.25 on Nevada Supreme Court litigation that the State Engineer  
2 initiated to overturn the district court's ruling. This amount was calculated by the following:

3                   Senior Partner Attorney time:       42.25 hours

4                   Associate Attorney time:           111.85 hours

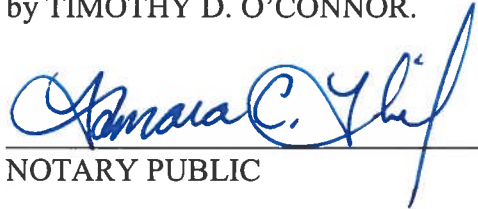
5                   Paralegal time:                   57 hours

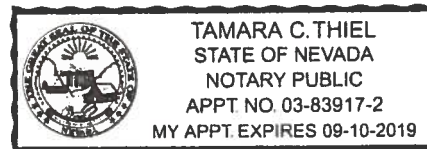
6           FURTHER AFFIANT SAYETH NAUGHT.

7           DATED this 20 day of July, 2018.

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TIMOTHY D. O'CONNOR, ESQ.

SUBSCRIBED and SWORN to  
before me this 20th day of July, 2018,  
by TIMOTHY D. O'CONNOR.

  
NOTARY PUBLIC





**ATTACHMENT 4**

**ATTACHMENT 4**

FILED

2018 NOV 25 PM 2:50

TAMARA S. STONE  
DIST. COURT CLERK

1 CASE NO.: CV 20, 112

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 Engineer,  
13 DIVISION OF WATER RESOURCES,  
14 DEPARTMENT OF CONSERVATION AND  
NATURAL RESOURCES,

15 Respondent.

**[PROPOSED] ORDER GRANTING  
MOTION FOR ATTORNEYS' FEES**

16  
17 THIS MATTER comes before the Court on Petitioner RODNEY ST. CLAIR's ("St. Clair") July  
18 2, 2018, Motion for Attorneys' Fees (hereinafter "Motion"). Respondent, JASON KING, P.E. Nevada  
19 State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND  
20 NATURAL RESOURCES ("State Engineer") filed his Opposition to Motion for Attorneys' Fees on  
21 July 16, 2018. St. Clair filed his Reply in Support of Motion for Attorneys' Fees on July 23, 2018. Oral  
22 argument was held on October 19, 2018, with both parties appearing. Having considered the arguments  
23 contained in the papers and presented at oral argument, the Court hereby grants St. Clair's Motion. St.  
24 Clair is awarded attorney's fees requested in the Motion, and additional attorney's fees incurred in  
25 preparation and argument of the Motion, pursuant to NRS 18.010(2)(b) due to the State Engineer's  
26 claims maintained throughout the instant litigation without reasonable ground.

## DISCUSSION AND BACKGROUND

1  
2 St. Clair owns real property in Humboldt County, Nevada, that was purchased in August 2013.  
3 St. Clair filed a Proof of Appropriation to prove that he owned a vested groundwater right which existed  
4 on his property when he purchased the property (hereinafter the "Vested Right"). On November 8,  
5 2013, St. Clair filed a change application to change the point of diversion of the vested water right to a  
6 new well. The State Engineer issued Ruling 6287 on July 25, 2014, finding that the Vested Right was  
7 valid, and the right did exist on St. Clair's property, but, without holding a hearing and without evidence  
8 of intent to support the claim, that the Vested Right had been abandoned by the previous owner.<sup>1</sup> St.  
9 Clair subsequently appealed the State Engineer's Ruling 6287 to this Court.

10 During the litigation before this Court, the State Engineer took multiple positions that  
11 unnecessarily raised the expenses being incurred by St. Clair, without reasonable ground. On July 3,  
12 2015, St. Clair filed a Request for Judicial Notice with the district court, requesting that the district court  
13 review legal briefs and prior State Engineer decisions. The State Engineer did not file a timely  
14 opposition to St. Clair's request, thereby waiving any objection to the request. Nevertheless, five months  
15 later, without leave of Court or stipulation of counsel, the State Engineer filed his untimely Opposition  
16 to St. Clair's Request for Judicial Notice. This late filing was in clear opposition to DCR 13(3). St.  
17 Clair timely filed his Reply to the State Engineer's Opposition. The Court, after consideration of all  
18 arguments and timeliness of filings, found it proper to take judicial notice of the documents requested  
19 by St. Clair.

20 After initial oral argument on the merits of the abandonment matter, this Court found that the  
21 State Engineer had no evidence to support the claim of abandonment. This Court found that the State  
22 Engineer clearly violated Nevada law by relying only on non-use evidence while wholly ignoring the  
23 element of intent – a necessary and pivotal requirement for abandonment. As such, this Court ruled for  
24 St. Clair, specifically noting that "abandonment in Nevada is defined as the relinquishment of the right  
25 by the owner with the intention to forsake and desert it."<sup>2</sup> Continuing, the Court explained that "if  
26 there's only evidence of non-use, that's not good enough."<sup>3</sup> Ultimately, the State Engineer demonstrated

27  
28 <sup>1</sup> Ruling 6287.

<sup>2</sup> January 5, 2016, Hearing Transcript, p. 79:21-23.

<sup>3</sup> *Id.*, p. 80:20-21.

1 no argument, nor did he put forth any case law, which would suggest that the clear Nevada law is not  
2 applicable in the instant matter.

3 St. Clair was then directed to draft a proposed order for this Court, and confer with the State  
4 Engineer's office prior to submitting the order, as "it is common practice for Clark County district courts  
5 to direct the prevailing party to draft the court's order."<sup>4</sup> When the parties could not come to an  
6 agreement on the proposed order, both parties' orders were submitted to this Court for consideration.  
7 The State Engineer then objected to the proposed order, filing a 78-page, six-exhibit document with the  
8 district court, despite having his order submitted in conjunction with St. Clair's proposed order. St.  
9 Clair filed a response to the objection, and another hearing was eventually held on the matter of the  
10 proposed order. This Court, after hearing the State Engineer's objections and St. Clair's responses,  
11 found that St. Clair's order accurately reflected this Court's findings and overruled the State Engineer's  
12 objections.

13 The State Engineer appealed the matter to the Nevada Supreme Court, maintaining the same  
14 argument rejected by this Court – that St. Clair's Vested Right was abandoned based solely on non-use.  
15 The Nevada Supreme Court upheld this Court's ruling, finding in relevant part that "there is not clear  
16 and convincing evidence" that the Vested Right was ever abandoned.<sup>5</sup> The Nevada Supreme Court  
17 concluded that "the State Engineer misapplied Nevada law by presuming abandonment *based on nonuse*  
18 *evidence alone.*"<sup>6</sup>

19 The Nevada Supreme Court also upheld this Court's decisions on both the Request for Judicial  
20 Notice and St. Clair's proposed order. The Nevada Supreme Court ruled, as this Court did, that "the  
21 State Engineer failed to preserve [the objection] with its opposition filed five months after St. Clair's  
22 request for judicial notice."<sup>7</sup> The Nevada Supreme Court also found that this Court had a hearing on the  
23 issue of St. Clair's proposed order, after which "the district court found [the State Engineer's] objections  
24 unpersuasive."<sup>8</sup> The Nevada Supreme Court noted that the district court did not "neglect[ ] its duty to  
25 make factual findings."<sup>9</sup>

26 <sup>4</sup> *King v. St. Clair*, 134 Nev. Adv. Op. 18, 8, 414 P.3d 314, 318 (2018).

27 <sup>5</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at 317.

28 <sup>6</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

1       Upon completion of the appellate process, and after ensuring that he was a prevailing party, St.  
2 Clair filed the Motion for Attorney's Fees before this Court. In the Motion St. Clair requested fees on  
3 the basis of NRS 18.010(2)(b), arguing that the State Engineer, throughout the litigation, maintained a  
4 position without reasonable ground relating to 1) the claims of abandonment of the Vested Right, 2) the  
5 Request for Judicial Notice, and 3) this Court's proposed order process. St. Clair argued that the State  
6 Engineer's meritless claims, motions, and objections unreasonably added to the cost of the litigation,  
7 and St. Clair should not be held to suffer the burden of that cost alone. After briefing and a hearing on  
8 the matter, in which both parties were present and put forth argument, this Court found that attorney's  
9 fees were warranted in this matter due to the State Engineer's groundless claims, meritless objections,  
10 and untimely motions. This Court finds that the State Engineer's maintenance of a claim without  
11 reasonable ground demonstrates an appropriate situation for an award of attorneys' fees pursuant to NRS  
12 18.010(2)(b).

#### 13                   STANDARD OF REVIEW FOR ATTORNEY'S FEES

14       Under NRS 533.450 parties feeling aggrieved from a decision of the State Engineer are allowed  
15 to seek judicial review of the decision before a district court.<sup>10</sup> "[T]he practice in civil cases applies" to  
16 judicial reviews of a State Engineer decision.<sup>11</sup> The district court has discretion under NRS  
17 18.010(2)(b), found in Title 2 of the Nevada Statutes, entitled "Civil Practice," to award attorney's fees  
18 upon a finding that a party maintained a claim "without reasonable ground."<sup>12</sup> Additionally, NRS  
19 18.010(2)(b) mandates that a Court "shall liberally construe the provisions of this paragraph in favor of  
20 awarding attorney's fees in all appropriate situations."<sup>13</sup>

21       A review of Nevada Supreme Court rulings demonstrates that "for purposes of an award of  
22 attorney's fees pursuant to NRS 18.010(2)(b), a claim is groundless if the allegations in the complaint .  
23 . . are not supported by any credible evidence at trial."<sup>14</sup> Further, unlike NRS 18.010(2)(a), NRS  
24 18.010(2)(b) is clear that attorneys' fees can be granted "[w]ithout regard to the recovery sought . . ."  
25 and therefore a monetary recovery is not a prerequisite. The Nevada Supreme Court has also visited  
26

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27 <sup>10</sup> NRS 533.450.

28 <sup>11</sup> NRS 533.450(8).

<sup>12</sup> NRS 18.010(2)(b).

<sup>13</sup> NRS 18.010(2)(b).

<sup>14</sup> *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).

1 this question and concluded that subsection (b) did allow for attorneys' fees for nonmonetary  
2 judgments.<sup>15</sup> In reviewing this statute, the Nevada Supreme Court held that "NRS 18.010 provides no  
3 time limits for motions for attorney's fees. Absent a specific statutory provision governing the time  
4 frame in which a party must request attorney's fees, the timeliness of such requests, we conclude, is a  
5 matter left to the discretion of the trial court."<sup>16</sup> As such, district courts have discretion to determine  
6 "[w]hether a motion for attorney's fees is timely."<sup>17</sup>

### 7 ANALYSIS

#### 8 I. The State Engineer Maintained A Claim Against St. Clair's Request For Judicial Notice 9 Without Reasonable Ground.

10 On June 2, 2015, St. Clair requested that this Court take notice of several public documents. The  
11 State Engineer did not timely object to the request. Five months later, however, on November 17, 2015,  
12 the State Engineer filed an opposition without leave of Court or stipulation by St. Clair. Under DCR  
13 13(3), any party opposing a motion is required to file and serve the opposition within 10 days after  
14 service of the motion. St. Clair incurred attorneys' fees in responding to the State Engineer's untimely  
15 filing. Because the filing was five months late, filed without leave of Court, and filed without a  
16 stipulation by St. Clair, this Court finds the filing and the arguments made therein were brought without  
17 reasonable ground. St. Clair is therefore awarded attorneys' fees associated with the State Engineer's  
18 late opposition.

#### 19 II. The State Engineer Maintained A Claim Against St. Clair's Proposed Order Without 20 Reasonable Ground.

21 St. Clair was ordered to prepare an order after prevailing before this Court. Requesting draft  
22 orders from the prevailing party is a "common practice for Clark County district courts."<sup>18</sup> After the  
23 parties could not come to an agreement on the language to be included in the proposed order, this Court  
24 accepted and reviewed both the State Engineer and St. Clair's proposed orders. The State Engineer also  
25 contacted the Court separately and made its concerns about the proposed order known to the Court. This  
26

27 <sup>15</sup> *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990).

<sup>16</sup> *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988).

<sup>17</sup> *Davidson v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).

28 <sup>18</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318 (citing EDCR 1.90(a)(5) ("[A] judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law.")).

1 Court held an additional hearing on the proposed order matter, in which this Court overruled each of the  
2 State Engineer's objections. Ultimately, this Court found that St. Clair's proposed order was accurate,  
3 accepted St. Clair's proposed order as drafted, and executed that order. Because the positions relating  
4 to the proposed order that the State Engineer maintained were without reasonable ground in light of the  
5 proceedings, St. Clair is awarded attorneys' fees associated with the State Engineer's objections to the  
6 proposed order.

7 This Court finds that it would be against public policy to allow the State Engineer to maintain  
8 unreasonable groundless claims and litigation positions, and have St. Clair pay attorneys' fees to defend  
9 against the claims, only to allow the State Engineer to remain unaccountable for the attorneys' fees  
10 incurred. This Court finds that the first consideration to be made in considering motions for attorneys'  
11 fees is to look at what the movant spent, and then look at the non-movant and see what they spent. Here,  
12 St. Clair spent \$41,881.25, plus additional fees in preparation and argument for the instant motion  
13 totaling \$8,143.75, and the State Engineer was represented by the Attorney General's Office. This Court  
14 finds in its discretion that the State Engineer's actions and litigation positions taken in the instant case  
15 qualify as an "appropriate situation to punish for and deter"<sup>19</sup> such groundless positions, because "such  
16 claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious  
17 claims and increase the costs of engaging in business and providing professional services to the  
18 public."<sup>20</sup> In short, St. Clair would not have expended tens of thousands of dollars on this matter had  
19 the State Engineer followed otherwise clear Nevada law and past State Engineer practice. St. Clair was  
20 put in an unfair position, and the State Engineer should compensate him for the attorneys' fees spent on  
21 countering the State Engineer's groundless arguments.

22 **III. The State Engineer Maintained Claim of Abandonment Against St. Clair Without**  
23 **Reasonable Ground.**

24 The rules of civil practice apply to judicial review taken under NRS 533.450.<sup>21</sup> NRS  
25 18.010(2)(b) is a rule of civil practice, and dictates when attorney's fees may be awarded. Under that  
26 statute, attorney's fees may be granted when a claim is maintained without reasonable ground.<sup>22</sup> NRS

27 <sup>19</sup> NRS 18.010(2)(b).

28 <sup>20</sup> *Id.*

<sup>21</sup> NRS 533.450(8).

<sup>22</sup> NRS 18.010(2)(b).

1 18.010(2)(b) further mandates that this Court is required to “liberally construe the provisions of this  
2 paragraph in favor of awarding attorney’s fees in all appropriate situations.” A claim is groundless under  
3 NRS 18.010(2)(b) “if the allegations in the complaint . . . are not supported by any credible evidence at  
4 trial.”<sup>23</sup>

5 Here, throughout the district court and Nevada Supreme Court litigation, the State Engineer was  
6 unable to point to any evidence whatsoever to support his claim of abandonment. The State Engineer  
7 relied only on non-use evidence which, under clear Nevada law, is not adequate. The State Engineer  
8 brought forth no evidence of intent to abandon, which is a required element to maintain a claim of  
9 abandonment. This fact was recognized by this Court after the district court proceedings in its order,<sup>24</sup>  
10 and recognized again at the Nevada Supreme Court in its ruling.<sup>25</sup> Notably, the State Engineer never  
11 submitted evidence of intent to abandon the vested water right, and relied only on nonuse evidence. The  
12 State Engineer had a history of correctly implementing and analyzing the law of abandonment in  
13 Nevada, yet erroneously pursued his abandonment claim against St. Clair based solely on nonuse  
14 evidence. As there was no evidence to support a claim of abandonment, St. Clair is entitled to recover  
15 reasonable attorneys’ fees incurred in defending against a claim maintained without reasonable ground.

16 The State Engineer made a series of arguments as to why St. Clair should not be awarded  
17 attorneys’ fees pursuant to NRS 18.010(2)(b). Each argument was unpersuasive. First, the State  
18 Engineer argued that NRS 533.450(7), which limits costs against the State Engineer should additionally  
19 limit attorney’s fees against the State Engineer. However, the State Engineer recognized in his argument  
20 that NRS 533.450 “does not include a provision for awarding attorney fees, but includes a provision  
21 regarding the recovery of costs, as in civil cases.”<sup>26</sup> In Nevada, attorney fees are not considered costs.<sup>27</sup>  
22 Because “the principle of statutory construction [i]f the mention of one thing implies the exclusion of  
23 another,”<sup>28</sup> this Court cannot find that the State Engineer is exempt from paying attorneys’ fees in  
24 appropriate situations.

25  
26 <sup>23</sup> *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.

27 <sup>24</sup> See April 22, 2016, Order Overruling State Engineer’s Ruling 6287, CV 20, 112, at 12:13-14.

28 <sup>25</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at 317.

<sup>26</sup> Opposition to Motion for Attorneys’ Fees at 7:20-22 (emphasis added).

<sup>27</sup> *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).

<sup>28</sup> *Rural Tel. Co. v. Pub. Utils. Comm’n*, 133 Nev. Adv. Op. 53 at 5, 398 P.3d 909, 911 (2017) (quoting *Sonia F. v. Eighth Jud. Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009)).



1           Second, the State Engineer argued that *Fowler*,<sup>29</sup> *Wrenn*,<sup>30</sup> and *Zenor*<sup>31</sup> each prohibit an award  
2 of attorney's fees under NRS 18.010(2)(b) in a judicial review action. These cases are inapplicable for  
3 numerous reasons. First and foremost, none of these cases involve NRS 533.450 appeals, and are limited  
4 to appeals made under NRS 233B or NRS 616. The substantial difference between NRS 533.450 and  
5 other statutes is that NRS 533.450 authorizes the "practice in civil cases" including NRS 18.010.<sup>32</sup>  
6 Additionally, the Nevada Supreme Court has limited awards of attorney's fees in NRS 233B cases  
7 because NRS 233B includes specific limiting language stating that "the provisions of this chapter are  
8 the *exclusive* means of judicial review . . ."<sup>33</sup> The applicable statute at hand, NRS 533.450, includes  
9 no such limiting provision. Finally, the State Engineer is specifically exempt from the provisions of  
10 NRS 233B, making the State Engineer's lineage of case law inapplicable here.<sup>34</sup>

11           Third, the State Engineer's arguments relating to the fact that St. Clair's claims were not  
12 monetary in nature do not have any impact on recovery under NRS 18.010(2)(b). NRS 18.010(2)(b) is  
13 clear that attorneys' fees can be granted "[w]ithout regard to the recovery sought . . ." and therefore a  
14 monetary recovery is not a prerequisite.<sup>35</sup> The Nevada Supreme Court has explained that subsection (b)  
15 did allow for attorneys' fees for nonmonetary judgments in proper situations.<sup>36</sup>

16           Finally, the State Engineer argued that any attorneys' fees that were expended based on the  
17 Nevada Supreme Court litigation are not warranted. NRS 18.010(2)(b) is silent with respect to  
18 attorneys' fees on appeal. Further, Nevada law appears to be silent on the matter. Recently, the Nevada  
19 Supreme Court relied on other jurisdictions' interpretations of fee shifting statutes to find that appellate  
20 fees can be granted.<sup>37</sup>

21           The State Engineer's conduct regarding the abandonment claim warrants attorney's fees in this  
22 matter. The State Engineer maintained an unsupported claim of abandonment, and despite his office's  
23 knowledge of the requirements of the claim, proceeded with the claim against St. Clair anyway. This  
24

25 <sup>29</sup> *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993).

26 <sup>30</sup> *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988).

27 <sup>31</sup> *Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28 (2018).

28 <sup>32</sup> NRS 533.450(8).

<sup>33</sup> *Fowler*, 109 Nev. at 785, 858 P.2d at 377 (emphasis added).

<sup>34</sup> NRS 233B.039(j).

<sup>35</sup> NRS 18.010(2)(b).

<sup>36</sup> *Key Bank of Alaska*, 106 Nev. 49, 787 P.2d 382.

<sup>37</sup> *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009).

1 Court finds that the State Engineer's maintenance of its claim against St. Clair was without reasonable  
2 ground, and it would be manifestly unjust to require a litigant to expend attorney's fees defending against  
3 such a claim without reimbursement. As such, the Court finds it proper to award St. Clair attorney's  
4 fees:

5 States with fee-shifting rules or statutes similar to Nevada's have held they  
6 apply to appellate fees. Additionally, nothing in the language of NRCP  
7 68 and NRS 17.115 suggests that their fee-shifting provisions cease  
8 operation when the case leaves trial court. We therefore hold that the fee-  
shifting provisions in NRCP 68 and NRS 17.115 extend to fees incurred  
on and after appeal.<sup>38</sup>

9 Similarly, nothing in the language of NRS 18.010 suggests that its fee-shifting provisions cease  
10 operation when the case leaves district court. The State Engineer cites to *Bd. of Gallery of History, Inc.*  
11 *v. Datecs Corp.*<sup>39</sup> for the proposition that fees on appeal cannot be granted pursuant to NRS 18.010(2).  
12 With seemingly competing rulings on this issue, the Court finds that the more recent controlling law,  
13 and the law with the more beneficial public policy to this case, is to allow fees for the appellate process  
14 under NRS 18.010(2). This approach maintains the legislature's mandate of "liberally constru[ing] the  
15 provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations."<sup>40</sup>  
16 This approach additionally follows more recent Nevada case precedent.

17 **IV. St. Clair's Motion Was Timely.**

18 No mention of time frames to file a motion is contained in NRS 18.010, leaving such a  
19 determination of timeliness to the district court's discretion.<sup>41</sup> Indeed, the Nevada Supreme Court has  
20 instructed that "[a]bsent a specific statutory provision governing the time frame in which a party must  
21 request attorney's fees, the timeliness of such requests, we conclude, is a matter left to the discretion of  
22 the trial court."<sup>42</sup> In *Pickering*, the Court determined that it was proper for a party seeking attorney's  
23 fees to make such a request upon completion of the appellate process, "as soon as he was assured that  
24 he was the prevailing party within the meaning of NRS 18.010(2)."<sup>43</sup>

25  
26 <sup>38</sup> *Id.* (internal quotations omitted).

27 <sup>39</sup> 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000).

28 <sup>40</sup> NRS 18.010(2)(b).

<sup>41</sup> NRS 18.010; *see also Pickering*, 104 Nev. at 662, 765 P.2d at 182.

<sup>42</sup> *Pickering*, 104 Nev. at 662, 765 P.2d at 182.

<sup>43</sup> *Id.*

1 St. Clair filed his Motion after he completed the appellate process and ensured he was a  
2 prevailing party. This Court, after hearing argument, determined within its discretion that it would hear  
3 the Motion given the facts and circumstances of the case. St. Clair during the hearing argued that the  
4 State Engineer was not prejudiced by the timing of the filing. The State Engineer made no claims or  
5 showing of unfairness, surprise, or prejudice.

6 The State Engineer further argued that NRCP 54(d)(2) should bar a request for attorneys' fees  
7 under NRS 18.010. This logic was flawed for multiple reasons. First, NRCP 54(d)(2)'s 20-day timeline  
8 for filing a motion does not bind NRS 18.010. In *Pickering*, a similar argument was made to limit an  
9 NRS 18.010 motion based on NRCP 59(e). The Nevada Supreme Court declined to extend a time limit  
10 imposed by NRCP 59(e) to NRS 18.010, citing to *White v. New Hampshire Department of Employment*  
11 *Security*, which held "we do not think that application of Rule 59(e) to [attorney's] fee requests is either  
12 necessary or desirable to promote finality, judicial economy, or fairness."<sup>44</sup> Here, similar logic prevails.  
13 The timelines given in NRCP 52(d)(2) are no more necessary or desirable to promote finality, judicial  
14 economy, or fairness as those included in NRCP 59(e). Additionally, St. Clair was diligent in seeking  
15 fees, making his Motion shortly after completion of the appellate process and ensuring that he was a  
16 prevailing party. Therefore, the Court finds that the Motion was made in a timely manner.

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<sup>44</sup> *Id.*

CONCLUSION

IT IS HEREBY ORDERED that St. Clair's Motion for Attorneys' Fees is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that the State Engineer shall reimburse St. Clair for his attorneys' fees in the amount of \$50,025.00.

IT IS HEREBY FURTHER ORDERED that the State Engineer shall forward the amount of \$50,025.00 directly to TAGGART & TAGGART, LTD., counsel for St. Clair, at 108 North Minnesota Street, Carson City, Nevada, 89703 within thirty (30) days from service of this order, unless otherwise ordered by this Court or a Court of competent jurisdiction.

IT IS SO ORDERED.

DATED this 20 day of November, 2018.

  
DISTRICT COURT JUDGE

Respectfully submitted by:

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

By: /s/ Timothy D. O'Connor  
PAUL G. TAGGART, ESQ.  
Nevada State Bar No. 6136  
TIMOTHY D. O'CONNOR, ESQ.  
Nevada State Bar No. 14098  
Attorneys for Petitioner

**ATTACHMENT 5**

**ATTACHMENT 5**

1 CASE NO.: CV 20, 112

2 DEPT. NO.: 2

FILED

2018 DEC -3 PM 12: 22

TAMI 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 Engineer,  
13 DIVISION OF WATER RESOURCES,  
14 DEPARTMENT OF CONSERVATION AND  
NATURAL RESOURCES,

15 Respondent.

**NOTICE OF ENTRY OF ORDER**

16  
17 PLEASE TAKE NOTICE that on November 26, 2018, the above-entitled Court entered its Order  
18 Granting Motion for Attorneys' Fees in the above-captioned matter, a copy of which is attached hereto  
19 as Exhibit 1.

20 ///

21 ///

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28 ///

**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 29 day of November, 2018.

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  
TIMOTHY D. O'CONNOR, ESQ.  
Nevada State Bar No. 14098  
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), 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, by depositing for mailing in the United States Mail, with postage prepaid, an envelope containing the foregoing document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

James N. Bolotin, Esq.  
Nevada Attorney General's Office  
100 North Carson Street  
Carson City, Nevada 89701  
Attorney for Respondent

The Hon. Steven R. Kosach  
P.O. Box 1950  
Reno, NV 89505

DATED this 29<sup>th</sup> day of November, 2018.

  
Employee of TAGGART & TAGGART, LTD.



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

EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>	<u>Page Count</u>
1.	Order Granting Motion for Attorneys' Fees	11

# **EXHIBIT 1**

# **EXHIBIT 1**

FILED

2018 NOV 25 PM 2:50

TAMARA S. STONE  
DIST. COURT CLERK

1 CASE NO.: CV 20, 112

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 Engineer,  
13 DIVISION OF WATER RESOURCES,  
14 DEPARTMENT OF CONSERVATION AND  
NATURAL RESOURCES,

15 Respondent.

**[PROPOSED] ORDER GRANTING  
MOTION FOR ATTORNEYS' FEES**

16  
17 THIS MATTER comes before the Court on Petitioner RODNEY ST. CLAIR's ("St. Clair") July  
18 2, 2018, Motion for Attorneys' Fees (hereinafter "Motion"). Respondent, JASON KING, P.E. Nevada  
19 State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND  
20 NATURAL RESOURCES ("State Engineer") filed his Opposition to Motion for Attorneys' Fees on  
21 July 16, 2018. St. Clair filed his Reply in Support of Motion for Attorneys' Fees on July 23, 2018. Oral  
22 argument was held on October 19, 2018, with both parties appearing. Having considered the arguments  
23 contained in the papers and presented at oral argument, the Court hereby grants St. Clair's Motion. St.  
24 Clair is awarded attorney's fees requested in the Motion, and additional attorney's fees incurred in  
25 preparation and argument of the Motion, pursuant to NRS 18.010(2)(b) due to the State Engineer's  
26 claims maintained throughout the instant litigation without reasonable ground.

## DISCUSSION AND BACKGROUND

1  
2 St. Clair owns real property in Humboldt County, Nevada, that was purchased in August 2013.  
3 St. Clair filed a Proof of Appropriation to prove that he owned a vested groundwater right which existed  
4 on his property when he purchased the property (hereinafter the "Vested Right"). On November 8,  
5 2013, St. Clair filed a change application to change the point of diversion of the vested water right to a  
6 new well. The State Engineer issued Ruling 6287 on July 25, 2014, finding that the Vested Right was  
7 valid, and the right did exist on St. Clair's property, but, without holding a hearing and without evidence  
8 of intent to support the claim, that the Vested Right had been abandoned by the previous owner.<sup>1</sup> St.  
9 Clair subsequently appealed the State Engineer's Ruling 6287 to this Court.

10 During the litigation before this Court, the State Engineer took multiple positions that  
11 unnecessarily raised the expenses being incurred by St. Clair, without reasonable ground. On July 3,  
12 2015, St. Clair filed a Request for Judicial Notice with the district court, requesting that the district court  
13 review legal briefs and prior State Engineer decisions. The State Engineer did not file a timely  
14 opposition to St. Clair's request, thereby waiving any objection to the request. Nevertheless, five months  
15 later, without leave of Court or stipulation of counsel, the State Engineer filed his untimely Opposition  
16 to St. Clair's Request for Judicial Notice. This late filing was in clear opposition to DCR 13(3). St.  
17 Clair timely filed his Reply to the State Engineer's Opposition. The Court, after consideration of all  
18 arguments and timeliness of filings, found it proper to take judicial notice of the documents requested  
19 by St. Clair.

20 After initial oral argument on the merits of the abandonment matter, this Court found that the  
21 State Engineer had no evidence to support the claim of abandonment. This Court found that the State  
22 Engineer clearly violated Nevada law by relying only on non-use evidence while wholly ignoring the  
23 element of intent – a necessary and pivotal requirement for abandonment. As such, this Court ruled for  
24 St. Clair, specifically noting that "abandonment in Nevada is defined as the relinquishment of the right  
25 by the owner with the intention to forsake and desert it."<sup>2</sup> Continuing, the Court explained that "if  
26 there's only evidence of non-use, that's not good enough."<sup>3</sup> Ultimately, the State Engineer demonstrated

27  
28 <sup>1</sup> Ruling 6287.

<sup>2</sup> January 5, 2016, Hearing Transcript, p. 79:21-23.

<sup>3</sup> *Id.*, p. 80:20-21.

1 no argument, nor did he put forth any case law, which would suggest that the clear Nevada law is not  
2 applicable in the instant matter.

3 St. Clair was then directed to draft a proposed order for this Court, and confer with the State  
4 Engineer's office prior to submitting the order, as "it is common practice for Clark County district courts  
5 to direct the prevailing party to draft the court's order."<sup>4</sup> When the parties could not come to an  
6 agreement on the proposed order, both parties' orders were submitted to this Court for consideration.  
7 The State Engineer then objected to the proposed order, filing a 78-page, six-exhibit document with the  
8 district court, despite having his order submitted in conjunction with St. Clair's proposed order. St.  
9 Clair filed a response to the objection, and another hearing was eventually held on the matter of the  
10 proposed order. This Court, after hearing the State Engineer's objections and St. Clair's responses,  
11 found that St. Clair's order accurately reflected this Court's findings and overruled the State Engineer's  
12 objections.

13 The State Engineer appealed the matter to the Nevada Supreme Court, maintaining the same  
14 argument rejected by this Court – that St. Clair's Vested Right was abandoned based solely on non-use.  
15 The Nevada Supreme Court upheld this Court's ruling, finding in relevant part that "there is not clear  
16 and convincing evidence" that the Vested Right was ever abandoned.<sup>5</sup> The Nevada Supreme Court  
17 concluded that "the State Engineer misapplied Nevada law by presuming abandonment *based on nonuse*  
18 *evidence alone.*"<sup>6</sup>

19 The Nevada Supreme Court also upheld this Court's decisions on both the Request for Judicial  
20 Notice and St. Clair's proposed order. The Nevada Supreme Court ruled, as this Court did, that "the  
21 State Engineer failed to preserve [the objection] with its opposition filed five months after St. Clair's  
22 request for judicial notice."<sup>7</sup> The Nevada Supreme Court also found that this Court had a hearing on the  
23 issue of St. Clair's proposed order, after which "the district court found [the State Engineer's] objections  
24 unpersuasive."<sup>8</sup> The Nevada Supreme Court noted that the district court did not "neglect[ ] its duty to  
25 make factual findings."<sup>9</sup>

26 <sup>4</sup> *King v. St. Clair*, 134 Nev. Adv. Op. 18, 8, 414 P.3d 314, 318 (2018).

27 <sup>5</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at 317.

28 <sup>6</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

1       Upon completion of the appellate process, and after ensuring that he was a prevailing party, St.  
2 Clair filed the Motion for Attorney's Fees before this Court. In the Motion St. Clair requested fees on  
3 the basis of NRS 18.010(2)(b), arguing that the State Engineer, throughout the litigation, maintained a  
4 position without reasonable ground relating to 1) the claims of abandonment of the Vested Right, 2) the  
5 Request for Judicial Notice, and 3) this Court's proposed order process. St. Clair argued that the State  
6 Engineer's meritless claims, motions, and objections unreasonably added to the cost of the litigation,  
7 and St. Clair should not be held to suffer the burden of that cost alone. After briefing and a hearing on  
8 the matter, in which both parties were present and put forth argument, this Court found that attorney's  
9 fees were warranted in this matter due to the State Engineer's groundless claims, meritless objections,  
10 and untimely motions. This Court finds that the State Engineer's maintenance of a claim without  
11 reasonable ground demonstrates an appropriate situation for an award of attorneys' fees pursuant to NRS  
12 18.010(2)(b).

#### 13                   STANDARD OF REVIEW FOR ATTORNEY'S FEES

14       Under NRS 533.450 parties feeling aggrieved from a decision of the State Engineer are allowed  
15 to seek judicial review of the decision before a district court.<sup>10</sup> "[T]he practice in civil cases applies" to  
16 judicial reviews of a State Engineer decision.<sup>11</sup> The district court has discretion under NRS  
17 18.010(2)(b), found in Title 2 of the Nevada Statutes, entitled "Civil Practice," to award attorney's fees  
18 upon a finding that a party maintained a claim "without reasonable ground."<sup>12</sup> Additionally, NRS  
19 18.010(2)(b) mandates that a Court "shall liberally construe the provisions of this paragraph in favor of  
20 awarding attorney's fees in all appropriate situations."<sup>13</sup>

21       A review of Nevada Supreme Court rulings demonstrates that "for purposes of an award of  
22 attorney's fees pursuant to NRS 18.010(2)(b), a claim is groundless if the allegations in the complaint .  
23 . . are not supported by any credible evidence at trial."<sup>14</sup> Further, unlike NRS 18.010(2)(a), NRS  
24 18.010(2)(b) is clear that attorneys' fees can be granted "[w]ithout regard to the recovery sought . . ."  
25 and therefore a monetary recovery is not a prerequisite. The Nevada Supreme Court has also visited  
26

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27 <sup>10</sup> NRS 533.450.

28 <sup>11</sup> NRS 533.450(8).

<sup>12</sup> NRS 18.010(2)(b).

<sup>13</sup> NRS 18.010(2)(b).

<sup>14</sup> *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).

1 this question and concluded that subsection (b) did allow for attorneys' fees for nonmonetary  
2 judgments.<sup>15</sup> In reviewing this statute, the Nevada Supreme Court held that "NRS 18.010 provides no  
3 time limits for motions for attorney's fees. Absent a specific statutory provision governing the time  
4 frame in which a party must request attorney's fees, the timeliness of such requests, we conclude, is a  
5 matter left to the discretion of the trial court."<sup>16</sup> As such, district courts have discretion to determine  
6 "[w]hether a motion for attorney's fees is timely."<sup>17</sup>

### 7 ANALYSIS

#### 8 I. The State Engineer Maintained A Claim Against St. Clair's Request For Judicial Notice 9 Without Reasonable Ground.

10 On June 2, 2015, St. Clair requested that this Court take notice of several public documents. The  
11 State Engineer did not timely object to the request. Five months later, however, on November 17, 2015,  
12 the State Engineer filed an opposition without leave of Court or stipulation by St. Clair. Under DCR  
13 13(3), any party opposing a motion is required to file and serve the opposition within 10 days after  
14 service of the motion. St. Clair incurred attorneys' fees in responding to the State Engineer's untimely  
15 filing. Because the filing was five months late, filed without leave of Court, and filed without a  
16 stipulation by St. Clair, this Court finds the filing and the arguments made therein were brought without  
17 reasonable ground. St. Clair is therefore awarded attorneys' fees associated with the State Engineer's  
18 late opposition.

#### 19 II. The State Engineer Maintained A Claim Against St. Clair's Proposed Order Without 20 Reasonable Ground.

21 St. Clair was ordered to prepare an order after prevailing before this Court. Requesting draft  
22 orders from the prevailing party is a "common practice for Clark County district courts."<sup>18</sup> After the  
23 parties could not come to an agreement on the language to be included in the proposed order, this Court  
24 accepted and reviewed both the State Engineer and St. Clair's proposed orders. The State Engineer also  
25 contacted the Court separately and made its concerns about the proposed order known to the Court. This  
26

27 <sup>15</sup> *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990).

<sup>16</sup> *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988).

<sup>17</sup> *Davidson v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).

28 <sup>18</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318 (citing EDCR 1.90(a)(5) ("[A] judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law.")).

1 Court held an additional hearing on the proposed order matter, in which this Court overruled each of the  
2 State Engineer's objections. Ultimately, this Court found that St. Clair's proposed order was accurate,  
3 accepted St. Clair's proposed order as drafted, and executed that order. Because the positions relating  
4 to the proposed order that the State Engineer maintained were without reasonable ground in light of the  
5 proceedings, St. Clair is awarded attorneys' fees associated with the State Engineer's objections to the  
6 proposed order.

7 This Court finds that it would be against public policy to allow the State Engineer to maintain  
8 unreasonable groundless claims and litigation positions, and have St. Clair pay attorneys' fees to defend  
9 against the claims, only to allow the State Engineer to remain unaccountable for the attorneys' fees  
10 incurred. This Court finds that the first consideration to be made in considering motions for attorneys'  
11 fees is to look at what the movant spent, and then look at the non-movant and see what they spent. Here,  
12 St. Clair spent \$41,881.25, plus additional fees in preparation and argument for the instant motion  
13 totaling \$8,143.75, and the State Engineer was represented by the Attorney General's Office. This Court  
14 finds in its discretion that the State Engineer's actions and litigation positions taken in the instant case  
15 qualify as an "appropriate situation to punish for and deter"<sup>19</sup> such groundless positions, because "such  
16 claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious  
17 claims and increase the costs of engaging in business and providing professional services to the  
18 public."<sup>20</sup> In short, St. Clair would not have expended tens of thousands of dollars on this matter had  
19 the State Engineer followed otherwise clear Nevada law and past State Engineer practice. St. Clair was  
20 put in an unfair position, and the State Engineer should compensate him for the attorneys' fees spent on  
21 countering the State Engineer's groundless arguments.

22 **III. The State Engineer Maintained Claim of Abandonment Against St. Clair Without**  
23 **Reasonable Ground.**

24 The rules of civil practice apply to judicial review taken under NRS 533.450.<sup>21</sup> NRS  
25 18.010(2)(b) is a rule of civil practice, and dictates when attorney's fees may be awarded. Under that  
26 statute, attorney's fees may be granted when a claim is maintained without reasonable ground.<sup>22</sup> NRS

27 <sup>19</sup> NRS 18.010(2)(b).

28 <sup>20</sup> *Id.*

<sup>21</sup> NRS 533.450(8).

<sup>22</sup> NRS 18.010(2)(b).



1 18.010(2)(b) further mandates that this Court is required to “liberally construe the provisions of this  
2 paragraph in favor of awarding attorney’s fees in all appropriate situations.” A claim is groundless under  
3 NRS 18.010(2)(b) “if the allegations in the complaint . . . are not supported by any credible evidence at  
4 trial.”<sup>23</sup>

5 Here, throughout the district court and Nevada Supreme Court litigation, the State Engineer was  
6 unable to point to any evidence whatsoever to support his claim of abandonment. The State Engineer  
7 relied only on non-use evidence which, under clear Nevada law, is not adequate. The State Engineer  
8 brought forth no evidence of intent to abandon, which is a required element to maintain a claim of  
9 abandonment. This fact was recognized by this Court after the district court proceedings in its order,<sup>24</sup>  
10 and recognized again at the Nevada Supreme Court in its ruling.<sup>25</sup> Notably, the State Engineer never  
11 submitted evidence of intent to abandon the vested water right, and relied only on nonuse evidence. The  
12 State Engineer had a history of correctly implementing and analyzing the law of abandonment in  
13 Nevada, yet erroneously pursued his abandonment claim against St. Clair based solely on nonuse  
14 evidence. As there was no evidence to support a claim of abandonment, St. Clair is entitled to recover  
15 reasonable attorneys’ fees incurred in defending against a claim maintained without reasonable ground.

16 The State Engineer made a series of arguments as to why St. Clair should not be awarded  
17 attorneys’ fees pursuant to NRS 18.010(2)(b). Each argument was unpersuasive. First, the State  
18 Engineer argued that NRS 533.450(7), which limits costs against the State Engineer should additionally  
19 limit attorney’s fees against the State Engineer. However, the State Engineer recognized in his argument  
20 that NRS 533.450 “does not include a provision for awarding attorney fees, but includes a provision  
21 regarding the recovery of costs, as in civil cases.”<sup>26</sup> In Nevada, attorney fees are not considered costs.<sup>27</sup>  
22 Because “the principle of statutory construction [i]f the mention of one thing implies the exclusion of  
23 another,”<sup>28</sup> this Court cannot find that the State Engineer is exempt from paying attorneys’ fees in  
24 appropriate situations.

25  
26 <sup>23</sup> *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.

27 <sup>24</sup> See April 22, 2016, Order Overruling State Engineer’s Ruling 6287, CV 20, 112, at 12:13-14.

28 <sup>25</sup> *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at 317.

<sup>26</sup> Opposition to Motion for Attorneys’ Fees at 7:20-22 (emphasis added).

<sup>27</sup> *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).

<sup>28</sup> *Rural Tel. Co. v. Pub. Utils. Comm’n*, 133 Nev. Adv. Op. 53 at 5, 398 P.3d 909, 911 (2017) (quoting *Sonia F. v. Eighth Jud. Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009)).

1           Second, the State Engineer argued that *Fowler*,<sup>29</sup> *Wrenn*,<sup>30</sup> and *Zenor*<sup>31</sup> each prohibit an award  
2 of attorney's fees under NRS 18.010(2)(b) in a judicial review action. These cases are inapplicable for  
3 numerous reasons. First and foremost, none of these cases involve NRS 533.450 appeals, and are limited  
4 to appeals made under NRS 233B or NRS 616. The substantial difference between NRS 533.450 and  
5 other statutes is that NRS 533.450 authorizes the "practice in civil cases" including NRS 18.010.<sup>32</sup>  
6 Additionally, the Nevada Supreme Court has limited awards of attorney's fees in NRS 233B cases  
7 because NRS 233B includes specific limiting language stating that "the provisions of this chapter are  
8 the *exclusive* means of judicial review . . ."<sup>33</sup> The applicable statute at hand, NRS 533.450, includes  
9 no such limiting provision. Finally, the State Engineer is specifically exempt from the provisions of  
10 NRS 233B, making the State Engineer's lineage of case law inapplicable here.<sup>34</sup>

11           Third, the State Engineer's arguments relating to the fact that St. Clair's claims were not  
12 monetary in nature do not have any impact on recovery under NRS 18.010(2)(b). NRS 18.010(2)(b) is  
13 clear that attorneys' fees can be granted "[w]ithout regard to the recovery sought . . ." and therefore a  
14 monetary recovery is not a prerequisite.<sup>35</sup> The Nevada Supreme Court has explained that subsection (b)  
15 did allow for attorneys' fees for nonmonetary judgments in proper situations.<sup>36</sup>

16           Finally, the State Engineer argued that any attorneys' fees that were expended based on the  
17 Nevada Supreme Court litigation are not warranted. NRS 18.010(2)(b) is silent with respect to  
18 attorneys' fees on appeal. Further, Nevada law appears to be silent on the matter. Recently, the Nevada  
19 Supreme Court relied on other jurisdictions' interpretations of fee shifting statutes to find that appellate  
20 fees can be granted.<sup>37</sup>

21           The State Engineer's conduct regarding the abandonment claim warrants attorney's fees in this  
22 matter. The State Engineer maintained an unsupported claim of abandonment, and despite his office's  
23 knowledge of the requirements of the claim, proceeded with the claim against St. Clair anyway. This  
24

25 <sup>29</sup> *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993).

26 <sup>30</sup> *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988).

27 <sup>31</sup> *Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28 (2018).

28 <sup>32</sup> NRS 533.450(8).

<sup>33</sup> *Fowler*, 109 Nev. at 785, 858 P.2d at 377 (emphasis added).

<sup>34</sup> NRS 233B.039(j).

<sup>35</sup> NRS 18.010(2)(b).

<sup>36</sup> *Key Bank of Alaska*, 106 Nev. 49, 787 P.2d 382.

<sup>37</sup> *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009).

1 Court finds that the State Engineer's maintenance of its claim against St. Clair was without reasonable  
2 ground, and it would be manifestly unjust to require a litigant to expend attorney's fees defending against  
3 such a claim without reimbursement. As such, the Court finds it proper to award St. Clair attorney's  
4 fees:

5 States with fee-shifting rules or statutes similar to Nevada's have held they  
6 apply to appellate fees. Additionally, nothing in the language of NRCP  
7 68 and NRS 17.115 suggests that their fee-shifting provisions cease  
8 operation when the case leaves trial court. We therefore hold that the fee-  
shifting provisions in NRCP 68 and NRS 17.115 extend to fees incurred  
on and after appeal.<sup>38</sup>

9 Similarly, nothing in the language of NRS 18.010 suggests that its fee-shifting provisions cease  
10 operation when the case leaves district court. The State Engineer cites to *Bd. of Gallery of History, Inc.*  
11 *v. Datecs Corp.*<sup>39</sup> for the proposition that fees on appeal cannot be granted pursuant to NRS 18.010(2).  
12 With seemingly competing rulings on this issue, the Court finds that the more recent controlling law,  
13 and the law with the more beneficial public policy to this case, is to allow fees for the appellate process  
14 under NRS 18.010(2). This approach maintains the legislature's mandate of "liberally constru[ing] the  
15 provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations."<sup>40</sup>  
16 This approach additionally follows more recent Nevada case precedent.

17 **IV. St. Clair's Motion Was Timely.**

18 No mention of time frames to file a motion is contained in NRS 18.010, leaving such a  
19 determination of timeliness to the district court's discretion.<sup>41</sup> Indeed, the Nevada Supreme Court has  
20 instructed that "[a]bsent a specific statutory provision governing the time frame in which a party must  
21 request attorney's fees, the timeliness of such requests, we conclude, is a matter left to the discretion of  
22 the trial court."<sup>42</sup> In *Pickering*, the Court determined that it was proper for a party seeking attorney's  
23 fees to make such a request upon completion of the appellate process, "as soon as he was assured that  
24 he was the prevailing party within the meaning of NRS 18.010(2)."<sup>43</sup>

25  
26 <sup>38</sup> *Id.* (internal quotations omitted).

27 <sup>39</sup> 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000).

28 <sup>40</sup> NRS 18.010(2)(b).

<sup>41</sup> NRS 18.010; *see also Pickering*, 104 Nev. at 662, 765 P.2d at 182.

<sup>42</sup> *Pickering*, 104 Nev. at 662, 765 P.2d at 182.

<sup>43</sup> *Id.*

1 St. Clair filed his Motion after he completed the appellate process and ensured he was a  
2 prevailing party. This Court, after hearing argument, determined within its discretion that it would hear  
3 the Motion given the facts and circumstances of the case. St. Clair during the hearing argued that the  
4 State Engineer was not prejudiced by the timing of the filing. The State Engineer made no claims or  
5 showing of unfairness, surprise, or prejudice.

6 The State Engineer further argued that NRCP 54(d)(2) should bar a request for attorneys' fees  
7 under NRS 18.010. This logic was flawed for multiple reasons. First, NRCP 54(d)(2)'s 20-day timeline  
8 for filing a motion does not bind NRS 18.010. In *Pickering*, a similar argument was made to limit an  
9 NRS 18.010 motion based on NRCP 59(e). The Nevada Supreme Court declined to extend a time limit  
10 imposed by NRCP 59(e) to NRS 18.010, citing to *White v. New Hampshire Department of Employment*  
11 *Security*, which held "we do not think that application of Rule 59(e) to [attorney's] fee requests is either  
12 necessary or desirable to promote finality, judicial economy, or fairness."<sup>44</sup> Here, similar logic prevails.  
13 The timelines given in NRCP 52(d)(2) are no more necessary or desirable to promote finality, judicial  
14 economy, or fairness as those included in NRCP 59(e). Additionally, St. Clair was diligent in seeking  
15 fees, making his Motion shortly after completion of the appellate process and ensuring that he was a  
16 prevailing party. Therefore, the Court finds that the Motion was made in a timely manner.

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<sup>44</sup> *Id.*

CONCLUSION

IT IS HEREBY ORDERED that St. Clair's Motion for Attorneys' Fees is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that the State Engineer shall reimburse St. Clair for his attorneys' fees in the amount of \$50,025.00.

IT IS HEREBY FURTHER ORDERED that the State Engineer shall forward the amount of \$50,025.00 directly to TAGGART & TAGGART, LTD., counsel for St. Clair, at 108 North Minnesota Street, Carson City, Nevada, 89703 within thirty (30) days from service of this order, unless otherwise ordered by this Court or a Court of competent jurisdiction.

IT IS SO ORDERED.

DATED this 20 day of November, 2018.

  
DISTRICT COURT JUDGE

Respectfully submitted by:

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