IN THE SUPREME COURT OF THE STATE OF NEVADA

TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellant, vs. RODNEY ST. CLAIR, Respondent.	Case No. 77651

JOINT APPENDIX

VOLUME V of V
(JA 961–1161)

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DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
11/16/18	Affidavit of Timothy O'Connor in Support of Motion for Attorneys' Fees	V	1077–1079
12/06/18	Case Appeal Statement	V	1132–1136
12/06/18	Ex Parte Motion for Order Shortening Time on Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1141–1143
12/09/16	Joint Appendix, Volume I of II (JT APP 001–556), *Jason King v. St. Clair*, Case No. 70458	I–III	1–560
12/09/16	Joint Appendix, Volume II of II (JT APP 557–844), *Jason King v. St. Clair*, Case No. 70458	III–IV	561–852
08/09/18	Memo as to Court Date (Hearing set for 10/19/18)	IV	907–908
12/06/18	Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1137–1140
12/06/18	Notice of Appeal	V	1112–1131
12/03/18	Notice of Entry of Order Granting Motion for Attorneys' Fees	V	1096–1111
12/26/18	Notice of Entry of Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1151–1158
06/28/18	Notice of Motion and Motion for Attorneys' Fees	IV	855–870
12/07/18	Notice of Non-Opposition to Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1144–1146

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07/16/18	Opposition to Motion for Attorneys' Fees	IV	871–884
12/18/18	Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1147–1150
10/19/18	PowerPoint Presentation (St. Clair's)	IV	909–936
10/19/18	PowerPoint Presentation (State Engineer's)	IV–V	937–989
11/16/18	[Proposed] Order Granting Motion for Attorneys' Fees (St. Clair's)	V	1080–1095
05/04/18	Remittitur and Clerk's Certificate/Judgment, *Jason King v. St. Clair*, Case No. 70458	IV	853–854
07/20/18	Reply in Support of Motion for Attorneys' Fees	IV	885–899
07/23/18	Request for Submission	IV	900–906
01/02/19	Request for Transcript	V	1159–1161

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DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
10/19/18	Transcript of Hearing on Motion for Attorneys' Fees	V	990–1076

RESPECTFULLY SUBMITTED this 30th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 30th day of April, 2019, I served a copy of the foregoing JOINT APPENDIX and DOCUMENTS JA 1–1161, by electronic service to:

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St. Clair's Motion is Untimely

NRCP 54(d)(2)(B) – Motion for Attorney Fees "must be filed no later than 20 days after notice of entry of judgment is served . . . The time for filing the motion **may not** be extended by the court after it has expired"

April 29, 2016 – St. Clair served Notice of Entry of Order
June 28, 2018 – St. Clair served Motion for Attorneys' Fees

St. Clair's Motion for Attorney's Fees was filed over 2 years after service of the NOE.

This is far beyond the 20 days set by NRCP 54; therefore, St. Clair's Motion should be denied as untimely.

St. Clair is Not Entitled to Attorneys' Fees

NRS 533.450 is the only means for a petition for judicial review of an order or decision of the State Engineer

"[A]ttorney fees may not be awarded absent a statute, rule, or contract authorizing such award."

- *Thomas v. City of North Las Vegas*, 122 Nev. 82, 91, 127 P.3d 1057, 1063 (2006)

NRS 533.450 does not include a provision for awarding attorneys fees

St. Clair is Not Entitled to Attorneys' Fees

While State Engineer is exempted from NRS 233B (*see* NRS 233B.039(j)), the Supreme Court's analysis regarding 233B in the context of attorneys' fees is persuasive

St. Clair is Not Entitled to Attorneys' Fees

In *Fowler*, Nevada Supreme Court noted that, like NRS 533.450 for petitions for judicial review of State Engineer decisions,

"NRS 233B.130 does not contain any specific language authorizing the award of attorney's fees in actions involving petitions for judicial review of agency action."

- *Fowler*, 109 Nev. at 785, 858, P.2d at 377

St. Clair is Not Entitled to Attorneys' Fees

In *Zenor*, the Nevada Supreme Court noted that, like NRS 533.450 for decisions of the State Engineer,

"the provisions of NRS Chapter 233B 'are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies.'"

- *Zenor v. State, Dep't of Transp.*, 134 Nev. Adv. Op. 14, 412 P.3d 28, 30 (2018) (*citing Fowler*, 109 Nev. at 785, 858, P.2d at 377)

St. Clair is Not Entitled to Attorneys' Fees

Zenor

Nevada Supreme Court held that district court properly interpreted *Fowler* to mean that NRS 233B.130 precluded attorney's fees pursuant to NRS 18.010(2)(b) because:

"NRS 233B.130 does not contain any specific language authorizing the award of attorney's fees in actions involving petitions for judicial review of agency action."

- *Zenor,* 134 Nev. Adv. Op. 14, 412 P.3d at 30 (*citing Fowler*, 109 Nev. at 785, 858, P.2d at 377)

St. Clair is Not Entitled to Attorneys' Fees

The Nevada Supreme Court has "repeatedly refused to imply provisions not expressly included in the legislative scheme" and has held that "it is not the business of [the Supreme Court] to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done."

- *Zenor*, 134 Nev. Adv. Op. 14, 412 P.3d at 30 (internal citations omitted)

St. Clair is Not Entitled to Attorneys' Fees

In *Rand Props., LLC*, another case involving water, the Nevada Supreme Court looked at two (2) other provisions in NRS Chapter 533 providing for costs, NRS 533.190(1) and NRS 533.240(3), and reversed the award of attorney fees because:

"These statutes specifically provide for an award of costs, but under Nevada law, attorney fees are not costs."

- *See Rand Props., LLC v. Filippini*, Docket No. 66933, 2016 WL 1619306 (Order of Reversal and Remand, Apr. 21, 2016) (*citing Smith v. Crown Fin. Services of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).

"[T]he district court may not award attorney fees absent authority under a statute, rule, or contract."

- *See Rand* (*citing Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006).

St. Clair is Not Entitled to Attorneys' Fees

"[A]ttorney fees <u>are not mentioned anywhere in the statute</u> … [a]ccordingly, we reverse the award of attorney fees."

- *See Rand Props., LLC*

THIS SPECIFICALLY REFERS TO NRS CHAPTER 533!

St. Clair is Not Entitled to Attorneys' Fees

- St. Clair requests attorney's fees pursuant to NRS 18.010(2)(b) (just like *Zenor*)
- NRS 533.450 is the exclusive means for filing a petition for judicial review of State Engineer's decisions (despite not specifically saying so)
- St. Clair filed his petition for judicial review "pursuant to NRS 533.450." *See* Petition, p. 1.
- NRS 533.450 does not include provision providing for attorney's fees
  - "That the Legislature intentionally omitted attorney fees from NRS Chapter 233B is supported by the fact that the Legislature expressly authorized fees and costs in similar statutes – specifically for frivolous petitions of hearing officer decisions involving industrial injuries. *See* NRS 616C.385"
    - *Zenor,* 134 Nev. Adv. Op. 14, 412 P.3d at 30
- Here, NRS 533.450 itself *specifically* provides for costs. *See* NRS 533.450(7). This supports the idea that the omission of attorney fees was intentional.

St. Clair is Not Entitled to Attorneys' Fees

Therefore, petitioners (including St. Clair in this case) are not entitled to attorneys' fees in NRS 533.450 petitions for judicial review against the State Engineer

St. Clair is Not Entitled to Attorneys' Fees

Notwithstanding aforementioned case law, the State Engineer's Defense and Appeal were not "brought or maintained without reasonable ground or to harass the prevailing party" as required under NRS 18.010(2)(b)

The State Engineer acted reasonably and in good faith

NRS 18.010(2)(b) requires "evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party."

- *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486, 851 P.2d 459, 464 (1993).

The State Engineer acted reasonably and in good faith

A claim is groundless if:

- Not supported by any credible evidence at trial;
- It is brought in bad faith; or,
- It is fraudulent

- *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1095, 901 P.2d 687, 688 (1995).

The State Engineer acted reasonably and in good faith

Previous analysis depends on actual circumstances of the case, rather than hypothetical facts supporting moving party's averments.

- *See Semenza v. Caughlin Crafted Homes,* 111 Nev. 1095, 901 P.2d 687, 688 (1995).

The State Engineer acted reasonably and in good faith

While the State Engineer was ultimately not the prevailing party in either his defense of Ruling No. 6287 or his appeal to the Supreme Court, both were maintained in good faith, based on a reasonable, albeit ultimately incorrect, interpretation of law and fact.

No finding in the record otherwise.

St. Clair is Not Entitled to Attorneys' Fees

NRS 533.450(1) – "nature of an appeal"

St. Clair brought its motion pursuant to NRS 18.010(2)(b), silent with respect to appeals

NRAP 38 provides for costs on appeal "where an appeal has frivolously been taken or been processed in a frivolous manner."

St. Clair is Not Entitled to Attorneys' Fees

Neither the District Court nor the Supreme Court found that the State Engineer maintained his defense of Ruling No. 6287 in a "frivolous nature."

St. Clair is Not Entitled to Attorneys' Fees

Supreme Court found that State Engineer acted arbitrarily and capriciously in issuing Ruling No. 6287, finding the ruling unsupported by substantial evidence

This is the standard required to overturn a decision of the State Engineer.

- *See King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314, 316 – 18 (2018) (*citing Pyramid Lake Paiute Tribe of Indians v. Washoe Cnty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996)).

St. Clair is Not Entitled to Attorneys' Fees

Finding that a State Engineer's decision is arbitrary and capricious, and not supported by substantial evidence

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State Engineer's defense of his decision being frivolous

No finding of frivolity by either Court

JA 980

St. Clair is Not Entitled to Attorneys' Fees

Despite ruling in St. Clair's favor, neither the District Court nor the Supreme Court found that the State Engineer maintained his case frivolously, for purposes of delay, or otherwise misused the appellate processes.

Rather, Supreme Court found only:

- No clear and convincing evidence that St. Clair's predecessor intended to abandon the water right
- State Engineer's other arguments on appeal lacked merit for varying reasons

- *King*, 134 Nev. Adv. Op. at 18, 414 P.3d at 317 – 318

St. Clair is Not Entitled to Attorneys' Fees

Lack of finding of frivolousness prohibits award of fees under NRAP 38

The District Court Lacks Authority to Award Fees Incurred on Appeal to Supreme Court

"NRS 18.010 does not explicitly authorize attorney's fees on appeal, and … NRAP 38(b) limits attorney's fees on appeal to those instances where an appeal has been taken in a frivolous manner."

- *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1356-57, 971 P.2d 383, 388 (1998).

The District Court Lacks Authority to Award Fees Incurred on Appeal to Supreme Court

Again, the American rule:

Attorneys' 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 District Court Lacks Authority to Award Fees Incurred on Appeal to Supreme Court

The Supreme Court has held that there is no provision in statute authorizing the district court to award attorneys' 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.

JA 985

The District Court Lacks Authority to Award Fees Incurred on Appeal to Supreme Court

Therefore, while St. Clair's Motion should be denied for the other previously mentioned reasons, St. Clair is not entitled to attorneys' fees incurred at the Supreme Court nor is this Court authorized to award such fees.

CONCLUSION

St. Clair's Motion for Attorneys' Fees should be denied

CONCLUSION

- The Motion is untimely, per NRCP 54(d), by more than two (2) years

- There is no legal authority providing for attorneys' fees for petitions for judicial review of decisions of the State Engineer under NRS 533.450

- The State Engineer's defense and subsequent appeal of his decision were made in good faith

- This District Court lacks authority to award attorney fees incurred at the Supreme Court, and applicable legal authorities actually prohibit such an award

CONCLUSION

The State Engineer respectfully requests that this Court deny St. Clair's Motion for Attorneys' Fees

Case No. CV 20,112

Department No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

HONORABLE STEVEN KOSACH, DISTRICT JUDGE

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

_____/

TRANSCRIPT OF PROCEEDINGS

Motion for Attorneys' Fees

Friday, October 19, 2018

Carson City, Nevada

Reported by: Susan Kiger, CCR 343

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CARSON CITY, NEVADA, FRIDAY, OCTOBER 19, 2018, A.M. SESSION

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THE COURT: We are here on the record in the Sixth Judicial District Court of the State of Nevada and for the County of Humboldt in Case Number CV 20,112, Rodney St. Clair, the Petitioner, represented by Mr. Paul Taggart and Mr. Tim O'Connor, who are present, versus Jason King, Nevada State Engineer, Division of Water Resources, are represented by Mr. James Bolotin.

I didn't make a mistake this time.

MR. BOLOTIN: You got it, Your Honor.

THE COURT: And I see former counsel back there. Good morning, Ms. Fairbank.

MS. FAIRBANK: Good morning, Your Honor.

THE COURT: Nice to see you.

MS. FAIRBANK: Nice to see you.

THE COURT: Well, we are here on a motion by Petitioner for attorneys' fees. I have the Petitioner's motion for attorneys' fees, Petitioner Rodney St. Clair. And I have the response -- I have the reply.

I'm ready. I have everything here. I remember this case very well. We were in Winnemucca. I love Winnemucca. It's a wonderful place, wonderful staff. And we argued the case in Winnemucca a couple of years ago. And then

the State appealed, and Justice Stiglich wrote the opinion. Lydia Stiglich was appointed in my department in Reno when I retired, and we got to be good friends. And she's just a wonderful person, sincerely, as I'm sure all of you realize that if you've met her. And I went to a fundraiser -- my wife and I went to the fundraiser for Lydia. It's the first time I've ever said this. "Hey, Lydia. Hey, thanks a lot for affirming me." Just a personal thing, and it was really nice. I hadn't been overturned too many times in my career, but it was kind of a nice person doing what I thought was a nice job.

So what I would like for you to do is sum up your arguments. I understand you have a PowerPoint presentation, Mr. Bolotin. Of course, that's fine. I appreciate the fact that we have this wonderful courtroom here, and we know we have these hearings in Carson City as often as possible when we have the Attorney General representing the State Engineer and Mr. Taggart's law firm in Carson City. So I love it down here. It was a beautiful drive, nice day.

Let's go, please.

MR. O'CONNOR: Your Honor, as a quick summary, if you would like a summary from both parties before we get going.

THE COURT: Sure.

MR. O'CONNOR: As a quick summary, we are going

to go over a couple of different portions that we believe merit attorneys' fees. Now, we want to point out that attorneys' fees, as Your Honor might recognize, isn't something that we normally go after in cases like this. We don't end every water case and try and get attorneys' fees against the Attorney General here -- or against the State Engineer, rather. Now, we don't believe that necessarily weakens our case, but it's this case and these specific facts and the things that happened as they progress through the case we believe were especially egregious. And they essentially ran up different attorneys' fees for our client that we don't believe were necessary.

So there's three different pieces we are asking for here. We are asking for attorney fees that were incurred for the Supreme Court litigation; we are asking for attorneys' fees that occurred responding to the untimely motions and the groundless motions for the opposition to request for judicial notice that we filed, and we'll go through those facts with you; and then we are asking for attorneys' fees regarding the -- what we believe was the groundless and kind of meritless objection to the proposed order we filed after being requested by Your Honor to file that, given the facts and how that unfolded as well.

So, notably, we are not asking for fees for the

case in front of the District Court. We recognize that the State Engineer, as anybody does, has a right to appeal these things. They have a right to make a decision as an agency would. But the problem, Your Honor, is in this case -- and we'll go through this as we are going through our entire case. The problem in this case is the State Engineer just kind of took a complete 180 on the law that he has applied for years and years and years in Nevada, for decades. This abandonment law that has always required an intent factor.

During the previous case, where Mr. Taggart was arguing it, we compared it to the mens rea in a criminal case. There has to be intent. That's the law in Nevada. This wasn't an unclear law, but the State Engineer shifted the burden arbitrarily and capriciously, as the Court decided for the first time.

Now, there's clear law on it in the State Engineer's rulings in the past, and there's clear law on it from court rulings in the past. So there's really no reason for the State Engineer to be pushing this case forward, and that's what we think makes this case especially egregious is because it wasn't a case where there's argument over how to interpret a statute or there wasn't a case of first impression where this never happened and both sides are taking a legal position. But all throughout this case -- and Your Honor

reflected on it, the Supreme Court reflected on it -- the law of abandonment has always been clear, and the State Engineer should have applied it correctly, and especially after the District Court told him to apply it correctly. Pointed out the law wasn't clear, and it wasn't a difficult decision for this Court to make. The State Engineer shouldn't have pushed far, but he filed late notice that cost. He also filed meritless objections to the proposed order that Your Honor requested. And that's commonplace in our law, and that cost our client attorneys' fees. And even though there's no real policy behind it that we can see -- and we'll get into details further -- we don't think the State Engineer was correct in appealing to the Supreme Court after the clear law was put in front of him and he was told he was making a mistake.

Under that basis, we are going to request the Court issue an award for attorneys' fees on behalf of Mr. St. Clair because, at the end of the day, what we have is the State Engineer has made a mistake action has certain abraded in pushing the case, in continuing to file meritless and untimely objections. And, at the end of the day, it's Mr. St. Clair holding the bag to pay for everything. He is having to pay to play because the State Engineer made a mistake that they weren't willing to recognize.

THE COURT: Thank you.

Mr. Bolotin.

MR. BOLOTIN: The emergent theme of why we do not think attorneys' fees can be awarded in this case is that Nevada follows the American rule for attorneys' fees, meaning a party is not entitled to an award of attorney fees unless there's statute, rule, or contract authorizing such an award.

We are going to go through four major points in our opposition. Number 1 -- and I think a serious factor and speaking of clear law -- is that Mr. St. Clair's motion for attorneys' fees was untimely by over two years.

Secondly, as I said, the American rule controls attorneys' fees in this state, and there lacks any legal foundation for an award of attorneys' fees under NRS 533.450, the statute pursuant to which Mr. St. Clair filed his petition for judicial review. Even if there was a statute allowing attorneys' fees, attorneys' fees in this case are unwarranted. While the State Engineer was incorrect ultimately in his inter- -- interpretation of facts and law, it's unwarranted, as he acted reasonably and in good faith.

And, lastly, this Court as a District Court lacks authority to award attorneys' fees incurred on appeal to the Supreme Court, and that is also clearly stated in Nevada state law.

THE COURT: For the Supreme Court portion?

MR. BOLOTIN: For the -- yeah. For the -- yes.

THE COURT: Okay. Mr. O'Connor, did you care to have a rebuttal to that, or do we go into the PowerPoint? You just tell me.

MR. O'CONNOR: I think we can just move into the PowerPoint, Your Honor. Okay. I have a PowerPoint, Your Honor, if I may approach and give you a copy.

THE COURT: Thank you.

MR. O'CONNOR: Okay.

Your Honor, I'm not sure if normally they show up on your screen or not. I'm not using the technology in the room. We've had issues with it in the past; I figured it would just be easier to flip through the PowerPoint in hard copy and make notes and that sort of thing.

THE COURT: It's not on my screen.

MR. O'CONNOR: Okay.

THE COURT: I've got your Exhibit.

MR. O'CONNOR: Okay. Well, starting -- I'd like to move through with a kind of a brief review of the facts. I know Your Honor had mentioned that you remember the case very well. And the facts you pointed out, as far as I'm aware, are all correct here. But I would like to kind of go through the important facts for -- for the pieces that we are arguing.

Mr. St. Clair was -- was essentially, in this

case, given an option: He could either pay tens of thousands of dollars in attorneys' fees to maintain a vested right that the State Engineer recognized he legally had on his property, or he could allow the State Engineer to abandon that property in which case he wasn't going to be able to use it anymore.

Throughout this case, the State Engineer was not creating new law or making new law, interpreting new law. He was not interpreting something that hadn't happened in the past. As I had said in kind of my brief -- my brief overview today, the State Engineer was just blatantly wrong on what was, in the past, a clear law. You had to have intent to abandon a water right in order for it to be abandoned. You have to have that mens rea to abandon a water right. But the State Engineer, as you will see as we progress through the facts of this case, he came to court without any evidence of intent. He had shifted that burden onto Mr. St. Clair, unlike he had done in the past in his own rulings -- which shows that he knew what the law was in the past -- and unlike the court -- the Supreme Court in Nevada has constantly upheld over time. It shifted that burden to bring evidence of non-intent to Mr. St. Clair. And that's what makes this case especially egregious, Your Honor, is the fact that the State Engineer blatantly had turn -- turned a 180 on how to imply this law -- or how to apply this law, something that he had

never done before: Requiring someone else to show non-intent of abandonment or intent not to abandon a water right, even though the Supreme Court has held that the law is clear and the State Engineer has correctly applied this law in the past.

And throughout this case, as we'll go through the facts of it, we can see that the State Engineer exacerbated this issue and kind of compounded this issue over time with untimely motions that they filed, unfounded objections, kind of groundless claims throughout it that essentially just ran up the bill on Mr. St. Clair. And as we stand here today, after District Court litigation, after multiple hearings in front of the District Court, and after the Supreme Court -- when the Supreme Court had said this is -- was, you know, a law where you have to have intent to abandon, it's only Mr. St. Clair left holding the bill at the end of the day. And, Your Honor, that's just -- that's just patently unjust here.

Now, for a case where we are interpreting new law or for a case where -- where it's a case of first impression where we haven't done it and both sides are taking a reasonable stance or at least have evidence to support their stance, we wouldn't be up here arguing for attorneys' fees. But it's solely the reason that there was no evidence to support a claim of abandonment that this Court found and the

Supreme Court found, and the fact that this bill was essentially ran up through meritless litigation all the way through. If we were in a typical civil case where both parties were playing with the same general budget -- you know, if this was your average case where it's Party A against Party B and it's private money funding it, the steps that we saw happen in this case wouldn't have happened. But it's only the fact that the State Engineer doesn't have to necessarily worry because they can lean into the Attorney General about what steps they take in litigation.

And, again, this isn't something that we would normally be standing up here and arguing. We believe that the State Engineer does have a right to appeal and they do have a right to, you know, press forward cases. But it's the fact of the steps that they took in this manner that were just disregarding the law and disregarding procedure that ran up the bill on Mr. St. Clair.

At the end of the day, Mr. St. Clair is being asked to pay on his own here -- and that's why we are asking Your Honor for a piece of attorneys' fees -- asked to pay for the State Engineer's incorrect implementation of the abandonment law that the State Engineer had correctly applied in the past and the Supreme Court was very clear what was required; the State Engineer's efforts at the District Court

level through untimely and improper motion practice; the State Engineer's unfounded objections to a common request from the Court for Mr. St. Clair to draft a proposed order, and then be pulled back into court to argue over that proposed order; and ultimately the State Engineer's decision to appeal an otherwise clear law to the Nevada Supreme Court when there's no good policy reasons behind it.

Because at the end of the day, Your Honor, it -- you'll remember what we are arguing over here, it's not like -- it's not like the Pure Energy cases where Pure Energy is in line, waiting for water to become available, and there's -- you know, there's somebody back in line. This water right that we are talking about is in the middle of the desert essentially and was used for irrigation. There's no one around it. This water right isn't impacting anyone else's water right. There's -- there's just simply no reason to push and push and push and try to abandon a water right when you've been told over and over again that the law that you're trying to implement is just wrong. You don't have evidence to support your claim, and there's no policy reason to support the claim.

And so I'm on Slide 4 now, Your Honor. Mr. St. Clair owns real property in Humboldt County, and he had filed a vested claim for water right on that property and

had also filed a change application on that property. And this is what got this case started. The State Engineer, in his order, agreed that there was a vested right on the property, but that that vested right had been abandoned. And that was Ruling 6287. That was issued on July 25th, 2014, and it had denied the change application and declared Mr. St. Clair's vested water right to be abandoned.

Now, there was no hearing held before -- before the State Engineer for Mr. St. Clair to kind of try and bring light to this issue. The first time that we were able to put forth evidence or, you know, put forth this law was in front of the District Court. And, again, this wasn't a request for District Court money. Right? This isn't a request for the appeal to the District Court.

On August 22nd, Mr. St. Clair filed his petition for judicial review, and that briefing was done by, I believe, April 13th, 2016. I'm not sure if the State Engineer has a different date, but about mid April, the briefing was done.

Now, on July 3rd, St. -- Mr. St. Clair filed a request for judicial notice for previous legal briefs and State Engineer decisions regarding abandonment. And this is a common request that we make in water rights cases, and it's a common request that's made, you know, in litigation generally is these requests for judicial notice. Everything that

Mr. St. Clair requested under judicial notice was a public document. These are all just old State Engineer opinions and State Engineer positions on what it takes to abandon a water right. And the purpose of this was to show, "Look, you have to show intent." There has to be intent for a water right. And Your Honor eventually found that the judicial request was warranted, and he let those documents in. But the State Engineer originally did not -- did not oppose this request for judicial notice.

They filed an official opposition to the request for judicial notice on November 17th, which was five months late, after -- after Mr. St. Clair had filed that original request for judicial notice here. And why that matters is because it's -- I mean, it's common in the law everywhere you look, it's common in the District Court rules, it's common in the Eighth Judicial rules that any type of request has to be met with an opposition, if you're going to oppose it, within ten days. This opposition was filed five months late, and Mr. St. Clair was then required to continue to argue this point, not only in motion practice, but also before Your Honor in the District Court.

THE COURT: Was there any kind of -- apparently not -- a stipulation to allow for the five-month response? Apparently no communication?

MR. O'CONNOR: No. As far as I know, there was no -- well, there was no stipulation, I can tell you that. There was no request for leave that was filed with it. There was no -- as far as I know, any ex parte communication to file -- to file the motion. It was just something that was filed five months late.

THE COURT: What did you guys do -- your law firm do with Mr. St. Clair? Just sit and wait? In other words, if you -- if you're requesting a judicial notice, does it take that long to get notices from the State Engineer?

MR. O'CONNOR: Well, we requested judicial notice of you. We had filed the briefs, and then we said, "We have these other documents, these old State Engineer rulings and these old State Engineer legal positions. Judge Kosach, we would like you to take request of judicial notice of this before we all show up" --

THE COURT: Excuse me.

MR. O'CONNOR: -- "before we all show up for hearing."

THE COURT: I get it. I get you.

MR. O'CONNOR: Yeah, yeah. So there wasn't --

THE COURT: I got you.

MR. O'CONNOR: Yeah. It wasn't a request for documents.

THE COURT: Based -- okay. Based on my experience as a District Judge, I made this comment in front of everybody in this room: "Hey, is this stuff going to be done before I die?"

MR. O'CONNOR: Right.

THE COURT: And so in my mind, this stuff is slow. It's slow. But as soon as you told this stuff, meaning responses, replies --

MR. O'CONNOR: Right.

THE COURT: -- submissions, decisions.

MR. O'CONNOR: Uh-huh.

THE COURT: But as soon as you told me that you requested judicial notice of me --

MR. O'CONNOR: Yes.

THE COURT: -- the District Court, I granted it. When -- if you know, when was it granted?

MR. O'CONNOR: Well, it was granted during the hearing that we had. There was never a grant before the hearing, but we had a hearing date, we requested that you take judicial notice of certain --

THE COURT: Just like that, and I did it.

MR. O'CONNOR: And during the hearing, you let them in.

THE COURT: Okay.

MR. O'CONNOR: But this -- the request was made in May -- or in August -- sorry. July 3rd, 2015, we made this request.

THE COURT: When was the hearing?

MR. O'CONNOR: The hearing was --

THE COURT: In Winnemucca.

MR. O'CONNOR: -- I want to say it was January 5th. January 5th.

THE COURT: Of?

MR. O'CONNOR: 2015 -- 16.

THE COURT: Okay. For some reason, I thought it was the summer, but that -- that's just me.

Anybody else? January? Do you have --

MR. BOLOTIN: That's correct. January 5th, 2016.

THE COURT: January 5th.

MR. O'CONNOR: So as Mr. Taggart just pointed out, there was a different judge at that time. Right? Not that that changes one way or another the order of the operations here, the time between. But that's why you might not recall getting the original judicial notice request is because it wasn't in front of Your Honor; it was in front of a different judge at the time.

THE COURT: Was it Judge Lane?

MR. O'CONNOR: Do you know if it was Judge Lane?

MR. TAGGART: Your Honor, if you recall, we had Judge --

THE COURT: Montero?

MR. TAGGART: -- Montero.

THE COURT: And he --

MR. TAGGART: And then he recused himself when we appeared to argue the case initially. We can -- we just review, he -- he ended up recusing himself, then you came on the case. And what we are talking about was happening during that -- during that time frame.

THE COURT: Okay. When I got there. Because as long as you told me -- which is -- which happens all the time, "Judge, will you take judicial notice?" And you go, "Okay."

MR. O'CONNOR: Right. Right.

THE COURT: But I understand now because, you know, I did step in on this one also when Judge -- when Mike -- when Judge Montero recused himself. Okay. Now -- now I'm clear. In January of, you say, '16.

MR. O'CONNOR: '16.

THE COURT: Sure. Because this stuff -- see, what you're saying on page 5, you had to refresh my memory. I didn't know about it.

MR. O'CONNOR: Uh-huh. Right. So as just a general, brief recap. On July 3rd, 2015, we filed that

request for judicial notice before the Court.

THE COURT: Okay.

MR. O'CONNOR: There was no timely opposition to that request.

THE COURT: Okay.

MR. O'CONNOR: And then an untimely objection came November 17th, five months late without any type of court leave or without any type of court request, just a filed document that then we had to respond to. Again, we are talking about things that shouldn't be done, that aren't normally, typically done, that don't have a basis to be done, that just raised -- raised the amount of attorneys' fees that Mr. St. Clair was incurring.

So during the argument, the District Court granted St. Clair's PJR, and he granted that request for judicial notice of these documents. The Court found, in that order, that the State Engineer did not have sufficient evidence for abandonment; rather, the court found that there was only evidence of non-use which was not enough to sustain a claim of abandonment. Specifically on the -- in the hearing transcript on page 8215 to -20, the court found that, quote, "This is not a difficult decision for Court to make based on what was presented." And that's because this was clear law

going in, Your Honor. There -- it wasn't a difficult decision. The law was clear. There wasn't any evidence of intent to abandon. The State Engineer only showed up with non-use evidence, and that isn't enough and it's never been enough in Nevada to abandon a water right.

THE COURT: Well, as a matter of fact -- and I don't mind saying this at all -- it was almost my mind then, listening to the case, I'm going -- maybe the foreman screwed up. The computer didn't work or -- I mean, it's stuff like that that he's saying. And I'm going "Huh?"

MR. O'CONNOR: Well, that was in the Happy Creek case, Your Honor.

THE COURT: Thank you. All right.

MR. O'CONNOR: So yeah, yeah. That was -- that was the Happy Creek case that we were discussing where the foreman messed up and the dog ate his homework and all of that, and we were a day late, I think was some of the analogies.

THE COURT: Yeah.

MR. O'CONNOR: In this case, it was strictly an abandonment of the water right. So the State Engineer was telling --

THE COURT: All right. I got it.

MR. O'CONNOR: So it was the abandonment. Right?

They were saying that the predecessor to Mr. St. Clair had intended to abandon this water right and, therefore, it disappeared. And in order to do that, they've had to show that the water right had intended to be abandoned. Right? That mens rea. You had to have the intent to do it. It's just -- non-use isn't good enough. And that law was always clear. And Your Honor ended up finding that it wasn't a difficult decision because the law was clear, because there was no evidence of intent to abandon, and, therefore, the abandonment couldn't be sustained.

St. Clair, at the end of the day, was the prevailing party. And as is common practice, as Your Honor knows, in most courts if not all courts in Nevada, for any noncomplex orders, it's -- it's permissible for the District Court to request the prevailing party to draft the proposed order.

THE COURT: I've done it for years.

MR. O'CONNOR: Right. It's very common. You've done it for years. We've been asked for years to do it. Clerks do it on occasion, but the prevailing party drafts the proposed order, and that's exactly what we did here. Your Honor asked St. Clair to prepare the proposed order. We prepared a proposed order. We shared it with the other side. The State Engineer sent back edits that they -- that they

requested. And after multiple meet-and-confers, multiple going back and forth on -- you know, what should this order say, what shouldn't this order say -- the two parties just couldn't come to a decision, which is, again, in my experience and I am sure in your experience, not all that uncommon for proposed orders.

So St. Clair issued an e-mail to Your Honor, and I've got a copy of that e-mail on the table here, actually. If I can approach Your Honor. And so what we believe is common practice and what the district court rules and what the Eighth Judicial Court rules lay out are that the -- are that the prevailing party prepares the proposed order.

THE COURT: Excuse me for a second. Why were you saying Eighth Judicial District?

MR. O'CONNOR: That's the rule that includes it, and a lot of -- even though the Eighth Judicial -- you know, we are not in the Eighth Judicial right now. We don't have specific court rules for the judicial district court that we were in. So adopting the Eighth Judicial District Court rules is common.

But it's also under all judicial district court rules -- Rule 13, I believe, has a piece on it. Point being that it's not uncommon for a prevailing party to be asked to draft a proposed order.

THE COURT: Right.

MR. O'CONNOR: Right. So when the two parties couldn't come to an agreement on the proposed order, St. Clair issued to Your Honor both St. Clair's version of the prepared order along with the State Engineer's version of the prepared order and allowed the District Court to decide what the final proposed order should be.

Now, the District Court looked at both of those orders and ultimately the District Court found that -- that St. Clair's proposed order was an accurate reflection of the order and found that St. Clair's order was going to be the order that the District Court signs, and we believe that that should have been the end of this case. We had put forth all of the evidence and all of the case to show that there should be no claim of abandonment; the District Court found that the State Engineer erred in a clear law of abandonment; and there was no reason, we believe, that this case should have been taken any further to the Supreme Court and taken to incur any extra legal fees.

A typical civil case like this probably wouldn't move forward. But the State Engineer -- who, again, has a right to appeal -- should have reviewed his own order here, should have seen if there was any basis to continue.

THE COURT: On page 6, I think -- I think we need

to make a correction. "Proposed order was filed on March 7, 2018." That should have been March 7, 2016.

MR. O'CONNOR: '16. Yes, Your Honor.

THE COURT: So I just corrected that.

Understand, Mr. Bolotin.

MR. BOLOTIN: Huh?

THE COURT: Understand?

MR. BOLOTIN: Yeah.

THE COURT: Okay.

MR. O'CONNOR: On March 18th, 2016 -- now, I'm on Slide 7 -- the State Engineer filed a formal objection to the proposed order. So this is before that you signed that proposed order. That formal objection that they filed was 78 pages, it was six exhibits long, and St. Clair was, of course, required to respond to that objection at risk of giving up that issue on appeal had an appeal moved forward.

So what we are talking about again, Your Honor, is you asked a very common request that the prevailing party prepare a proposed order. We did that. We even moved -- we worked with the State Engineer to come to it. We gave Your Honor both copies in case you wanted to edit those orders in a way that you found fit. But still the State Engineer filed a proposed order and brought, again, another set of oral arguments before this Court to discuss the proposed order.

Oral arguments were held on April 11th, 2016. And during those oral arguments, the Court overruled every one of the State Engineer's objections. Ultimately, he signed Mr. St. Clair's proposed order, and we can see that in the hearing transcript at 34, 6 through 10, and the Court found that the proposed order was an accurate reflection of the hearing.

The State Engineer appealed the matter to the Nevada Supreme Court on May 20th, 2016.

THE COURT: I'll make that correction.

MR. O'CONNOR: Thank you, Your Honor.

Now, after Supreme Court arguments, the Supreme Court -- as you mentioned, Justice Stiglich -- affirmed this Court's order and process for having Mr. St. Clair draft the order. Ultimately, the Nevada Supreme Court found that there was no evidence of intent to abandonment; they said in multiple cases -- and we'll look at those -- multiple times throughout that record there was just no evidence to support this claim. The State Engineer also pro- -- found -- or the State Engineer presumed abandonment based on non-use evidence alone. And that's at 134 Nevada Advanced Opinion 18 at page 8.

The Supreme Court found that the State Engineer had filed five months after St. Clair's request for judicial

notice and, therefore, was unable and improper to object at that point, and they could -- they had not sustained that objection.

And, finally, the Nevada Supreme Court found that the District Court did not neglect any of its duties in making factual findings in regards to this proposed order process.

THE COURT: Explain to me the third bullet on page 8, the State Engineer, quote, "Filed five months after St. Clair's request for judicial notice" --

MR. O'CONNOR: So we -- we --

THE COURT: -- "and therefore was unable" -- who was unable to object?

MR. O'CONNOR: The State Engineer should not have been -- this is what the Supreme Court found.

THE COURT: And was therefore -- the State Engineer was unable to object?

MR. O'CONNOR: Absolutely. The State Engineer was unable to object to this judicial notice because they were five months late on their opposition.

So, Your Honor, again, just kind of putting a bow on it, St. Clair was asked to spend tens of thousands of dollars litigating issues that were not new issues of law, they were not issues of first impression, they were not ambiguous issues. They were clear issues. And St. Clair is

the only party, at the end of the day, with any responsibility to pay a bill here.

Meritless and untimely motions that were filed by the State Engineer -- which St. Clair argues have no value in public policy because of the nature of this water right and where this water right was located -- have only driven the cost that St. Clair had to incur up throughout this entire appearance.

And water users, ultimately, should not be required to kind of pay to play here. You shouldn't have to spend tens of thousands of dollars to fight a State Engineer order that is clearly wrong in order to maintain a property right in Nevada. The State Engineer shouldn't be pushing these cases, especially after it's a clear loss at a District Court level just to continue rising bills for a water user. It's an uneven playing field, Your Honor. The State Engineer doesn't have to have hearings to figure out if he's right or not. He can go to District Court, and he can lean into the Attorney General's Office who's funded by the taxpayer, all while Mr. St. Clair has to respond to everything and has to fight it out of his own pocket.

So these motions for attorneys' fees are ways to even that playing field. They're ways to be able to light the burden on a water right user when he is so clearly right, that

the State -- that the Supreme Court of Nevada finds no evidence whatsoever in the record to support the State Engineer's case.

Now, I'm on page 10, Your Honor. We'll discuss the standard of review here for what it is that we are asking for. I think it's very common -- and the State Engineer agreed and cited to it in their motion -- that the practice in civil case does apply to judicial reviews from a State Engineer's decision. And that's in NRS 533.450 sub 8, and I've got that for Your Honor, as well, because we are going to be going back and looking at it a few times. And, Your Honor, so this is NRS 533.450. It's the statute under which we appeal State Engineer decisions for judicial review. It's pretty common, and it's a common argument you've heard our firm make quite a bit. On page 2, subsection 8, "The practice in civil cases applies to the informal and summary character of these proceedings."

So the question of whether or not -- whether or not the practice in civil case applies -- you know, the Rules of Civil Procedure, for instance, the statutes that we have in normal civil cases -- that applies to these proceedings that we have. It's written right into the appeal statute.

Now, NRS 18.010 2(b) is the statute that we are requesting attorneys' fees under. And this will probably be

the most important piece of paper that you have in front of you today. Now, you can see in subsection 2, this statute is applicable for attorneys' fees in addition to the cases where allowance is authorized by a specific statute. So what that means is we -- in Nevada, we have certain statutes that allow specifically for attorneys' fees. Right? But this is in addition to those. This is a -- its own cause; you can bring a claim under this by itself. So it's in addition to those other statutes. You don't have to have a statute that says, this can have attorneys' fees, because this is in addition to those statutes.

We also see under 2b, which is what we are requesting attorneys' fees under, it starts with the phrase, "Without regard to the recovery sought." Now, this is important, and we'll get into this. But the State Engineer has claimed that we have to seek monetary damages and we have to -- we have to be awarded monetary damages in order to be awarded attorneys' fees. It's simply not true under Subsection 2(b).

Under Subsection 2(a), you have to recover monetary damages. And the cases the State Engineer has cited to, they interpret 2(a). And they interpret 2(a) to say you have to get a monetary win in order to get attorneys' fees.

But 2(b) is a different -- is a different piece

for nonmonetary damages: "Without regard to the recovery sought." So it doesn't matter if we are seeking monetary damages; we can still get attorneys' fees if we need the other pieces of 2(b).

And what we are looking at here, and we see it in 2(b), is, "When the Court finds that the claim is brought or maintained without reasonable ground or to harass the prevailing party." And what our claim is in this case is that this case was maintained without a reasonable ground. We are not going to argue that the whole purpose of case was -- was that the State Engineer was trying to harass Mr. St. Clair. But under the definitions in Nevada law, there was no reasonable ground to bring the case to the Supreme Court or to bring the objection to the request for judicial notice five months late, and there was no reasonable ground to object to the proposed order.

And, lastly, Your Honor, and I think very importantly, this statute has written into it that, "The Court shall liberally" -- "shall liberally construe the provisions of this paragraph in favor of awarding attorneys' fees." And that's right under 2(b). So we don't have to try and interpret what the legislature means. We don't have to try and interpret necessarily what the statute means because it tells us right in there. This is meant for the Court's -- and

it uses the word "shall," so it's mandatory. The Court shall interpret it liberally in favor of awarding attorneys' fees for these groundless claims.

Lastly it says, "It is the intent of the legislature that the Court award attorneys' fees pursuant to this paragraph." And if the Court finds -- if the Court finds so that it should, Rule 11 sanctions are built in there. But, again, this statute tells us exactly what the legislature intended with it. It's a standalone statute to award attorneys' fees when groundless claims continue forward, and there is no requirement for monetary damages.

So I want to flip to page 11 in our slide, Your Honor, and I want to talk about some of the things that aren't applicable because I think it's very important to kind of think about what lane we are in and to think about what it is that we are asking for, what it is Mr. St. Clair has asked for. And it's strictly under NRS 18.010 2(b), for groundless claims.

So things that aren't applicable in this case, things that the State Engineer has argued should be considered by the Court, are the 233 provisions. Because under 233B appeals -- right? Not the 533 appeals, but on the 233B appeals, you can't win attorneys' fees. And the reason you can't win attorneys' fees under 233B is because 233B has

specific language built into that statute that says, "The exclusive remedies are herein listed."

So 233B within that statute says specifically no other remedies are available except for what is listed. 533 doesn't have that. They don't have any limiting provision within 533. What they have is a provision that says the rules in civil practice apply. These rules that we have in civil practice apply. That doesn't exist in 233B.

What's also not applicable in this case are time bars under NRCP rules, under which we are not asking for attorneys' fees. So under NRCP 54(d)2(B), there's a time bar for when you can file a motion for attorneys' fees if you are seeking them under the rules of that statute. But again, we are not seeking them under the rules of that statute, so those time bars don't matter. In fact, the Supreme Court has interpreted that NRS 18 doesn't have a time bar. There is no time that you have to file with the Sup- -- with the District Court. Rather, it's a reasonableness misjudgment. It's all in Your Honor's discretion. If this was filed within a reasonable time -- which we believe it was, and we'll get to that -- then -- then the Court can consider these motions and, within its discretion, grant attorneys' fees.

NRS 18.010 2(a), that's equally irrelevant to this hearing because that is a piece of the statute with

completely separate rules.

And lastly, there's an argument that NRS 533 is limited to costs, and that's going to be equally as irrelevant because, as Your Honor likely knows, costs are separate from attorneys' fees in Nevada.

So the first piece I want to get to under the plain language, "Attorneys' fees are available if the State Engineer would maintain a claim without reasonable grounds." And I'm on Slide 12 now, Your Honor.

We have Nevada Supreme Court precedent from 1999, and that's at 11 Nevada at 1354 that specifically says, "Pursuant to NRS 18.010 2(b), a claim is groundless if the allegations in that complaint are not supported by any credible evidence at trial." So again, looking back, the District Court -- the rule for this is the District Court is supposed to liberally construe these statutes in favor of awarding attorneys' fees in appropriate situations. And it is without recovery sought, so we don't have to seek monetary damage.

So the question is did the State Engineer maintain his claim without a reasonable ground? There was no evidence put forth whatsoever by the State Engineer to support his claim for abandonment.

On Slide 13, the State Engineer -- The District

Court found in your order that the State Engineer's determination of abandonment regarding this vested water right was based only on evidence of non-use. The Supreme Court in three different pieces first found that Nevada law does not presume abandonment from non-use alone. So we have to have more than non-use evidence.

"Second, we find that no such evidence existed in the record to support abandonment." The Supreme Court looked through the record and agreed with Your Honor that there's nothing in the record that shows intent.

Third, the Supreme Court found that the State Engineer misapplied Nevada law by presuming abandonment on non-use evidence alone.

So these are three different Supreme Court statements that we know there was no evidence to support a claim of abandonment.

So the state for -- the State Engineer maintained a claim -- a groundless claim because it had no evidence to support it, which meets that test from the Bobby Berosini case that I just cited to. Again, a claim is groundless when the allegations are not supported by any credible evidence. And the State Engineer and this District Court found multiple times there is no evidence whatsoever in the file to support a claim of abandonment. By definition, that claim is

groundless, and groundless claims get awards of attorneys' fees under this statute.

On Slide 14, Your Honor, is a bit of a wrap-up. There was no evidence supported on the State Engineer's claim; therefore, by definition, it is groundless under Nevada, and attorneys' fees are available under NRS 18.010 sub 2(b). So Mr. St. Clair is asking for attorneys' fees for the Supreme Court litigation totalling $37,361.25.

I now want to move on to the judicial notice piece, Your Honor. And, again, it falls under the same rule, whether or not that -- this claim, this opposition put forth by the State Engineer was groundless. District Court Rule 13.3, in all common civil practice across the State of Nevada, requires that oppositions to requests or to motions be filed within ten days after service of that motion. That's very common practice. St. Clair filed his request for judicial notice on June 2nd, 2015. This request was only State Engineer documents. It was only public documents that we are asking the Court to take requirement of. So the State Engineer, in our opinion, shouldn't have been objecting to it whatsoever. These are his own documents. However, the State Engineer did file an opposition to it, but he didn't file it until five months later. And, again, this was without any request of leave for the Court. It was without any court

permission. It was without any type of stipulation with our office. They just filed the documents five months after the deadline.

Now, St. Clair was the one who had to then expend the attorneys' fees to reply to this opposition to ensure that these documents -- that are all files of the State Engineer -- were before this Court in interpreting this case. The opposition was grossly untimely, it was not filed with leave of court, and Mr. St. Clair is now left to have to pay for that out of his own pocket.

So Mr. St. Clair is requesting that attorneys' fees be paid in the amount of $2,672.50 for the cost of responding to that untimely and groundless motion.

Had there been leave of court, had there been a stipulation like what Your Honor suggested, we wouldn't be asking for this. But the fact that the State Engineer filed a five-month-late motion without any communications or permission from the Court in order to do that is absolutely egregious, and it wouldn't ever fly in a normal civil practice. In a -- in a normal civil practice, if something like this happened, attorneys' fees would likely be given over because of the egregiousness of the harm here.

And so now I want to move to our third piece. So our first piece was the Supreme Court litigation, under which

there was no evidence to support the claim.

The second piece was a five-month-late opposition, which had no support or no law to be allowed to file five months late.

And this third piece is the opposition to St. Clair's proposed order. Your Honor already kind of hit the nail on the head when he said, you know, "We do this all the time." You always ask prevailing parties to prepare the order. It's how it works in Nevada. It's how it works probably on most judicial systems across the United States: When a prevailing party wins, they draft the order.

Now, in this case in particular, because it's a practice our firm has -- it's probably a practice most firms have -- we exchange that order back and forth with the State Engineer. We talked to them before we submit it to Your Honor to avoid these exact expenses because these things get expensive very quickly, and people like Mr. St. Clair shouldn't be required to pay these in addition to everything else that they are paying just to maintain a vested water right.

Both parties worked on this order together. Both parties discussed disagreements to this order. The parties could not come to an agreement, so we submitted both documents to Your Honor here for Your Honor to go through and to -- you

know, to kind of parse it if you wanted to and to pick the order that he thought best reflected, or create his own order based off the orders that best reflected the hearing. This was proper procedure.

Not only did we send both orders to you, but the State Engineer also followed up with a secondary e-mail to Your Honor explaining why -- why Your Honor should take in, to consider these changes that weren't included in St. Clair's order but that were submitted to you.

And that's where this should have ended because that's where this normally ends in civil cases. Your Honor will go through those orders, Your Honor will either pick one or draft an order that's kind of a mixture of both, and everyone moves on with their life.

But that's not what happened here. The State Engineer requested that we have a hearing to consider the State Engineer's issues. We came back in front of Your Honor, costing Mr. St. Clair more money again and argued over whether or not it -- these proposed order process should continue forward.

After that hearing, Your Honor found that each of the State Engineer's objections were -- were overruled, and he took -- Your Honor took Mr. St. Clair's order and signed it in full.

So despite the Court's hearing on the issue, the State Engineer again brought up this question in front of the Supreme Court, in which the Supreme Court backed Your Honor in saying that it's common practice for Clark County District Courts to direct the prevailing party to draft the district court's order. So the Supreme Court recognizes this is common practice. This happens every day in our legal system. Prevailing parties draft orders because courts are just simply too busy anymore to draft the majority of their own orders. So, again, this was a groundless claim against a common practice which only increased Mr. St. Clair's litigation costs here.

Mr. St. Clair is -- is requesting an award of $1,847.50, which is the amount of money that he had to pay in order to respond to this meritless objection, this objection to what's otherwise a common practice in nearly every case that happens.

THE COURT: Does that include the hearing time?

MR. O'CONNOR: That does including the hearing time.

So, Your Honor, here on page 20, before we get to the State Engineer's defenses, the policy implications that we're talking about here is that the law was clear prior to the State Engineer's claim.

In our -- in our briefing, we cited to at least four different rulings, all prior to Mr. St. Clair, that the State Engineer had correctly interpreted abandonment and correctly considered this intent-to-abandon element, this mens rea element that we talked about. We also cited to four different -- we also cite to four different Supreme Court cases in Nevada and one case in the federal circuit interpreting Nevada abandonment law that all laid out these specific intents. Again, this wasn't something new. This wasn't a case where we had to figure out what the law was. This was just an egregious State Engineer error that he refused to go back and reflect on to figure out if he did it right. He just pushed the case forward and forward and forward and raised the bill for Mr. St. Clair more and more and more until we got through the Supreme Court. And that's simply unfair and unjust for someone like Mr. St. Clair to have to fight against when it is such a clear and unambiguous law with clear rules that not a single piece of evidence was brought by the State Engineer's office to try and uphold.

Your Honor, I'm on to Slide 21. The State Engineer's defenses that he put forth in his opposition to this motion are all either irrelevant to what we are asking for, which is specifically under, 18.010 2(b) or they're just an incorrect interpretation of the law. The first -- and

Mr. Bolotin outlined these in his -- in his overview. But the first we are going to talk about is this erroneous argument that we were somehow late filing for this motion for attorneys' fees. It's true that, if you file for attorneys' fees under NRCP 54, which has its own, you know, specific requirements for attorneys' fees -- if you file under that, you have to file within 20 days after notice of entry of judgment. That is true.

But, one, we are not filing for attorneys' fees under the rules of NRCP 54. So those time frames are irrelevant to this case. We are not asking for those attorneys' fees. Second, NRCP 54 (d)2(B) specifically states -- here is NRCP 54. This is a piece that the State Engineer -- and it's on the second page as attorneys' fees. This is a piece that the State Engineer, for whatever reason, either didn't recognize or left out of the briefing. The first phrase in NRCP 54(d)2(B) states that, "Unless a statute provides otherwise, the motion must be filed within 20 days." Well, we have a statute that provides otherwise; so this is just absolutely irrelevant.

NRC- -- or NRS 18.010 2B, attorneys' fees do not have a hard deadline, and that's been explained by the Nevada Supreme Court. And if Your Honor would like it, we have the Pickering case we cited to in our briefing. But the Pickering

case states that NRS 18 provides no time limits for motions for attorneys' fees. There are no time limits for these. Absent a specific statutory provision, the timeliness is a matter left to the discretion of the trial court. And what the Pickering court did was said that the trial court has discretion to grant these; they have discretion on the time. So the type of thing for the trial court to look at is the diligence in filing it and any prejudice to the other side, The basic things we always look at for untimely -- or motions with no time frame on them.

Well, here, St. Clair only waited two -- about two months -- I think a little under two months between the filing and the remittitur from the Nevada Supreme Court, which essentially, you know, put a back-end book mark, which ended this case, and filing this. And the reason that was necessary and the reason we don't have to file right after Your Honor makes a -- makes a declaration here is because we have to wait and make sure that we are right all the way up on appeal, if that makes sense. We have to make sure that the Supreme Court supports our side and it comes back down.

And, secondly, like I alluded to, this is not something that we normally ask for. We wouldn't normally go and ask a District Court to issue attorneys' fees, except this was an especially egregious case here. We have an especially

egregious set of facts where the State Engineer just blatantly didn't follow the law as written and didn't follow time frames as written. And we believe, therefore, we are entitled to attorneys' fees.

If we go on to Slide 22, Your Honor, the next -- the next argument that the State Engineer made was that he argued the 233 cases, 233B cases -- and note the case law therein -- which interpreted 233B should be applicable here. But each case relied on by the State Engineer, one, is only interpreting 233B, which is not what we're appealing under; those rules are not applicable to this proceeding whatsoever, and, in fact, the State Engineer recognizes that his office is specifically exempt from 233B. That's something I've heard -- I'm sure Your Honor has heard before. But the rules of 233B, they don't apply to the State Engineer.

Second, the reasoning of the cases, the reason they found you can't get attorneys' fees under 233B is because there is a unique provision that specifically limits awards of attorneys' fees contained in 233B. And I have for Your Honor here on page 2 -- this is 233B. On page 2 of the document, which is 233B sub 6, it says, "The provisions of this chapter are the exclusive means of judicial review." Now, the Court's -- the Supreme Court has taken this sentence and said because the legislature inserted that sentence, then we can't

give anything other than what's listed in the chapter. Now, it's notable, Your Honor, that NRS 533, our appeal statute that we are dealing with, does not have any language that compares to this. There is no exclusive remedy provision in 533. What 533 has in contrast to this is the provision that states that the practice in civil cases applies, where 233B has its own rules; 533 uses the Rules of Civil Procedure, which includes this attorneys' fees provision that we are seeking attorneys' fees under.

So any argument that 233B would somehow limit a statute's applicability to 533 cases is erroneous. It's not enough to say that they are both judicial review statutes so 533 doesn't get attorneys' fees because 233 doesn't. That's just a not -- non-nuanced reading of it. It's an incorrect reading of it. And it's not a reading that would be supported by law.

The State Engineer also brought forth this -- an argument saying that their claims, even though they wound up being wrong, were made in good faith. But that is irrelevant to this case because the test that we use under 18.010 2(b) isn't good faith, bad faith; it isn't whether or not they had a nefarious intent to the maintain it; it isn't whether or not, you know, they were trying to -- trying to pull one over on Mr. St. Clair. That's all -- that's all irrelevant. All

of those are attorneys' fees that you can get for other reasons. That's the NRAP 38 attorneys' fees for maintaining a frivolous lawsuit. Those are, you know, Rule 11 sanctions type of fees where you maintained a lawsuit that was in bad faith.

What we are talking about is a groundless claim. Not a bad faith claim, but a groundless claim. And a groundless claim is one where you don't have any evidence to support it. It may be all in good faith. You may really believe in your case. But if you don't show up to the door of the courtroom with evidence, you are at risk of costing yourself attorneys' fees. That is what 18.010 2(b) states, and that's what it holds is for groundless claims, for claims that may be brought in good faith, but there is no evidence to support it. And that's what we have here, Your Honor, is it may been a good faith claim. We are not arguing that it was brought to harass Mr. St. Clair. We are not arguing that it was frivolous or nefarious, as the State Engineer put it in his opposition. We are just arguing that it was groundless. It had no evidence to support it, and it should not have been maintained.

On Slide 23, the State Engineer also argues that various case law which states that 18.010 2(a) should limit subsection (b) of the same statute. So what we have here,

Your Honor, in looking at our Statute 18.010, we see we have subsection (a) and we have subsection (b). They are two completely different pieces, and they -- they require two different things. In fact, the State Engineer cites cases under 2- -- .010 2(a), which state that a monetary judgment is necessary. And the reason those cases state that is because subsection (a) has a -- has a piece in it that says that the prevailing party has to not have recovered more than $20,000. Right?

But subsection (b) -- and we have Nevada case law that says that there's no dollar requirement. In fact, there's no monetary requirement necessary. That was our Alaska KeyBank case that we cited from the Nevada Supreme Court. The Nevada Supreme Court state that subsection (b) does not require a monetary judgment to get attorneys' fees. In fact, it can be used for cases which no monetary recovery was ever requested. That was -- those were the facts of the Alaska KeyBank case. They didn't request monetary fees, but the Court found that subsection (b) was still applicable even though there was no monetary requirement. So any argument the State Engineer makes that there has to have been some type of monetary win, that the Supreme Court should have afforded us some type of monetary win is irrelevant under 2(b) -- subsection (b), which is what we are asking for.

The State Engineer also argued that the 533 appeal statute itself limits attorneys' fees because of subsection 7. And if you go to NRS 533.450 subsection 7 -- do you have that in front of you, Your Honor?

THE COURT: Yes.

MR. O'CONNOR: I don't want to move too fast. I'm sorry. Subsection 7 states that costs -- not attorneys' fees, but costs must be paid in civil cases brought in the District Court except by the State or the State Engineer.

Now, the State Engineer is attempting to lean into this and say that this statute shows that there is some type of immunity against attorneys' fees under this statute. But that simply isn't true under statutory construction or the plain reading of this. The Nevada Supreme Court has long held that when we interpret statutes, the mention of one thing implies the exclusion of another. That's -- you know, that's -- that is statutory interpretation 101. When the legislature enumerates a specific immunity, for example, that means any other immunity that wasn't written down cannot be implied. The inclusion of one thing means the exclusion of others. Now, what the legislature did here is they included an immunity for costs. We can't go after the State Engineer for costs under this case because of that subsection 7. But when the State -- when the legislature includes costs, that

means they specifically excluded fees.

And this isn't -- this isn't a game of semantics. The Nevada Supreme Court stated that it's fair to assume that when the legislature enumerates certain instances, it names all that it contemplates. So had the legislature wanted to grant the State Engineer immunity for fees, they would have written "costs and fees." But they left it at "costs."

Now, the State Engineer in his opposition recognizes that in Nevada, attorneys' fees are separate from costs. In situations where you're not allowed to get fees, you may recover costs. In the alternative here, we have a situation where we are not allowed to recover costs. What that means, we can still go after fees. There is no immunity for attorneys' fees. So any argument that tries to lump in fees with costs in this case is irrelevant because while the State Engineer may have an immunity for costs under this statute, there is no such immunity for attorneys' fees under statutes.

The State Engineer also cited to various lines of cases that are irrelevant that stated that when a statute does not consider costs or fees, the District Court does not have the authority to award costs or fees. Now, this is a -- this is -- this is inaccurate for two reasons in our case -- or it's inapplicable, rather, for two reasons in our case. The

first is that we are not -- we are not progressing under a statute that ignores costs or fees. While NRS 533, the appeal statute, does not list specifically anything about attorneys' fees, the statute that we are proceeding under, 18.010 clearly lists attorneys' fees. That's the whole reason for its existence. It's an attorneys' fees statute. So we brought a claim under attorneys' fees statute; so there is authority for the District Court under that statute to award attorneys' fees. Had we showed up to court and said, "Give us attorneys' fees under 533," maybe we wouldn't get it because nothing in 533 ever says attorneys' fees. But we are not bringing the claim under that. We are bringing a claim under the specific attorneys' fees statute, which is a vast difference between cases which absolutely ignore them.

The other difference, Your Honor, is those cases which the State Engineer cited to that -- that claim that you can't get attorneys' fees under water law statutes are completely different situations than this case. Our adjudication statutes allow for cost-splitting; they allow certain attorneys' fees provisions. But we are not under an adjudication statute here. We are asking that, under the specific statute which allows for groundless claim attorneys' fees, that the Court award attorneys' fees to Mr. St. Clair.

So all of this information plus taking the

legislature's intent to define NRS 18.010 liberally in favor of awarding attorneys' fees, all point to the solution that in a case like this -- where the methods used by the State Engineer were groundless and meritless, they had no evidence to support their claims of abandonment, they had no law or evidence to rely on for a five-month-late filing that cost Mr. St. Clair almost $3,000, they had no law or reason to object to a proposed order, which cost Mr. St. Clair another $2,000 -- that's why we have these attorneys' fees statutes that do apply to our case because they are applicable in -- civil claim -- civil practice is applicable under appeals from the State Engineer.

Lastly, the State Engineer argued that NRAP 38 is also a limit on attorneys' fees. But NRAP 38 is attorneys' fees for frivolous cases, for when a claim is brought for frivolity purposes. Right? But that's not what we are talking about here. Again, this is -- it's what's known as a strawman argument: The State Engineer is propping up something we never said and tearing it down. We never tried to bring attorneys' fees claims under NRAP 38; so those rules are unapplicable -- or inapplicable to what we are talking about here today. We never brought a claim under NRAP 38. There's certain things you have to show to bring a claim under NRAP 38, and we simply didn't bring that.

So NRS 18.010 2(b), our claim, is, again, in addition to cases where an allowance is authorized by statute. So it is, therefore, a standalone statute.

So in conclusion, Your Honor, the practice in civil cases applies to what we are dealing with here. Appeals from the State Engineer aren't limited by 233B because the State Engineer is specifically exempt. They are not limited to only what's contained within 533 because there's a specific provision that says that civil case practice applies here. The State Engineer should be required to pay these attorneys' fees because the case was absolutely groundless that they maintained. It wasn't frivolous. It wasn't meant to harass, maybe. But that's not the test we are dealing with here. The sole test that we are dealing with is whether or not they had any evidence of intent.

So again, Your Honor, in closing, State -- Mr. St. Clair should not be the one left holding the bag here. When the State Engineer makes this egregious of a mistake and doesn't reflect on whether or not he should be able to maintain his claim and files five months after deadlines and opposes common practice that's outlined in the District Court rules -- all of that cost shouldn't be put solely on the water right user. Because the State Engineer can lean into the Attorney General and get those costs covered, but

Mr. St. Clair doesn't have any option other than spend tens of thousands of dollars to fight a groundless lawsuit with absolutely no evidence put forth, and Mr. St. Clair shouldn't be required to pay those fees on his own.

So, Your Honor, just to wrap up for the record, Mr. St. Clair is requesting $37,000 -- or $37,361 for the Supreme Court litigation, $2,672 for the untimely oppositions to that request for judicial notice, and $1,847 on the meritless objections to the proposed order. We ask that you grant these attorneys' fees to even this playing field that we are asked to play on. Grant them to show that -- that a water right user shouldn't be forced to pay to play for his vested water right.

THE COURT: Thank you. Let's take a short break before I hear from the State.

(A break was taken.)

THE COURT: Okay. Let's go on the record. Welcome back, everybody. Mr. Bolotin, we are on the record in St. Clair versus the State Engineer. Mr. Bolotin, please.

MR. BOLOTIN: And, Your Honor, I do have a PowerPoint up, and I also have physical copies in case --

THE COURT: Oh, please. I can look at both. I appreciate it. When I say "I can look at both," I am following along, but it is on the screen.

MR. BOLOTIN: Yes. As I said in my introduction, Your Honor, St. Clair's motion -- Mr. St. Clair, who we'll call St. Clair, if that's okay for purposes of today's argument -- their motion should be denied. There's one thing throughout my argument, an overarching theme, that's the American Rule for Attorneys' Fees, which Nevada follows pursuant to the Thomas v. City of North Las Vegas case. Attorneys' fees may not be awarded absent a statute, rule, or contract authorizing such award.

There's four primary bases why St. Clair's motion should be denied in this context. Contrary to what Mr. St. Clair said earlier, his motion for attorneys' fees is untimely. Not only is it untimely, it's untimely by over two years. The semantics regarding the rules and what rules apply, the fact of the matter is there's case law in point, the rule applies here. They need to be filed within 20 days of the notice of entry of order, and it wasn't.

Second, it lacks legal foundation. There's no authority that says you can get -- be awarded attorneys' fees in a 533.450 case.

Third, even if there was, attorneys' fees are unwarranted under 18.010 2(b).

And, lastly, this Court lacks authority to award attorneys' fees incurred on appeal. There's clear law on this

fact.

Let me go through a little bit of background, some dates which are important here. On July 25th, 2014, the State Engineer issued Ruling Number 6287 declaring proof of Appropriation V010493 abandoned and therefore also denying Change Application Number 83246T filed by Rodney and Virginia St. Clair. The change application was denied as a result of the abandonment as there is no unappropriated water available under the water right, and granting a change application on an abandoned water right was detrimental to the public interest. This is in the record of appeal in this case, pages 4 through 10.

On August 24th -- on August 21st, 2014, Rodney St. Clair filed his petition for judicial review, seeking reversal of the State Engineer's Ruling Number 6287. By February 27th, 2015, the petition for judicial review was fully briefed. And then on January 5th, 2016, the Court held oral arguments on that petition for judicial review.

THE COURT: When I said earlier in Winnemucca, the hearing was here in this exact room. And forgive me for saying and thank you for helping me with that. When you mentioned Happy Creek, I go, "uh-oh." Meaning I screwed it up. The hearing was here, and Ms. Caviglia was representing the State Engineer at that time. But I had to let everybody

know that I'm not -- never mind. Please go ahead, Mr. Bolotin.

MR. BOLOTIN: I didn't -- I was probably somewhere in a prison at that point, given my litigation experience. On January 5th, 2016, as you said, the Court held oral arguments on the petition for judicial review.

On April 22nd, 2016, the Court signed the order affirming in part and reversing in part Ruling Number 6287. The Court affirmed the finding that St. Clair had a vested water right under V010493 but overruled the finding of abandonment and ordered the State Engineer to grant the change application.

On April 29th, 2016, the Petitioner filed a notice of entry of order overruling State Engineer's Ruling 6287, six days after the order was issued.

Then on May 23rd, 2016, State Engineer filed his notice of appeal, appealing this Court's order to the Nevada Supreme Court.

On March 9th, 2017, the matter was fully briefed with the Supreme Court, oral arguments were held in November of 2017.

And then on March 29th of this year, the Nevada Supreme Court issued its opinion affirming this Court's decision.

The remittitur was filed May 4th.

And then June 28th, 2018, St. Clair filed his motion for attorneys' fees with this Court.

THE COURT: Who argued to the Supreme Court? I'm just curious. Who argued on behalf of the State?

MR. BOLOTIN: I'm not sure, Your Honor. I think it was Justina.

THE COURT: It was Justina?

MR. BOLOTIN: Yeah.

THE COURT: Ms. Caviglia. And was it you, Mr. Taggart? Are you --

MR. TAGGART: Yes.

THE COURT: Just curious. Thank you. Please.

MR. BOLOTIN: As I said previously, Mr. St. Clair's motion for attorneys' fees is untimely. NRCP 54(d) governs attorneys' fees. Section 2(b) of that statute says, "Unless a statute provides otherwise, the motion must be filed no later than 20 days after the notice of entry of judgment is served. The time for filing the motion may not be extended by the Court after it has already expired. A claim for attorneys' fees must be made by motion, and the District Court may decide the motion despite the existence of a pending appeal from the underlying final judgment."

The only exception to NRCP 54D2B's 20-day rule is

that claims for fees and expenses as sanctions pursuant to a rule or statute or when the applicable substantive law required attorneys' fees be proved at trial as an element of damages.

There is absolutely no calculation, Your Honor, of time whereby St. Clair's motion is timely. The notice of entry of order was filed on April 27th, 2016. Before this date, all of the so-called egregious things occurred. The rejection -- the objection to the request for judicial notice and the fight over the proposed order all happened before this note of -- notice of entry of order was filed. Pursuant to NRCP 54(d)2(B), motion for fees must be filed within 20 days of the notice of entry of order, or the deadline was May 17th, 2016. St. Clair's motion for attorneys' fees was served on June 28th, 2018, more than two years after the deadline. And pursuant to the rule, after the deadline has passed, the Court cannot extend it.

The State Engineer's appeal did not toll the deadline. As I said earlier, NRCP 54(d)2(a) states that motions for fees may be decided despite the existence of a pending appeal. Plus the State Engineer's notice of appeal was filed on May 23rd, 2016, after St. Clair's 20-day deadline to appeal -- to file a motion for attorneys' fees had already run. The time to file did not start running following the

Supreme Court proceedings. They had their own attorneys' fees rule, which we'll get to later.

"Parties not entitled to fees on appeal absent a showing of frivolity." That's from NRAP 38. And from the Board of Gallery History, Inc., case, which we'll get to later, the District Court lacks authority to award attorneys' fees incurred on appeal. As I stated, the time to file a motion for attorneys' fees did not start to run following the Supreme Court proceedings. But even assuming that it did, arguendo, St. Clair's motion is still untimely. The remittitur was filed on May 4th, 2018, and Mr. St. Clair filed motion for fees on June 28, 2018. That's more than 50 days after the remittitur, even if there was a rule that permitted such a motion, which there isn't.

In Mr. St. Clair's reply in the argument today, they cite two cases for why NRCP 54's 20-day rule doesn't apply. St. Clair cites the Farmers Insurance Exchange versus Pickering case, a case from 1988, for the proposition that timeliness of an attorneys' fees motion is a matter left to the discretion of the trial court. St. Clair also filed -- cites the Fowler case in the reply for the proposition that there is no deadline for filing a motion for attorneys' fees under NRS 18.01 2(b). This is a case from 1993. Both of these arguments ignore the fact that NRCP 54 was amended in

2008 to codify the 20-day deadline, effectively overruling both of these cases. And this case has been around for now -- this rule has been around for now ten years.

If I can approach the bench, Your Honor. I've handed you Administrative Docket Number 426, which was when the Supreme Court amended NRCP Rule 54.

Therein, the Supreme Court expressly codified the holding of Collins v. Murphy, a 1997 case which required a motion for attorneys' fees to be filed before the deadline to file a notice of appeal. As you might remember, Your Honor, this was a case of a District Court that was before you, Collins v. Murphy. And it was a case where fees were sought under NRS Chapter 18, not NRCP 54, as opposing counsel argues. And to the extent they require -- they argue that NRCP 54 has an argument "unless a rule provides otherwise," nowhere in NRS 18 does it provide otherwise that you can provide -- that you can file a motion for fees after the 20-day deadline of NRCP 54.

Administrative Docket Number 426, the Supreme Court expressly stated, "It appears that the codification of this Court's holding in Collins in the form of a rule will result in broader awareness of the timing requirement for attorney fees motions, as well as more uniform application of the requirement, and therefore amendment of the Nevada Rules

of Civil Procedure is warranted." As a result, NRCP 54D was added to the Nevada Rules of Civil Procedure, including the requirement that a motion for attorneys' fees must be filed no later than 20 days after notice of entry of judgment is served. As you know, they have an asterisk there. When the state -- when the Court Supreme amended the rule, they made it effective 30 days after entry of the order when the rule required it to be amended six -- go into effect 60 days after, so they did have to amend their own order. But, ultimately, Administrative Docket Number 426 did result in this amendment to the Nevada Rules of Civil Procedure requiring a motion for fees to be filed within 20 days of the notice of entry of order.

And therefore the 1988 case of Farmers Insurance Exchange that St. Clair cites for the proposition that timeliness of attorneys' fees is left to the discretion of the District Court, in the 1993 case of Cowler -- of Fowler that St. Clair cites for the proposition that there is no deadline had been clearly overruled by the Nevada Supreme Court through its amendments in the 2008, 2009 codifying the 20-day deadline now found at NRCP 54(D) 2(b).

While Farmers Insurance Exchange in 1988 found that the absence of a specific statutory provision governing the time frame in which a party must request attorneys' fees,

this specific statutory provision now exists, and it has since 2008 or 2009 via the Administrative Docket Number 426, now codified as NRCP 54(d)2(B).

As I said earlier, NRCP 54 requires a motion for attorneys' fees must be filed no later than 20 days after notice of entry of judgment is served. The time for filing the motion may not be extended by the Court after it has expired.

St. Clair served the notice of entry of order on April 29th, 2016, and they served their motion for attorneys' fees June 28th, 2018. St. Clair's motion for attorneys' fees was filed over two years after service of the notice of entry of order, and this is far beyond the 20 days set by NRCP 54 and, therefore, St. Clair's motion should be denied as untimely.

Next, St. Clair is not entitled to attorneys' fees, even if he did file it timely. NRS 533.450 is the only known means for a petition for judicial review of an order of decision of the State Engineer. And pursuant to the American Rule, attorneys' fees may not be awarded absent a statute, rule, or contract authorizing such an award. And NRS 533.450 does not include such a provision for attorneys' fees.

As opposing counsel stated, the State Engineer is well aware that he's exempted from NRS 233B. But in this

context of administrative law and fees, the Supreme Court's analysis regarding 233B in the context of fees is persuasive. In Fowler, Nevada Supreme Court noted that, like NRS 533.450 for petitions for judicial review of State Engineer decisions, NRS 233(b) 130 does not contain any specific language authorizing the award of attorneys' fees in actions involving petitions for judicial review of agency action.

In the Zenner case, the Nevada Supreme Court noted that, like NRS 533.450 for decisions of the State Engineer, despite the fact that NRS 534 -- 533.450 doesn't have the exact same language, the provisions of NRS Chapter 233B are the exclusive means for judicial review of or judicial action concerning a final decision in a contested case involving an agency to which the chapter applies.

And noticeably, the Zenner case, the Nevada Supreme Court held that the District Court properly interpreted Fowler to mean that NRS 233(B).130 precluded attorney fees pursuant NRS 18.012(B), the exact statute that St. Clair cites, finding that this statute does not contain any specific language authorizing the award of attorneys' fees in actions involving petitions for judicial review of agency action.

In that same case, the Nevada Supreme Court held that it has repeatedly refused to imply provisions not

expressly included in the legislative scheme and has held that it is not the business of the Supreme Court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.

In the Rand Properties LLC case, another case involving water, the Nevada Supreme Court looked at two other provisions in NRS Chapter 533 providing for costs -- NRS 533.1901 and NRS 533.2403 -- and reversed the award of attorneys' fees, finding that these statutes specifically provide for an award of costs but, under Nevada law, attorneys' fees are not costs. The District Court may not award attorneys' fees absent authority under a statute, rule, or contract. The Rand Property case held that attorneys' fees are not mentioned anywhere in the statute. Accordingly, we reversed the award of attorneys' fees. This specifically refers to NRS Chapter 533, the case -- the statute that the petition for judicial review in this case was brought under.

Just to summarize all of this, St. Clair requested attorneys' fees pursuant to NRS 18.010 2(b), just like the Petitioner or whoever the litigant was in the Zenner case. NRS 533.450 is the exclusive means for filing a petition for judicial review of the State Engineer's decisions, despite not specifically saying so, unlike 233B. St. Clair filed his petition for judicial review pursuant to

NRS 533.450, and 533.450 does not include a provision providing for attorneys' fees. As the Zenner court said, that the legislature intentionally omitted attorneys' fees from NRS Chapter 233B is supported by the fact that the legislature expressly authorized fees and costs in similar statutes specifically for frivolous petitions of hearing officer decisions involving industrial injuries. Here, NRS 533.450 itself specifically provides for costs. See NRS 533.450 sub 7. This supports the idea that the omission of attorneys' fees was intentional.

St. Clair argues that 533.450 sub 7 actually works in their favor because it's an immunity-to-cost statute. That's not the purpose of statute. The statute is to allow costs under certain circumstances. And since they allowed costs under certain circumstances but were silent as to fees, this exclusion is intentional; therefore, petitioners challenging decisions of the State Engineer -- including St. Clair in this case -- are not entitled to attorneys' fees in NRS 533.450 petitions.

Notwithstanding the aforementioned case law, State Engineer's defense in appeal were not brought or maintained without a reasonable ground or to harass the prevailing party as required under NRS 18.012B, even if these were permitted in NRS 533.450 cases. The State Engineer here

acted reasonably and in good faith. And if I point you to NRS 18, which was provided by the opposing counsel, it has to be read completely. Yes, the Court shall liberally construe the provisions of this paragraph in favor of awarding attorneys' fees in all appropriate situations. "It is the intent of the legislature that the Court award attorneys' fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses, and such claims and defenses overburden limited judicial resources," et cetera. So they argue that it's all about reasonable grounds, reasonable grounds. But the rule itself says the purpose of the statute is to deter frivolous or vexatious claims. While the State Engineer admits he was wrong here, he was -- the facts before the State Engineer was that -- not St. Clair, but the previous owner of the property had let the well fall into despair [sic], basically. And he wasn't going after St. Clair's intent but the intent of the previous owner, which as far as the State Engineer understood, was not clearly established. It is now, based on the Supreme Court's decision in this case, but the State Engineer at all times proceeded in defending his decision reasonably and in good faith.

"A claim is groundless if it's not supported by

any type of credible evidence at trial, it is brought in bad faith, or it is fraudulent." This analysis depends on the actual circumstances of the case rather than the hypothetical facts supporting the moving party's affirmance. It's from the Semenza v. Caughlin Crafted Homes case of 1995. Here, the State Engineer acted reasonably and in good faith. While the State Engineer was ultimately not the prevailing party in either his defense of Ruling Number 6287 or his appeal to the Supreme Court, both were maintained in good faith by the facts and law as he saw them based on a reasonable albeit ultimately incorrect interpretation of law and fact. There's no finding in the record otherwise.

Moreover, NRS 533.450 sub 1 deems that, "Actions challenging decisions of the State Engineer are in the nature of an appeal." St. Clair brought its motion pursuant to NRS 18.0102(B), which is silent with respect to appeals. NRAP 38, however, provides for costs on appeal where an appeal has frivolously been taken or been processed in a frivolous manner. Neither the District Court nor the Supreme Court found that the State Engineer maintained his defense of Ruling Number 6287 in a frivolous manner. And, therefore, St. Clair is not entitled to attorneys' fees from either level of litigation.

While the Supreme Court found the State Engineer

acted arbitrarily and capriciously in issuing Ruling Number 6287, finding the ruling unsupported by substantial evidence, this is the standard required to overturn a decision of the State Engineer and does not mean that it was maintained without reasonable grounds or that it was frivolous. Finding that a State Engineer's decisions is arbitrary and capricious and not supported by substantial evidence does not mean that the State Engineer's defense of his decision was frivolous. There is no finding of frivolity by either this Court or the Supreme Court.

Despite ruling in St. Clair's favor, neither the District Court nor the Supreme Court found the State Engineer maintained his case frivolously, for purpose of delay, or otherwise misused the appellate processes. Rather, the Supreme Court found only that no clear and convincing evidence that St. Clair's predecessor intended to the abandon the water right existed and that the State Engineer's other arguments on appeal lacked merit for varying other reasons. The lack of finding of frivolousness prohibits award of attorneys' fees under NRAP 38; however, St. Clair's attorney himself argued that NRAP 38B doesn't apply. This alone would bar fees that were incurred on appeal before the Supreme Court. In the Bobby Berosini case, the Court held the -- Supreme Court held NRS 18.010 does not explicitly authorize attorneys' fees on

appeal, and NRAP 38B limits attorneys' fees on appeal to those instances where an appeal has been taken in a frivolous manner.

Again, back to the American Rule, Border Gallery of History Inc., v. Datex Corp., attorneys' fees cannot be recovered absent a statute, rule, or contractual provision to the contrary.

In that same case, the Supreme Court held that there is no provision in statute authorizing the District Court to award attorneys' fees incurred on appeal, and NRS 38B authorizes only the Nevada Supreme Court and now the Nevada Court of Appeals to make such an award if it determines that the appeals process has been misused.

And, therefore, while St. Clair's motion should be denied for the other previously mentioned reasons, St. Clair is not entitled to attorneys' fees incurred at the Supreme Court nor is this Court authorized to make such an award.

In conclusion, Your Honor, St. Clair's motion for attorneys' fees must be denied, first and foremost, procedurally the motion is untimely. If we are talking about something that's egregious here, we are talking about how egregiously untimely this motion is. It was filed more than two years past the statutory deadline to file this type of a

motion based on the Rule of Civil Procedure that came from a case based on award of attorney -- of attorneys' fees under Chapter 18, the exact chapter that Mr. St. Clair cites for his motion for attorneys' fees.

Second, there is no legal authority providing for attorneys' fees for petitions for judicial review of decisions of the State Engineer under NRS 533.450.

Third, the State Engineer's defense and subsequent appeal of the decision were made in good faith and did not rise to the levels of frivolity or other nefarious levels that are required to grant attorneys' fees under the circumstances.

And, lastly, the -- this District Court lacks authority to award attorneys' fees incurred at the Supreme Court, and applicable legal authorities actually prohibit such an award from the District Court for fees incurred at the Supreme Court.

Therefore, the State Engineer respectfully requests that this Court denies St. Clair's motion for attorneys' fees.

THE COURT: Thank you. Before we do the reply, let's take a very brief break, just five-minute stretch break.

(A break was taken.)

THE COURT: All right. We are back on the record

in St. Clair versus Jason King. Let the record show that the parties are present through counsel, and we can proceed with the reply, please.

Mr. O'Connor?

MR. O'CONNOR: Thank you, Your Honor. Just one moment while I kind of make my paper a little organized here.

Thank you, Your Honor. There are three different points that we want -- that we want to touch on that Mr. Bolotin, I think, touched on. The first is going to be whether or not this amendment to Rule 54 had any effect whatsoever on the Pickering. We believe it doesn't for a few different reasons.

The second is whether or not the fact that the State Engineer had a good faith basis to believe their claim is relevant whatsoever to -- to what NRS 18 asks for, and we believe it doesn't because NRS is pretty clear that -- or NRS 18 is pretty clear that it doesn't matter if you bring it in good faith; what matters is the grounds that you bring it on. And third, we want to just briefly touch on this question of -- of what exactly NRS 533 subsection 7 grants and doesn't grant.

Kind of starting from the top, the State Engineer argued that the amendment that you have in front of you, the order amending Nevada Rule of Civil Procedure 54 somehow

overrode Pickering. And the State Engineer's argument that you have to file for attorneys' fees before you start to appeal and you only have 20 days after the appeal process in order to file just doesn't make any sense if you play it out like -- like they are hoping it would work. Because, Your Honor, if St. Clair -- for example in a hypothetical. Right? This isn't what happened. But in a hypothetical, if St. Clair were to have won and then asked for attorneys' fees right away, like the State Engineer wants you to try to interpret this statute, pending an appeal, how are you supposed to award attorneys' fees pending appeal when you don't know what those fees will be on appeal? Mr. St. Clair doesn't know if he's going to be successful on appeal. And even if you do grant attorneys' fees -- say $5,000 in attorneys' fees to us -- what happens if we are not successful on appeal? Then we have to recut a check back, or does that check sit in limbo, some kind of quasi-escrow, you know, type of situation? It just doesn't make any sense. How it practically works, how attorneys' fees have worked for a long time, and how Pickering explains attorneys' fees working is that you wait until you're all the way through appeal because you have to know whether or not you're a prevailing party under the terms of NRS 18 before you go file a motion for attorneys' fees under NRS 18. It just doesn't make any sense

to try to interpret it differently. You can't be a prevailing party until the appeals are over.

The second piece that the State Engineer was arguing is that somehow an amendment to a Rule of Civil Procedure can override a statute put in by the legislature. And, Your Honor, the fact that the State Engineer is trying to argue that an amendment to a rule will somehow override a statute is a little ironic because, in Pickering -- and we have Pickering here for Your Honor, just so you can see the words. So if you recall, Your Honor, this Pickering case is kind of the center of the debate on what the time is to file an amend- -- or to file attorneys' fees. And if you flip to the second page, paragraph -- the paragraph with Head Notes 1 and 2 on it, the first full paragraph -- it explains that NRS 18.010 provides no time limits for motions. And absent a specific statutory provision governing a time frame, timeliness of such requests, we conclude, are a matter left to the District Court. And this wasn't something magical about Pickering and it wasn't a magical rule necessarily about NRS 18. This is for any statute, any statute that lives out there in the world that doesn't have a time attached to it gets this discretionary reasonableness test to it.

Now, what's ironic about the State Engineer trying to argue that this was overriden by a rule is that in

Pickering, the petitioner tried to argue that NRCP 59(e) should control NRS 18. The time limits in the rule should control the time limits in the statute. That was -- that was the argument in Pickering. There's a time limit of ten days in the rule; so you should only have ten days when you're filing this NRS 18. Are you following me there? That was the argument.

That's the exact argument that the State Engineer is making today: We have a time requirement in NRCP 54, and you have to apply that to NRS 18. But the Supreme Court held in Pickering -- the exact holding was that we decline to apply the ten-day [sic] time limits under NRCP 59E because there is no time limit in the NRS. The Court can't revise a statute; that is the legislature's job. The Court can revise its own rules, but those rules don't necessarily bind statutes.

And importantly when the legislate -- or when the Court went and amended Rule 54, it's very notable that when they put in the time limits on Rule 54, they kept in the leading sentencing -- the leading clause that states, Rule 54(d)2(B), Timing and Contents of Motion, "Unless a statute provides otherwise." So that means unless they -- you have a statute that has a different rule, you have to follow the 20-day rule. And they left it in there, and they left it in there for a reason. It's because the Supreme Court, as

much as they may want to, they don't have the authority to override statute. So unless a statute gives you a different rule, you have to follow this 20-day rule.

But we know that NRS 18 has a different rule. We know that from Pickering. We also know from Pickering that time frames in rules cannot control time frames in statutes. We have separation of powers, and the legislature gets to make those rules.

So the argument that somehow this amendment of Rule 54 alters the holding in Pickering is the exact opposite of what Pickering held. Pickering said a rule can't affect Rule 18. The State Engineer now wants you to try and buy that argument, but it just simply doesn't make any sense.

Second, NRS -- or Rule 54 --

Second, Your Honor, a rule -- Rule 18 or NRS 18.010 2(b) states it was the intent of the legislature to award attorneys' fees pursuant to this paragraph and impose sanctions when necessary. Right? So we are talking about those groundless claims again.

And, Your Honor, NRCP 54 (2)(d), it doesn't apply to sanction statutes. Sanction statutes are given to a court in order to impose sanctions when it needs to. And, specifically, NRS 18.020 is for groundless claims.

Now, I want to go back, and I want to touch on

this again because I think it's a very important distinction that we need to make. St. Clair has never accused the State Engineer of trying to harass him or bringing a frivolous case or bringing a nefarious case or having ulterior motives. We do not think the State Engineer was necessarily out to get Mr. St. Clair, and we've never argued that. Our argument is, under NRS 18, it is a specific provision for groundless claims, and there is a big difference between a groundless claim and what the State Engineer tried to do to box in as a nefarious claim or as what he said were reasonable grounds.

But under the Bobby Berosini case, it specifically interpreted it, that said, "Pursuant to NRS 18.010 2(b)" -- so it's specifically interpreting the statute we are talking about -- "a claim is groundless if the allegations in the Complaint are not supported by credible evidence." So it doesn't matter if you had all the good faith in the world and you really believed in what you were doing. If you showed up to court with empty hands and no evidence to show intent, that is a groundless claim under 18.010 2(b). It doesn't have to be nefarious; it just has to be groundless and unsupported.

In fact, on page 38 of the State Engineer's own PowerPoint, they recognize this. If you go to page 38 of their PowerPoint, it states right on there that one of the

reasons that you can get attorneys' fees is if your claim is not supported by any credible evidence at trial. And this wasn't even a case where they weren't supported by any credible evidence; they just didn't have any evidence, period. And the Supreme Court recognized that multiple times throughout the case. The Supreme Court recognized that it was based solely on non-use. There was no evidence of intent whatsoever. So, I mean, breaking it down to as simple as it gets, there's this element of intent that they have to prove if they want to prove abandonment. And Your Honor told them, "You don't have that element. You have no evidence to meet that." They appealed it to the Supreme Court. The Supreme Court said, There is not a lick of evidence in this record anywhere that shows anything to point toward intent. That's the definition of a groundless case. It's not even that there was no credible evidence; there was no evidence before it at all to try to support it.

And lastly, Your Honor, regarding NRS 533.450 subsection 7, the State Engineer tried to argue that in certain instances, you know, costs may be okay, costs may not be okay, and that's what they are talking about. But that's simply not true from the face of the statute. NRS 533.477 says the State Engineer and the State cannot have costs levied against them. It absolutely ignores any type of immunity

under -- under any other civil claim for attorneys' fees, which means there is no type of immunity given to the State Engineer's office or the State for claims under something like NRS 18, which is a standalone statute that allows attorneys' fees.

And just -- I mean, kind of as an aside, Your Honor, the State Engineer continues to cite authority from NRAP 38. NRAP 38 is a special sua sponte sanction statute for an appellate court to apply. We are not asking an appellate court to apply anything. The rules of appellate procedure don't apply here; we use the Rules of Civil Procedure, including statutes like NRS 18.010. So any argument regarding NRAP 38 is irrelevant. We are not requesting these under NRAP 38.

So to but a bow on it, Your Honor, it's just -- it's just simply unfair when water users like Mr. St. Clair are left holding a large attorneys' fee because the State Engineer doesn't use a little bit of reflection and see whether or not he can actually substantiate a claim he is making. Had the State Engineer ever looked and said, "What type of evidence do we have to support intent," he would likely have found that he doesn't have any, and this case would not have gone any farther. But instead of doing that, they've essentially shifted the bill to Mr. St. Clair. Like

they shifted the burden of intent, they've now shifted the bill to Mr. St. Clair to either pay up or lose a water right. And that simply isn't fair. It's an unfair playing field, and that's why we have statutes that can incorporate attorneys' fees in situations where there is not a contract otherwise.

And we'd ask that this Court implement that statute and award Mr. St. Clair the attorneys' fees requested.

THE COURT: Thank you. Submitted?

MR. O'CONNOR: Unless there's response from the State Engineer.

THE COURT: Okay. I will ask that first.

Do you have any further --

MR. BOLOTIN: If I can do a quick response to some things -- to some things that were said there.

THE COURT: Sure. Sure.

MR. BOLOTIN: Your Honor, St. Clair's attorney, again, points to the Pickering case, which states that, "Absent a specific statutory provision governing the time frame in which a party must request attorneys' fees, the timeliness of such request, we conclude, is a matter left to the discretion of the trial court"; however, as I stated in my argument, that specific provision now exists in the form of NRCP 54 (d)2(B).

They point out in the Pickering case how they

found out that NRCP 59 does not apply to attorneys' fees motions, but that's a -- it doesn't apply for a completely different reason. That's the deadline to amend a judgment. Ten days is the deadline to amend a judgment. You don't need to amend a judgment to award attorneys' fees. That's why they found that NRCP 59 doesn't apply there.

And then where they cite the rule, "Unless the statute provide otherwise" -- and they argue somehow that NRS 18 provide otherwise; that's just simply not true. NRS 18 has no deadline to file an attorneys' fees motion, and, therefore, it does not provide otherwise and does not have a separate deadline that's different from the 20-day deadline provided in NRCP 54.

And then Collins v. Murphy -- which is a case that specifically codified when this Supreme Court amended and added NRCP 54(d)2(B) -- states its reasoning. It's the exact reasoning that St. Clair's attorney found so egregious or unreasonable, but it's the exact reasoning they held. To read from Collins v. Murphy, 113 Nevada 1380 from 1997, "Respondents obtained a judgment for $5,125. Appellants could well have anticipated that it would cost more than this to pursue even a meritorious appeal; however, appellants would have had a much greater incentive to pursue an appeal had they known that this judgement could be relied upon to support

attorneys' fees award of nearly $50,000. Therefore, we conclude that appellants were unfairly prejudiced by respondents' failure to file their motion for attorneys' fees after the deadline for an appeal had passed." This is the reasoning why the Supreme Court amended that rule and, therefore, required an attorneys' fees motion to be filed before the deadline to appeal.

In that case, Collins v. Murphy, also -- I just want to mention one more time, they sought attorneys' fees under Chapter 18, the exact chapter that St. Clair seeks attorneys' fees, and they found that it still needed to be filed before the deadline to appeal. And this is now codified in the Nevada Rules of Civil Procedure.

And, lastly, one more point, to the extent they argue NRAP 38 doesn't apply, as I stated during my argument, this is the only rule that allows fees to be awarded that were incurred on appeal. Absent application of that statute and there's other case law on point, the District Court has no authority to award attorneys' fees incurred on appeal.

And I respectfully, once again, Your Honor, ask that you deny their motion for attorneys' fees.

THE COURT: Thank you. Any comment in regards to Mr. Bolotin's continued response?

MR. O'CONNOR: Very briefly, Your Honor. Yeah,

very briefly.

We'd like to point out that here in court today is the first time we've ever heard, I believe -- and maybe Mr. Bolotin can correct me if I'm wrong -- of Collins v. Murphy or this argument that somehow NRCP 54 was amended in the late '90s to somehow affect NRS 18. Unless I missed it.

MR. BOLOTIN: No. I -- Your Honor, I pulled those cases in response to St. Clair's citing Pickering and those other cases in their reply, which I felt like I needed to address here because I believe that those cases are no longer good law in terms of how they dictate the timing for an attorneys' fees motion because there's now a Rule of Civil Procedure that specifically sets out that deadline. And I didn't have an opportunity to respond to the reply, so I wanted to point it out during our argument, Your Honor.

THE COURT: And I invited it.

MR. O'CONNOR: Okay. So we would just like to point out that it's the first time, so we are trying to, you know, respond to this on the fly. And -- but point being that we don't think it overrules Pickering because it states in there specifically that Rules of Civil Procedure can't control statutes. That's -- that's the rule that was put forth in Pickering.

Then Mr. Bolotin -- or, sorry, the State Engineer

argued that there -- that, you know, there's nothing in 18.010 to offset this -- this 20-day language, but that's the whole point of Pickering is there's still nothing in NRS 18 that dictates when a date is filed. The -- when they amended NRCP 54, they included that statement in there, that unless there's a statute out there that's different from what we're saying, then you have to follow the 20-day rule. Nothing has ever been amended in NRS 18 to limit it to 20-day rule. The Court ordered that Mr. -- or that the State Engineer put forth, doesn't say it overrules Pickering. I know of no case, including this Collins v. Murphy case, that says that this rule now applies to 18.010 sub 2(b). But rather, the Collins case, they were applying discretion. They weighed back and forth what discretion or what type of -- what type of prejudice did one side feel with the late attorney's motion. They weren't saying that there's a hard 20-day bar, and there's a bright-line rule that -- that this doesn't get in. That wasn't -- that wasn't what I heard. What I saw was discretion being applied. Had there been an earlier -- had there been an earlier filing, then maybe something else would have happened. But this notion that there's a bright-line 20-day rule that's attached somehow to NRS 18, which doesn't appear in NRS 18, is not a correct interpretation of it.

So with that, Your Honor, we would submit the motion to the Court.

THE COURT: Submitted, Mr. Bolotin?

MR. BOLOTIN: Submitted, Your Honor.

THE COURT: Thank you.

You know what I always do when I have these types of arguments, I always lean -- I always ask. Well, first of all, let Mr. St. Clair know where I'm coming from. When I first got the motion, I got everything at once. When I first got it, I go, "41,000 bucks?" So with that being said, Mr. St. Clair and Counsel, I always, in chambers or in the courtroom, I always turn to the other side and say, "Hey, what did you spend? What did you charge, Mr. or Ms. Attorney?" And if it's close, then I know, you know, I know that, "Oh, okay." Then I move toward my decisions as far as attorney's fees. And it is 18.0102(b). There's no time. And as a matter of fact, Mr. O'Connor's argument was just spot on. How in the hell can a district court judge exercise his or her discretion in regards, "Okay, I'll give you 5,000 bucks on appeal." Mr. St. Clair is not going to appeal, "Just in case I lose, Supreme Court, I want attorneys fees." And 5,000 bucks is not enough, especially in relationship to $41,000.

Listen to this -- and I totally respect Mr. Bolotin's argument. I totally respect the State's

argument. But what really -- what really it is in my opinion is, "Wow, we've got to find something where we don't have to pay, because we never paid before." But listen to this. 18.010 sub (2): "Without regard to the recovery sought," remember that. Mr. St. Clair was appealing a decision by the State Engineer where there was no intent to abandon, it was just the State Engineer took a position that a right was abandoned. Hell, I remember it now. 1930's I think was the last time the well was there or the last time that they even looked to see the well. "Without regard to the recovery sought, when the Court finds that the defense of the opposing party was brought or maintained without a reasonable ground," and I said it, Supreme Court said it, it wasn't reasonable. The State Engineer should have just said, "There was no intent. It wasn't an abandoned." And there's case law on that. I'm not going to go into harass and harangue and, you know, I'm not going to do that. You didn't do that. The State Engineer didn't harass or harangue. You're trying to find stuff -- later on trying to find stuff to justify the opposition.

It goes on. "The Court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." This is an appropriate situation.

It goes on: "In all appropriate situations to punish the defenses because such claims and defenses" -- this is the key, "overburden limited judicial resources, number one, hinder the timely resolution of meritorious claims." This was a meritorious claim on the part of Mr. St. Clair. "Increase -- and increase the cost of engaging in business." Hey, take 41,000 dollars out of your pocket, Mr. St. Clair, and go apply it to whatever you're going to apply. Come on. That doesn't make any sense to me. "And providing professional services to the public."

But what this says, I'm awarding you 41,000 plus, Mr. St. Clair, plus the additional preparation time for this hearing, plus the three hours for this hearing, because Mr. Taggart and Mr. O'Connor provided the professional services to the public, Mr. St. Clair.

I totally appreciate both arguments. You got me thinking, Mr. Bolotin, but by the same token, go ahead and get me an order. I'm the additional prep time and the three hours, and I will sign it. So I'm looking for -- I'm not going to say what it will be, but I'm looking to sign that order.

Thank you very much for your presentation, both of you. Everybody have a good weekend.

(Proceedings concluded.)

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STATE OF NEVADA)
) ss.
CARSON CITY)

I, SUSAN KIGER, a certified court reporter in the State of Nevada, DO HEREBY CERTIFY:

That I am not a relative, employee or independent contractor of counsel to any of the parties, or a relative, employee or independent contractor of the parties involved in the proceeding, or a person financially interested in the proceedings;

That I was present in Department No. 2 of the above-entitled Court on October 19, 2018, and took verbatim stenotype notes of the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 87, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At, Carson City, Nevada, this 26th day of November, 2018.

Susan Kiger

SUSAN KIGER, CCR No. 343

CASE NO.: CV 20, 112

DEPT. NO.: 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

AFFIDAVIT OF TIMOTHY D. O'CONNOR, ESQ. IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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

STATE OF NEVADA)
):ss.
COUNTY OF CARSON CITY)

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

1. I am over the age of eighteen (18) and of sound mind.

2. I am an attorney of record for Petitioner, RODNEY ST. CLAIR, and have, along with other members of TAGGART & TAGGART, LTD., at all relevant times, provided valuable and necessary services on behalf of RODNEY ST. CLAIR for which he is requesting compensation.

3. That the legal services provided were actually and necessarily incurred and were reasonable under the circumstances.

4. RODNEY ST. CLAIR is requesting an award of attorneys' fees in the amount of $8,143.75. The amount of fees is calculated based on the hours billed for services related to this case and the hourly rates charged by TAGGART & TAGGART, LTD. as follows:

Senior Partner hourly rate:	$325.00
Associate Attorney hourly rate:	$150.00

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

6. St. Clair spent $2,937.50 to research and draft his Motion for Attorneys' Fees. This amount was calculated by the following:

Senior Partner Attorney time:	2.0 hours
Associate Attorney time:	15.25 hours

7. St. Clair spent $1,093.75 to review the State Engineer's Opposition to Motion for Attorneys' Fees and draft and file his Reply in Support of Motion for Attorneys' Fees. This amount was calculated by the following:

Senior Partner Attorney time:	0.25 hours
Associate Attorney time:	6.75 hours

8. St. Clair spent $4,112.50 to prepare for and attend the hearing on the Motion for Attorneys' Fees and draft the proposed order. This amount was calculated by the following:

Senior Partner Attorney time:	5.50 hours
Associate Attorney time:	15.50 hours

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 16 day of November, 2018.

TIMOTHY D. O'CONNOR, ESQ.

SUBSCRIBED and SWORN to
before me this 16th day of November, 2018,
by TIMOTHY D. O'CONNOR.

NOTARY PUBLIC

SARAH HOPE
Notary Public - State of Nevada
Appointment Recorded in Carson City
No: 15-3128-3 - Expires September 17, 2019

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
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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 16th 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

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DEPT. NO.: 2

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Respondent.

[PROPOSED] ORDER GRANTING MOTION FOR ATTORNEYS' FEES

A proposed order is attached hereto as Exhibit 1.

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

AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 16 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

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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 16 day of November, 2018.

Employee of TAGGART & TAGGART, LTD.

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EXHIBIT INDEX

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EXHIBIT 1

EXHIBIT 1

CASE NO.: CV 20, 112

DEPT. NO.: 2

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IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

[PROPOSED] ORDER GRANTING MOTION FOR ATTORNEYS' FEES

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

DISCUSSION AND 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 (hereinafter the "Vested Right"). 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 issued Ruling 6287 on July 25, 2014, finding that the Vested Right was valid, and the right did exist on St. Clair's property, but, without holding a hearing and without evidence of intent to support the claim, that the Vested Right had been abandoned by the previous owner.[1] St. Clair subsequently appealed the State Engineer's Ruling 6287 to this Court.

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

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

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[1] Ruling 6287.
[2] January 5, 2016, Hearing Transcript, p. 79:21-23.
[3] *Id.*, p. 80:20-21.

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

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

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

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

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[4] *King v. St. Clair*, 134 Nev. Adv. Op. 18, 8, 414 P.3d 314, 318 (2018).
[5] *St. Clair*, 134 Nev. Adv. Op. 18 at7, 414 P.3d at 317.
[6] *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.
[7] *Id.*
[8] *Id.*
[9] *Id.*

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

STANDARD OF REVIEW FOR ATTORNEY'S FEES

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

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

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[10] NRS 533.450.
[11] NRS 533.450(8).
[12] NRS 18.010(2)(b).
[13] NRS 18.010(2)(b).
[14] *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).

this question and concluded that subsection (b) did allow for attorneys' fees for nonmonetary judgments.[15] 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."[16] As such, district courts have discretion to determine "[w]hether a motion for attorney's fees is timely."[17]

ANALYSIS

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

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

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

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

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[15] *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990).
[16] *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988).
[17] *Davidsohn v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).
[18] *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").

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

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

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

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

[19] NRS 18.010(2)(b).
[20] *Id.*
[21] NRS 533.450(8).
[22] NRS 18.010(2)(b).

18.010(2)(b) further mandates that this Court is required to "liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." A claim is groundless under NRS 18.010(2)(b) "if the allegations in the complaint . . . are not supported by any credible evidence at trial."[23]

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

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

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[23] *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.
[24] *See* April 22, 2016, Order Overruling State Engineer's Ruling 6287, CV 20, 112, at 12:13-14.
[25] *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at317.
[26] Opposition to Motion for Attorneys' Fees at 7:20-22 (emphasis added).
[27] *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).
[28] *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)).

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

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

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

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

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[29] *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993).
[30] *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988).
[31] *Zenor v. State, Dep't of Transp.*,134 Nev. Adv. Op. 14, 412 P.3d 28 (2018).
[32] NRS 533.450(8).
[33] *Fowler*, 109 Nev. at 785, 858 P.2d at 377 (emphasis added).
[34] NRS 233B.039(j).
[35] NRS 18.010(2)(b).
[36] *Key Bank of Alaska*, 106 Nev. 49, 787 P.2d 382.
[37] *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009).

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

> States with fee-shifting rules or statutes similar to Nevada's have held they apply to appellate fees. Additionally, nothing in the language of NRCP 68 and NRS 17.115 suggests that their fee-shifting provisions cease 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.[38]

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

IV. St. Clair's Motion Was Timely.

No mention of time frames to file a motion is contained in NRS 18.010, leaving such a determination of timeliness to the district court's discretion.[41] Indeed, the Nevada Supreme Court has instructed that "[a]bsent 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."[42] In *Pickering*, the Court determined that it was proper for a party seeking attorney's fees to make such a request 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)."[43]

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[38] *Id.* (internal quotations omitted).
[39] 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000).
[40] NRS 18.010(2)(b).
[41] NRS 18.010; *see also Pickering*, 104 Nev. at 662, 765 P.2d at 182.
[42] *Pickering*, 104 Nev. at 662, 765 P.2d at 182.
[43] *Id.*

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

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

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[44] *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 _____ day of _____, 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

CASE NO.: CV 20, 112

DEPT. NO.: 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

NOTICE OF ENTRY OF ORDER

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

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

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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 29th day of November, 2018.

Employee of TAGGART & TAGGART, LTD.

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

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Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
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EXHIBIT 1

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IN AND FOR THE COUNTY OF HUMBOLDT

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RODNEY ST. CLAIR,

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vs.

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

Respondent.

[PROPOSED] ORDER GRANTING MOTION FOR ATTORNEYS' FEES

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

DISCUSSION AND 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 (hereinafter the "Vested Right"). 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 issued Ruling 6287 on July 25, 2014, finding that the Vested Right was valid, and the right did exist on St. Clair's property, but, without holding a hearing and without evidence of intent to support the claim, that the Vested Right had been abandoned by the previous owner.[1] St. Clair subsequently appealed the State Engineer's Ruling 6287 to this Court.

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

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

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[1] Ruling 6287.
[2] January 5, 2016, Hearing Transcript, p. 79:21-23.
[3] *Id.*, p. 80:20-21.

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

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

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

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

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[4] *King v. St. Clair*, 134 Nev. Adv. Op. 18, 8, 414 P.3d 314, 318 (2018).
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[8] *Id.*
[9] *Id.*

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

STANDARD OF REVIEW FOR ATTORNEY'S FEES

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

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

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[10] NRS 533.450.
[11] NRS 533.450(8).
[12] NRS 18.010(2)(b).
[13] NRS 18.010(2)(b).
[14] *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).

this question and concluded that subsection (b) did allow for attorneys' fees for nonmonetary judgments.[15] 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."[16] As such, district courts have discretion to determine "[w]hether a motion for attorney's fees is timely."[17]

ANALYSIS

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

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

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

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

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[15] *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990).
[16] *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988).
[17] *Davidsohn v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).
[18] *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.").

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

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

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

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

[19] NRS 18.010(2)(b).
[20] *Id.*
[21] NRS 533.450(8).
[22] NRS 18.010(2)(b).

18.010(2)(b) further mandates that this Court is required to "liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." A claim is groundless under NRS 18.010(2)(b) "if the allegations in the complaint . . . are not supported by any credible evidence at trial."[23]

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

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

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[23] *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.
[24] *See* April 22, 2016, Order Overruling State Engineer's Ruling 6287, CV 20, 112, at 12:13-14.
[25] *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at317.
[26] Opposition to Motion for Attorneys' Fees at 7:20-22 (emphasis added).
[27] *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).
[28] *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)).

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

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

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

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

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[29] *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993).
[30] *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988).
[31] *Zenor v. State, Dep't of Transp.*,134 Nev. Adv. Op. 14, 412 P.3d 28 (2018).
[32] NRS 533.450(8).
[33] *Fowler*, 109 Nev. at 785, 858 P.2d at 377 (emphasis added).
[34] NRS 233B.039(j).
[35] NRS 18.010(2)(b).
[36] *Key Bank of Alaska*, 106 Nev. 49, 787 P.2d 382.
[37] *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009).

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

> States with fee-shifting rules or statutes similar to Nevada's have held they apply to appellate fees. Additionally, nothing in the language of NRCP 68 and NRS 17.115 suggests that their fee-shifting provisions cease 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.[38]

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

IV. St. Clair's Motion Was Timely.

No mention of time frames to file a motion is contained in NRS 18.010, leaving such a determination of timeliness to the district court's discretion.[41] Indeed, the Nevada Supreme Court has instructed that "[a]bsent 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."[42] In *Pickering*, the Court determined that it was proper for a party seeking attorney's fees to make such a request 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)."[43]

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[38] *Id.* (internal quotations omitted).
[39] 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000).
[40] NRS 18.010(2)(b).
[41] NRS 18.010; *see also Pickering*, 104 Nev. at 662, 765 P.2d at 182.
[42] *Pickering*, 104 Nev. at 662, 765 P.2d at 182.
[43] *Id.*

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

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

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[44] *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

Case No. CV 20,112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

NOTICE OF APPEAL

Notice is hereby given that 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 appeals to the Nevada Supreme Court from this Court's Order granting Petitioner's Motion for Attorneys' Fees, entered by this Court on November 26, 2018. Notice of Entry of Order was served on November 29, 2018. A copy of said Notice of Entry of Order is attached hereto as Exhibit 1.

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AFFIRMATION

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

DATED this 5th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____

JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: JBolotin@ag.nv.gov
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 5th day of December, 2018, I served a true and correct copy of the foregoing NOTICE OF APPEAL, by placing said document in the U.S. Mail, postage prepaid, addressed to:

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

_____
Dorene A. Wright

INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Notice of Entry of Order	16

EXHIBIT 1

EXHIBIT 1

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

FILED
2018 DEC -3 PM 12: 22
TAMI RAE SPERO
DIST. COURT CLERK

CASE NO.: CV 20, 112

DEPT. NO.: 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

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Petitioner,

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Respondent.

NOTICE OF ENTRY OF ORDER

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

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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 29th day of November, 2018.

Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
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EXHIBIT INDEX

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EXHIBIT 1

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FILED

2018 NOV 26 PM 2:50

DISTRICT COURT CLERK

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RODNEY ST. CLAIR,

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

Respondent.

[PROPOSED] ORDER GRANTING MOTION FOR ATTORNEYS' FEES

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

DISCUSSION AND 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 (hereinafter the "Vested Right"). 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 issued Ruling 6287 on July 25, 2014, finding that the Vested Right was valid, and the right did exist on St. Clair's property, but, without holding a hearing and without evidence of intent to support the claim, that the Vested Right had been abandoned by the previous owner.[1] St. Clair subsequently appealed the State Engineer's Ruling 6287 to this Court.

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

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

[1] Ruling 6287.
[2] January 5, 2016, Hearing Transcript, p. 79:21-23.
[3] *Id.*, p. 80:20-21.

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

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

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

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

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[4] *King v. St. Clair*, 134 Nev. Adv. Op. 18, 8, 414 P.3d 314, 318 (2018).
[5] *St. Clair*, 134 Nev. Adv. Op. 18 at7, 414 P.3d at 317.
[6] *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.
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Upon completion of the appellate process, and after ensuring that he was a prevailing party, St. Clair filed the Motion for Attorney's Fees before this Court. In the Motion St. Clair requested fees on the basis of NRS 18.010(2)(b), arguing that the State Engineer, throughout the litigation, maintained a position without reasonable ground relating to 1) the claims of abandonment of the Vested Right, 2) the Request for Judicial Notice, and 3) this Court's proposed order process. St. Clair argued that the State Engineer's meritless claims, motions, and objections unreasonably added to the cost of the litigation, and St. Clair should not be held to suffer the burden of that cost alone. After briefing and a hearing on the matter, in which both parties were present and put forth argument, this Court found that attorney's fees were warranted in this matter due to the State Engineer's groundless claims, meritless objections, and untimely motions. This Court finds that the State Engineer's maintenance of a claim without reasonable ground demonstrates an appropriate situation for an award of attorneys' fees pursuant to NRS 18.010(2)(b).

STANDARD OF REVIEW FOR ATTORNEY'S FEES

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

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

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[13] NRS 18.010(2)(b).
[14] *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).

this question and concluded that subsection (b) did allow for attorneys' fees for nonmonetary judgments.[15] 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."[16] As such, district courts have discretion to determine "[w]hether a motion for attorney's fees is timely."[17]

ANALYSIS

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

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

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

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

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[15] *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990).
[16] *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988).
[17] *Davidsohn v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).
[18] *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.").

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

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

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

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

[19] NRS 18.010(2)(b).
[20] *Id.*
[21] NRS 533.450(8).
[22] NRS 18.010(2)(b).

18.010(2)(b) further mandates that this Court is required to "liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." A claim is groundless under NRS 18.010(2)(b) "if the allegations in the complaint . . . are not supported by any credible evidence at trial."[23]

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

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

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[23] *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.
[24] *See* April 22, 2016, Order Overruling State Engineer's Ruling 6287, CV 20, 112, at 12:13-14.
[25] *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at317.
[26] Opposition to Motion for Attorneys' Fees at 7:20-22 (emphasis added).
[27] *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).
[28] *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)).

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

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

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

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

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[29] *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993).
[30] *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988).
[31] *Zenor v. State, Dep't of Transp.*,134 Nev. Adv. Op. 14, 412 P.3d 28 (2018).
[32] NRS 533.450(8).
[33] *Fowler*, 109 Nev. at 785, 858 P.2d at 377 (emphasis added).
[34] NRS 233B.039(j).
[35] NRS 18.010(2)(b).
[36] *Key Bank of Alaska*, 106 Nev. 49, 787 P.2d 382.
[37] *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239 (2009).

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

> States with fee-shifting rules or statutes similar to Nevada's have held they apply to appellate fees. Additionally, nothing in the language of NRCP 68 and NRS 17.115 suggests that their fee-shifting provisions cease 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.[38]

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

IV. St. Clair's Motion Was Timely.

No mention of time frames to file a motion is contained in NRS 18.010, leaving such a determination of timeliness to the district court's discretion.[41] Indeed, the Nevada Supreme Court has instructed that "[a]bsent 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."[42] In *Pickering*, the Court determined that it was proper for a party seeking attorney's fees to make such a request 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)."[43]

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[38] *Id.* (internal quotations omitted).
[39] 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000).
[40] NRS 18.010(2)(b).
[41] NRS 18.010; *see also Pickering*, 104 Nev. at 662, 765 P.2d at 182.
[42] *Pickering*, 104 Nev. at 662, 765 P.2d at 182.
[43] *Id.*

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

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

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[44] *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

Case No. CV 20,112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

Jason King, P.E., in his official capacity as the Nevada State Engineer, the Nevada Department of Conservation and Natural Resources, Division of Water Resources.

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Honorable Senior Judge Steven R. Kosach.

3. Identify each appellant and the name and address of counsel for each appellant:

a. The appellant is Jason King, P.E., in his official capacity as the Nevada State Engineer, the Nevada Department of Conservation and Natural Resources, Division of Water Resources (hereafter "State Engineer").

///

b. The attorneys for the State Engineer:

Adam Paul Laxalt, Attorney General
James N. Bolotin, Deputy Attorney General
Nevada Bar No. 13829
100 North Carson Street
Carson City, Nevada 89701-4717

4. Identify each respondent and the name and address of appellate counsel, if known, for each:

a. The respondent is Rodney St. Clair.

b. Upon information and belief, the following attorneys will represent Rodney St. Clair in the appeal:

Paul G. Taggart, Esq.
Nevada Bar No. 6136
Timothy D. O'Connor, Esq.
Nevada Bar No. 14098
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703

5. Indicate whether any attorney identified above in response to questions 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted the attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

The attorneys identified above in response to questions 3 and 4 are licensed to practice law in Nevada.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by the Office of the Attorney General before the district court.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant is represented by the Office of the Attorney General on appeal.

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8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Appellant did not seek leave to proceed in forma pauperis and was not granted leave to proceed in forma pauperis.

9. Indicate the date the proceedings commenced in the district court (*e.g.*, date complaint, indictment, information, or petition was filed):

A petition for judicial review of State Engineer Ruling 6287 was filed on August 22, 2014. The motion for attorneys' fees, at issue in this appeal, was served and filed on or about June 28, 2018.

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

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. That decision is being appealed by the State Engineer.

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11. Indicate whether the case has previously been subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

Yes, the underlying case on the merits was previously the subject of an appeal to the Supreme Court.

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellant, vs. RODNEY ST. CLAIR, Respondent, Supreme Court Case No. 70458.

12. Indicate whether this appeal involves child custody or visitation:

This appeal does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

Based upon the nature of the appeal, and the arguments that will be raised therein, this case does not involve the possibility of settlement.

AFFIRMATION

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

DATED this 5th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____
JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1231
Fax: (775) 684-1108
Email: JBolotin@ag.nv.gov
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 5th day of December, 2018, I served a true and correct copy of the foregoing CASE APPEAL STATEMENT, 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

Case No. CV 20,112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL

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 moves this Honorable Court, pursuant to NRCP 62(d), for an order staying execution of this Court's Order granting Petitioner's Motion for Attorneys' Fees pending appeal of that Order to the Nevada Supreme Court, on an order shortening time. This Motion is based upon the attached Points and Authorities and the pleadings and papers on file herein.

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POINTS AND AUTHORITIES

I. NOTICE OF MOTION

A hearing on this matter is respectfully requested prior to the deadline set in this Court's Order for the State Engineer to pay the judgment of Attorneys' Fees to Petitioner Rodney St. Clair ("St. Clair").

II. BACKGROUND

St. Clair served and filed his Motion for Attorneys' Fees on or about June 28, 2018. Following a complete briefing on this matter, the Court held a hearing on this matter on October 19, 2018. After taking oral argument from both sides, this Court ordered that St. Clair's Motion for Attorneys' fees be granted, requesting a proposed written order from counsel for St. Clair. Counsel for St. Clair submitted their proposed order on November 16, 2018. The written order was filed on November 26, 2018, and the Notice of Entry of Order was served on November 29, 2018.

Based on the arguments made to the District Court, the State Engineer is appealing this Court's ruling to the Nevada Supreme Court and has filed his Notice of Appeal concurrently with this Motion. As the State Engineer is seeking reversal of this Court's Order granting St. Clair's Motion for Attorneys' Fees, he now seeks a stay of this Court's Order pending the appeal.

III. DISCUSSION

Pursuant to NRCP 62(d), the government is not entitled to stay of a money judgment merely upon filing a notice of appeal; rather, the state government must move for a stay in the district court. *Clark Cnty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018) (*citing Nelson v. Heer*, 121 Nev. 832, 834 n.4, 122 P.3d 1252, 1253 n.4 (2005); *Public Serv. Comm'n v. First Jud. Dist. Ct.*, 94 Nev. 42, 45–46, 574 P.2d 272, 274 (1978)). Upon motion, as a secured party, the state government is generally entitled to a stay of a money judgment under NRCP 62(d) without posting a supersedeas bond or other security. *Id.*; NRCP 62(e). Thus, upon motion, the state government is generally entitled to an automatic stay of a

money judgment pending appeal, including those for attorney fees, without needing to post a supersedeas bond or other security. *Id.*

Concurrently with this Motion, the State Engineer, the administrator of the Nevada Division of Water Resources, a Nevada state agency, files a Notice of Appeal of this Court's Order granting St. Clair's Motion for Attorneys' Fees. Pursuant to NRCP 62(d), the State Engineer hereby requests a stay of this money judgment pending the instant appeal. As a state government party, and therefore a secured party, the State Engineer is not required to post a supersedeas bond or other security. NRCP 62(e). Just as the Nevada Supreme Court ruled that the governmental party in *Las Vegas Review-Journal* was entitled to a stay of the attorney fees judgment pending appeal, as of right, here the State Engineer is also entitled to the requested stay of the attorneys' fees judgment pending appeal, without the need to post a supersedeas bond or other security.

The State Engineer is entitled to this requested stay by law upon his filing of the instant Motion.

IV. CONCLUSION

Upon motion, state government appellants are entitled to a stay of a money judgment pending appeal, without needing to post a supersedeas bond or other security. Here, the State Engineer, a state government party, is appealing this Court's Order granting St. Clair's Motion for Attorneys' Fees, a money judgment. Thus, the State Engineer is entitled to this requested stay, and need not post a supersedeas bond or other security. Therefore, and based on the foregoing, the State Engineer respectfully requests that this Court grant this Motion for Stay of Attorneys' Fees Judgment Pending Appeal.

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AFFIRMATION

The undersigned does hereby affirm that the preceding Motion for Stay of Attorneys' Fees Judgment Pending Appeal does not contain the social security number of any person.

DATED this 5th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____

JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: JBolotin@ag.nv.gov
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 5th day of December, 2018, I served a true and correct copy of the foregoing MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL, 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

Case No. CV 20,112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

EX PARTE MOTION FOR ORDER SHORTENING TIME ON MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL

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 moves this Honorable Court for an ex parte order shortening the time for Petitioner Rodney St. Clair ("St. Clair") to respond to the State Engineer's Motion for Stay of Attorneys' Fees Judgment Pending Appeal. This Motion is made in good faith and is based upon the attached Points and Authorities and the pleadings and papers on file herein.

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POINTS AND AUTHORITIES

I. NOTICE OF MOTION

A hearing on this matter is not requested.

II. DISCUSSION

The State Engineer files this ex parte motion to ensure that his Motion for Stay of Attorneys' Fees Judgment Pending Appeal is heard before the thirty (30) day deadline for payment of the attorneys' fees judgment to St. Clair, and with enough time to request the same relief from the Nevada Supreme Court in the event this Court denies the requested stay. Out of an abundance of caution, the State Engineer respectfully requests an order shortening time for St. Clair to respond to the State Engineer's Motion for Stay to ensure the resolution of the Motion for Stay prior to the obligation to pay the attorneys' fees, defeating the purpose of the Motion for Stay.

Based on the foregoing, the State Engineer respectfully requests that the Court order that St. Clair has five (5) days to respond to the Motion for Stay. The State Engineer is prepared to file a reply brief, if at all, within two (2) days of the filing of any response, and prior to any hearing on the Motion for Stay. The State Engineer further requests that a hearing on the State Engineer's Motion for Stay be held prior to the December 31, 2018, deadline set in this Court's Order for the State Engineer to pay the judgment of Attorneys' Fees to St. Clair.

Although this Motion is filed ex parte, the undersigned counsel has provided a copy of this Motion to counsel for St. Clair via email, and notified opposing counsel that the State Engineer is seeking an order shortening time for the Motion for Stay.

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AFFIRMATION

The undersigned does hereby affirm that the preceding Ex Parte Motion for Order Shortening Time on Motion for Stay of Attorneys' Fees Judgment Pending Appeal does not contain the social security number of any person.

DATED this 5th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____
JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: JBolotin@ag.nv.gov
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 5th day of December, 2018, I served a true and correct copy of the foregoing EX PARTE MOTION FOR ORDER SHORTENING TIME ON MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL, 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

CASE NO.: CV 20, 112

DEPT. NO.: 2

FILED

DEC 0 7 2018

TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

NOTICE OF NON-OPPOSITION TO MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL

Taggart & Taggart, Ltd.
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(775)882-9900 ~ Telephone
(775)883-9900 ~ Facsimile

COMES NOW Petitioner RODNEY ST. CLAIR, by and through his counsel, PAUL G. TAGGART, ESQ. and TIMOTHY D. O'CONNOR, ESQ., of the law firm of TAGGART & TAGGART, LTD., to hereby notice this Court that he will not be opposing the Motion for Stay of Attorneys' Fees Judgment Pending Appeal filed in the above entitled action.

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JA 1144

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 12 day of December, 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 14th day of December, 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

Case No. CV 20,112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

[PROPOSED] ORDER GRANTING MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL

This matter comes before the Court on Respondent Jason King, P.E.'s, the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources ("State Engineer") Motion for Stay of Attorneys' Fees Judgment Pending Appeal. Having considered the arguments presented by both parties, the Court hereby grants the State Engineer's Motion. This Court's judgment awarding attorneys' fees to St. Clair in the amount of $50,025.00 is hereby STAYED pending further order from the appellate court of competent jurisdiction, pursuant to NRCP 62(d) and (e) and the Nevada Supreme Court's holding in *Clark County Office of Coroner/Medical Examiner v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16 (2018).

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I. BACKGROUND

St. Clair served and filed his Motion for Attorneys' Fees on or about June 28, 2018. Following a complete briefing on this matter, the Court held a hearing on this matter on October 19, 2018. After taking oral argument from both sides, this Court ordered that St. Clair's Motion for Attorneys' Fees be granted, requesting a proposed written order from counsel for St. Clair. Counsel for St. Clair submitted their proposed order on November 16, 2018. The written order was filed on November 26, 2018, and the Notice of Entry of Order was served on November 29, 2018.

The State Engineer is appealing this Court's ruling on St. Clair's Motion for Attorneys' Fees to the Nevada Supreme Court and has filed his Notice of Appeal concurrently with the instant Motion. As the State Engineer is seeking reversal of this Court's Order granting St. Clair's Motion for Attorneys' Fees, he now seeks a stay of this Court's Order pending the appeal. This Court hereby grants the State Engineer's Motion and imposes the requested stay of the attorneys' fees judgment pending the State Engineer's appeal.

II. DISCUSSION

Pursuant to NRCP 62(d), the government is not entitled to stay of a money judgment merely upon filing a notice of appeal; rather, the state government must move for a stay in the district court. *Clark Cnty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018) (*citing Nelson v. Heer*, 121 Nev. 832, 834 n.4, 122 P.3d 1252, 1253 n.4 (2005); *Public Serv. Comm'n v. First Jud. Dist. Ct.*, 94 Nev. 42, 45–46, 574 P.2d 272, 274 (1978)). Upon motion, as a secured party, the state government is generally entitled to a stay of a money judgment under NRCP 62(d) without posting a supersedeas bond or other security. *Id.*; NRCP 62(e). Thus, upon motion, the state government is generally entitled to an automatic stay of a money judgment pending appeal, including those for attorney fees, without needing to post a supersedeas bond or other security. *Id.*

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Concurrently with this Motion, the State Engineer, the administrator of the Nevada Division of Water Resources, a Nevada state agency, files a Notice of Appeal of this Court's Order granting St. Clair's Motion for Attorneys' Fees. Pursuant to NRCP 62(d), the State Engineer requests a stay of this Court's attorneys' fees judgment pending the instant appeal. As a state government party, and therefore a secured party, the State Engineer is not required to post a supersedeas bond or other security. NRCP 62(e). Just as the Nevada Supreme Court ruled that the governmental party in *Las Vegas Review-Journal* was entitled to a stay of the attorney fees judgment pending appeal, as of right, here the State Engineer is also entitled to the requested stay of the attorneys' fees judgment pending appeal, without the need to post a supersedeas bond or other security.

The State Engineer is entitled to this requested stay by law upon his filing of the instant Motion.

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III. CONCLUSION

IT IS HEREBY ORDERED that the State Engineer's Motion for Stay of Attorneys' Fees Judgment Pending Appeal is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that this Court's Order Granting St. Clair's Motion for Attorneys' Fees is **STAYED** during the pendency of the State Engineer's appeal, and the State Engineer need not post a supersedeas bond or other security. The State Engineer will not be required to pay the attorneys' fees judgment until and unless otherwise ordered by this Court or a Court of competent jurisdiction following the conclusion of the appeal.

IT IS SO ORDERED.

DATED this 11 day of December, 2018.

DISTRICT JUDGE

Submitted by:

ADAM PAUL LAXALT
Attorney General
JAMES N. BOLOTIN
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: JBolotin@ag.nv.gov

Case No. CV 20,112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL

TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, please take notice that an Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal was entered in the above-entitled matter on the 18th day of December, 2018. A copy of said Order is attached hereto as Exhibit 1.

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AFFIRMATION

The undersigned does hereby affirm that the preceding Notice of Entry of Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal does not contain the social security number of any person.

DATED this 24th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____

JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: jbolotin@ag.nv.gov
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 24th day of December, 2018, I served a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL, 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

Sherrie Connell
Sherrie A. Connell

INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal filed December 18, 2018	4

EXHIBIT 1

EXHIBIT 1

Case No. CV 20,112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

[PROPOSED] ORDER GRANTING MOTION FOR STAY OF ATTORNEYS' FEES JUDGMENT PENDING APPEAL

This matter comes before the Court on Respondent Jason King, P.E.'s, the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources ("State Engineer") Motion for Stay of Attorneys' Fees Judgment Pending Appeal. Having considered the arguments presented by both parties, the Court hereby grants the State Engineer's Motion. This Court's judgment awarding attorneys' fees to St. Clair in the amount of $50,025.00 is hereby STAYED pending further order from the appellate court of competent jurisdiction, pursuant to NRCP 62(d) and (e) and the Nevada Supreme Court's holding in *Clark County Office of Coroner/Medical Examiner v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16 (2018).

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I. BACKGROUND

St. Clair served and filed his Motion for Attorneys' Fees on or about June 28, 2018. Following a complete briefing on this matter, the Court held a hearing on this matter on October 19, 2018. After taking oral argument from both sides, this Court ordered that St. Clair's Motion for Attorneys' Fees be granted, requesting a proposed written order from counsel for St. Clair. Counsel for St. Clair submitted their proposed order on November 16, 2018. The written order was filed on November 26, 2018, and the Notice of Entry of Order was served on November 29, 2018.

The State Engineer is appealing this Court's ruling on St. Clair's Motion for Attorneys' Fees to the Nevada Supreme Court and has filed his Notice of Appeal concurrently with the instant Motion. As the State Engineer is seeking reversal of this Court's Order granting St. Clair's Motion for Attorneys' Fees, he now seeks a stay of this Court's Order pending the appeal. This Court hereby grants the State Engineer's Motion and imposes the requested stay of the attorneys' fees judgment pending the State Engineer's appeal.

II. DISCUSSION

Pursuant to NRCP 62(d), the government is not entitled to stay of a money judgment merely upon filing a notice of appeal; rather, the state government must move for a stay in the district court. *Clark Cnty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 134 Nev. Adv. Op. 24, 415 P.3d 16, 19 (2018) (*citing Nelson v. Heer*, 121 Nev. 832, 834 n.4, 122 P.3d 1252, 1253 n.4 (2005); *Public Serv. Comm'n v. First Jud. Dist. Ct.*, 94 Nev. 42, 45–46, 574 P.2d 272, 274 (1978)). Upon motion, as a secured party, the state government is generally entitled to a stay of a money judgment under NRCP 62(d) without posting a supersedeas bond or other security. *Id.*; NRCP 62(e). Thus, upon motion, the state government is generally entitled to an automatic stay of a money judgment pending appeal, including those for attorney fees, without needing to post a supersedeas bond or other security. *Id.*

///

Concurrently with this Motion, the State Engineer, the administrator of the Nevada Division of Water Resources, a Nevada state agency, files a Notice of Appeal of this Court's Order granting St. Clair's Motion for Attorneys' Fees. Pursuant to NRCP 62(d), the State Engineer requests a stay of this Court's attorneys' fees judgment pending the instant appeal. As a state government party, and therefore a secured party, the State Engineer is not required to post a supersedeas bond or other security. NRCP 62(e). Just as the Nevada Supreme Court ruled that the governmental party in *Las Vegas Review-Journal* was entitled to a stay of the attorney fees judgment pending appeal, as of right, here the State Engineer is also entitled to the requested stay of the attorneys' fees judgment pending appeal, without the need to post a supersedeas bond or other security.

The State Engineer is entitled to this requested stay by law upon his filing of the instant Motion.

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III. CONCLUSION

IT IS HEREBY ORDERED that the State Engineer's Motion for Stay of Attorneys' Fees Judgment Pending Appeal is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that this Court's Order Granting St. Clair's Motion for Attorneys' Fees is **STAYED** during the pendency of the State Engineer's appeal, and the State Engineer need not post a supersedeas bond or other security. The State Engineer will not be required to pay the attorneys' fees judgment until and unless otherwise ordered by this Court or a Court of competent jurisdiction following the conclusion of the appeal.

IT IS SO ORDERED.

DATED this 11 day of December, 2018.

DISTRICT JUDGE

Submitted by:

ADAM PAUL LAXALT
Attorney General
JAMES N. BOLOTIN
Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: JBolotin@ag.nv.gov

Case No. CV 20,112

Dept. No. 2 3

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.

REQUEST FOR TRANSCRIPT OF PROCEEDINGS

TO: Susan Kiger
Capitol Reporters
123 West Nye Lane, Suite 107
Carson City, Nevada 89706

Pursuant to NRAP 9, Appellant, 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 requests preparation of the transcript of the proceeding before the District Court as follows:

1. The name of the judge who heard the proceeding was the Honorable Steven R. Kosach;

2. The Hearing on Rodney St. Clair's Motion for Attorneys' Fees was held on October 19, 2018;

3. The entire transcript of the Hearing is requested;

4. Two (2) copies of the entire transcript were requested; and

5. I hereby certify that on October 22, 2018, my purchase order was approved and, thereafter, I ordered the transcript from Ms. Kiger. No deposit was requested at that time. I received the certified copies of the entire transcript of the Hearing on December 3, 2018. Per discussions with opposing counsel, opposing counsel has also received a copy of the transcript. However, counsel is unsure if the entire transcript of the Hearing has been filed with the District Court as of this date, and therefore submits this Request out of an abundance of caution.

AFFIRMATION

The undersigned does hereby affirm that the preceding Request for Transcript of Proceedings does not contain the social security number of any person.

DATED this 31st day of December, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____
JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
T: (775) 684-1231
E: jbolotin@ag.nv.gov
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 31st day of December, 2018, I served a true and correct copy of the foregoing REQUEST FOR TRANSCRIPT OF PROCEEDINGS, 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

Dorene A. Wright

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

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

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

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

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

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

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

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

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

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

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

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

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

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100 North Carson Street
Carson City, Nevada 89701-4717

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

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

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

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

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
Opposition to the Request for Judicial Notice			
Senior Partner	4.25	$ 325.00	$ 1,381.25
Associate Attorney	4	$ 175.00	$ 700.00
Paralegal	4.25	$ 120.00	$ 510.00
SUBTOTAL			**$ 2,591.25**

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

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

III. CONCLUSION

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

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

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

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 13th day of July, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____

JAMES N. BOLOTIN
Deputy Attorney General
Nevada Bar No. 13829
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1231
Fax: (775) 684-1108
Email: JBolotin@ag.nv.gov
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 13th 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

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

CASE NO.: CV 20, 112

DEPT. NO.: 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
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COMES NOW, Petitioner, RODNEY ST. CLAIR ("St. Clair"), by and through his counsel of record, PAUL G. TAGGART, ESQ. and TIMOTHY D. O'CONNOR, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby respectfully submits his Reply in Support of Motion for Attorneys' Fees. This reply is based on the attached Memorandum of Points and Authorities, all 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"[1] 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.[2]

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[1] *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).
[2] NRS 233B.130(12).

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Unlike NRS 233B, NRS 533.450 does not contain any "exclusive remedy" language, and therefore this argument fails.

Last, the State Engineer's argument that St. Clair's Motion for Attorneys' Fees ("Motion") is untimely fails because the Nevada Supreme Court has found that "the timeliness of such requests, we conclude, is a matter left to the discretion of the trial court"[3] as NRS 18.010 contains no provisions of deadlines. St. Clair filed his Motion within a reasonable time and therefore it is within the Court's discretion.

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

ARGUMENT

I. Attorneys' Fees Are Permitted Under NRS 18.010(2)(b).

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.

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

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[3] *Farmers Ins. Exchange v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988).
[4] *Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.
[5] NRS 533.450(8).
[6] NRS 18.010(2)(b).

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

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

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

2. The State Engineer's opposition to St. Clair's request for judicial notice was groundless.

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

3. The State Engineer's objection to St. Clair's proposed order was groundless.

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[7] Opening Brief at 5-8.
[8] *See Bobby Berosini, Ltd.*, 114 Nev. at 1354, 971 P.2d at 387.
[9] April 22, 2016, Order Overruling State Engineer's Ruling 6287, CV 20, 112, at 12:13-14.
[10] *King v. St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d 314, 317 (2018).
[11] *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)).

After St. Clair prevailed at the district court, the district court ordered St. Clair to draft a proposed order for review. Requesting draft orders from the prevailing party is a "common practice for Clark County district courts."[12] Nevertheless, the State Engineer objected to the Court's adoption of St. Clair's draft order. The parties returned to the district court for another hearing, in which the district court found the State Engineer's arguments unpersuasive.[13]

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

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

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[12] *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.")).

[13] *Id.*

[14] *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 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) ("[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 of the stability and security of the right to the continued use of such water.").

[15] *Id.*

[16] *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d at 317.

[17] *See* NRAP 38.

[18] NRS 18.010(2)(b) (emphasis added).

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

The State Engineer argues that the Court cannot "imply provisions not expressly included in the legislative scheme."[19] The State Engineer cites to NRS 533.450(7), which states that "[*c*]*osts* must be paid as in civil cases brought in the district court, except by the State Engineer or the State."[20] However, costs and attorneys' fees are different.

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

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

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

[19] Opposition to Motion for Attorneys' Fees at 7:2-4.
[20] NRS 533.450(7) (emphasis added).
[21] *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).
[22] *Id.* (*quoting Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920)).
[23] Opposition to Motion for Attorneys' Fees at 7:20-22 (emphasis added).

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

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

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

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

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

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

[24] Opposition to Motion for Attorneys' Fees at 9:14-15.
[25] *Id.* at 2:19-25.
[26] *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990).
[27] Opposition to Motion for Attorneys' Fees at 6:21-25.

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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.[28] The Nevada Supreme Court found that NRS 233B.130(6) states that "the provisions of this chapter are the *exclusive* means of judicial review . . ."[29] Ultimately, the Nevada Supreme Court found that that *exclusive* language prohibited the attorneys' fees from being levied.[30]

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.[31] 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).[32] 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."[33] As such, district courts have discretion to determine "[w]hether a motion for attorney's fees is timely."[34]

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)."[35] Here, St. Clair was also diligent in seeking his fees upon completion of the appellate process. St. Clair filed his Motion

[28] *State, Dep't of Human Resources, Welfare Division v. Fowler*, 109 Nev. 782, 858 P.2d 375 (1993).
[29] *Id.*, 109 Nev. at 785, 858 P.2d at 377 (emphasis added).
[30] *Id.*, 109 Nev. 782, 858 P.2d 375.
[31] NRS 533.450(7).
[32] NRS 18.010(2)(b).
[33] *Pickering*, 104 Nev. 662, 765 P.2d 182.
[34] *Davidsohn v. Steffens*, 112 Nev. 136, 139, 911 P.2d 855, 857 (1996).
[35] *Pickering*, 104 Nev. at 662, 765 P.2d at 182.

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

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

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

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

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[36] *Id.*
[37] Opposition to Motion for Attorneys' Fees at 4-6.
[38] NRCP 54(d)(2)(b) (emphasis added).
[39] *Pickering*, 104 Nev. 662, 765 P.2d at 182.
[40] NRS 18.010(2)(b).
[41] *Pickering*, 104 Nev. 660, 765 P.2d 181.

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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 25 day of July, 2018.

TAGGART & TAGGART, LTD.
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By: _____
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
TIMOTHY D. O'CONNOR, ESQ.
Nevada State Bar No. 14098
Attorneys for Petitioner

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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.

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EXHIBIT INDEX

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

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CASE NO.: CV 20, 112

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IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

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RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

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STATE OF NEVADA)
):ss.
COUNTY OF CARSON CITY)

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

1. I am over the age of eighteen (18) and of sound mind.

2. I am making this affidavit in support of Petitioner's Notice of Motion and Motion for Attorneys' Fees filed in the above entitled action.

3. I am an attorney of record for Petitioner, RODNEY ST. CLAIR, and have, along with other members of TAGGART & TAGGART, LTD., at all relevant times, provided valuable and necessary services on behalf of RODNEY ST. CLAIR for which he is requesting compensation.

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

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

Senior Partner hourly rate:	$325.00
Associate Attorney hourly rate:	$150.00-175.00
Paralegal hourly rate:	$120.00

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

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

Senior Partner Attorney time:	4.5 hours
Associate Attorney time:	4 hours
Paralegal time:	4.25 hours

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

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

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

Senior Partner Attorney time:	42.25 hours
Associate Attorney time:	111.85 hours
Paralegal time:	57 hours

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 20 day of July, 2018.

TIMOTHY D. O'CONNOR, ESQ.

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

NOTARY PUBLIC

TAMARA C. THIEL
STATE OF NEVADA
NOTARY PUBLIC
APPT. NO. 03-83917-2
MY APPT. EXPIRES 09-10-2019

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IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

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RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

REQUEST FOR SUBMISSION

Taggart & Taggart, Ltd.
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COMES NOW, Petitioner, RODNEY ST. CLAIR ("St. Clair"), by and through his counsel of record, PAUL G. TAGGART, ESQ. and TIMOTHY D. O'CONNOR, ESQ., of the law firm of TAGGART & TAGGART, LTD., and hereby respectfully requests that his July 2, 2018, Motion for Attorneys' Fees ("Motion") be submitted to this Court for decision. All parties have fully briefed the Motion. A proposed order is attached hereto as Exhibit 1.

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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 23 day of July, 2018.

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

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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 23rd day of July, 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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1.	[Proposed] Order Granting Motion for Attorneys' Fees	2

Taggart & Taggart, Ltd.
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EXHIBIT 1

EXHIBIT 1

CASE NO.: CV 20, 112

DEPT. NO.: 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

ORDER GRANTING MOTION FOR ATTORNEYS' FEES

THIS MATTER comes before the Court on Petitioner RODNEY ST. CLAIR's ("St. Clair") July 2, 2018, Motion for Attorneys' Fees. Respondent, Jason King, P.E. Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES ("State Engineer") filed his Opposition to Motion for Attorneys' Fees on July 16, 2018. St. Clair filed his Reply in Support of Motion for Attorneys' Fees on July 23, 2018. Having considered the arguments contained therein, the Court hereby finds the following:

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.

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 $41,881.25.

IT IS HEREBY FURTHER ORDERED that the State Engineer shall forward the amount of $41,881.25 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.

IT IS SO ORDERED.

DATED this _____ day of _____, 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: _____
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
TIMOTHY D. O'CONNOR, ESQ.
Nevada State Bar No. 14098
Attorneys for Petitioner

MEMO AS TO COURT DATE

SENIOR JUDGE, STEVE KOSACH
WINNEMUCCA, HUMBOLDT COUNTY

08/09/18

Case #: CV-0020112 Department: 30

Date Filed: 08/22/14

Case Type: OTHRSP OTHER SPECIAL PROCEEDINGS

Title/Caption:
Rodney St. Clair
vs.
Jason King P.E., et al.

OFFICE OF THE ATTORNEY GENERAL
CARSON CITY, NEVADA

AUG 14 2018

BUREAU OF GOVERNMENT AFFAIRS
GNR/BL/APPELLATE

Comment: ORDER OF RECUSAL FROM DEPT 2

Plaintiff(s): Name	Attorney Name
ST. CLAIR, RODNEY	TAGGART, PAUL G.

Def/Juvie(s): Name	Attorney Name
KING, JASON	ATTORNEY GENERAL
	CAVIGLIA, JUSTINA A.
DIVISION OF WATER RESOURCES	ATTORNEY GENERAL
DEPARTMENT OF CONSERVATION	ATTORNEY GENERAL

Hearings:

Date	Time	Event	Reference
		ORAL ARGUMENTS - CONT'D	K/MF/RW8/12
11/03/15	3:00	CONT'D ORAL ARGUMENTS	K/J/P10/20
1/05/16	10:00	CONT'D ORAL ARGUMENTS (CARSON CITY)	ORD 1/4/16
*10/19/18	9:00	MOTIONS HEARING (CARSON CITY)	CT 8/3/18

* Carson City Dist. Court - 3rd Floor Specialty Court

Cc: Judge Kosach - Paul Taggart - Attorney General

Run: 08/09/18 08:29:20 Daily Court Calendar
FRI 10/19/18
HUMBOLDT County Dept: 30 Honorable STEVEN KOSACH Presiding

Time	Case No.	Name of Case: Rodney St. Clair vs. Jason King P.E., et al.
9:00	CV-0020112 Dept # 30	

Plts Attorney	Dfts Attorney Or Appearance
TAGGART, PAUL G.	ATTORNEY GENERAL

Purpose of Hearing: MOTIONS HEARING (CARSON CITY)

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.	Case No. CV 20, 112 Dept. No. 2

Motion for Attorneys' Fees

October 19, 2018

Review of Facts

- Mr. St. Clair was required to either spend tens of thousands of dollars, or wrongfully lose his property to the State.
- State Engineer was not instituting unclear law, or new law, improperly.
- State Engineer was blatantly wrong on a clear law, which he had implemented correctly numerous times, and Mr. St. Clair had to foot the bill.

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Review of Facts

- Mr. St. Clair was made to pay for:
  - State Engineer's incorrect implementation of abandonment law
  - State Engineer's efforts at the district court level through untimely and improper motion practice
  - State Engineer's unfounded objections to a common Court request for Mr. St. Clair to draft the order after he was successful at district court
  - State Engineer's decision to appeal an otherwise clear law to the NV Supreme Court, when no policy reasons supported the appeal.

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Review of Facts

- St. Clair owns real property in Humboldt County
- Filed a vested claim for water rights on that property, and later filed a change application to move that water so he could beneficially use the water.
- State Engineer agreed that vested right was valid.

Review of Facts

- On July 25, 2014, State Engineer issued Ruling 6287 on the change application, and declared St. Clair's vested water right abandoned.
  - No hearing was held for St. Clair to clarify use or law before the State Engineer.
- On August 22, 2014, St. Clair filed his Petition for Judicial Review before this Court.
- On July 3, 2015, St. Clair filed a Request for Judicial Notice for review of previous legal brief and State Engineer decisions regarding abandonment.
- State Engineer did not timely object to the RJN, and filed a late objection on November 17, 2015 – five months late without any permission from Court.

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Review of Facts

- After further argument and briefing, District Court granted St. Clair's PJR.
  - Court found that the State Engineer did not have evidence of abandonment.
  - Court found that "this is not a difficult decision for a court to make based on what was presented." *Hearing Transcript*, p. 82:15-20.
- St. Clair, as the prevailing party, was asked to draft the proposed order.
  - St. Clair worked with the State Engineer to draft the proposed order.
  - When the parties reached a point of nonagreement, both proposed orders were submitted to the court.
  - State Engineer was aware of both orders being submitted.
  - Proposed Order was filed on March 7, 2018.
- Given the evidence presented and the Court's decision, this should have been the end of the matter.

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Review of Facts

- On March 18, 2016, State Engineer filed a formal objection to proposed order.
  - 78 pages, 6 exhibits
  - St. Clair was required to respond to the objection.
- Oral argument was again held on these issues, on April 11, 2016.
  - Court Signed the Proposed Order as written. Hr. Tr. At 34:6-10.
  - Found that the Proposed Order was accurate.

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Review of Facts

- On State Engineer appealed that matter to the Nevada Supreme Court on May 20, 2018.
- Supreme Court affirmed the District Court's order and processes of having St. Clair draft the Proposed Order.
- NV Supreme Court found that:
  - There was no evidence of intent to abandon, a requirement for an abandonment claim.
  - The State Engineer "presume[ed] abandonment based on nonuse evidence alone." *St. Clair*, 134 Nev. Adv. Op. 18 at 8.
  - The State Engineer "filed five months after St. Clair's Request for Judicial Notice" and therefore was unable to object. Id.
  - District Court did not "neglect[ ] its duty to make factual findings" regarding the Proposed Order. *Id*.

JA 916

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Review of Facts

- St. Clair spent tens of thousands of dollars litigating these issues that were not ambiguous.
- St. Clair is the only party left holding the bag for the State Engineer's egregious errors of law.
- Meritless and untimely motions filed by the State Engineer, for no valuable public policy, have only driven the costs up.
- Water users should not be required to "pay to play" against the State Engineer.
  - Uneven playing field
  - Trying to correct an injustice

Standard of Review

- Practice in civil cases applies to judicial reviews from a State Engineer decision. NRS 533.450(8).
- NRS 18.010(2)(b) authorizes a district court to award attorney's fees where the opposing party has advanced claims that are "brought or maintained without reasonable ground."
  - "Without regard to the recovery sought…"
  - "It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph . . . to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." NRS 18.010(2)(b).
  - A District Court "shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." *Id*.

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Standard of Review

- What is not applicable in this case:
  - 233B provisions, which specifically limit the awards an applicant can get when appealing through 233B.
    - No such limitations for claims under 533
    - The Rules of Civil Procedure are not applicable to 233B appeals
    - The State Engineer is not subject to 233B
  - NRCP 54(d)(2)(b), who's time bar is only applicable absent other statutes
  - NRS 18.010(2)(a) and NRS 18.010(1), which are different, have different factors, and require different analysis from the Court.
  - Case law interpreting NRS 18.010(2)(a) equally as irrelevant.
  - NRAP 38, which was not requested and does not apply
  - NRS 533.450(7) which limits *costs* only against the State Engineer.

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The State Engineer maintained a groundless claim of abandonment.

- Under NRS 18.010(2)(b)'s plain language, attorneys' fees are available when State Engineer maintains claim without reasonable grounds.
  - "Pursuant to NRS 18.010(2)(b), a claim is groundless if the allegations in the complaint . . . are not supported by any credible evidence at trial." *Bobby Berosini, Ltd.*, 114 Nev. at 1354.
  - A District Court "shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." NRS 18.010(2)(b).
  - "Without regard to recovery sought..." *Id*; see also *Alaska Key Bank*

The State Engineer maintained a groundless claim of abandonment.

- No evidence whatsoever put forth by the State Engineer to support its claim for abandonment
  - District Court – "The State Engineer's determination of abandonment regarding [the vested water right] was based only on evidence of non-use." Order at 12:13-14.
  - NV Supreme Court – "Nevada law does not presume abandonment of a water right from nonuse alone." *King v. St. Clair* at 6.
  - NV Supreme Court – "We find no such evidence in the record" to support abandonment. Id. at 7.
  - NV Supreme Court – "The State Engineer misapplied Nevada law by presuming abandonment on *nonuse evidence alone*." Id. at 8.
- State Engineer put forth no evidence whatsoever to support a claim of abandonment. Meets the test from *Bobby Berosini*.

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The State Engineer maintained a groundless claim of abandonment.

- No evidence supported the State Engineer's claim, thus the claim was groundless under Nevada law.
- Attorney's fees for the Supreme Court litigation totaled $37,361.25.
- St. Clair should not be left to fund this bill to correct the State Engineer's clear error.

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State Engineer' s opposition to St. Clair's request for judicial notice was groundless

- DCR 13(3) and common civil practice requires oppositions to be filed "within 10 days after service of the motion."
- On June 2, 2015, St. Clair requested that the Court take notice of State Engineer documents and public records.
- State Engineer did not file an opposition until five months later, on November 17, 2015.
- The State Engineer's late opposition was groundless as it was grossly untimely, and was not filed with leave of court.
- St. Clair had to expend attorney's fees to respond and argue these groundless issues before the Court.

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State Engineer' s opposition to St. Clair's request for judicial notice was groundless

- State Engineer, without leave of court, filed his opposition five months late.
- St. Clair spent $2,672.50 responding
- State Engineer should be required to pay for these attorney's fees, as it's opposition was unreasonably maintained.

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State Engineer' s opposition to St. Clair's Proposed Order was groundless.

- Common for all Clark County courts. EDCR 1.9(a)(5)
- The Court requested that St. Clair draft the Proposed Order
  - Both parties worked on the order
  - Two orders were submitted due to disagreement
  - The Court found that St. Clair's order was proper
- District Court even granted a hearing to consider the State Engineer's issues, but found St. Clair's order was accurate.

State Engineer' s opposition to St. Clair's Proposed Order was groundless.

- Despite the Court's hearing on the issue, the State Engineer again brought the issue up before the Supreme Court.
- "It is common practice for Clark County district courts to direct the prevailing party to draft the court's order." St. Clair at 4.
- Groundless claims against common practice again increased costs of litigation that only affects St. Clair.

State Engineer' s opposition to St. Clair's Proposed Order was groundless.

- The State Engineer's objection to the proposed order was unreasonable, and did not merit further argument.
- St. Clair spent $1,847.50 to respond to the State Engineer's meritless objection.

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The Policy Implications

- Law was clear prior to the State Engineer's abandonment claims.
  - Courts had clearly outlined the abandonment law.
  - State Engineer had correctly implemented the law in the past.
- State Engineer should not have maintained the case after the District Court gave its opinion.
- State Engineer filed two groundless objections that cost St. Clair attorney's fees.
- State Engineer has the ability to lean on Attorney General, costing them nothing.
- St. Clair has paid tens of thousands in attorney's fees to maintain his vested right.

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The State Engineer's defenses are irrelevant or incorrect.

- State Engineer erroneously argued that NRCP 54(d)(2)(b) prohibits St. Clair's Motion.
  - "*Unless a statue provides otherwise*, the motion must be filed no later than 20 days after notice of entry of judgment."
  - Here, we have a statute that provides otherwise.
- NRS 18.010(2)(b) has no hard deadline, as explained by the NV Supreme Court.
  - The statute "provides no time limits for motions for attorney's fees. Absent a specific statutory provision . . . the timeliness is a matter left to the discretion of the trial court." Pickering, 104 Nev. 662.
  - *Pickering* - diligence after the appellate process, no prejudice
  - Here, St. Clair only waited 2 months, which was spent researching question of attorney's fees

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The State Engineer's defenses are irrelevant or incorrect.

- State Engineer argued that 233B and case laws interpreting those appeals prohibit an award of attorney's fees.
  - Each case relied on by the State Engineer relies on specific language found in 233B that does not exist in 533.
    - Unique 233B provisions specifically limit the awards an applicant can get when appealing through 233B. *State, Dept. of Human Resources*, 109 Nev. At 785.
    - Courts have found that express language limits the ability to give attorney's fees.
    - "Provisions of [233B] are the exclusive means of judicial review."
  - The "practice in civil cases" are not applicable to 233B appeals like appeals from the State Engineer decisions
  - The State Engineer recognizes he is specifically exempt from 233B. Opposition at 7 ft. 3.
- Any argument that 233B somehow limits statutes applicable to this appeal is erroneous.

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The State Engineer's defenses are irrelevant or incorrect.

- State Engineer argued that limitations on NRS 18.010(2)(a) should also limit NRS 18.010(2)(b).
  - St. Clair requested attorney's fees under NRS 18.010(2)(b)
  - State Engineer cited cases under NRS 18.010(2)(a), which has different factors and different requirements
  - Monetary award requirements are not applicable under NRS 18.010(2)(b)
    - Plain language of statute is clear
    - Intent is clear
    - Supreme Court has stated that subsection (b) does not require monetary judgment to award attorney's fees. *Alaska Key Bank*

The State Engineer's defenses are irrelevant or incorrect.

- State Engineer argued that NRS 533.450(7), which limits *costs*, prohibits a grant of fees.
  - NV Supreme Court has long held that statutory construction rules demand "the mention of one thing implies the exclusion of another." *Rural Telephone Co.* 133 Nev. Adv. Op 53 at 5.
  - NV Supreme Court stated "it is fair to assume that, when the legislature enumerates certain instances in which an act may be done. . . It names all that it contemplates." *Id.*
- State Engineer conceded that "it is significant that NRS 533.450 does not include a provision for awarding attorneys fees, but includes a provision regarding the recovery of costs." Opposition at 7:20-22
- Different from ignoring costs and fees. Specific immunities cannot be expanded.

The State Engineer's defenses are irrelevant or incorrect.

- Here, there is a limit on recovery of costs, not attorneys fees, under NRS 533.450(7).
- Under basic statutory construction, the mentioning of a limit for costs implies there is no limit on attorney's fees.
- Opposite of the State Engineer's argument, the inclusion of one immunity signifies the exclusion of other immunities.
- Difference between the State Engineer's cited cases and this case is that those cases include no discussion of fees or costs.
  - Here, we have a specific consideration of immunity for costs.
  - Thus, no immunity for fees can be presumed.
  - Taking the legislature's intent to define NRS 18.010 liberally, that statute applies to this matter.

The State Engineer's defenses are irrelevant or incorrect.

- State Engineer argued that NRAP 38 requires a frivolous case to be awarded attorney's fees.
  - NRAP 38, which was not requested and does not apply.
  - NRAP 38 is *sua sponte* through a court for frivolous appeals, or abuse of process.
  - NRAP 38 is not the vehicle for groundless cases maintained absent evidence.
  - NRS 18.010(2)(b) is "in addition to the cases where an allowance is authorized by specific statute" and therefore stands alone.

Conclusion

- Practice in civil cases apply
  - NRS 18.010(2)(b) allows for attorneys fees for groundless claims
  - The State Engineer provided no evidence to support a finding of abandonment
  - State Engineer's untimely motion was groundless and denied.
  - State Engineer's objection to the proposed order was meritless.
- The State Engineer has not put forth any convincing arguments against the district court's ability to grant attorney's fees.
  - State Engineer's arguments regarding procedural inadequacies are meritless.
  - The State Engineer did not argue any basis for not awarding these fees.
- St. Clair should not be required to bear the burden of the appeal to correct the State Engineer alone.

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Conclusion

- St. Clair is requesting a total of $41,881.25 for the fees incurred during the groundless litigation, and fighting the meritless objections.
  - $37,361.25 on Supreme Court litigation
  - $2,672.50 on untimely opposition to RJN
  - $1,847.50 on meritless objection to the Proposed Order

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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 Petitioner's Motion for Attorneys' Fees
James N. Bolotin, Deputy Attorney General, on behalf of the State Engineer

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF HUMBOLDT
Case Number CV 20, 112

October 19, 2018 – Carson City Dist. Court, 3rd Floor Specialty Court

St. Clair's Motion Should Be Denied

Nevada follows the American Rule for attorney fees:

"[A]ttorney fees may not be awarded absent a statute, rule, or contract authorizing such award."

- *Thomas v. City of North Las Vegas*, 122 Nev. 82, 91, 127 P.3d 1057, 1063 (2006)

St. Clair's Motion Should Be Denied

- Untimely
- Lacks legal foundation
- Unwarranted
- This Court lacks authority to award fees incurred on appeal

BACKGROUND

Background

July 25, 2014

State Engineer issued Ruling No. 6287:

Declared Proof of Appropriation V-010493 Abandoned; and

Denied change Application No. 83246T,

filed by Rodney and Virginia St. Clair:

- no unappropriated water available under the water right, due to abandonment
- granting a change application on an abandoned right was detrimental to public interest

SE ROA at 4 – 10

Background

August 21, 2014

Rodney St. Clair (hereafter "St. Clair")

filed Petition for Judicial Review

Seeking reversal of State Engineer's Ruling No. 6287

Background

February 27, 2015

Petition was fully briefed

January 5, 2016

Court held oral arguments on the Petition

Background

April 22, 2016

The Court signed the Order, affirming in part and reversing in part Ruling No. 6287

- Affirmed finding that St. Clair had a vested water right under V-010493
- Overruled finding of abandonment, and Ordered State Engineer to grant Application No. 83246T

Background

April 29, 2016

Petitioner filed Notice of Entry of Order Overruling State Engineer's Ruling 6287

May 23, 2016

State Engineer filed Notice of Appeal, appealing the Court's Order to the Nevada Supreme Court

Background

March 9, 2017

Matter fully briefed at Nevada Supreme Court

November 7, 2017

Oral argument held at Nevada Supreme Court

Background

March 29, 2018

Nevada Supreme Court issued its Opinion, affirming this Court's decision

May 4, 2018

Remittitur filed

June 28, 2018

St. Clair filed Motion for Attorneys' Fees with this Court

St. Clair's Motion is Untimely

NRCP 54(d): Attorney Fees (emphasis added)

(2)(B) Unless a statute provides otherwise, the motion **must** be filed no later than 20 days after notice of entry of judgment is served…

The time for filing the motion may not be extended by the court after it has expired

St. Clair's Motion is Untimely

NRCP 54(d): Attorney Fees

(2)(A) A claim for attorney fees must be made by motion. The district court may decide the motion despite the existence of a pending appeal from the underlying final judgment.

St. Clair's Motion is Untimely

Only exception to NRCP 54(d)(2)(B)'s 20-day rule:

NRCP 54(d)(2)(C)

Claims for fees and expenses as sanctions pursuant to a rule or statute, or when the applicable substantive law required attorney fees to be proved at trial as an element of damages

St. Clair's Motion is Untimely

There is no calculation of time whereby St. Clair's Motion is timely

Notice of Entry of District Court's Order: April 27, 2016

+

NRCP 54(d)(2)(B): Motion for Fees must be filed within 20 days, or by **May 17, 2016**

St. Clair's Motion for Attorneys' Fees: Served on **June 28, 2018**

OVER TWO YEARS PAST THE DEADLINE!

St. Clair's Motion is Untimely

State Engineer's Appeal did not toll the deadline

NRCP 54(d)(2)(A): Motions for Fees may be decided despite existence of pending appeal

Plus, State Engineer's Notice of Appeal was filed on May 23, 2016

Therefore, *after* St. Clair's 20-day deadline had run

St. Clair's Motion is Untimely

Time to file did not start to run following the Supreme Court proceedings

Party not entitled to fees on appeal absent a showing of frivolity

- NRAP 38

District Court lacks authority to award attorneys' fees incurred on appeal

- *Bd. of Gallery of history, Inc. v. Datecs Corp.*, 116 nev. 286, 288, 994 P.2d 1149, 1150 (2000). (more on this later)

St. Clair's Motion is Untimely

Time to file did not start to run following the Supreme Court Proceedings

Assuming that it did, *arguendo*, St. Clair's Motion is <u>still</u> untimely

Remittitur filed May 4, 2018

St. Clair's Motion filed June 28, 2018

<u>More than 50 days after the remittitur!</u>

St. Clair's Motion is Untimely

St. Clair's Reply cites:

Farmers Ins. Exchange v. Pickering, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988) for proposition that:

"timeliness of [attorney fee motions]… is a matter left to discretion of the trial court." *See* Reply, p. 3; and

State, Dep't of Human Resources, Welfare Division v. Fowler, 109 Nev. 782, 858 P.2d 375 (1993) for the proposition that there is "no deadline for filing a motion for attorneys' fees" under NRS 18.010(2)(b)." *See* Reply, p. 8.

This ignores the fact that NRCP 54 was amended in 2008 to codify the 20-day deadline

St. Clair's Motion is Untimely

On July 8, 2008, the Supreme Court, in ADKT No. 426, issued its Order Amending Nevada Rule of Civil Procedure 54.

See Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426 (Nev. July 8, 2008)

Therein, the Supreme Court expressly codified the holding of *Collins v. Murphy*, 113 Nev. 1380, 1384, 951 P.2d 598, 601 (1997), **requiring a motion for attorney's fees to be filed *before* the deadline for an appeal**.

St. Clair's Motion is Untimely

In ADKT No. 426, the Supreme Court expressly stated:

[I]t appears that codification of this court's holding in *Collins* in the form of a rule will result in broader awareness of the timing requirement for attorney fees motions, as well as more uniform application of the requirement" and therefore "amendment of the Nevada Rules of Civil Procedure is warranted.

See Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426 (Nev. July 8, 2008)

St. Clair's Motion is Untimely

As a result, NRCP 54(d) was added to the Nevada Rules of Civil Procedure, including the requirement that a motion for attorney fees "must be filed no later than 20 days after notice of entry of judgment is served."

See Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426, (Nev. July 8, 2008)*

*After being advised that the July 8, 2008, order amending NRCP 54 was in conflict with NRS 2.120(2), as it was made effective thirty (30) days after entry of the order rather than the required sixty (60) days after entry of the order, on February 6, 2008, the Supreme Court vacated the July 8, 2008, order in ADKT No. 426, and issued an order with the same amendment to NRCP 54, with an effective date of May 1, 2009.

See Order Amending Nevada Rule of Civil Procedure 54, ADKT No. 426, (Nev. Feb. 6, 2009)

St. Clair's Motion is Untimely

Therefore, the 1988 case of *Farmers Ins. Exchange*, that St. Clair cites for proposition that timeliness of attorney fees motions is left to the discretion of the trial court, and the 1993 case of *Fowler*, that St. Clair cites for the proposition that there is no deadline . . .

have been clearly overruled by the Nevada Supreme Court through its amendments in 2008/09 expressly codifying the 20-day deadline now found at NRCP 54(d)(2)(B)

St. Clair's Motion is Untimely

While *Farmers Ins. Exchange*, in 1988, found the absence of a "specific statutory provision governing the time frame in which a party must request attorney's fees"

104 Nev. 662, 765 P.2d 182.

This "specific statutory provision" now exists, and has since 2008/09, via ADKT No. 426, codified as NRCP 54(d)(2)(B)

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellant, vs. RODNEY ST. CLAIR, Respondent.	Case No. 77651

JOINT APPENDIX

VOLUME IV of V
(JA 721–960)

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Attorneys for Respondents

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
11/16/18	Affidavit of Timothy O'Connor in Support of Motion for Attorneys' Fees	V	1077–1079
12/06/18	Case Appeal Statement	V	1132–1136
12/06/18	Ex Parte Motion for Order Shortening Time on Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1141–1143
12/09/16	Joint Appendix, Volume I of II (JT APP 001–556), *Jason King v. St. Clair*, Case No. 70458	I–III	1–560
12/09/16	Joint Appendix, Volume II of II (JT APP 557–844), *Jason King v. St. Clair*, Case No. 70458	III–IV	561–852
08/09/18	Memo as to Court Date (Hearing set for 10/19/18)	IV	907–908
12/06/18	Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1137–1140
12/06/18	Notice of Appeal	V	1112–1131
12/03/18	Notice of Entry of Order Granting Motion for Attorneys' Fees	V	1096–1111
12/26/18	Notice of Entry of Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1151–1158
06/28/18	Notice of Motion and Motion for Attorneys' Fees	IV	855–870
12/07/18	Notice of Non-Opposition to Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1144–1146

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
07/16/18	Opposition to Motion for Attorneys' Fees	IV	871–884
12/18/18	Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1147–1150
10/19/18	PowerPoint Presentation (St. Clair's)	IV	909–936
10/19/18	PowerPoint Presentation (State Engineer's)	IV–V	937–989
11/16/18	[Proposed] Order Granting Motion for Attorneys' Fees (St. Clair's)	V	1080–1095
05/04/18	Remittitur and Clerk's Certificate/Judgment, *Jason King v. St. Clair*, Case No. 70458	IV	853–854
07/20/18	Reply in Support of Motion for Attorneys' Fees	IV	885–899
07/23/18	Request for Submission	IV	900–906
01/02/19	Request for Transcript	V	1159–1161

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DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
10/19/18	Transcript of Hearing on Motion for Attorneys' Fees	V	990–1076

RESPECTFULLY SUBMITTED this 30th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 30th day of April, 2019, I served a copy of the foregoing JOINT APPENDIX and DOCUMENTS JA 1–1161, by electronic service to:

Paul G. Taggart, Esq.
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/s/ Dorene A. Wright

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

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

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

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

The State Engineer's determination of abandonment regarding Proof of Appropriation V-010 was based only on evidence of non-use. The State Engineer references only evidence that shows nonu

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[38] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.
[39] *Orr Ditch*, 256 F.3d at 945-946; *Alpine* , 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.
[40] Petitioner's Appendix at 000084-000090, 000128-0000130; *See also* Petitioner's Appendix .
[41] Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.
[42] *See* Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.

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such as the condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and the failure St. Clair to submit evidence of continuous use. Further, there was no field investigation conducted by State Engineer to show when the water right was last used, or when the pump was removed from the w In total, the only evidence before the Court was that of non-use. The State Engineer's reliance solely non-use evidence was improper. Therefore, the State Engineer's conclusion that St. Clair's water ri was abandoned in not supported by substantial evidence, and was therefore, arbitrary, capricious, anc overruled.

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

Vested water rights are "regarded and protected as property."[43] The term vested water rights often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment Nevada's statutory appropriation system. *Id.;* NRS 533.085. Because a vested water right is deemed have been perfected before the current statutory water law, the State Engineer does not have powers alter vested water rights.[44] Thus, the State Engineer cannot apply a rule to a vested water right unless tl rule existed at common law. The State Engineer has recognized this limitation in the past, holding tl applying a rebuttable presumption standard would further undercut the stability and security of pre-19 vested water rights.[45]

Here, the State Engineer applied a more restrictive law of abandonment than existed prior to t adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be sho to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide water right owner with a notice of forfeiture before the water right can be forfeited.[46] A water right own can then cure the forfeiture.[47] Yet here, the State Engineer did not give St. Clair any notice of forfeitu

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[43] *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).
[44] *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
[45] Petitioner's Appendix 000021-000025.
[46] *Town of Eureka*, 108 Nev. At 168.
[47] *Id.*

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nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair w more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a le restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right w abandoned was arbitrary and capricious, and as such is overruled.

V. THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO S CLAIR TO PROVE LACK OF INTENT TO ABANDON.

This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects t assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of pro to a party defending a water right from abandonment.[48] In the *Alpine* case, the Ninth Circuit upheld t ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference intent to abandon, it does not create a rebuttable presumption."[49] Nevada maintains the rule that there no rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme a long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on on non-use evidence when considering the intent element of abandonment.[50]

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

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[48] *Orr Ditch*, 256 F.3d at 945-946.
[49] *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.
[50] *Id. See also In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316,; *United States v. Alpine Land and Reservoir Co.*, 27 F.Supp.2d 1230, 1239-1241 (D.Nev. 1998) (a protestant alleging forfeiture or abandonment "bears the burden of proving clea and convincing evidence" to establish that fact); *see also Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 951 (1992).
[51] SE ROA at 0007; (*citing Franktown Creek*,77 Nev. at 354).
[52] SE ROA at 0008; *Orr Ditch,* 256 F.3d at 945.
[53] At 5; v. *Alpine*, 291 F.3d at 1077.

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The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstan of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal a state government regarding change applications for a change in place, manner and use of water rights the Newlands Project prior to 1983.[54] The *continuous use* language the State Engineer relied on is in t Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."[55] In that section, t Ninth Circuit was specifically analyzing whether equitable principles should apply to protect on *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has bearing on the current instance because this case does not involve the circumstance that existed in t Newlands Project, or an intrafarm transfer.

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

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

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

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[54] *Alpine*, 291 F.3d at 1073-74.
[55] *Id.*
[56] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).
[57] *See Request for Judicial Notice* at 3.

application of the *Alpine Decree* to intrafarm transfers.[58] Yet, in the current instance, the State Engine completely changed course without evidence or facts in the record to explain his action.

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

CONCLUSIONS OF LAW

This Court, having reviewed the record on appeal,[59] and having considered the arguments of t parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in th matter, hereby ORDERS as follows:

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

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

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

IT IS SO ORDERED.

Senior District Court Judge

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

Case No.: CV 20, 112

Dept. No. 2

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IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

[PROPOSED] ORDER OVERRULING STATE ENGINEER'S RULING 6287

A Proposed Order is attached hereto as Exhibit 1.

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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.

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CERTIFICATE OF SERVICE

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

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

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

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

[___] By ELECTRONIC DELIVERY, via:

DATED this day of _____, 20___.

_____
Employee of TAGGART & TAGGART, LTD.

EXHIBIT 1

EXHIBIT 1

Case No.: CV 20, 112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

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

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

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

[2] SE ROA 0006.

[3] As stated in the State Engineer's ruling, the State Engineer was not adjudicating the vested right, but only examining it to determine whether the right appeared valid to support granting a change application.

[4] SE ROA 004-006.

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

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~~water right;~~

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

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

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

(8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933[8] was found on the property; and

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

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

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[6] SE ROA 0037.
[7] SE ROA 0045.
[8] SE ROA 0102.
[9] SE ROA 0038-0066.
[10] SE ROA 008 – 009.
[11] ~~Petitioner's Reply Brief, Exhibit 1.~~
[12] *Id.* (*emphasis in the original*) (*citing U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[13] SE ROA 007- 009.

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St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that the intent to abandon a water right must be shown by more than mere non-use evidence.[14] St. Clair also argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to abandon the water rights without conducting a formal adjudication.

DISCUSSION

The State Engineer's holding that "Applicants' admission the water has not been used continuously coupled with the admission they are without knowledge of when it was, or was not used . . . find that Proof of Appropriation V-010493 has been abandoned" is overturned because it is arbitrary, capricious, contrary to law and not supported by substantial evidence.[15] The State Engineer's misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment of a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair to demonstrate lack of intent to abandon the water right.

STANDARD OF REVIEW

A party aggrieved by an order or decision of the State Engineer is entitled to have the order or decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is "in the nature of an appeal," and review is ~~generally~~ confined to the administrative record.[16] The role of the reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discretion or if it was otherwise affected by prejudicial legal error.[17] A decision is arbitrary and capricious if it is

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[14] *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1072 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782 Nev. 782, 786, 603 P.2d 262, 264 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

[15] SE ROA 005.

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

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

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"'baseless'" or evidences "a sudden turn of mind without apparent motive...."[18] With regard to factua findings, the court must determine whether substantial evidence exists in the record to support the Stat Engineer's decision.[19] Substantial evidence is "that which a 'reasonable mind might accept as adequate t support a conclusion.'"[20] With regard to purely legal questions, such as statutory construction, th standard of review is de novo.[21]

~~**ST. CLAIR'S REQUEST FOR JUDICIAL NOTICE.**~~

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

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

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

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

~~This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorable Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance of~~

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[18] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).
[19] *Id.*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert v Ray*, 95 Nev. at 786, 603 P.2d at 264.
[20] *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (*quoting State, Employee Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).
[21] *In re Nevada State Eng'r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

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impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition to Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judicial Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility of Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included in the Request for Judicial Notice exist or are public documents.

The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court further finds that all documents submitted are public documents capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that all documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are entered onto the record of this Court for this case pursuant to NRS 47.130-150.

EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.

Nevada follows a bright-line rule of law to guide courts and the State Engineer in determining anc analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owne *with the intent* to "forsake and desert it."[22] Intent is the necessary element the State Engineer is required tc prove in abandonment cases.[23] This is the standard the State Engineer has previously relied upon.[24] In fact, the State Engineer has explained that "Nevada case law discourages and abhors the taking of wate rights away from people." and that is why abandonment must be proven by clear and convincing evidence.[25]

Abandonment requires a union of facts and intent to determine whether the owner of the wate right intended abandonment.[26] As intent to abandon is a subjective element, Tthe courts utilize al surrounding circumstances to determine the intent.[27] Because subjective intent to abandon is a necessary element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Engineer's

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[22] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.
[23] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315;*Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek*, 77 Nev. at 354, 364 P.2d at 1075;and *Revert*, 95 Nev. at 786, 603 P.2d at 266.
[24] *See* Petitioner's Appendix at 00001-0000135.
[25] Petitioner's Appendix at 000030-000037.
[26] *Revert*, 95 Nev. at786, 603 P.2d at 264.
[27] *Alpine*, 291 F.3d at 1072.

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

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

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

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

~~[29] Petitioner's Appendix 000051-000054.~~

[30] *Orr Ditch, 256 F.3d at 946.*

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

[32] *Alpine* 291 F.3d at 1072.

[33] *Orr Ditch,* 256 F.3d at 944-45.

[34] *Id.*

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

[36] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.

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coupled with other evidence to determine the subjective intent of the water user.[37] This well-developed rule was originally taken from Nevada's mining law.[38] The Ninth Circuit, while applying Nevada state law, has held that the following factors ~~should~~ may be considered to determine whether a water owner had the intent to abandon a water right: (1) substantial periods of non-use, (2) evidence of improvements inconsistent with irrigation, and (3) payment of taxes and assessments.[39]

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

Further, St. Clair filed a Change Application for the place and manner and use, and clearly has present-day intent to use the water right. As such, St. Clair demonstrated a lack of the subjective intent o the subjective water right owner to abandon the water right.[40] ~~Previously, the State Engineer has held tha this type of evidence (i.e. filing of a Change Application and a Report of Conveyance) is evidence that party does not intend to abandon their water right, and can be enough to demonstrate the lack of the subjective intent of abandonment.[41] The State Engineer has declined to declare a water right abandoned i an applicant filed a change application, stating that filing an application is "evidence that the Applican does not intend to abandon its water right…."[42]~~ This Court concludes that by this action alone, St. Clai demonstrated he did not intend to abandon his water rights.

~~Also, the State Engineer deemed that action over and above mere nonuse (i.e. failure to maintain corporate status, relinquishment of grazing rights or right-of-way, lack of communication with State~~

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[37] *Id.*
[38] *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).
[39] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.
[40] *Orr Ditch*, 256 F.3d at 945-946; *Alpine* , 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.
[41] Petitioner's Appendix at 000084-000090, 000128-0000130; *See also* Petitioner's Appendix .
[42] Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.

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

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

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

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

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

[43] *See* Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.
[44] *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).
[45] *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
[46] Petitioner's Appendix 000021-000025.

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~~Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide a water right owner with a notice of forfeiture before the water right can be forfeited.[47] A water right owner can then cure the forfeiture.[48] Yet here, the State Engineer did not give St. Clair any notice of forfeiture, nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair was more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a less restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right was abandoned was arbitrary and capricious, and as such is overruled.~~

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

This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects the assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of proof to a party defending a water right from abandonment.[49] In the *Alpine* case, the Ninth Circuit upheld the ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference of intent to abandon, it does not create a rebuttable presumption."[50] Nevada maintains the rule that there is no rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme and long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on only non-use evidence when considering the intent element of abandonment.[51]

The State Engineer correctly identified the standard that "[n]on-use for a period of time *may* inferentially be *some* evidence of intent to abandon a water right,"[52] and the State Engineer correctly stated that a prolonged period of non-use "does not create a rebuttable presumption of abandonment."[53] However, in the very next sentence, the State Engineer mischaracterized the leading case law on point

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[47] *Town of Eureka*, 108 Nev. At 168.
[48] *Id.*
[49] *Orr Ditch*, 256 F.3d at 945-946.
[50] *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.
[51] *Id. See also In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316,; *United States v. Alpine Land and Reservoir Co.*, 27 F.Supp.2d 1230, 1239-1241 (D.Nev. 1998) (a protestant alleging forfeiture or abandonment "bears the burden of proving clear and convincing evidence" to establish that fact); *see also Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 951 (1992).
[52] SE ROA at 0007; (*citing Franktown Creek*,77 Nev. at 354).
[53] SE ROA at 0008; *Orr Ditch*, 256 F.3d at 945.

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when he stated that "proof of continuous use of the water right should be required to support a finding of *lack* of intent to abandon."[54] The State Engineer hinged his abandonment determination of this misstatement of law.

~~The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstance of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and state government regarding change applications for a change in place, manner and use of water rights in the Newlands Project prior to 1983.[55] The *continuous use* language the State Engineer relied on is in the Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."[56] In that section, the Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no bearing on the current instance because this case does not involve the circumstance that existed in the Newlands Project, or an intrafarm transfer.~~

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

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

~~This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudden turn of mind without apparent motive demonstrates the State Engineer's decision is arbitrary and capricious.[57] Previously, the State Engineer continually upheld the standards for abandonment that were established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpine*~~

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[54] At 5; v. *Alpine*, 291 F.3d at 1077.
[55] *Alpine*, 291 F.3d at 1073-74.
[56] *Id.*
[57] ~~*City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).~~

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

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

CONCLUSIONS OF LAW

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

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

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

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

IT IS SO ORDERED.

Senior District Court Judge

~~[58] *See Request for Judicial Notice* at 3.~~
~~[59] *Id.*~~
~~[60] *See* SE ROA; *see also Petitioner's Appendix*; *see also Petitioner's Request for Judicial Notice*.~~

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EXHIBIT 3

EXHIBIT 3

Justina A. Caviglia

From: Paul Taggart <Paul@legaltnt.com>
Sent: Monday, March 14, 2016 6:00 PM
To: Justina A. Caviglia
Cc: Dorene A. Wright
Subject: RE: Jungo Ranch
Attachments: 2016-03-14 Ltr to Caviglia.pdf

Justina: Please find the attached response to your letter from Friday. Based on your objection, I will provide the original and your changes to the proposed order to the court.

Paul G. Taggart
TAGGART & TAGGART, LTD.
108 N. Minnesota St.
Carson City, NV 89703
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(775) 883-9900 – Facsimile

From: Justina A. Caviglia [mailto:JCaviglia@ag.nv.gov]
Sent: Friday, March 11, 2016 4:04 PM
To: Paul Taggart
Cc: Dorene A. Wright
Subject: RE: Jungo Ranch

Attached are the State Engineer's comments to your proposed order.

Justina Alyce Caviglia
Deputy Attorney General
State of Nevada
Office of the Attorney General
Bureau of Government Affairs
Government and Natural Resources Division
100 N. Carson Street
Carson City, NV 89701
Telephone: (775) 684-1222
Facsimile: (775) 684-1108

recipient, please notify the sender immediately by return e-mail, delete this communication and destroy all copies.

PUBLIC RECORD: Any communication within this email may be subject to monitoring and disclosure to third parties.

From: Paul Taggart [mailto:Paul@legaltnt.com]
Sent: Monday, March 07, 2016 5:32 PM
To: Justina A. Caviglia
Subject: Jungo Ranch

Justina: Please find the attached proposed order that Judge Kosach requested. After your five day review period, I would like to forward it to the judge. Thanks.

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RACHEL L. WISE
DAVID H. RIGDON

March 14, 2016

Ms. Justina Caviglia
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

Re: *St. Clair v. Jason King, P.E., Nevada State Engineer*
Case No. CV 20112; Dept. 2

Justina Caviglia:

I am in receipt of your letter dated March 11, 2016. To say the least, our firm was taken by surprise at both the contents as well as the tone of the letter. Our firm strives to work ethically and diligently for our clients and our community, and as such, take accusations of ethical violations very seriously.

Our firm practices the same methods for proposing orders to the Courts as nearly all firms in Nevada, and likely the majority firms in the United States. The procedure, to us, is clear. After a hearing, both sides are invited to—if not required to—submit their proposed order to the Court. These proposed orders are to include both the basis and rational for the Court's holding, including the facts and circumstances that lead to the holding. The purpose for this practice is to give context to the holding, not to alter findings of the court as you have stated. After reviewing both parties' proposed orders, the Court construes what it finds to be the state of the law in Nevada, using the parties' proposed orders as guidelines. This is not a rubber-stamp process. If, for whatever reason, the Court believes one party added, or omitted, any facts or law, the Court will ensure their final order is complete and accurate.

As such, we will submit both parties' proposed orders for the Court. Having established the common practice and procedure for submitting proposed orders to a Court, let me address your letter, issue by issue.

First and foremost, you open the letter claiming that we have violated our ethical duty of candor to the Court by adding additional findings to our proposed order. The duty of candor prohibits any attorney from knowingly making false statements of fact or law, or knowingly offering false evidence to the Court. The rule further prohibits failing to disclose the same.

You state in your letter that we have misconstrued the findings of the Court. To the contrary, every fact in our proposed order was brought before the Court both by oral argument and PowerPoint presentation on the date of the argument. There were no objections made during

argument about these facts, and the Court relied on each of these facts when coming to his holding. Thus, it is *within* our duty of candor to include all relevant facts when proposing the order. To leave out relevant facts or factors which the Court relied on may taint the record, leave the record incomplete, or leave the Court with less information than it may need when creating their final order. The Court specifically directed that we draft a decision which includes the evidence heard at argument, findings of fact, and conclusions of law, and then run it by the State. Nothing within the proposed order is outside of the Court's direction. The direction was to create a draft order based on the oral decision *as well as* the evidence on record.

Second, you state that the findings of which we included could only originate from our client's argument and briefs. As the Court held in favor of our client, it is logical that the findings would also come from our client's argument. The Court clearly considered the arguments in the briefs when making his determination, as they stated on the record that both briefs were on point. While we are aware that our argument does not become the ruling, we are also aware that our argument was the foundation of the ruling. Proposing an order without a foundation for that proposed order would leave the Court empty-handed when creating their final order. Simply put, there can be no understanding of law without context.

You further stated in the letter that our proposed order fails to accurately reflect the Court's oral order. The letter states that the Court found that although there was physical evidence of abandonment, the intent element was missing. However, the Court did not find an absence of present-day intent as you stated in the letter. Rather, the Court found evidence of intent to use, and intent to *not* abandon, the water right. The Court ruled that while it understood where the State was coming from based on the physical evidence, it disagreed with the finding of abandonment. The Court stated quite clearly, time and again, that there was no abandonment:

> In some ways I can see how the State made this, the Engineer, made his decision, and I can understand it. I can understand it from the physical evidence of abandonment; however, abandonment in Nevada is defined as the relinquishment of the right by the owner with the intention to forsake and desert it. Those two have to coincide.
>
> I do not see any abandonment here.
>
> Again, totally understanding the State's Point of view, I believe the law, is, and I do not mind saying this, the law is that you are not abandoning when you have the intent to revise the claim, when you have the intent to apply for the application, that shows that your intent is not to abandon. So shifting the burden was not, in my opinion, proper.
>
> Basically if there is only evidence of non-use, that is not good enough
>
> It has to be shown by clear and convincing evidence that the

> petitioner abandoned with intent. No. There is no clear and convincing evidence of that here. That is why I say it was improper to shift the burden.
>
> The facts show that the owner filed a change application, filed a conveyance of documents, and reports of conveyance, has the present day intent to use the well...that doesn't show any abandonment according to Nevada law, he has the intent to use that water.
>
> I feel very strongly that I am backed by the law. I feel very strongly that this is not a difficult decision for a court to make based on what was presented to me in the briefs and the argument.

You also propose revisions to the draft order to indicate the Court simply remanded this issue back to the State Engineer. This, too, was not the Court's holding. The Court was clear that the denial of the application was improper, and that the finding of abandonment was *overturned*, not remanded. The Court specifically ruled that the State Engineer abused his discretion, and that the Court would overturn the State Engineer's decision. The Court further stated that the State Engineer was wrong in denying our client's change application based on abandonment.

Finally, you state that our firm's actions will not be overlooked by the State Engineer in the future. We are unsure how to read this sentence, and would like to ensure that the Attorney General does not mean what the sentence seems to imply. The sentence reads like a warning, indicating that the State Engineer will find against our future clients merely because of the dispute over this proposed order. We truly hope this is not the case, as such would be both unethical and unlawful. We ask for clarification on this sentence.

Sincerely,

PAUL G. TAGGART, ESQ.

PGT:tdo

EXHIBIT 4

EXHIBIT 4

...erk of Carson City, State ...
...nio Clerk of the District Court, in and fo...
...ic hereby certify that the foregoing is a full, true
...rrect copy of the JAVS recording from the hearing held on
January 5, 2016 in the action entitled and numbered
...-112 (Sixth Judicial District Ct.): Rodney St. Clair vs. Jason King et. a
which now remains on file and of record in my office in said Carson City

St. Clair
1/5/16
oral arg.

PLEASE NOTE: THE VIEWING OF DOMESTIC PROCEEDINGS BY MINOR CHILDREN
...S NOT CONSIDERED TO BE IN THEIR BEST INTEREST. THE PURPOSE OF T...
...D RECORDING IS FOR ATTORNEYS AND CLIENTS AND IS PROHIBITED FR...
...NG PUBLISHED OR SOLD. YOU MAY BE FOUND IN CONTEMPT OF C...
FOR VIOLATING THIS POLICY.

EXHIBIT 5

EXHIBIT 5

SIXTH JUDICIAL DISTRICT COURT MINUTES

CASE NO. CV20-112

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

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

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

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

Statements were made by Court.
Counsel presented arguments.
Court stated its findings of facts and conclusions of law.
COURT ORDERED: It overturns the State Engineer's decision.
Taggart to draft the decision.
Statements were made by Court.

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

EXHIBIT 6

EXHIBIT 6

Case No. CV 20112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

THIS MATTER was heard by the Court on January 5, 2016, in the First Judicial Distri Courthouse upon Petitioner RODNEY ST. CLAIR's (hereinafter "Petitioner") Petition fo Judicial Review of State Engineer's Ruling 6287. Petitioner was represented by Paul C Taggart, Esq. and Rachel L. Wise, Esq. of Taggart and Taggart, Ltd., and Responde JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES (hereinafter "Stat Engineer"), was represented by Attorney General Adam Laxalt and Deputy Attorney Gener Justina Caviglia. This Court, having reviewed the record on appeal, and having considere the arguments of the parties and all pleadings and papers on file in this matter, hereb **GRANTS THE PETITION FOR JUDICIAL REVIEW OF RULING 6287**.

///

///

///

FINDINGS OF FACT

This matter arises out of Petitioner's Petition for Judicial Review filed on August 22 2014, following the State Engineer's issuance of Ruling 6287. Ruling 6287 was based upo Petitioner's Application 83246T filed with the State Engineer to change a point of diversion c a portion of their vested water right claim, Proof of Appropriation V-010493. Record o Appeal ("ROA") at 4. The State Engineer's first finding in Ruling 6287 focused on Petitioner' vested claim. ROA 5–6. Based upon evidence provided by Petitioner, the State Enginee found that Petitioner's Proof of Appropriation V-010493 was valid. *Id.* Petitioner did nc dispute this finding in the Petition for Judicial Review.

The second finding in Ruling 6287 reviewed whether Proof of Appropriation V-01049 had been abandoned. ROA 6. The State Engineer reviewed Petitioner's application an found that the photos that Petitioner submitted in support of his application show that the we casing is rusted through and that the well has silted in. ROA 7, 75–76. The State Enginee concluded that this evidence showed that the "casing is unusable in its current condition an that it has gone unused for a significant period of time." ROA 7. The State Enginee considered the fact that Petitioner, in his application answered unknown for the question tha asked what years the land was or was not irrigated. ROA 7-8. The State Engineer sei correspondence to Petitioner on December 2, 2013, requesting additional information c evidence from Petitioner that demonstrated continuous beneficial use to the present time wit respect to the application. ROA 8, 105. The State Engineer found:

> [w]hile sufficient evidence to support a vested right at the time the well was drilled and the land patents exists, the decayed state of the casing, Applicants' admission the water has not been used continuously coupled with the admission they are without knowledge of when it was, or was not used, in addition to the failure of evidence of continuous beneficial use of the water, compels the State Engineer to find that Proof of Proof of Appropriation V-010493 has been abandoned.

ROA 008.

Petitioner filed his Petition for Judicial Review on December 8, 2014, and filed h Opening Brief on December 8, 2014. The State Engineer filed his Answering Brief c

January 22, 2015. Petitioner filed his Reply Brief on February 27, 2015. Petitioner also file an Appendix on March 3, 2015, and a Request for Judicial Notice in Support of Petitioner Reply Brief on June 2, 2015. The State Engineer filed an Opposition to the Request fo Judicial Notice in Support of Petitioner's Reply Brief on November 19, 2015. Petitioner filed Reply to the Opposition on November 30, 2015.[1]

STANDARD OF REVIEW

NRS 533.450 provides for judicial review of orders and decisions of the State Engine made under NRS 533.270 through NRS 533.445 (setting forth the statutory procedure fo appropriation). NRS 534.090(4) provides that any decision relating to forfeiture o abandonment is also to be reviewed as provided in NRS 533.450. Under this statute, "[t]h decision of the State Engineer is *prima facie* correct and the burden of proof is on the par attacking the same." NRS 533.450(10).

The Court's review under NRS 533.450 is limited to a determination of whether th State Engineer's decision is supported by substantial evidence. *Revert v. Ray*, 95 Nev. 78 786, 603 P.2d 262 (1979). Substantial evidence is "that which a reasonable mind migl accept as adequate to support a conclusion." *Bacher v. State Engineer*, 122 Nev. 1110, 112 146 P.3d 793, 800 (2006). Thus, in evaluating the present matter, this Court may not "pas upon the credibility of the witness nor reweigh the evidence." *Id.*

DISCUSSION

The subject of this Petition for Judicial Review is whether the State Engineer incorrect found that the Proof of Appropriation V-010493 had been abandoned.[2] Nevada law is clea abandonment occurs when there is a "relinquishment of the right by the owner with th intention to forsake and desert it." *In re: Manse Spring*, 60 Nev. 280, 108 P.2d 311, 31 (1940). Abandonment requires a union of acts and intent and is a question of fact to b determined from all surrounding circumstances. *Revert v. Ray*, 95 Nev. 782, 603 P.2

[1] The Request for Judicial Notice and its opposition were not addressed by this Court during the January 5, 201 hearing.

[2] As neither party objected to the State Engineer's determination that Petitioner's Vested Claim 010493 w valid, this Court will not address that finding in this Order.

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

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

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

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CONCLUSIONS OF LAW

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

1. Based upon the non-opposition by either party, the portion of Ruling 628 which found that Petitioner has a vested water right under Proof of Appropriation V-010493, AFFIRMED;

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

3. This case is remanded to the State Engineer to process Application 83246T.

IT IS SO ORDERED.

DATED this _____ day of _____, 2016.

_____
HONORABLE STEVEN R. KOSACH
SENIOR DISTRICT COURT JUDGE

RESPECTFULLY SUBMITTED BY:

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Case No. CV 20112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR.

Petitioner,

vs.

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

Respondent.

JUNGO RANCH RESPONSE TO STATE ENGINEER'S OBJECTION TO PROPOSED ORDER

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

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POINTS AND AUTHORITIES

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

Petitioner prudently included all relevant facts when proposing the order. To leave out relevant facts or factors which the Court relied on may taint the record, leave the record incomplete, or leave the Court with less information than it may need when creating its final order. The Court specifically directed that Petitioner draft an order that includes the evidence heard at argument, findings of fact, and conclusions of law, and then submit it to the State for comment. Nothing within the proposed order is outside of the Court's direction. The direction was to create a draft order based on the oral decision as well as the evidence on record.

I. FACTUAL AND PROCEDURAL BACKGROUND

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

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

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[1] *See* November 16, 2016 Order of Recusal.
[2] *See* Respondent's Objection to Petitioner's Proposed Order at 3:11-15.

the evidence. The Honorable Judge Kosach requested that the Petitioner's draft a Proposed Order based upon the evidence produced at hearing and all issues briefed.[3]

II. ARGUMENT

The State Engineer first objects to Petitioner's order on the basis that Petitioner included in the order: "additional findings than [sic] those made by the State Engineer in the Ruling."[4] These findings include "a lack of evidence of the failure to pay taxes and assessment fees for the right to use the water right", and "newspaper articles [that were] published in the early 1920s discussing the irrigation of alfalfa with groundwater using drilled wells."[5] The State Engineer argues that he rejected this evidence when coming to a decision in his ruling, and thus it would be an inaccurate reflection of the State Engineer's ruling to include them in the order. However, the Proposed Order is a reflection of the information used by the Court to come to its decision on the State Engineer's ruling, and is not limited to the information used by the State Engineer to come to his ruling.

Through both oral argument and PowerPoint presentation, Petitioner argued that the factors listed above should have been relied on by the State Engineer in this case, and are relied on regularly as factors for determining forfeiture of a water right. The State Engineer cites to two federal cases in his objection which outline the approved use of these factors. Through the oral argument and presentation, Petitioner's use of these cases and factors was never objected to by the State Engineer, and the Court further relied on these factors when coming to their holding.

Clearly, the State Engineer did not follow the lawful procedure for declaring a water right forfeited, as the Court ruled against him from the bench. This fact is only made more apparent in the State Engineer's admission that he did not consider the two factors laid out above when coming to the determination in this ruling. His objections that the Court applied these factors in the Court's own ruling

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[3] *See* Oral Argument hearing video at 2:01 p.m – 2:03 p.m. ("and I am going to overturn the state engineer's decision . . . pursuant to this decision and the evidence therein . . . you can include findings of fact. You can include conclusions of law . . . go ahead and send it to me and I'll look at it . . . I don't mean to leave anything out form this oral decision because I feel very strongly that I'm backed by the law. I feel very strongly that this is not a difficult decision for a Court to make based upon what was presented to me in the briefs and the argument").

[4] Respondent's Objection to Petitioner's Proposed at 3.

[5] *Id.*

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are untimely. If the State Engineer wished that the Court disregard these factors, that objection should have been made in argument.

The Proposed Order is a reflection of the information used by the Court to come to its ruling overturning the State Engineer; it is not limited to the information used by only the State Engineer to come to his ruling. As such, the inclusion of these relevant and approved factors should be included in the Court's Order.

The Petitioner submitted the Petitioner's Appendix on February 27, 2015 ("Petitioner's Appendix"). The State Engineer never objected to this submission. On June 2, 2015, Petitioner submitted their request for judicial notice in support of Petitioner's Reply Brief ("Request for Judicial Notice"). Respondent, State Engineer, waited five (5) months to oppose Petitioner's Request for Judicial Notice ("Opposition to Judicial Notice"). Furthermore, the State Engineer's Objection to Judicial Notice was only filed after the November 16, 2015 Order of Recusal entered by the Honorable Judge Montero.[6] Petitioner timely replied to the State Engineer's November 17, 2015 Opposition to Judicial Notice. Now the State Engineer Objects to both, the Petitioner's Appendix and the Petitioner's Request for Judicial notice.[7]

During the hearing, the Honorable Judge Kosach issued an order from the bench, based on all the evidence. The Honorable Judge Kosach requested that the Petitioner's draft their Proposed Order for this Hearing based upon the evidence produced at hearing and all issues that were briefed.[8]

The Court's decision was clear, "this is not a difficult decision for the Court to make based upon what was presented to me in the briefs and the argument."[9] The Court was clear. The State Engineer's ruling is overturned.[10] To enter a proper order, the Petitioner had a duty to present the Court with an

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[6] *See* November 16, 2016 Order of Recusal.
[7] *See* Respondent's Objection to Petitioner's Proposed Order at 3:11-15.
[8] *See* Oral Argument hearing video at 2:01 p.m – 2:03 p.m. ("and I am going to overturn the state engineer's decision . . . pursuant to this decision and the evidence therein . . . you can include findings of fact. You can include conclusions of law . . . go ahead and send it to me and I'll look at it . . . I don't mean to leave anything out form this oral decision because I feel very strongly that I'm backed by the law. I feel very strongly that this is not a difficult decision for a Court to make based upon what was presented to me in the briefs and the argument").
[9] *See* Oral Argument hearing video at 2:01 p.m – 2:03 p.m.
[10] *See* Oral Argument hearing video at 2:01 p.m – 2:03 p.m.

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analysis of laws and facts that supported the Court's ultimate conclusion.[11] The Petitioner's actions were proper, and their proposed order is sound.

Petitioner requests, among other things, relief in the form of the Court directing the State Engineer to grant Application 83246T. The State Engineer argues that the Court would be exceeding its authority to grant the application of a water right. It is well understood law that, on appeal, a reviewing court has the power to direct the lower court to abide by its decision.

III. CONCLUSION

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

AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 29th day of March, 2016.

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

CERTIFICATE OF SERVICE

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

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

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

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

[___] By ELECTRONIC DELIVERY, via:

DATED this 21st day of March, 2016.

Employee of TAGGART & TAGGART, LTD.

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SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

BEFORE THE HONORABLE STEVEN R. KOSACH,

SENIOR DISTRICT COURT JUDGE

-oOo-

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

Case No. CV 20112

Dept. No. 2

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TRANSCRIPT OF HEARING

Monday, April 11, 2016

(Humboldt County case, held in Carson City, Nevada)

TRANSCRIPT PREPARED BY:
SHANNON L. TAYLOR, CCR, CSR, RMR
Certified Court/Shorthand and Registered Merit Reporter
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A P P E A R A N C E S

For the Petitioner, Rodney St. Clair:

Paul G. Taggart, Esq.
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108 North Minnesota Street
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For the Respondent, Nevada State Engineer:

Justina A. Caviglia, Esq.
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717

CARSON CITY, NEVADA, MONDAY, APRIL 11, 2016, 1:42 P.M.

-oOo-

THE COURT: Okay. I want to, I want to thank you for coming, both of you. And I want to thank Angela of the District Court and the clerks for this room.

We're on the record in Rodney St. Clair, petitioner, vs. Jason King, Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources. And this is CV 20112 in the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt.

We're doing this in Carson City because the Attorney General's Office is in Carson, represented by Ms. Justina Caviglia. And Mr. Paul Taggart, excuse me, is also an attorney in Carson City, representing the petitioner.

My name is Steve Kosach. I'm a Senior Judge for the State of Nevada.

And we're here based on the State's, respondent's objection to petitioner's proposed order.

Now, when I heard this case in January of 2016, I declared the what I thought was the law at that time as far as the issue of the primary issue of abandonment. And I found that there was no abandonment and, therefore, found in favor of the petitioner. I asked

Mr. Taggart to prepare an order overruling the State Engineer's ruling 6287. And then the State filed objections to the petitioner's proposed order. So instead of signing that order that Mr. Taggart prepared, I wanted to hear the objections. And that's why we're here today.

So I just, I met informally with the attorneys right before the hearing started this afternoon. And I asked Ms. Caviglia to state her objections for the record. And each, each one will be responded to, either -- well, I wouldn't say each one.

It depends on what you want to do, Mr. Taggart, in response. If you want to respond to everything, that's fine. If you want to respond to each one, that's fine, too. Because I'll sort them out.

I have a copy of the objections to respondent's -- to the proposed order. I'm ready, after all of that.

Ms. Caviglia, please.

MS. CAVIGLIA: Thank you, Your Honor.

Just for preliminary, Mr. Taggart did provide us with the proposed order. We responded and sent him a copy of the order with our strike-through and language that we were -- did not agree on. At that point, Mr. Taggart submitted it to the Court, and we did

provide the objection to the Court. And I'll go through page by page with the objection, and it's sort of set out that way in the objection as well.

The first objection that the State Engineer brought forth in its objection to the proposed order is on page two and page three. In the facts and procedural history of this matter, Mr. Taggart listed a number of following facts that supported the State Engineer's decision. However, when you look at numbers four and five, one was the lack of evidence of the payment of taxes and assessments, and the next was newspaper articles.

If you read the ruling itself, the State Engineer did not rely on the newspaper articles. And there's no mention at all of payment of taxes and assessment fees that was put into the ruling.

So even though Mr. Taggart had provided the newspaper articles to support the vested water rights claims, those are specifically, in the ruling, discounted by the State Engineer. And that's on the State Engineer record of appeal on page six. The State Engineer found that the newspaper articles do not help establish perfection of a vested right.

So we don't believe that that should be listed here, because that was not used by the State Engineer in

its ruling.

THE COURT: And when you say not listed here, you mean --

MS. CAVIGLIA: In the final order.

THE COURT: -- in the proposed order?

MS. CAVIGLIA: In the proposed order.

THE COURT: Okay. Mr. Taggart, can you respond to that?

MR. TAGGART: Yes, Your Honor.

THE COURT: Four and five, if you will. Pay taxes, failure to pay taxes and newspaper articles.

MR. TAGGART: The -- for the record, Paul Taggart on behalf of Jungo Ranch and Rodney St. Clair.

The State Engineer did review those pieces of evidence in his -- in his ruling. Those were pieces of evidence that were supplied by particularly the newspaper articles that were supplied by my client to the State Engineer, and he did review them when he made his decision, and he described why they were or were not relevant. So that's why we put it in there, because it was something that he relied upon.

And with respect to the failure to pay taxes and assessment fees, the State Engineer, if -- they're saying now that he didn't rely on that. I mean he made a finding of abandonment. And in order to make a

finding for abandonment, he has to make a determination about whether taxes or assessments were paid. So that would have been their position regarding that point.

THE COURT: Okay. Thank you.

Ms. Caviglia.

MS. CAVIGLIA: Further on, on page three, and it goes more towards the first section on the judicial review, there's a sentence, "Notably, this declaration of abandonment was the first in time Nevada history that the State Engineer declared a vested groundwater right abandoned."

It goes to the section on St. Clair's request for judicial notice and further on in the order -- oh, where is it? The section on the State -- on page 11, "The State Engineer's declaration of abandonment was arbitrary and capricious because he applied the wrong rule of law."

Both of those sentences are based upon petitioner's argument that the State Engineer was arbitrary and capricious because this ruling had diverted from prior rulings of the State Engineer. It also is based upon request for judicial notice and an objection to that judicial notice. That was not heard by the Court. Although it wasn't heard by the Court, and it wasn't stated by the Court, petitioner did

include it in this, his order. And I'm not sure it was actually even relevant to this ruling. The Court did not specifically state that day that the decision for arbitrary and capriciousness was based upon prior rulings of the State Engineer.

This ruling does talk about the case law regarding the State Engineer is not bound by stare decisis, but then switches it to make the finding for arbitrary and capriciousness based upon the State Engineer diverting from whatever rulings were in the past.

I don't believe that's what the Court ruled upon. When I looked at the recording, it's not clear that that was what the Court ruled upon. Mr. Taggart has used it in his argument. However, I'm not sure that's what this Court based, was based upon. And based upon my understanding of the Court's ruling, based upon the case law, it was clear that the Court didn't even need to go to this depth.

Petitioner did include this, based upon his argument --

THE COURT: And what does "this step" mean, "this step" mean to you, Ms. Caviglia? I just, I just got lost in the sense of "this step."

MS. CAVIGLIA: I don't think he -- the looking

at prior rulings of the State Engineer's Office would be required by this Court to find the rulings that -- or based, was based upon what this Court ruled upon. It was clear by your order that you were basing it on the evidence and the case law, and that was presented to you, not based upon prior rulings of the State Engineer.

THE COURT: I think, there was only one reference. And I'm really trying to be careful to not argue. But because, in a sense, we are arguing about what should or shouldn't be in, I'm going to respond. So let's put it that way.

This ruling -- or, no, not, not my ruling. The State Engineer's ruling, according to Mr. Taggart's pleadings, is the first time in the history of the State of Nevada that the State Engineer ruled that there was an abandonment.

Am I correct with that, with the facts as we know in this case, am I correct with that statement?

MR. TAGGART: Abandonment of a underground vested water right, yes, first time.

THE COURT: An abandonment of an underground vested water right. So I took that, in the hearing and in the exhibits you showed, Mr. Taggart, in the hearing, and -- and, as you called it, stare decisis -- along with Ninth Circuit court cases, I took that as history

to the point where it was only illustrative of, Judge, this is the first time this has ever happened, see how wrong it is?

Do you see what, do you see what I'm saying? That's my, that was my conclusion. So, in a sense, I'm not -- my conclusion of what Mr. Taggart was arguing. In a sense, I'm not bothered by it. Why is the State bothered by it? Does it make the State Engineer look bad or something?

Do you see what I'm saying? I'm getting -- I don't mean to get personal, but I want to know why the objection's there.

MS. CAVIGLIA: I think, there's -- there's a fine line between the first time in history and the stare decisis argument. The State Engineer is concerned about his prior rulings being used against him, because that's specifically what Desert Irrigation says cannot be done.

So whether the State -- and, I believe, that's what Mr. Taggart was putting forward was the State Engineer's prior ruling should be used against him to show that he was being arbitrary and capricious. And that is how we read this section, not that this was the first time this has happened.

THE COURT: Okay. All right.

MS. CAVIGLIA: And that's how we have taken it. That's how he's pled it in other cases as well. And that's where the State Engineer is concerned. Because Desert Irrigation is very specific. Stare decisis cannot be used against the State Engineer, not ruling as we have in prior rulings, is not arbitrary and capricious. I believe, it's in my objection. And that's where the fine line is from where using it for it's never happened before, but, and then switching it so that the prior rulings of the State Engineer's Office are now arbitrary and capricious.

So that, we took it as the latter, not as how you've stated it, Your Honor.

THE COURT: Interesting. I don't care how you presented it, Mr. Taggart. You already know how I took it. But do you have -- I mean I can, I can kind of understand, if we're setting precedent. It's the first time in history, right? If we're setting precedent, I can understand where the State's going if they interpreted it as being against previous orders.

Do you see, do you see what I mean?

But it's a conclusion that I came to, based on all the evidence, and it was not a difficult conclusion. There was no abandonment.

So please help. When I say "help," can you

understand the interpretation by the State?

MR. TAGGART: No.

THE COURT: Okay. Please tell me.

MR. TAGGART: I think that the State Engineer, or his office, knew exactly what the law is, and they applied it intentionally incorrectly. That's what I think. And that's why the Ninth Circuit decision was so important, because they were a party in that case, and they argued the exact same position we argued in this case.

I think, my client has had to spend --

THE COURT: "They" meaning the State?

MR. TAGGART: The State Engineer. I think, my client has had to spend a tremendous amount of money in this case because the State Engineer did not follow the law, and the law was absolutely clear. If you remember, there was this interfarm transfer exception. That does not apply in this case. And they took that rule, and they know that rule doesn't apply in general across the state, and they applied it in this case.

I stated during oral argument that stare decisis does not apply to the State Engineer. I recognize that. But that doesn't mean the State Engineer can make decisions one way in one case and another way in another case without being called to task

for it. That means that if he has a history of making decisions one direction, and he decides to change his mind, he has to explain it to the court. It doesn't mean he's bound by his prior precedent. But if he changes his mind without any reason, that is arbitrary and capricious.

And the Supreme Court of this state has been very frustrated with the State Engineer's failure to have regulations and clear direction on how he acts. And for him to be able to just simply say, "I can do it however I want, whenever I want. You, Judge, can't look at my prior decisions to see how I've handled these situations in the past," that is in -- that's improper.

There's no, there's no law books on the wall that give us history of how the State Engineer has handled abandonment in the state of Nevada. There's just one, maybe two cases in the Nevada Supreme Court. But we have scores of rulings from the State Engineer over the last 50 years of how the State Engineer's Office has dealt with it. Why doesn't the State Engineer want a court to be able to see that? Why don't they want a court to review that to see how the State Engineer has applied these same principles in other cases?

And so this notion that somehow stare decisis

doesn't apply to the State Engineer, I get that. That's not what we're talking about. We're talking about arbitrary and capricious. If you do it one way for an entire set of decades, and then you decide to change your mind, I'm entitled to put on that pattern of how they've done it. Then they have to explain why they've changed their decision and their path. And if they can't do that, if they can't establish a reasoned decision for that, then that's arbitrary and capricious.

And that's what we did. And that's why we put it in the prior rulings. And that's why, that's why we think the prior rulings are important to support the decision of this Court.

THE COURT: Is there any issue by the State with Mr. Taggart arguing Ninth Circuit cases, and that type of thing, any issue with that?

MS. CAVIGLIA: Well, the Alpine and Orr Ditch are slightly different. They are decree cases. They are handled -- they are surface water cases. They do require taxes and assessments. Groundwater does not. So they're slightly different.

For example, the surface water, under the Alpine decree, TCID requires payment of assessments. That's where that language comes from in abandonment, is because they are required to pay assessments. So if

they don't pay assessments, then it's different than a groundwater situation. Groundwater, there are no assessments to pay.

So they are slightly different factually than a traditional underground vested groundwater case. They are decree cases. They are river cases. They do focus on Nevada law, but more so for the surface water, less the groundwater.

THE COURT: So you're saying that, that Mr. Taggart applied surface water cases instead of groundwater cases in the hearing, or in the evidence?

MS. CAVIGLIA: It's a little different. There's not a lot of case law on this. So the only case law we have is the surface water cases with the abandonment. So that's where that language does come from, is the Ninth Circuit. And Alpine and Orr Ditch are both surface water decreed cases.

THE COURT: Mr. Taggart.

MR. TAGGART: Your Honor, those are the cases they cited to in the ruling. When they ruled that my client's water right was abandoned, they relied upon the Ninth Circuit holdings on abandonment and the statements in those cases about what the law of abandonment is.

So we have to be able to explain what the Ninth Circuit meant when it made those statements.

And the fact it's surface water versus groundwater, that doesn't make a difference. The point is that you look for facts surrounding the use of the water over time. And sometimes that's taxes, and sometimes it's assessments.

If there's no assessments because it's not an irrigation district, fine, that's not an issue. But taxes are. There was never a finding that this land or water rights had been -- you know, that someone had failed to pay taxes. If somebody had failed to pay taxes, it would show an intent to abandon. The lack of that type of evidence is part of that surrounding circumstance.

So, again, the Ninth -- what we put in the request for judicial notice was the State Engineer's brief to the Ninth Circuit, in the case that they cited to in the ruling, we put in the ruling on remand that the State Engineer entered after the Ninth Circuit made that decision. And then we put in the Ninth Circuit brief of the State Engineer to defend that ruling on remand.

So there was the State Engineer's brief to the Ninth Circuit before it made the decision, their ruling after the decision, and their argument in support of that ruling on remand. And they all point to what the

real meaning of that provision was that they're relying upon in this ruling.

And we ask that you take judicial notice of that. I thought you did. We were talking about it in the oral argument. And it was something that I referred to extensively. I can't even understand how anyone could argue that it can't be judicial notice. It's an official document of the Ninth Circuit or the State Engineer's Office. So.

So that's why that was in the proposed order, because we assume that that was part of the decision that the Court had made.

THE COURT: Throughout the years, just in regards to that last thing -- I have two things to say, but the latter is judicial notice, the latter of the two things I have to say. Did I ever say at any time, "I'll take judicial notice of that"?

MS. CAVIGLIA: Not --

THE COURT: I don't think I did.

MR. TAGGART: I don't believe so.

THE COURT: Okay. I will say it now. I will take judicial notice of it.

And it's interesting, because -- and I'm going to elucidate. It's interesting, because in 26 years of being a district court judge, maybe I did it half the

time, I'll take judicial notice of that, or it's so obvious that I took judicial notice of it. So I'm not bothered with that at all. That's why I said, after the fact, I'll take judicial notice of the Ninth Circuit cases.

What the other observation -- and, sincerely, it is an observation. And maybe, Ms. Caviglia, and maybe, Mr. Taggart, too, maybe you don't know what I'm talking about. But I hope you know. It's so hard to prove a negative, Ms. Caviglia.

In other words, I can, I can see your fertile mind, sincerely. Your mind is bringing up these issues about maybe you're -- I don't think you are. Maybe the Engineer's offended by the words "arbitrary and capricious." But to try to explain the difference between what you're trying to explain to me is almost trying to prove a negative.

MS. CAVIGLIA: Correct, Your Honor. I think --

THE COURT: And that's all, I mean it in all --

MS. CAVIGLIA: Yeah, and to -- back to the judicial notice, the part that really upsets, bothered the State Engineer, it wasn't the cases, it wasn't the orders, it was the fact that petitioner's using briefs submitted by attorneys on behalf of the State Engineer. Those were the pieces of evidence that, had any other

case, I'm not sure a brief of the party would ever come in. The fact that that's what they're using, it's concerning.

THE COURT: Okay.

MS. CAVIGLIA: Can the State Engineer ever make a clear argument with the ability for petitioner to bring in any brief, in any case, on any factual scenario, to use it against the State Engineer?

THE COURT: I think --

MS. CAVIGLIA: And those were the two, those were the main issues with the judicial notice.

THE COURT: And I think that you've mentioned this. I don't know if it was to me personally or in writing somewhere or ex-parte; I don't know. But didn't, have you not represented the State Engineer on numerous cases, Mr. Taggart?

MR. TAGGART: Yes, I have.

THE COURT: And aren't some of those cases you cited your own?

MR. TAGGART: They are.

THE COURT: I think, that's the answer. And I understand.

Do you remember, both of you, do you remember when I first, when we first had a pretrial conference? And I walked into Mr. Taggart's office. You were there,

Justina. You were there, Ms. Caviglia. And I said, "Hey, I'm new to this case. I've had a couple in my years. But does this have anything to do with Nevada being an arid state?" in the middle of a -- in the middle of a trial? Do you remember that? That was stated in December of last year.

And so, in other words, you know, my thinking as being a very -- I'm going to smile when I say this -- very astute human being of human nature, that's why I picked up that, is the State Engineer offended by "arbitrary and capricious"? No, they're just words of art that are used by -- in the profession in this type of -- in this type of setting.

And so, when you both answered, "No, not to my knowledge," it -- you know, a new Attorney General, trying to save water, you know. Do you see what I mean? As I'm driving down from Reno to that meeting, I'm thinking, these issues that I -- and as my personality, I'll bring it all up, so we can get the right decision, correct decision, right decision. Okay. Good. We got that one.

Anything else on that one I'll call issue to?

MS. CAVIGLIA: No, Your Honor.

THE COURT: Okay.

MS. CAVIGLIA: The other issue was, there's a

section on page nine called "The State Engineer unlawfully impaired St. Clair's water rights by applying a rule that is stricter than water statutes." In that section, he talked about how the State Engineer requires, is required to provide notice on a forfeiture matter, but he didn't do that here, that how the law is more restrictive than forfeiture.

Although I do believe it is in Mr. Taggart's argument, I don't believe the Court ruled on that. And that is why we objected to that section.

THE COURT: Okay. Mr. Taggart.

MR. TAGGART: Your Honor, our point was that abandonment and the law of abandonment cannot be as the State Engineer said, because it would, it would make it more restrictive, or it would make it easier to abandon a water right than to forfeit a water right. That was an argument we made in our brief. We made it in oral argument. It's just one more reason why it doesn't make any sense for the State Engineer's conclusion to be accurate. And so that's why we had it in our argument and our written brief, we had it in our oral argument, and we included it in there.

I mean what I haven't said is that, you know, I -- I've practiced for 20 years. And when I'm asked to prepare an order, I understand that my job is to write

an order that will be defensible on appeal.

And so we had what we argued in the case in that order. When the Judge says, "I'm ruling for you, Mr. Taggart, you're to draft the order," I get the right to draft the order as if I was the law clerk for the Judge writing the most defensible order.

The Court has the ability to read the order that I prepare and take anything out that it doesn't like. But that's been my approach for 20 years. I think, that's the right, the right way to go about proposing orders. And that's what we did here.

And so that section that we provided there was in our brief, it was in our argument, and it demonstrates why the State Engineer's position was wrong.

THE COURT: Do you have any response after Mr. Taggart, his response, Ms. Caviglia?

MS. CAVIGLIA: My biggest response is, for the last 10 years, prior to coming here, I worked for Douglas County, and I also prepared numerous orders for the court. And I would never go against what the court ruled in the order. I would never include my own briefs, my own arguments. I would go based off of what the court ordered at the time of the hearing.

So we just have two different styles of how we

prepare orders. And I just, I'm not comfortable with going outside of what this Court actually would have ruled.

THE COURT: Sure. And I respect that. And your objections do not even attempt to change my mind or anything on what I thought was the primary issue. And I respect that.

Let me ask this, because this is right off the top of my head. I just, I remember looking at statutes. And this one particular statute, abandonment versus forfeiture, I think, there was one statute ahead of the other in numerical order. Am I correct in that? I remember looking at it, but I'm not sure if it was there.

And in a sense, I agreed that abandonment is -- yeah, it's -- well, I don't, I don't want to say the wrong thing. It is stricter than a forfeiture. Or am I wrong? I don't want to. My wife says, "Don't think out loud," and I do all the time. But you --

MR. TAGGART: Well, Your Honor, I don't recall exactly how this happened, but there was, there was a dialogue during the hearing about the point I made, which was, if the State Engineer had wanted to forfeit our water right, he would have had to send out a four-year letter.

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

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

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

THE COURT: Okay. Any comment?

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

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

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

THE COURT: Right. And that --

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

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

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

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

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

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

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

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

MS. CAVIGLIA: "Should be."

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

MS. CAVIGLIA: Yeah.

THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

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

application?

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

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

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

THE COURT: M-hm (affirmative).

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

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

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

THE COURT: All right.

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

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

THE COURT: Any comments?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

Engineer, but other property owners, could be impacted.

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

THE COURT: Okay. And thank you for that.

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

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

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

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

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

THE COURT: M-hm (affirmative).

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

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

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

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

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

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

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

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

Do you have that order, Ms. Caviglia?

MS. CAVIGLIA: I do, Your Honor.

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

MS. CAVIGLIA: Yes.

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

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

MS. CAVIGLIA: Yes.

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

And then number one, the ruling 6287 is

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

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

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

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

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

THE CLERK: But I can --

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

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

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

THE CLERK: Okay.

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

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

* * * * *

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

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TRANSCRIBER'S CERTIFICATE

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

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

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

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

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

Shannon L. Taylor

SHANNON L. TAYLOR
Nevada CCR #322, RMR

CERTIFIED COPY

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR, Petitioner, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	**ORDER OVERRULING STATE ENGINEER'S RULING 6287**

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

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

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

[2] SE ROA 0006.

[3] SE ROA 004-006.

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

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with groundwater using drilled wells;

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

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

(8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933[7] was found on the property; and

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

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

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

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[5] SE ROA 0037.
[6] SE ROA 0045.
[7] SE ROA 0102.
[8] SE ROA 0038-0066.
[9] SE ROA 008 – 009.
[10] Petitioner's Reply Brief, Exhibit 1.
[11] *Id.* (*emphasis in the original*) (*citing U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[12] SE ROA 007- 009.
[13] *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1072 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the*

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

DISCUSSION

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

I. STANDARD OF REVIEW

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

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

[14] SE ROA 005.

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

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

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

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

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

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of review is de novo.[20]

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

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

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

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

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

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

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

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

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

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

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

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

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

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[21] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.
[22] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315;*Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek*, 77 Nev. at 354, 364 P.2d at 1075;and *Revert*, 95 Nev. at 786, 603 P.2d at 266.
[23] *See* Petitioner's Appendix at 00001-0000135.
[24] Petitioner's Appendix at 000030-000037.
[25] *Revert*, 95 Nev. at786, 603 P.2d at 264.
[26] *Alpine*, 291 F.3d at 1072.
[27] Petitioner's Appendix 0000131-0000135; *See also* Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.
[28] Petitioner's Appendix 000051-000054.
[29] *Orr Ditch, 256 F.3d at 946.*
[30] *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

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

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

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

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[31] *Alpine* 291 F.3d at 1072.
[32] *Orr Ditch*, 256 F.3d at 944-45.
[33] *Id.*
[34] *In re Manse Spring, 60 Nev* at 288,108 P.2d at 317; *Orr Ditch*, 256 F.3d at 941, *Alpine*, 291 F.3d at 1072, *Franktown Creek, 77 Nev.* at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.
[35] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.
[36] *Id.*
[37] *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).
[38] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.

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

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

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

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

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

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[39] *Orr Ditch*, 256 F.3d at 945-946; *Alpine* , 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.
[40] Petitioner's Appendix at 000084-000090, 000128-0000130; *See also* Petitioner's Appendix .
[41] Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.
[42] *See* Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.
[43] *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

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

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

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

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

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[44] *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
[45] Petitioner's Appendix 000021-000025.
[46] *Town of Eureka*, 108 Nev. At 168.
[47] *Id.*
[48] *Orr Ditch*, 256 F.3d at 945-946.
[49] *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

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

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

The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstance of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and state government regarding change applications for a change in place, manner and use of water rights in the Newlands Project prior to 1983.[54] The *continuous use* language the State Engineer relied on is in the Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."[55] In that section, the Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no bearing on the current instance because this case does not involve the circumstance that existed in the Newlands Project, or an intrafarm transfer.

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

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

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

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

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

[54] *Alpine*, 291 F.3d at 1073-74.

[55] *Id.*

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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[56] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).
[57] *See Request for Judicial Notice* at 3.
[58] *Id.*
[59] *See* SE ROA; *see also Petitioner's Appendix; see also Petitioner's Request for Judicial Notice.*

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

IT IS SO ORDERED.

April 11, 2016

Senior District Court Judge

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

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

DECLARATION OF SERVICE

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

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

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

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

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

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

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

DEPUTY CLERK

Case No. CV 20112

Dept. No. 2

FILED

2016 APR 29 AM 10: 38

TAMI RAE SPERO
CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR.

Petitioner,

vs.

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

Respondent.

NOTICE OF ENTRY OF ORDER

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

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AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 27th day of April 2016.

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

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CERTIFICATE OF SERVICE

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

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

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

DATED this 27th day of April 2016.

Employee of TAGGART & TAGGART, LTD.

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Case Title: *St. Clair v. King*

Case No.: CV 20112

INDEX OF EXHIBITS

Exhibit No.	Description
1	Order Overruling State Engineer's Ruling 6287

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EXHIBIT 1

EXHIBIT 1

Case No.: CV 20, 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR. Petitioner, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	**ORDER OVERRULING STATE ENGINEER'S RULING 6287**

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

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

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

[2] SE ROA 0006.

[3] SE ROA 004-006.

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

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with groundwater using drilled wells;

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

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

(8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933[7] was found on the property; and

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

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

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

[5] SE ROA 0037.
[6] SE ROA 0045.
[7] SE ROA 0102.
[8] SE ROA 0038-0066.
[9] SE ROA 008 – 009.
[10] Petitioner's Reply Brief, Exhibit 1.
[11] *Id.* (*emphasis in the original*) (*citing U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[12] SE ROA 007- 009.
[13] *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1072 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the*

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

DISCUSSION

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

I. STANDARD OF REVIEW

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

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

[14] SE ROA 005.

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

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

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

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

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

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of review is de novo.[20]

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

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

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

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

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

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

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

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

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

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

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

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

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

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[21] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.
[22] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315;*Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek*, 77 Nev. at 354, 364 P.2d at 1075;and *Revert*, 95 Nev. at 786, 603 P.2d at 266.
[23] *See* Petitioner's Appendix at 00001-0000135.
[24] Petitioner's Appendix at 000030-000037.
[25] *Revert*, 95 Nev. at786, 603 P.2d at 264.
[26] *Alpine*, 291 F.3d at 1072.
[27] Petitioner's Appendix 0000131-0000135; *See also* Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.
[28] Petitioner's Appendix 000051-000054.
[29] *Orr Ditch, 256 F.3d at 946.*
[30] *Orr Ditch*, 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

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

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

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

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[31] *Alpine* 291 F.3d at 1072.
[32] *Orr Ditch*, 256 F.3d at 944-45.
[33] *Id.*
[34] *In re Manse Spring, 60 Nev* at 288,108 P.2d at 317; *Orr Ditch*, 256 F.3d at 941, *Alpine*, 291 F.3d at 1072, *Franktown Creek, 77 Nev.* at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.
[35] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.
[36] *Id.*
[37] *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).
[38] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.

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

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

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

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

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

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[39] *Orr Ditch*, 256 F.3d at 945-946; *Alpine* , 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.
[40] Petitioner's Appendix at 000084-000090, 000128-0000130; *See also* Petitioner's Appendix .
[41] Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.
[42] *See* Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.
[43] *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

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

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

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

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

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[44] *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
[45] Petitioner's Appendix 000021-000025.
[46] *Town of Eureka*, 108 Nev. At 168.
[47] *Id.*
[48] *Orr Ditch*, 256 F.3d at 945-946.
[49] *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.

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

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

The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstance of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and state government regarding change applications for a change in place, manner and use of water rights in the Newlands Project prior to 1983.[54] The *continuous use* language the State Engineer relied on is in the Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."[55] In that section, the Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no bearing on the current instance because this case does not involve the circumstance that existed in the Newlands Project, or an intrafarm transfer.

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

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

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

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

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

[54] *Alpine*, 291 F.3d at 1073-74.

[55] *Id.*

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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[56] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).
[57] *See Request for Judicial Notice* at 3.
[58] *Id.*
[59] *See* SE ROA; *see also Petitioner's Appendix; see also Petitioner's Request for Judicial Notice.*

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

IT IS SO ORDERED.

April 11, 2016

Senior District Court Judge

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

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

DECLARATION OF SERVICE

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

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

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

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

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

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

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

DEPUTY CLERK

Case No. CV 20112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

NOTICE OF APPEAL

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

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

AFFIRMATION (Pursuant to NRS 239B.030)

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

DATED this 20th day of May, 2016.

ADAM PAUL LAXALT
Attorney General

By: _____
JUSTINA A. CAVIGLIA
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Nevada State Engineer

CERTIFICATE OF SERVICE

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

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

Dorene A. Wright

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

INDEX OF EXHIBITS

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

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

EXHIBIT 1

EXHIBIT 1

Case No. CV 20112

Dept. No. 2

FILED

2016 APR 29 AM 10: 38

JAMI RAE SPERO
CLERK OF COURT

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR.

Petitioner,

vs.

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

Respondent.

NOTICE OF ENTRY OF ORDER

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

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AFFIRMATION
Pursuant to NRS 239B.030

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

DATED this 27th day of April 2016.

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By: _____
PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
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Nevada State Bar No. 12303
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CERTIFICATE OF SERVICE

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

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

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

DATED this 7th day of April 2016.

Employee of TAGGART & TAGGART, LTD.

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Case Title: *St. Clair v. King*

Case No.: CV 20112

INDEX OF EXHIBITS

Exhibit No.	Description
1	Order Overruling State Engineer's Ruling 6287

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EXHIBIT 1

EXHIBIT 1

Case No.: CV 20. 112

Dept. No. 2

FILED

2016 APR 22 PM 2:48

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR. Petitioner, vs JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	**ORDER OVERRULING STATE ENGINEER'S RULING 6287**

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

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

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

[2] SE ROA 0006.

[3] SE ROA 004-006.

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

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with groundwater using drilled wells;

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

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

(8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933[7] was found on the property; and

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

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

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

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[5] SE ROA 0037.
[6] SE ROA 0045.
[7] SE ROA 0102.
[8] SE ROA 0038-0066
[9] SE ROA 008 – 009
[10] Petitioner's Reply Brief, Exhibit 1
[11] *Id.* (*emphasis in the original*) (*citing U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002)
[12] SE ROA 007- 009.
[13] *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1072 (9th Cir. 2001), *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and the*

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

DISCUSSION

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

I. STANDARD OF REVIEW

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

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

[14] SE ROA 005.

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

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

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

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

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

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of review is de novo.[20]

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

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

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

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

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

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

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

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

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

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

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

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

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

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[21] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.
[22] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315;*Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077, *Franktown Creek*, 77 Nev. at 354, 364 P.2d at 1075;and *Revert*, 95 Nev. at 786, 603 P.2d at 266.
[23] *See* Petitioner's Appendix at 00001-0000135.
[24] Petitioner's Appendix at 000030-000037.
[25] *Revert*, 95 Nev. at786. 603 P.2d at 264.
[26] *Alpine* 291 F.3d at 1072.
[27] Petitioner's Appendix 0000131-0000135; *See also* Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.
[28] Petitioner's Appendix 000051-000054.
[29] *Orr Ditch, 256 F.3d at 946*
[30] *Orr Ditch*, 256 F.3d at 946. *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

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

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

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

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[31] *Alpine* 291 F.3d at 1072.
[32] *Orr Ditch*, 256 F.3d at 944-45.
[33] *Id.*
[34] *In re Manse Spring*, 60 Nev at 288,108 P.2d at 317; *Orr Ditch*, 256 F.3d at 941, *Alpine*, 291 F.3d at 1072, *Franktown Creek*, 77 Nev. at 354, 364 P.2d at 1075; *Revert*, 95 Nev. at 786, 603 P.2d at 266.
[35] *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.
[36] *Id.*
[37] *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).
[38] *Orr Ditch*, 256 F.3d at 945; *Alpine*, 291 F.3d at 1072.

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

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

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

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

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

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[39] *Orr Ditch*, 256 F.3d at 945-946; *Alpine*, 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096
[40] Petitioner's Appendix at 000084-000090, 000128-0000130, *See also* Petitioner's Appendix .
[41] Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.
[42] *See* Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.
[43] *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).

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

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

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

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

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[44] *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
[45] Petitioner's Appendix 000021-000025.
[46] *Town of Eureka*, 108 Nev. At 168.
[47] *Id.*
[48] *Orr Ditch*, 256 F.3d at 945-946.
[49] *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945

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

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

The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstance of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal and state government regarding change applications for a change in place, manner and use of water rights in the Newlands Project prior to 1983.[54] The *continuous use* language the State Engineer relied on is in the Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."[55] In that section, the Ninth Circuit was specifically analyzing whether equitable principles should apply to protect only *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has no bearing on the current instance because this case does not involve the circumstance that existed in the Newlands Project, or an intrafarm transfer.

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

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

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

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

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

[54] *Alpine* 291 F.3d at 1073-74.

[55] *Id.*

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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[56] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994)
[57] *See Request for Judicial Notice* at 3.
[58] *Id.*
[59] *See* SE ROA; *see also Petitioner's Appendix, see also Petitioner's Request for Judicial Notice*

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

IT IS SO ORDERED.

April 11, 2016

Senior District Court Judge

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

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

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

DECLARATION OF SERVICE

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

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

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

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

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

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

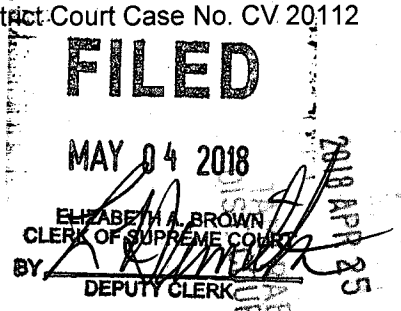
Executed on April 22, 2016, at Winnemucca, Nevada.

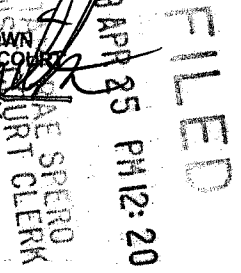
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,
Appellant,
vs.
RODNEY ST. CLAIR,
Respondent.

Supreme Court No. 70458
District Court Case No. CV 20112





REMITTITUR

TO: Tami Rae Spero, Humboldt County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 24, 2018

Elizabeth A. Brown, Clerk of Court

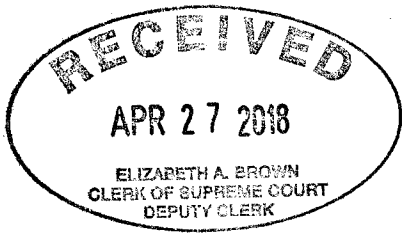
By: Amanda Ingersoll
Chief Deputy Clerk

cc (without enclosures):
Hon. Steven R. Kosach, Senior Judge
Attorney General/Carson City
Taggart & Taggart, Ltd.

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on April 25, 2018.

Jody Clark, Deputy
District Court Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,
Appellant,
vs.
RODNEY ST. CLAIR,
Respondent.

Supreme Court No. 70458
District Court Case No. CV 20112

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Affirmed."

Judgment, as quoted above, entered this 29th day of March, 2018.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this April 24, 2018.

Elizabeth A. Brown, Supreme Court Clerk

By: Amanda Ingersoll
Chief Deputy Clerk

CASE NO.: CV 20, 112

DEPT. NO.: 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

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

///

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.[1]

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

[1] Ruling 6287.

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

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

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

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

[2] January 5, 2016, Hearing Transcript, p. 79:21-23.
[3] *Id.*, p. 80:15-17.
[4] *Id.*, p. 80:20-21.
[5] *Id.*, p. 82:17-20.

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

Despite the district court's clear and simple order, the State Engineer appealed the order to the Nevada Supreme Court. The State Engineer again argued that V-010493 was abandoned because St. Clair could not show an intent not to abandon the water right. The Nevada Supreme Court agreed with the district court, finding that "there is not clear and convincing evidence" that V-010493 was ever abandoned.[6] The Nevada Supreme Court concluded that "the State Engineer misapplied Nevada law by presuming abandonment based on nonuse evidence alone" just as the district court had explained to the State Engineer.[7]

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

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

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[6] *King v. St. Clair*, 134 Nev. Adv. Op. 18, 7, 414 P.3d 314, 317 (2018).
[7] *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*, 134 Nev. Adv. Op. 18 at 9, 414 P.3d at 318.

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

STANDARD OF REVIEW

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

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

ARGUMENT

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

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

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[13] NRS 18.010(2)(b).

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

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

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

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

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

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

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[16] NRS 233B.039(j).
[17] 109 Nev. 782, 858 P.2d 375 (1993).
[18] 134 Nev. Adv. Op. 14, 412 P.3d 28 (2018).
[19] *Id.* (citing NRS 533B.130(6)).
[20] *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.

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

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

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

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

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[21] *See* DCR 13.
[22] January 5, 2016, Transcript, pp. 81:23-24 – 82:1-4.
[23] *See* EDCR 1.90(a)(5); *see also St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.
[24] April 4, 2016, Hearing Transcript, pp. 33:16 – 34:10.
[25] *St. Clair*, 134 Nev. Adv. Op. 18 at 8, 414 P.3d at 318.

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

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

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

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

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[26] *Id.*
[27] *St. Clair*, 134 Nev. Adv. Op. 18 at 7, 414 P.3d at 317.
[28] *See* e.g., Ruling 6032 (finding intent to abandon based on loss of grazing rights and failure to respond to State Engineer inquiries); Ruling 5898 (same); *see also* Ruling 6131, p. 3 (finding voluntary intent to abandon based on failure of owner to have valid corporation filed with Secretary of State, and failure to communicate with State Engineer's office for over 60 years); Ruling 6152 (same); Ruling 6081 (same).
[29] Ruling 6201, p. 3.
[30] *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314.
[31] *Id.*

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

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

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

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[32] January 5, 2016, Hearing Transcript, p. 82:17-20.
[33] NRS 18.010(2)(b).
[34] *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. 240, 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.

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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 28th day of June, 2018.

Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
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EXHIBIT INDEX

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EXHIBIT 1

EXHIBIT 1

CASE NO.: CV 20, 112

DEPT. NO.: 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

***

RODNEY ST. CLAIR,

Petitioner,

vs.

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

Respondent.

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

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STATE OF NEVADA)
):ss.
COUNTY OF CARSON CITY)

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

1. I am over the age of eighteen (18) and of sound mind.

2. I am making this affidavit in support of Petitioner's Notice of Motion and Motion for Attorneys' Fees filed in the above entitled action.

3. I am an attorney of record for Petitioner, RODNEY ST. CLAIR, and have, along with other members of TAGGART & TAGGART, LTD., at all relevant times, provided valuable and necessary services on behalf of RODNEY ST. CLAIR for which he is requesting compensation.

JA 868

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

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

Senior Partner hourly rate:	$325.00
Associate Attorney hourly rate:	$150.00-175.00
Paralegal hourly rate:	$120.00

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

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

Senior Partner Attorney time:	4.25 hours
Associate Attorney time:	4 hours
Paralegal time:	4.25 hours

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

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

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

Senior Partner Attorney time:	42.25 hours
Associate Attorney time:	111.85 hours
Paralegal time:	57 hours

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 28 day of June, 2018.

TIMOTHY D. O'CONNOR, ESQ.

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

NOTARY PUBLIC

SARAH HOPE
Notary Public - State of Nevada
Appointment Recorded in Carson City
No: 15-3128-3 - Expires September 17, 2019

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Case No. CV 20,112

Dept. No. 2

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

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).

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

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

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

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

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

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

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

II. BACKGROUND

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

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

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

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

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

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

III. ARGUMENT

A. St. Clair's Motion is Untimely

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

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

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

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

[2] 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.

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

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

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

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

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

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

[3] While pursuant to NRS 233B.039(j), the State Engineer is expressly excluded from the Nevada 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.

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

I. INTRODUCTION

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

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

II. STANDARD OF REVIEW

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

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

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[1] NRS 47.130(2)(a)&(b).
[2] *Jones v. United States*, 11 S.Ct. 80, 84 (1890).

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

III. ARGUMENT

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

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

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

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

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

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

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Court on June 3, 2015. An opposition was due no later than June 19, 2015.[6] The State Engineer's Opposition is four (4) months late.

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

> The Court notes the [State Engineer's] motion sets forth absolutely no authority in support of the request by the State Engineer in violation of EDCR 2.20. The fact that counsel failed to timely oppose the motion does not support reconsideration of the order, and the Court is not inclined to set aside its order [. . .]. The Motion was filed on July 1, 2015. The Opposition should have been filed by July 20, 2015. No opposition was filed. No motion for extension of time to file an opposition was filed. No stipulation to extend the time to oppose was filed.
>
> . . .
>
> The failure of counsel to properly calendar and timely respond to motions is neither a basis for reconsideration nor a basis to set aside an order. Therefore, the Motion by the State Engineer is denied.[8]

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

B. <u>This Court Should Take Judicial Notice of the Documents Offered by Petitioner.</u>

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

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[6] DCR 13(3); NRCP 6(e).
[7] *See* September 9 Order attached hereto as Exhibit 1.
[8] *See* Exhibit 1 attached hereto.

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

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

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

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

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

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[9] NRCP 11(a).
[10] *Dudum v. Arntz*, 640 F.3d 1098, 1101, n.6 (9th Cir. 2011).
[11] NRS 51.155.
[12] NRS 47.130(b).

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3. Ruling on Remand 5464-K.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The State Engineer misapplied Supreme Court precedent in his opposition.

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

The holding in *Kent v. Smith* does not apply to the current instance as implied by the State Engineer. *Kent* relates to the administration of a previous decree determining relative rights of water users of the Humboldt River (the Humboldt Decree).[14] In *Kent*, the Nevada Supreme Court was reviewing a non-decree court's interpretation of the Humboldt Decree. *Kent* does not apply to a district

[14] *Id.*, 62 Nev. at 32, 140 P.2d at 353; *see also United States v. Alpine Land and Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999) (holding continuing and exclusive jurisdiction of the federal court to hear appeals on the Carson or Truckee Rivers based on the Alpine or Orr Ditch Decrees).

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

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

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

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

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

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

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

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

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

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

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

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[21] *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *See Respondents' Motion to Strike* at 2:22-24.
[22] *Revert*, 95 Nev. at 785, 603 P.2d at 263-234.
[23] *Revert*, 95 Nev. at 785, 603 P.2d at 263-234; NRS 533.150.
[24] *Revert*, 95 Nev. at 787, 603 P.2d at 265.
[25] *Id.*
[26] *See* Opposition at 3:24-25.
[27] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).
[28] *Id.* 113 Nev. at 1052-53, 944 P.2d at 838.

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

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

IV. CONCLUSION

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

DATED this 30th day of November, 2015.

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By: _____
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[29] *Id.* 113 Nev. at 1060-61, 944 P.2d at 843.
[30] *Id.*
[31] *Id.* 113 Nev. at 1061, 944 P.2d at 843.

CERTIFICATE OF SERVICE

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

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

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

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

[___] By ELECTRONIC DELIVERY, via:

DATED this 30th day of November, 2015.

Paul D. Taggart
Employee of TAGGART & TAGGART, LTD.

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

Case No.: CV 20112

Dept.: II

INDEX OF EXHIBITS

Exhibit No.	Description
1.	Order Denying Respondent's Unopposed Motion to Set Aside District Court Order Granting Petitioner's Motion to Include Documents in the Record

EXHIBIT 1

EXHIBIT 1

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09/03/2015 04:21:02 PM

CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

THE MOAPA BAND OF PAIUTE INDIANS,

Petitioner(s),

vs.

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

Respondent(s).

In re Nevada State Engineer Ruling #6258

Case No.: A-14-697004-J

Dept. No.: 7

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

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

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

SEP 03 2015

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

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

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

The September 8, 2015 hearing is vacated.

DATED this 3rd day of September, 2015.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

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

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

Richard M. Berley, Esq. (pro hac vice)
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TINA HURD
JUDICIAL EXECUTIVE ASSISTANT

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

SIXTH JUDICIAL DISTRICT COURT MINUTES

CASE NO. CV20-112 TITLE: RODNEY ST. CLAIR VS JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

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

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

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

Statements were made by Court.
Counsel presented arguments.
Court stated its findings of facts and conclusions of law.
COURT ORDERED: It overturns the State Engineer's decision.
Taggart to draft the decision.
Statements were made by Court.

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

Case No. CV20-112
Dept. No. 2

ORIGINAL

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

-o0o-

RODNEY ST. CLAIR, an individual,
Petitioner,

vs.

JASON KING., P.E., Nevada State Engineer, Division of Water Resources & Department of Conservation and Natural Resources,

Respondents.

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

For the Petitioner: Paul Taggart, Esq.

For the Respondents: Justina Caviglia, Deputy Attorney General

Transcribed by: Capitol Reporters
Nicole Alexander

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

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

MR. ST. CLAIR: Sir.

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

MR. TAGGART: Good morning, Your Honor.

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

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

MS. JOSEPH-TAYLOR: Good morning.

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

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

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

MR. TAGGART: Yes, Your Honor.

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

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

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

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

THE COURT: Certainly.

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

So a process occurs where the State Engineer

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

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

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

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

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

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

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

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

Mr. Crosley.

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

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

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

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

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

THE COURT: I have it.

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

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

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

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

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

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

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

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

improvements inconsistent with irrigation to establish abandonment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So the State Engineer in this case said

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

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

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

And this is the most important part about

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

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

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

just went through.

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

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

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

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

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

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

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

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

And what the Court said is you have to look at surrounding facts in addition to the intent to abandon in order to determine whether or not abandonment has occurred. Again, I cited here to Alpine and that you -- non-use evidence is not enough. You have to show intent to abandon. And the ways that you can show intent to abandon are things like construction of improvements that are inconsistent with irrigation. If someone puts a road in over the top of their property, if someone puts a house on the top of their property, a driveway, that's an improvement inconsistent with irrigation. You can't irrigate when that happens.

The Ninth Circuit said that can be evidence of an intent to abandon. That is subjective or circumstantial evidence of a subjective intent, or if

someone doesn't pay their taxes on their water rights, that can be considered circumstantial evidence of intent to abandon. So these are the kinds of outside the non-use evidence, the types of evidence that can be used to establish a claim.

None of that's present here. There's no -- we're currently irrigating the property that was irrigated by this right originally. There's no improvements inconsistent with irrigation, and the taxes have been paid, and that's evidenced by the fact that the chain of title shows that the water rights were conveyed throughout that chain of title, there was no tax sale for any of the property, so there was no failure to pay taxes that led to a tax sale. The property was clear of that.

Now, prior to the adoption or, I'm sorry, prior to Ruling 6287, the State Engineer has made quite a few decisions about abandonment. And in our view, they properly articulated the rule for abandonment, and on this Slide, No. 14, I go through a series of decisions by the State Engineer.

And before I get into this, I'll just say that the prior rulings of the State Engineer, I will concede, are not precedential on the State Engineer. But in a world where water rights are not well-understood --

this isn't an area where a lot of cases get to courts. We don't have a lot of Supreme Court decisions on facts and how laws apply to facts and water rights. What we have is many, many, many rulings by the State Engineer that go into application of Nevada water law to facts. And it's relevant in a determination of whether the State Engineer has been arbitrary and capricious, which is our allegation in this case. It's relevant to look at how decisions were made historically on these points and then to weigh the current decision against that pattern.

And so these prior decisions by the State Engineer are helpful to explain what we can't find in statutes or in case law. And they are public records of the State Engineer, and so they are things that the Court can take into account. They're also not additional facts or evidence. It's just what it is is public records of the State Engineer that show the application of facts to the water law in the State of Nevada.

So in these four decisions, the State Engineer enforced this rule that non-use evidence alone is not enough to determine abandonment. In Ruling 462, the State Engineer said that Nevada case law discourages and abhors the taking of water rights away from people. Therefore, the Supreme Court in Nevada had to set the

standard of clear-and-convincing evidence. The Ninth Circuit's union of acts means more than just non-use.

And then the State Engineer in this case, in an oral ruling, said, "I find nothing in this record as to the other union of acts or circumstances that would lead the factfinder to find that these waters have been abandoned. The union of acts means more than just non-use."

Ruling 6201 says a very similar holding. Ruling 6182, which we'll talk about a little bit more, the State Engineer found that a rail yard was not used for many decades, but he refused to rely solely on the physical evidence of non-use to make an abandonment determination, and that's because we have to make a determination of actual intent. All of these rulings are attached to our appendix for your review.

And then in Ruling 4116, the State Engineer also said that non-use is only some evidence of intent to abandon the right. Bare ground by itself does not constitute abandonment. Bare ground is something we're going to talk about a little more. Bare ground is another way of referring to a piece of ground where water wasn't used, and that's the argument the tribe made in all of those cases that, "Hey, I've got an aerial

photograph that shows that there's bare ground." Well, bare ground just means nonuse of water. And that was found to not be sufficient to establish abandonment without more evidence. That ruling, 4116, is the one that was upheld in the Ninth Circuit in that Orr Ditch case that i read earlier.

So concluding on this idea about non-use evidence. A water rights owner's mental state for abandonment cannot be inferred from non-use. The State Engineer has always until now required more than mere nonuse to declare abandonment, and the State Engineer has consistently ruled until now that evidence of bare ground alone is not enough to establish intent to abandon. And the State Engineer previously advocated the same position to the Ninth Circuit that we advocate here, and the Ninth Circuit upheld that position.

Okay. So now we're going to get into a lot more detail about what the Ninth Circuit said, and the reason why this is important is because in the ruling that you're reviewing, the State Engineer cited to a rule of law and applied that rule of law, and that rule of law that he cited to comes from this case. And in our view, that rule of law does not apply in the situation we have before us. It was stated for a specific reason that is

different from what we have in front of us today.

So in Alpine 5, we had a thing called intrafarm transfers. And what I'm going to do is hand out a copy of this decision. And before I do, though, I want to -- I just want to point you to the last bullet on Slide 16. So the Ninth Circuit made this statement. "To qualify for a particular equitable remedy, the Court held at a minimum, proof of continuous use of the water right should be required to support a finding of lack of intent to abandon the water right." The language there shifts the burden to the water right owner. That's the language the State Engineer cited to in the ruling that you're reviewing.

And now we're going to talk about what that meant, what that ruling meant in Alpine 5. And in the State Engineer's ruling, they quote to that and they cite to Alpine 5. So if we go to Alpine 5, if you go to the first tab that I've included, the first Post-it I have on there, it has a highlighted area up in the top left there, and it goes back to the page before, which is page 6, and this is at page 1,071 in the case, which is 291 F. 3rd, 1062. And it says, "The district court also set forth a standard for evaluating evidence of abandonment. In particular, it held that where there is evidence of

both a substantial period of non-use combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment."

So the Court was weighing facts. They were saying that, you know, in addition to non-use evidence, you have to look at are there improvements with irrigation? Is there taxes being paid? And then on the next page, in the next column under analysis, the Court says that they're reviewing three things. And so under sub -- under Roman III, sub A, it says, "First," and this is -- and they're attributing argument to parties. First they argue that the district court improperly evaluated different evidentiary factors in determining abandonment. Second, they asked this Court to reconsider our ruling in Alpine 3. Finally, they contended that the district court erred in exempting intrafarm transfers from state forfeiture and abandonment law. So first the Court looks at the abandonment rule in general, and then they look at intrafarm transfers.

And so then in the first paragraph, they re-state the rule I've said over and over again already. They say, "First, with respect to the evidentiary issues related to abandonment, the United States and the tribe

argued that the district court erred in affirming the engineer's determination that a prolonged period of non-use of water rights does not create a rebuttal presumption that a landowner intended to abandon those rights. We rejected this argument in Orr Ditch" -- that's the case I read from before -- "holding that while a prolonged period of non-use may raise an inference, it does not create a rebuttal presumption."

So they make the statement in this case, the same rule of law that has applied in Nevada in all of the other cases we've talked about. But then if you go to page -- to the second tab or the second Post-it that I have in here, I've highlighted sub B of the case. So they have an outlined heading called, "Equitable Relief for Intrafarm Transfers."

So this is where they go into a very specific situation that was happening in the Newlands Project, and what it was is that folks would have a farm. They called it a farm unit, and it might be a thousand acres, and they had a water right on certain land. And over time, they picked up that water and moved it on other parts of their land in the same farm unit. And the tribe came in and said, "Well, you haven't used the water where you were supposed to. You had a right to use it on this part

of your farm, and you're now using it on this part of your farm, so you've abandoned your water right at this location, and/or you've forfeited it at this location."

And what Judge McKibben said was that, "No, that's not fair. Equity plays a role in water cases. That's not fair." If this -- and there's more complications. It's a very litigious situation out there in the Newlands Project, but the judge determined that it was okay for someone to move water around within their property, that they could be relieved from the strict rules of filing change applications to move water from one place to another if it was within their farm. And so he said there's an equitable remedy whenever it's an intrafarm transfer. That's what Judge McKibben said at the district court level.

Well, the Ninth Circuit reviewed his decision, and the Ninth Circuit said, "You know, we kind of agree with you, but we don't think it's a blanket rule. We don't think it's anytime anywhere it's within someone's farm unit, it creates this is equitable remedy. You've got to look at the facts of each case." And that's when they made the statement that at a minimum -- on the next page -- I have this here. "At a minimum, proof of continuous use of water -- of the water right

should be required to support a finding of lack of intent to abandon."

So the Court applied that rule in the very limited instance of intrafarm transfers and said, "We're not going to adopt Judge McKibben's intrafarm transfer rule. We're not going to say it's a blanket equitable remedy in all situations. We're only going to let it work in this one kind of situation." But if it's not intrafarm transfer, the same rule applies as I've stated and as applies in all of the cases.

So when we go to Ruling 6287, you'll see that the State Engineer, in our view, took that out of context. So this is the ruling that we're reviewing today. This is Ruling 6287, and this is the one that we filed the appeal from. And if you go to page 4 of the ruling, which is marked as State Engineer's ROA No. 7, I've highlighted where they've made this statement. But let me read that whole paragraph.

So they're stating what the law is in their view, and then they apply that law to the facts of this case. The State Engineer says, "Non-use" at the beginning of that paragraph -- "nonuse of a period of time may inferentially be some evidence of an intent to abandon a water rights." We agree. "Although a

prolonged period of non-use may raise an inference to intent to abandon, it has been held it does not create a rebuttal presumption of abandonment." We agree. But then they say, "At a minimum then, proof of continuous use of the water right should be required to support a finding of lack of intent to abandon."

In our view, they took that sentence out of the intrafarm transfer exception of Alpine 5. They ignored what Alpine 5 really said, that it carried forward the same rule that has always existed in those cases, that you cannot shift the burden to the water right owner to show lack of intent to abandon. But what they have said is that at a minimum, that water right owner is required to support a finding of lack of intent to abandon. So we just think the State Engineer is applying the wrong rule of law. And that is one of the points that we would request Your Honor to reverse their decision based upon.

THE COURT: But isn't this an intrafarm transfer?

MR. TAGGART: No.

THE COURT: Intrafarm in the sense that there's a group of farms. This particular section, the 160 acres, is part of a larger farm, "intra." The

request for these 160 acres they use -- why is it not then? Why is it not intrafarm?

MR. TAGGART: Well, this -- we're going to use the water on the same piece of ground where we used the water before.

THE COURT: Okay. All right. That answers my question.

MR. TAGGART: It's not moving it within one farm unit to another location.

THE COURT: That's right. And forgive me because I realize it might be intrafarm, but it is an existing quote unquote, "well or use."

MR. TAGGART: Uh-uh.

THE COURT: And maybe the term in general can explain, or maybe you can, could it be that the State Engineer thought it was intrafarm and therefore starts using these standards? I'm speculating when I say that.

MR. TAGGART: I'm sure my esteemed colleague can answer that for you. In our view, it's not an intrafarm. We think that was a specific situation in the Ninth Circuit case that does not apply here.

THE COURT: I can see from his decision on ROA 0007, he shifted the proof, he, the engineer, shifted the proof. "At a minimum then, proof of continuous use

of the water rights should be required to support a finding of lack of intent to abandon." See, I'm looking for why did he shift? What was on the engineer's mind? But I'm thinking out loud. My wife says, "Don't think out loud when you're on the bench," but I can't help myself, so please go on.

MR. TAGGART: Right. I mean, to understand what an intrafarm transfer is, we really would need to go more in-depth into what was going on in those cases, and those cases went back and forth to the State Engineer three or four times. It was terrible, the amount of litigation that happened. The rulings the State Engineer issued were hundreds and hundreds of pages. But you also have this complication that forever, the State Engineer's Office did not consider water rights in the Newlands Project to be under their jurisdiction. They believed they were federal water rights not under their jurisdiction.

In 1984, the U.S. Supreme Court had a case, Nevada v. U.S., which said that the water rights in that project are actually state water rights, and the State Engineer, as a result, did have jurisdiction over those water rights. And so what the tribe was saying is, "Hey, you know what? You guys weren't following the rules

before 1984. You're moving water around in your farms without going to the State Engineer." And the farmers are saying, "Well, wait a second. Before 1984, the government told us we didn't need to go to the State Engineer. Everyone believed that the situation was that the federal government controlled the reclamation project, not the State Engineer."

And so that's what the Ninth Circuit and Judge McKibben were looking at is that the farmers were saying, "Hey. We shouldn't be prejudiced because we didn't file a change application with the State Engineer prior to 1984. We didn't even know that we needed to do that then." And so the Ninth Circuit then said, "Okay. We buy that, but we're not just going to let everybody have that out. You have to at least show that you used the water." And so that's what the intrafarm transfer exception was all about.

Now, we have made a request for judicial notice with some documents that relate to the decisions that we've been talking about. And those decisions demonstrate that the State Engineer has not applied that intrafarm exception the way he has in this case. What we have included is the brief that was filed by the State Engineer to the Ninth Circuit prior to the Alpine 5 case,

and it argues the same principles that we're advocating about intent to abandon. Then the Ninth Circuit adopted that decision or adopted that particular argument.

Then the case got remanded by back to the State Engineer, in the Ruling 5464, the State Engineer applied that rule, and in the intrafarm transfer context applied one rule, but everywhere else applied the same rule that we believe applies here. And then in defense of that decision, they've had another decision to the Ninth Circuit, another argument to the Ninth Circuit, and another brief was filed, and we've provided that. And what they all show -- our intent is to show that this is the proper reading of Alpine 5, that the State Engineer even made these points about what Alpine 5 means. And so we've provided those for that purpose.

The Attorney General filed an opposition to our request for judicial notice. That was filed four months after we submitted our request for judicial notice, so the first point is we think that their opposition is late and should be denied for that purpose. One of the points they make is that there's no new -- that you cannot consider new evidence in the first instance here, and that's true. This is an appellate matter.

If new evidence is submitted, the State Engineer should review it in the first instance, and so your only option, if there was new evidence, would be to remand him to consider evidence first, and it would come back up to you for consideration. But these aren't new evidence. These are just -- these are public documents that demonstrate the precedent that the Ninth Circuit had established for water rights. And the reason why these particular documents are so important is because they tie directly to the rule of law that the State Engineer applied in this case, so it's not just a different case or a different situation. It's the very rule that they're relying upon here.

So stepping back a little bit, because now I'll move on from talking about the law, and we'll get into the facts and the evidence. But before I do that, I just wanted to just restate that vested water rights are property rights, and the law abhors the taking of those property rights by abandonment or forfeiture. That's why clear-and-convincing evidence is required to prove abandonment. And if a person does not use their water right, it does not -- but does not intend to forsake it forever, abandonment cannot occur. And this is important because a lot of people think about water rights, use it

or lose it. But that's just not the case when it comes to a property right that's owned and when abandonment is being alleged.

Forfeiture is different. Forfeiture is a different situation, but that's not what was claimed here by the State Engineer. And non-use evidence cannot express the intent of a landowner. And the reason here is if you just showed aerial photographs of the land and say, "Okay. The aerial photographs are the evidence of non-use, and that shows the intent to abandon," there's a lot of problems with aerial photographs. And in all of those cases that we have involving the tribe -- we went through all of those problems. I mean, you'd have photos that weren't taken during irrigation season. You'd have photos taken during droughts. And so just looking at aerial photographs to determine whether or not water is being put to use or if someone intends to abandon their water right is not sufficient.

So now what I want to want do is focus on how -- and all of the evidence that the State Engineer relied upon is non-use evidence. And if all he has is non-use evidence, he cannot meet the standard required for abandonment. And the State Engineer references evidence to show that water was not used. He cites to the well

condition, he cites to aerial photographs, and he indicates that the pump was pulled from the well. So these are three points that he makes. And in our view, all of those facts show non-use of water. That's all they show. They don't show an intent to abandon. They just show that the water wasn't being used at the time. And that's all the condition of the well can show or the lack of a pump in the well. And the State Engineer relies upon a statement made in the application that the water had not been used every year and that the applicant failed to submit evidence to show continuous use.

We don't think that the burden is on us to show evidence of continuous use, and the State Engineer has to have more than nonuse evidence to show abandonment. Also, all of the evidence that was submitted that the State Engineer relied upon was submitted by my client, so they didn't do any independent evaluation. They didn't come up with any facts themselves. They didn't travel out to the property and do a field investigation. They don't have any idea when the well (sic) was pulled out of the well or when the pump was pulled out of the well. They have no idea about the property because they didn't visit it, so they didn't do an independent analysis of the property, and they just

relied upon the information we submitted to prove that it was a vested right. We were focusing on water use prior to 1939 in order to establish a vested right. They took that evidence and used it against us to allege that we had abandoned this water right without doing any independent analysis.

And whenever there's a lack of certainty about whether the person has an intent to abandon, then there's going to have to be a finding of no abandonment because the clear-and-convincing evidence standard certainly requires a higher showing than uncertainty about those particular facts.

Now, abandonment can happen. I mean, I don't want so say that it's never possible. And it has happened. And the one case that we have from the Supreme Court is Revert, which talked about abandonment. So Revert v Ray is a case that we often cite to, and it is at 95 Nevada 782. And in that case, there was a finding of abandonment of a water right. What happened was -- and this is quoting from the case at page 783 or, I'm sorry, 784.

They say, "Prior to 1905, Montilius M. Beatty, subsequently known as 'Old Man Beatty,' acquired, by squatter's possession, a vested right of some

magnitude in the use of waters flowing from the Beatty Springs. In 1905, Beatty conveyed his water rights for consideration to Bullfrog Water, Light and Power Company. Bullfrog initially put the water to beneficial use, installing a pipeline running from the springs to the short-lived boomtown time of Rhyolite and executing a two-year lease of those water rights to the Indian Springs Water Company in January 1915. Bullfrog, however, eventually lost interest in the springs and vanished from the area at some time between 1915 to 1920 without transferring or selling the water rights."

Now, in our brief at page -- in our opening brief at page 9, in our reply brief at page 111, we refer to this case. And what it's saying is when a corporation owns a water right and the corporation vanishes, disappears, that can be considered intent to abandon. And later in that case, the Supreme Court said exactly that.

The record reflects that prior to 1919, Bullfrog had ceased all business and corporate operations in the Beatty area, had vanished from the community, and had allowed part of its property to be sold for delinquent taxes. So the Supreme Court upheld an abandonment when the company disappeared, they vanished

from the community, they stopped paying taxes, and that's the kind of evidence that is sufficient for abandonment to be found in the State of Nevada. And the State Engineer has taken that same view throughout a series of rulings that we've attached to our appendix, and the first one is Ruling 6201.

The facts here were that the owner of a water right had relinquished the grazing rights that they had in an area, so that was a fact outside nonuse of water. They relinquished the public right that they had with the BLM to graze cattle, and they did not continue to register their corporation with the Secretary of State's Office, and they didn't inquire of the State Engineer's Office when the State Engineer asked about the water right. Those are the kinds of things that are circumstantial evidence that can establish abandonment; a corporation going defunct, just like in the Revert v Ray case, giving up grazing rights, and the like. So that's Ruling 6201.

In Ruling 6182, this was an interesting one because it comes from an area out close to where we're talking about. This involved a water right for a rail yard in Imlay, Nevada, and the rail yard had not been used for decades. But the fact that the rail yard hadn't

been used for decades was not the reason the State Engineer found abandonment. So just the nonuse of water at the rail yard was not enough. There was also evidence that the water right owner had relinquished a right-of-way across public land that was required to use the water. So that was one thing. And then there was no communication from the owner of that water right with the State Engineer's Office when the State Engineer asked for information about the water right. So those, again, giving public rights of way that can inhibit your ability to use the water, not communicating with the State Engineer's Office, these are the kinds of things that are legitimate reasons for abandonment to be determined. And on page 23, we talk about more rulings that have similar decisions that involve other circumstantial evidence of intent to abandon.

So on Slide 24, we say that facts -- these are the types of facts in addition to nonuse that are required. The State Engineer must have evidence that actually reflects the actual intent and state of mind of the water right owner. I went through a couple of those: construction of a structure incompatible with irrigation, failure to pay taxes, failure to update title, failure to update an address, failure to maintain corporate

standing, failure to maintain communications with the State Engineer. Those are the things that evidence an intent to abandon.

Now, on Slide 25, we talk about bare ground again. The State Engineer, in prior rulings, has found that bare ground alone is not enough to find abandonment, and in our view, that's all the evidence they can point to when they talk about aerial photographs of our property, is that it shows bare ground. So in Ruling 4116, they found that that type of evidence is not sufficient to find abandonment.

Now, in the ruling -- in the ruling, the State Engineer refers to a series of aerial photographs. And if we could look at the -- you have that ruling in front of you. On page 5, which is State Engineer Ordway, page 8, they say, in the middle, the first full paragraph in the middle of that paragraph, "Further, the Office of the State Engineer informed applicants that it was questionable whether the 1954 image showed disturbed land in light of future aerial images from 1968, 1975, 1986, 1999, 2006 and 2013."

Those aerial photographs have not been provided to my client. They're not in the record before Your Honor. The only aerial photograph that's been

provided is the one that we provided, so we've asked that any reference to those documents of support for the State Engineer's decision be stricken because those documents aren't even before you to look at. But even if they were, our view is that all they can show is bare ground, and bare ground is just evidence of nonuse, and that's not evidence of an intent to abandon.

All right. Now I'm going to go through a few other slides that talk about other reasons why a water right cannot be -- why a person cannot be determined to have an intent to abandon. And so there's a series of rulings in the past where the State Engineer has said that the filing of a change application, like if I have a water right I haven't used in a long time, but then I come in and I file a change application with the State Engineer to use the water, that shows an intent to not abandon the water, or you can't find an intent to abandon from that.

If I record my water right information with the State Engineer, if I go in there and I give them my deeds and say, "Okay. I'm the current owner of this water right," that shows I don't intend to abandon the water right. And if the State Engineer needs to asks me about my water right and I respond to him, then that's a

reason why I don't have an intent to abandon. So those are in a series of rulings that we've provided. Ruling 6177 goes through this.

The State Engineer found that the filing of a change application itself is evidence of lack of intent to abandon a water right. We filed a change application, and that's why this is important because in the past, that would have been good enough for him to say, Okay. They said the applicant has filed an application to move the point of diversion of a well located on applicant's property to allow for easier access to the water. This is evidence that the applicant does not intend to abandon its water right and seeks to ensure that the water can be placed to beneficial use." So again, we did that.

On Slide 29, the State Engineer, in 2011, relied upon a change application, the filing of a change application to reject a protestant's claim that nonuse of a water right had occurred since 1956. The sole evidence the State Engineer relied upon in that ruling was that the applicant had filed a change application. The State Engineer found the applicant's intent to place the water to beneficial use is evidence by the filing of applications, and they go through the four applications.

We also included Ruling 5840 and 5791. Those

are rulings where the State Engineer ruled abandonment did not occur because someone had filed an extension of time. So that's a little bit different than a change application, but it's another filing that can be made with the State Engineer that evidences an intent not to abandon a water right.

So in this case, we filed change -- the present applications, we filed them, so that evidenced a lack of intent not to abandon the water rights, and we think that -- and then on page 31, we've cited to Ruling 6191, which shows that recording ownership with the State Engineer's Office has been enough to overcome a claim of abandonment. Ruling 6191 is the specific one there. The State Engineer found that nonuse evidence coupled with the fact that no conveyance documents or reports had been filed on that water right demonstrated an intent to abandon.

So in that case, the State Engineer said, "You haven't submitted any records or reports of conveyance, and therefore, you've intended to abandon the right." And they hadn't communicated with the State Engineer for 16 years.

Here, there's clearly evidence that Jungo bought the property and the water right that we're

debating conveyance documents and title evidence was submitted to the State Engineer, and in contrast to the prior rulings, there is evidence of the title documents and the reports in conveyance and also communications with the State Engineer's Office. So all of that should have been enough for the State Engineer to find that we did not intend to abandon the water right.

Now, the next series of slides I have here goes to this question of well, why care about what we want to do in 2013 if someone had abandoned a water right 50 years ago? And these series of cases say we look at what the intent is, the State Engineer has looked at what the intent of the current owner is, and if they don't intend to abandon the water right, the State Engineer will not declare it abandoned. So there's a series of rulings there that we've cited to Ruling 385 on that point.

Also on Slide 34, there's Ruling 6083 where the State Engineer -- and this is important because in this case, he's relied upon the disrepair of works of diversion to imply abandonment. And in 6083, the State Engineer said that -- and we've included this on the slide. We've cited to it.

"The protest requests the State Engineer

declare permit 10105 abandoned. The abandonment of the service water right in Nevada is the relinquishment of a right with the intention to forsake it within the meaning of the term abandonment and intent to abandon and as a necessary element. Nonuse of the water right is only some evidence of an intent to abandon. The right and use -- the right and does not create a rebuttal presumption."

"At the field investigation, Permittee Lincoln expressed a continued interest in returning the pipeline or other works of diversion to operate in condition, and based upon the statement of the individual at the time of the application that he wanted to continue using the water. The State Engineer declined to make a finding of abandonment." And then the next slide, 35, in Ruling 6090, is the same idea.

Another point that we make in our brief about the intent of the current owner being relevant on intent to abandon is that in 1999, the legislature indicated that abandonment cannot occur if a water right is conveyed to a municipality. So if Reno gets a water right, if Fernley gets a water right, that water right cannot be declared abandoned. So it's the owner of the water right, the municipality, and the intent to use the water right that overcomes any challenge of abandonment

regardless of the period of nonuse. So that's what the legislature said in 1999.

So in our case, we certainly have the intent to use the water and not to abandon the water. So in our case -- and this is now I'm on Slide 38 -- we filed a change application. We filed the conveyance documents and the reports of conveyance. We have a present day intent to use the well, and we've communicated with the State Engineer's Office about our well and about our desire to have the water right. So these should be enough facts to overcome any claim of abandonment.

Okay. Now the burden of proof, I've gone through that extensively already, so I'm not going to dwell on that anymore, but the burden of proof in this case is certainly on the State Engineer, and in our view, he improperly placed that onto my client. Throughout the ruling and in the brief to the Court, the State Engineer shifts that burden to Jungo Ranch to show lack of intent to abandon. This was improper.

All right. Now a couple more points. Stepping away a little bit from the facts, there's another few principles about water rights that we need to talk about. When the statutes were adopted to control water rights in the State of Nevada, there were all of

these people that had initiated water rights prior to that time, and they all said, "Whoa. No, we can't do that. You can't impair my property rights with a new statute." And the case went to the Supreme Court.

In 1913, Justice McCarran at the time decided that the State Engineer and the legislature cannot adopt a law that impairs a preexisting vested right. And then the statutes were changed subsequent to that, and we have the water law that we have today. So the principle is that we cannot -- we cannot impair a preexisting water right like a pre-1939 groundwater right, and we cannot impair it by applying a rule that's more strict than would have applied at common law prior to the statutes being adopted.

And that's the constitutional dimension of this case, is that by shifting the burden, the State Engineer is now putting a stricter rule on our vested water right than existed before the statutes were adopted, and that's a violation of the Constitution, and it's a violation of express statute, which calls for no impairment of preexisting water rights. And those more significant or stricter rules are the shifting of the burden and requiring us to prove lack of intent to abandon.

This idea that the State Engineer cannot apply a stricter rule to a pre-statutory water right has been agreed to by the State Engineer. On Slide 44, we point out that this is what was stated by the State Engineer at the time. "Applying a rebuttal presumption standard would further undercut the stability and security of pre-1939 vested water rights." And that was the State Engineer's way of saying that he cannot apply a stricter rule.

All right. Now, a big question should be asked. Why didn't the State Engineer just declare the water right forfeited?

THE COURT: I was there about 45 minutes ago. I was waiting for you or the State to answer that. What's the difference?

MR. TAGGART: Well, forfeiture --

THE COURT: Well, I didn't mean to get you off track.

MR. TAGGART: Yeah. Well, what I have here is the statute. So the reason is they couldn't have done it. I'll tell you why. So in 1992, the Supreme Court decided Town of Eureka. Town of Eureka is a case that there was a declaration of forfeiture by the State Engineer, and the Supreme Court said that someone could

cure forfeiture before a proceeding for forfeiture is initiated.

So if I don't use water for 20 years, and what the statute said, if I don't use water for five years in a row, that's forfeiture. And what Town of Eureka said is, "Hey, we re-used the water before you started your forfeiture proceeding, so we cured it." The Supreme Court said, "Yeah, that makes sense because the law abhors a forfeiture. It's an equitable remedy. The last thing we want is for the government to take people's property away." So the Supreme Court in Town of Eureka established a cure for forfeiture.

Then the legislature adopted a change to NRS 534.090. And here's the part that I've highlighted. It says -- well, you'll see in the first sentence, it says that "The failure for five successive years on the part of a water right owner," and you can go through the rest of it, that was a forfeiture.

But then it says, "If the records of the State Engineer or any other document specified by the State Engineer indicate at least four consecutive years but less than five consecutive years of non-use of all or any part of a water right which is governed by this chapter, the State Engineer shall notify the owner of the

water right as determined in the records of the Office of the State Engineer by registered or certified mail that the owner has one year from the date of the notice in which to use the water beneficially and to provide proof of such use to the State of Engineer or apply for relief due to Subsection 2 to avoid forfeiting the right.

So he has to give a four-year letter. That's what we call it. He has to give a warning. I'm going to forfeit your water right. I've got evidence of -- I've got these aerial photographs. They're showing me nonuse. So he would have had to give us a notice, and he didn't do it.

And then it says, "If after one year after the date of the notice, proof of presumption of beneficial use is not filed with the Office of the State Engineer, the State Engineer shall, unless the State Engineer is granted an extension of time, declare the water right forfeited." So he couldn't declare our water right forfeited without giving us a year to cure the forfeiture.

And how would we cure the forfeiture? We would file an application, which we already did. Now I think it's important to understand that we didn't just go out -- because a lot of people would do this. This is

what's happening in the State of Nevada. We could have advised our client, "Just go start using the water. Don't even ask for -- don't file a change application with the State Engineer. Just go start using the water. You've got a vested claim that predates 1939. You don't have to comply with the State Engineer. Just go start using the water." And then he could have cured that way. But instead, he filed an application with the State Engineer, and the State Engineer went the abandonment route. So I think that's why we don't see a forfeiture happening here because they didn't want to give us the four-year letter and give us the opportunity to cure.

THE COURT: Didn't want to, or how would even the State Engineer know? Didn't want to -- using your words -- didn't want to give you notice versus inadvertence or didn't give notice? Any idea?

MR. TAGGART: Well, I don't know. I mean, I respect the State Engineer. I'm sure that they did the best they could, but that's the only way I can reconcile my understanding of those cases that I was involved with with the Ninth Circuit. In this case, they had prolonged, you know, what they believed to be prolonged evidence of nonuse. They could have declared it forfeited, but this statute requires a process to occur.

So instead, they went abandonment and used a rule that I don't think applies.

All right. Now, a couple other points that we raised just point to the clear -- the fact that the State Engineer directed us to prove lack of intent to abandon.

And this is a letter that the State Engineer sent to my client, and this is in the Record on Appeal (inaudible.) And on the second page, it says -- and I've highlighted it, "In order for a claim of vested right to be valid, beneficial use must be perpetrated from the inception of the right to the present time." I just don't think that statement is the proper statement of the law. You have to show that you used the water prior to 1939 to get a vested right, and then a different set of rules apply on use up to the present time.

And then, at the end of the paragraph though, and it makes me think the State Engineer was thinking forfeiture when he sent this letter was, "Please be aware that even unadjudicated proofs of appropriation from an underground source are subject to the same statutes concerning forfeiture such as five or more successive years of nonuse." So we weren't put on notice that he was thinking about abandonment. We were put on notice

that he was thinking about forfeiture at the time that he sent this letter.

So the big points that we make here is that in our view, the wrong point of law was used; that intrafarm transfer was applied improperly to this case. The State Engineer shifted the burden to Jungo Ranch to show use of water. That was the second major mistake. They didn't rely on any additional evidence of their own. All of the evidence that they did have is nonuse evidence. That's all it is. And it was all provided by Jungo. They didn't do any of their own analysis, and they were really trying to avoid the forfeiture process by declaring this water right abandoned.

Now, in the Record on Appeal that the State Engineer submitted, if you go through it, there's really not much of any help to the State Engineer's decision. There's a series of documents that are the application being filed, the ruling itself, the publication of the application, letters for fees to be paid, letters about the publication, the information that was sent to the newspaper, the map of the area where the water was going to be used, the application itself, the file cover from the application, the, you know, another short letter to the applicant.

Then there is a large submittal by the applicant's engineer that was submitted to the State Engineer. They have that in there. And then they have the letter that I just showed you, and then they have more information submitted by the engineer. And that's it. There's no evidence submitted by them of their analysis. All of the documents are just procedural documents, or they're the documents that we submitted. Okay.

Now, I'm going to finish. I know that will make you happy. If you look at the ruling that we're reviewing -- you still have a copy of that. This is what you have to decide whether is sound or not -- I'll go through that real quick -- is on page 4, they talk about the rule of law. We already talked about that.

Then on the next page -- this is what we need to look at. The last paragraph on page 4 says that, "The photographs of the well casing strongly suggest a case for abandonment of the water right. The casing is silted in and shows areas which are rusted through, confirming that the casing is unusable in its current condition and has gone unused for a significant period of time."

We're looking at all of the photographs we submitted. "As well, proof of appropriation concedes the

water has not been used each and every year since the right was initiated, and the response to question 16 on the proof form likewise admits the land has not been irrigated recently. And in fact, it is unknown what years the land was or was not irrigated. These factors favor finding there has not been continuous use of water since perfection of the water right." The State Engineer is saying that those facts are relevant to show nonuse. He's conceding it. All he's got is nonuse.

Then he goes through the paragraph I showed you before about the aerial photographs, and I've talked at length about that. Then he says, "Even if the State Engineer afforded applicants every benefit of the doubt by considering this 1954 aerial photograph, this singular piece of evidence to suggest continued beneficial use is insufficient. No evidence has been presented to demonstrate that the water was used continuously." Burden on us. "The State Engineer finds no evidence pointing to lack of intent of the prior owner's intent to abandon," putting the burden on us. And then in the next paragraph, he lists a series of facts that go to the nonuse of the water, none of which go to intent to abandon.

So based upon that, we think that the wrong

rule was applied, and that the facts, if the proper rule was applied, would show that there has not been an intent to abandon. We ask that you reverse the ruling and require that the application that was filed be granted. We urge the Court to consider that because otherwise, we'll be waiting another year or two before we'll go back through the State Engineer's process again.

We want to use this water. My client's had to take water from other places to use on this land. He could be using that water on other land. He could be irrigating an additional 160 acres right now if he had this water, and so if Your Honor reverses the decision of the State Engineer, he can start to use the water that he owns and do that quickly and not have to wait the time it will take if this gets remanded. And that's all of my comments.

THE COURT: Thank you. I'm just looking -- Ms. Caviglia, let's go and let's start with your response, and then we can leave about 15 minutes or so and then come back.

MS. CAVIGLIA: Okay.

THE COURT: What we'll do, we'll do a response on whatever the State wants, and then we'll do a reply.

MS. CAVIGLIA: Thank you, Your Honor. I'm not going to go over a lot of the law because the law is what the law states that Mr. Taggart went copiously through with this Court. But what the State Engineer has to look at is the totality of the circumstances. What he received in 2013 was an application to prove a vested right from the 1930s. There was no communication with the prior owner for that entire time. This was the first time this water right was brought to his attention was in 2013.

This is a fully-appropriated basin. The basin has -- it's actually overappropriated if you look at the numbers of the basin. So in order to get new water, you would have to be able to find a previously vested water right. As part of the finding of facts within the State Engineer's finding, it actually does state that the applicants discovered the remnants of the well casing after they purchased the property. So this wasn't a well or water they even knew they purchased at the time when they got the property in 2013. It was done after the fact. So that's one of the bases that the State Engineer looked at when he received this application to prove one, vested water right, if it existed, and two, if it continues to exist.

The State Engineer looked at everything. He looked at the surrounding circumstances with the well casing. It's not just about non-use. It's about the lack of the ability to put the water to beneficial use. And that hasn't been in place for quite a number of years. Even if we gave, as the State Engineer did, the applicant the benefit of the doubt, the last time there was any indication water had been used was in the 1950s. That's well over 60 years ago. So that's what the State Engineer looked at.

When you look at the prior owners, none of the claims, none of the court cases or the court -- because this was through probate a few times, that's actually in the record, there was no mention of the water right. The only mention of the water right was when the initial property owner took possession in 1924, and that was required to obtain that 160 acres through the Homestead Act. They were required to seek water to put that land to beneficial use. There is no pump. There is not the ability to use the water right now, so even if you look at St. Clair's ability to use that water, they can't, not with the current condition of the well.

The applicants, on their own application which was received by the State Engineer, couldn't even

acknowledge when the last time the water was put to beneficial use. If you look at Item 16 -- it's on page 34 of the Record on Appeal -- Item 16 has "unknown." They don't know when the last time that water had been used.

The applicants point toward deeds to a lack of an intent to abandon. However, those deeds are silent. An appurtenance could be anything. If it's going to be a vested water right that has a huge financial value in this area, why isn't it in there? When the petitioner purchased the property, the right did not exist, and it had been abandoned by the prior owner. The prior owner never filed anything with the State Engineer's Office, and they only filed this application after they found the remnants of that well. So whether or not --

THE COURT: The prior owners?

MS. CAVIGLIA: No. Mr. St. Clair. So there is nothing from the prior owner. There is nothing in our files to show who that was. There was no reports of conveyance filed with the State Engineer. There was nothing on this well.

And like I said, this area, the hydrographic basin falls in is the Quinn River/Orovada sub area.

There's approximately 60,000 acre feet of water available in the perennial yield. And currently, there's over 102,000 acre feet that's been appropriated. It is a designated basin and has been since the 1960s. The 1960s was when the prior owner actually had the property.

Petitioner has also somewhat twisted the December 2nd, 2013 letter the State Engineer had sent them. The State Engineer, that letter that Mr. Taggart did provide to you, was asking for additional information from the applicant. They were asking for clarifications on exactly what was in the application, information that was missing, and they were trying to give the application or applicant an opportunity to answer those questions, and they didn't take that opportunity. They didn't file additional information. They didn't file anything with the State Engineer after that. So that was different than from the first application. So the State Engineer -- they tried to help him, but they did not. That letter is found on page 105 from the State Engineer, and that letter does talk about forfeiture.

If you look at the legislative history of that specific section of forfeiture, the legislative history actually shows that if more than five years of nonuse is evident, they didn't have to give notice to

resurrect forfeiture rights. So this was more than five years. The nonuse here was indicated from the 1950s on, if we give them the benefit of the doubt. They're the ones seeking this water. They're the ones trying to claim that they should have a water right and resurrect an old vested claim that hasn't been used in a number of years.

Petitioners also have riddled the reply and their requests with everything from other rulings of the State Engineer to briefs done by my office on behalf of State Engineer. The Nevada Supreme Court has been very clear in Desert Irrigation versus State of Nevada that even if the -- and this is a quote -- "Even if the State Engineer has failed to follow some of its prior decisions, the State Engineer has not abused its discretion or acted in ignorance of the law."

It further discusses that the State Engineer is not bound by stare decisis. The citation for that is 113 Nevada 1049 on page 1,058. So the State Engineer is not bound by its prior decisions or rulings. It has not committed abuse or discretion by not following those rulings. The Supreme Court has done that for numerous administrative agencies. We're not bound by anything that we've decided in the past, and we shouldn't be bound

by briefs filed by attorneys on behalf of the State Engineer in different cases. Each of those cases are different. Each of the cases have a different twist or turn as well as Orr Ditch and Alpine Decrees. Those are slightly different because they are federal-decreed courts. They do have special rules.

One of the issues in the Orr Ditch Decree is the payment of maintenance fees and taxes. You don't pay maintenance fees and taxes on a traditional groundwater right. That's only found in the Newlands Project where they're required to pay operation and maintenance fees. A traditional groundwater, they're not taxed upon that under the Nevada tax system. So each of these cases that the petitioner has cited to in which the State Engineer may have found a different ruling is different than this case, in which this case, he did look at the surrounding circumstances on which were filed by the applicant.

And even if you look at those cases, none of those cases have a period of over 60 years of nonuse. They don't have the inability to use the water, which we don't have here. They don't have a pump on the well, which we don't have here.

And going further than that, if you look at the Orr decision, it does talk about the construction of

structures incompatible with irrigation. Here, it's somewhat similar where you look at the ability to divert water. When the necessary to use -- in that case, they discuss, "When the necessity to use water does not exist, the right to divert it ceases."

This case is just like that. They have allowed the well to silt in, and this wasn't done by Mr. St. Clair. This was done by the previous owners, and it was done a long time ago. When you look at the photos of the well, which are in the Record of Appeal, and I do believe it's page 158, you can look at the condition of the well. It's completely silted in, and it has not been used in numerous, numerous years. And when you do look, although non-use in and of itself does not rise to the level of abandonment, the longer the period of long use, the greater the ability that it shows an intent to abandon. In this case, it was 60 years, 60 years of nothing that we can see. And that was even after giving the applicant the benefit of the doubt and seeking additional information which they didn't provide.

The State Engineer looked at everything on file at the time that they filed the application. He looked at everything on file that was provided to them. They looked at the aerial photos which are available

online. They're available at the State Engineer's site. They were informed of them. They could have looked at them at any time. And he saw that there was no use of this water right for a number of years. This isn't a case where vested water rights have been found years ago and that they're trying to reuse them again. This is one where they're seeking new water rights, water rights that were not aware of until 2013.

Let's see. You asked a question of why the State Engineer shifted the burden. That's because the application, the information the application -- the applicant provided to the State Engineer was missing. The State Engineer is allowed to ask for additional information from applicants. When we asked for additional information, instead of providing additional information, they provided the same information. And that's why the Record on Appeal, when you look at it, looks like it's a duplicative process because they didn't provide anything else.

They didn't answer question 16 of when the water was put to beneficial use. They couldn't prove anything past 1956 that water had been used. The State Engineer is different from those cases where the shifting of burden occurred. In those cases, a separate

independent party was attacking water rights. In this case, they're seeking water rights or confirmation of water rights from the State Engineer. They're a slightly different scenario. So the State Engineer has that right to ask for additional information from an applicant, and that's what they did in that December 10th, 2013 letter.

THE COURT: December 2nd?

MS. CAVIGLIA: Or December 2. I'm sorry, Your Honor. He sought additional information. And they chose not to take that opportunity. And so the State Engineer does believe that these water rights were abandoned previously by the prior owner.

It's not just nonuse, but it's the inability to use the water. And because of the location of the water, the fully appropriated basin it's located in and the information provided by the applicant themselves even after asking for additional information, the State Engineer believes that there's enough evidence to show that this water right was abandoned, and we would request that this Court affirm the ruling.

THE COURT: I have some questions, but I'll wait until the end of the reply. And as I said -- and I hope I didn't cut you off in any way because I want to give you an opportunity to go longer if you wish.

MS. CAVIGLIA: I was going to talk about the law in itself, Your Honor, but Mr. Taggart did cover a majority of that, so there's no point in rehashing that.

THE COURT: Okay. All right. Well, let's go ahead and take a break. As I said, I want to take lunch. Let's be back at 1:30, and we'll start up with the reply, and then I'll formulate -- I think I'm going to formulate questions. The first question I have -- will counsel approach before we take the break?

Mr. Taggart, you, in the very beginning when you gave me the aerial map, aerial photo, excuse me, you talked about arrow. Is this the property?

MR. TAGGART: (Inaudible.)

THE COURT: Oh, thank you. I thought I saw an arrow here.

MR. TAGGART: No.

MS. CAVIGLIA: I think that's a building.

MR. TAGGART: This is a box, and then there's an arrow next to the box.

THE COURT: Okay. Thank you. This is good. Thanks. That's all I needed. I'll cross this one out. And that's what I meant. Probably what I said was this not a --

MR. TAGGART: Intrafarm?

THE COURT: Yeah, thanks. Intrafarm. Because I thought the property was right next to, maybe, this cultivated area. And when was this photo taken?

MS. CAVIGLIA: 1950 -- it's written on the corner, Your Honor. It's 19 --

THE COURT: '54.

MS. CAVIGLIA: -- 54.

THE COURT: I've driven through, you know, that area, and you certainly don't see any of these dark areas now during the drought. And that was one of the questions I asked when we met informally. Okay. Everybody have a pleasant lunch. Let's be back at 1:30.

(Recess was taken.)

THE COURT: Thank you. Please be seated, everybody. Good afternoon. Okay. We're back on the record with St. Clair versus the State Engineer. And, Ms. Caviglia, do you have anything else that you care to present in regards to response? Again, I just didn't want to cut you off.

MS. CAVIGLIA: No, Your Honor.

THE COURT: Okay. Mr. Taggart, please.

MR. TAGGART: Good afternoon, Your Honor. A few comments just in response to Ms. Caviglia's response there. First of all, one of the comments is that we

discovered the well after the fact. Well, the fact is that we knew water rights existed on the property, and we didn't know where the well was, but we knew there were water rights.

Before the property was bought, due diligence occurred, and the deeds were collected, the same deeds that were submitted to the State Engineer and are in the Record on Appeal. And if you go back in those deeds to the first deed from the United States Government in 1924, which is Record on Appeal 127, it is a deed from the United States to George Crosley. It's signed by Calvin Coolidge, the President of the United States, and it says that the United States -- it says that, "There is, therefore, granted by the United States onto the said claimant the tract of land above described to have and to hold the said tract of land with the appurtenances thereto onto the said claimant and to the heirs and assigns of that said claimant forever."

And most people in this field understand that if the government granted a homestead, one of the requirements of a homestead is that water -- you had to irrigate. You had to cultivate a certain amount of acreage in order to get a homestead. So whenever you buy a piece of property in Nevada, the anticipation is

there's water rights because that's how the land was originally patented. So the idea that we discovered the water rights after we bought the property just isn't true, but the well itself is something that we didn't know exactly where it was. And when we found it, that was when we did the filing that we're here to talk about.

Now, there was an argument that the silting in the well shows a lack of ability to use the water, and that that is similar to being an improvement inconsistent with irrigation. An improvement inconsistent with irrigation is something like pavement or a home on the ground. It is not a works of diversion that can be repaired. We referenced Ruling 6083 earlier in my comments which involved a failed pipeline, and the failure of that pipeline was not enough for the State Engineer to find intent to abandon.

There's a comment that the last evidence of water use was in the 19 -- was in the 1960s. Again, the only evidence that the State Engineer has of what happened after 1954 are aerial photographs that aren't in the record, and so the Court can't review those. I haven't reviewed those, so there can't be a, you know, this allegation that there hadn't been water used since 1954. There's no evidence to support that.

There was a comment that the prior owner never filed on this water right. Well, there was never a requirement for the prior owner to file on this water right, so that really doesn't appear to be pertinent. There has never been an adjudication on this water, on this groundwater source, so there was never a requirement that anyone come in and file a claim with the State Engineer.

There was a statement that the basin's overappropriated, and therefore, somehow that has an impact on whether this water right should be abandoned. The fact that the basin is overappropriated shouldn't have any impact on the determination of whether there was intent to abandon in this case. If the State Engineer found that there was a water right and he found that it predated 1939, and so that water right would be in a senior priority to many of the groundwater rights that came later. So the fact that the basin is overappropriated should not be relevant to whether or not there was intent to abandon.

There was some points made about the letter that was sent on December 2nd, 19 -- 2013, excuse me. After that letter was sent, the application was amended, but information was not provided regarding the

consistency of use of the water right. And there isn't anything wrong with that. The State Engineer does have the right to inquire about the pertinent information that's necessary for him to make his determination on whether a water right is vested, but whether a water right is vested depends on whether it was used prior to 1939.

There's no reason for the State Engineer to ask an individual what happened after 1939 or whether the water was consistently used. The problem with that is it puts the burden on the water right owner to have to prove the actual use of water, and that's putting the burden on the water right owner, and the burden should be on the State Engineer when the State Engineer is trying to declare forfeiture.

There was some comments about the legislative history of the forfeiture statute, and that the statute -- apparently, there's some legislative history that says that if there's more than five years of nonuse, then they don't have to do a four-year letter. I'm not aware of that. That information hasn't been put before the Court. But even if it does exist, Town of Eureka specifically says that you can cure a forfeiture before a proceeding for forfeiture commences. We did that by filing the

change application.

Desert Irrigation, it does say the State Engineer is not bound by stare decisis, but it doesn't say the State Engineer is not bound by Nevada water law, and the cases that we've cited to clearly are Nevada water law. The federal decree is the fact that -- the federal cases shouldn't make a difference. Those federal courts were applying Nevada water law, they were interpreting Nevada water law, they were interpreting Manse Springs, Revert v Ray, Franktown, the same cases the state supreme court has interpreted in abandonment cases.

Taxes are paid on land when there are water rights attached to the land that increase the value of the land. The taxes that are paid on the land reflect the value of the water rights. So the fact that there was never a tax sale, that the property conveyed from one party to another through time is evidence that taxes were paid on the property.

Now, we cited to many, many rulings that support our position. The State Engineer hasn't cited to a single ruling in their records that support the proposition that the burden should be shifted to the water right owner to prove lack of intent to abandon. We

also cited to cases that have the type of timeframe. One case, the Ruling 6159, involved an alleged nonuse from 1956. And in that case, the State Engineer found there was not an intent to abandon.

And then there was a point that the State Engineer is different than others, than when a proponent of abandonment is an opposing party, there's one rule, but if it's the State Engineer who is purporting to or advanced -- or who is advancing abandonment, that a different standard applies. That's not true. Town of Eureka was a case from our Nevada Supreme Court where the State Engineer was the party who in that case declared forfeiture, and the Court said that if the burden was on him, it still has to be clear-and-convincing evidence. It doesn't matter who the proponent is of the forfeiture or abandonment. The same rules apply.

So to summarize, Your Honor, it's very simple. In this case, the State Engineer applied the wrong standard. He improperly shifted the burden to the water right owner to prove lack of intent to abandon, he relied on evidence that's not in the record to show long periods of non-use, and there's no clear-and-convincing evidence of intent to abandon in this case.

And it's like the example I talked about in

the beginning. If you have a piece of property that you haven't visited in a long time, that doesn't mean you've abandoned it. Water rights, mining rights, property are not abandoned simply by the lack of use of those assets. And those are all of the comments I have. Thank you, Your Honor.

THE COURT: Thank you. Any comments by either party?

MS. CAVIGLIA: No, Your Honor.

THE COURT: Thank you. Counsel, do you request to submit this case to me for decision?

MR. TAGGART: Yes.

MS. CAVIGLIA: Yes.

THE COURT: All right. I'm going to give a decision right now. First of all, I want to thank both of you for the very fine briefs. I found them to be very detailed and very, basically, on point.

I can -- in some ways, I can see how the State made this -- the engineer made his decision, and I can understand it. I can understand it from the physical evidence of abandonment. However, abandonment in Nevada is defined as the relinquishment of the right by the owner with the intention to forsake and desert it. Those two have to coincide, and it's very similar. You said

something, Mr. Taggart, that hit home, you know. Criminal Law 101. Intent and act coincided. That is exactly what this -- the law of abandonment is in the State of Nevada.

And you answered my question when I talked about what's the difference in forfeiture? You answered my question with this letter of December of '13 and the statute as far as the five-year notice and that type of thing or the one-year notice, excuse me. But I do not see any abandonment here because I do not see any intention to abandon.

As you were talking earlier, and even when Ms. Caviglia was talking, again, totally understanding the State's point of view, I believe the law is -- and I don't mind saying this -- the law is you're not abandoning when you have the intent to revise the claim, when you have the intent to apply for the application. That shows that your intent is not to abandon. So shifting the burden was not, in my opinion, proper.

Basically, if there's only evidence of non-use, that's not good enough. It has to be the intent to abandon. What is intent? It has to be shown by clear-and-convincing evidence that the petitioner abandoned with intent. No, there is no

clear-and-convincing evidence of that here. That's why I said it's improper to shift the burden.

The facts show that the owner filed a change application, filed a conveyance of documents and reports of conveyance, has a present-day intent to use the well. It's not really -- I don't know if Mr. St. Clair can go out and use that well right now as you said, Mr. Taggart, by but by the same token, he'd better repair the well and get things going before. But, I mean, that doesn't show any abandonment according to Nevada law. He has the intent to use that water.

And as far as communication with the State Engineer's Office, you know, I'm not quite sure. It's almost like a demurrer. I'm not quite sure if Mr. Taggart and Mr. St. Clair thought about this, but why do you have to respond to the State's letter of December of '13? In other words, if you don't understand it, you don't understand it. It's not forfeiture. You did what you did. You applied for your change, and it was denied based on abandonment, which was wrong.

Based on that, I believe that the State Engineer abused his discretion, and I'm going to overturn the State Engineer's decision. I'm going to ask Mr. Taggart to -- it's not in a sense of findings as we

normally would because this is a judicial review, but if you would, according to this decision and the evidence that's in, if you would please draft a decision, run it by the State.

You can include findings of fact, you can include conclusions of law, but it will not be a quote unquote, "decree." It will be an order that once you run it past the State and listen to any objections, if the State has any in regards to the order, go ahead and send it to me, and I'll look at it, and we might have a hearing if there's an issue that needs to be resolved on the record, but my intention was to give this decision in front of the bench.

Do either of you have any questions in regards to my decision? I do not mean to leave anything out from this oral decision because I feel very strongly that I'm backed by the law. I feel very strongly that this is not a difficult decision for a Court to make based on what was presented to me in the briefs and in the argument. Anybody have any questions or comments?

MR. TAGGART: No, Your Honor.

THE COURT: Okay. Thank you very much for your presentation. Nice meeting you all. I thank you for having it here in Carson City. I'm sure it saved the

State and all of us time and expense, but it's been a pleasure this morning and this afternoon to be here. Thank you. We'll be in recess.

(The proceedings concluded at 2:02 p.m.)

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STATE OF NEVADA)
)
CARSON TOWNSHIP)

I, Nicole Alexander, a transcriptionist for Capitol Reporters, do hereby certify:

That I was given a JAVS CD recording of the above proceeding held in Department No. 2 of the above-entitled court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Carson City, Nevada, this 1st day of June, 2016.

Nicole J. Alexander

Nicole Alexander, Transcriptionist

Case No. CV 20112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

RESPONDENT'S OBJECTION TO PETITIONER'S PROPOSED ORDER

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Enginee Department of Conservation and Natural Resources, Division of Water Resources ("Nevad State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt an Deputy Attorney General Justina A. Caviglia, hereby files this Objection to Petitioner' Proposed Order. This Objection is based upon the attached Points and Authorities and th pleadings and papers on file herein.

POINTS AND AUTHORITIES

Attached as Exhibit 1 is the letter emailed to Petitioner's counsel containing the Stat Engineer's general comments and objections to the original proposed order, which include the requested changes that the State Engineer made to his proposed order. Petitioner did nc amend the order, but rather sent this Court a copy of both his proposed order and the Stat Engineer's revisions. *See* email from Petitioner's Counsel, Exhibit 2 and Exhibit 3, Petitioner' response to the State Engineer's Opposition. In his email, Petitioner's counsel admits tha

their proposed order was based upon Petitioner's own arguments to support the Court' findings.

The Court made a very short and succinct ruling from the bench. *See* Exhibit 4 JAVS Recording and Exhibit 5, Sixth Judicial District Court Minutes. The pertinent portions o this Court's ruling provided:

> In some ways, I can see how the State made this, the Engineer made his decision, and I can understand it. I can understand it from the physical evidence of abandonment; however, abandonment in Nevada is defined as relinquishment of the right by the owner with the intention to forsake and desert it. Those two have to coincide. I do not see any abandonment here.
>
> Again, totally understanding the State's point of view, I believe the law, is, and I do not mind saying this, the law is that you are not abandoning when you have the intent to revise the claim, when you have the intent to apply for the application, that shows that your intent is not to abandon. So shifting the burden was not, in my opinion, proper. Basically if there is only evidence of non-use, that is not good enough.
>
> It has to be shown by clear and convincing evidence, that petition abandoned with intent. No, there is no clear and convincing evidence of that here. That is why I say it was improper to shift the burden.
>
> The facts show that the owner filed a change application, filed a conveyance of documents, and reports of conveyance, has the present day intent to use the well...that doesn't show any abandonment according to Nevada law, he has the intent to use that water.
>
> I feel very strongly that I am backed by the law. I feel very strongly that this is not a difficult decision for a court to make based on what was presented to me in the briefs and the argument.

Although the Court made a very succinct and brief ruling from the bench, Petitioner ha drafted a 12-page order. The State Engineer's objections to Petitioner's order are based upo the fact that Petitioner drafted an order using their arguments, rather than what the Cou actually stated on the record, which includes many findings the Court did not make.

I. OBJECTIONS

Petitioner included sections on the finding that the State Engineer made with holdin that the vested claim was valid. Petitioner did not object to this finding in his petition fo judicial review, nor was it opposed by the State Engineer. However, Petitioner still included

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Carson City, Nevada 89701-4717

in the order, and included additional findings than those made by the State Engineer in th Ruling. For example, on page 2 of the order, "*(4) Lack of any evidence of the failure to pa taxes and assessment fees for the right to use the water right.*" Although factors set forth i *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935, 945 (2001), and *U.S. v. Alpine Land & Reservo Co.*, 291 F.3d 1062, 1072 (2002), the payment of taxes and assessments was not included i the Ruling, or considered by the State Engineer. Another example on page 2 of the orde "*(5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalf with groundwater using drilled wells.*" The State Engineer rejected this evidence i Ruling 6287 as it did not discuss Crossley. ROA 0006. Petitioner's inclusions of these tw items did not accurately reflect the State Engineer's findings.

Petitioner included an entire section on his Request for Judicial Notice and the State' Opposition thereto. As this Court did not rule on the request, the State Engineer objected t its inclusion in the Order. Furthermore, throughout the Order, Petitioner relies upon thi assumption that the Court based the decision on the inclusion of information provided by hir to the Court in the appendix and Request for Judicial Notice. As such, throughout the ruling the State Engineer objects to the inclusion of any statement or citation that Petitioner mad based upon those documents. An example of this is the many statements related to the Stat Engineer's prior rulings or orders, such as page 6, lines 15-18; page 7, lines 3-4; page 8 lines 14-19, lines 21-22; and page 9, line1; and the entire section titled "**THE STAT ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRARY AND CAPRICIOU BECAUSE HE APPLIED THE WRONG RULE OF LAW.**" In that section, Petitioner actuall references the fact that in Nevada, administrative agencies and specifically the Stat Engineer are not bound by stare decisis. *Desert Irrigation, Ltd. v. State of Nevada, Stat Engineer*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). In that case, the Nevad Supreme Court found that "even if the State Engineer has failed to follow some of its pric decisions, the State Engineer has not abused its discretion or acted in ignorance of the law *Id.* However, Petitioner does not cite to this case law. Rather Petitioner, knowing an referring to this legal precedent, ignores it, and ignores the fact that this Court did not mak

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any of the findings that support his argument. Furthermore, this Court did not rule tha "Ruling 6287 represents a severe and sudden turn of mind by the State Engineer that cannc remedy his sudden and improper application of well-settled Nevada water law" as propose by Petitioner. Petitioner simply changed this Court's oral order.

Petitioner also included the section "**THE STATE ENGINEER UNLAWFULL IMPAIRED ST. CLAIR'S WATER RIGHT BY APPLYING A RULE THAT IS STRICTEI THAN THE WATER STATUTES.**" based solely on Petitioner's argument, not on the ora order of the Court. This entire section was not briefed or argued by the parties, nor was it pa of this Court's oral order.

Finally the State Engineer objects to Petitioner's relief listed on page 12, lines 19-2(Ruling 6287 did not address the actual application 83246T, rather it was based upon th abandonment of Proof of Appropriation V-010493. This matter is a petition for judicial revie of that ruling, which under NRS 534.450 is an appeal. As such, the Court would be exceedin its authority to grant an application, that has not been evaluated by the State Engineer' office, nor were its merits subject to the Petition for Judicial Review. As the State Enginee incorrectly determined that the Proof of Appropriation V-010493 had been abandoned, he di not evaluate the merits of that application. Therefore, the correct ruling is to remand th matter back to the State Engineer, as the abandonment of Proof of Appropriation V-01049 has been overturned. Not an order granting an application, whose merits have not even bee evaluated by the Division of Water Resources.

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Office of the Attorney General
100 North Carson Street
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II. CONCLUSION

The State Engineer is requesting that this Court adopt Respondent's Alternativ Proposed Order, included as Exhibit 6, as it more accurately reflects the Court's oral order.

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding Respondent's Objection t Plaintiff's Proposed Order does not contain the social security number of any person.

DATED this 18th day of March, 2015.

ADAM PAUL LAXALT
Attorney General

By: _____
JUSTINA A. CAVIGLIA
Deputy Attorney General
Nevada Bar No. 9999
100 North Carson Street
Carson City, Nevada 89701-4717
Tel: (775) 684-1222
Fax: (775) 684-1108
Email: jcaviglia@ag.nv.gov
Counsel for Respondent,
Nevada State Engineer

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney Genera and that on this 18th day of March, 2015, I served a true and correct copy of the foregoir RESPONDENT'S OBJECTION TO PLAINTIFF'S PROPOSED ORDER, by placing sa document in the U.S. Mail, postage prepaid, addressed to:

Paul G. Taggart, Esq.
Rachel L. Wise, Esq.
TAGGART & TAGGART
108 North Minnesota Street
Carson City, Nevada 89703

Dorene A. Wright

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

INDEX OF EXHIBITS

EXHIBIT NO.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Letter to Paul Taggart dated March 11, 2016, containing the State Engineer's general comments and objections to the Plaintiff's original proposed order	20
2.	Email from Paul Taggart dated March 14, 2006, forwarding to the Court a copy of both Plaintiff's proposed order and the State Engineer's revisions	34
3.	Letter from Paul Taggart dated March 14, 2006, responding to the State Engineer's objections	5
4.	JAVS Recording from 01/05/16	1
5.	Sixth Judicial District Court Minutes	1
6.	State Engineer's Alternate Proposed Order	5

EXHIBIT 1

EXHIBIT 1

Justina A. Caviglia

From:	Justina A. Caviglia
Sent:	Friday, March 11, 2016 4:04 PM
To:	'Paul Taggart'
Cc:	Dorene A. Wright
Subject:	RE: Jungo Ranch
Attachments:	03-11-16 - Ltr to Taggart re Objection with Attachment.pdf

Attached are the State Engineer's comments to your proposed order.

Justina Alyce Caviglia
Deputy Attorney General
State of Nevada
Office of the Attorney General
Bureau of Government Affairs
Government and Natural Resources Division
100 N. Carson Street
Carson City, NV 89701
Telephone: (775) 684-1222
Facsimile: (775) 684-1108

From: Paul Taggart [mailto:Paul@legaltnt.com]
Sent: Monday, March 07, 2016 5:32 PM
To: Justina A. Caviglia
Subject: Jungo Ranch

Justina: Please find the attached proposed order that Judge Kosach requested. After your five day review period, I would like to forward it to the judge. Thanks.

Paul G. Taggart
TAGGART & TAGGART, LTD.
108 N. Minnesota St.
Carson City, NV 89703
(775) 882-9900 – Telephone
(775) 883-9900 – Facsimile

STATE OF NEVADA

OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

ADAM PAUL LAXALT
Attorney General

WESLEY K. DUNCAN
First Assistant Attorney General

NICHOLAS A. TRUTANICH
First Assistant Attorney General

March 11, 2016

VIA EMAIL: Paul@legaltnt.com

Paul G. Taggart, Esq.
Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703

Re: *St. Clair v. Jason King, P.E., Nevada State Engineer*
Case No. CV 20112; Dept. 2

Dear Paul:

Enclosed please find a marked-up copy of St. Clair's proposed order that you emailed on Monday, March 7, 2016. The State Engineer is troubled that you have completely misconstrued the findings of the Court for your own benefit. The inclusion of these additional findings is in violation of your duty to candor to the court and will not be overlooked by the State Engineer.

Your order fails to accurately reflect the Court's oral order, based upon the notes of those present for the State Engineer and the recording of the hearing. The findings of the Court, based upon a review of the recording, are clear: The Court found that although there was physical evidence of abandonment, the intent element was missing. The Court further found that the State Engineer improperly shifted the burden to the Petitioner to prove lack of intent to abandon the claim to a vested water right. The absence of present-day intent and improper shifting of the burden by the State Engineer was an abuse of discretion, therefore the petition for judicial review was granted and the matter is remanded back to the State Engineer. None of the additional findings you included were ever stated by the Court; rather, those findings could only originate from your argument and briefs. As you should be fully aware, your argument does not becomes the ruling, but rather, the Court's findings.

The most troubling addition in your proposed order is Section II. The Court did not rule on your Request for Judicial Notice or the State Engineer's opposition thereto. The Court did not reference the materials that were considered as part of the record on appeal; therefore, the State Engineer requests that your entire Section II, which was not ordered by the Court at the hearing, be removed.

If you proceed to file the proposed order in its current state or with the gratuitous findings not made by the Court, the State Engineer will file an objection, its own proposed order based upon the transcript of the actual findings of the Court, and will seek any and all other remedies available.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: _____
JUSTINA A. CAVIGLIA
Deputy Attorney General
(775) 684-1222
jcaviglia@ag.nv.gov

JAC:dw
Enclosure

Case No.: CV 20, 112

Dept. No. 2

PAUL G. TAGGART, ESQ.
Nevada State Bar No. 6136
RACHEL L. WISE, ESQ.
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Attorneys for Petitioner

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

[PROPOSED] ORDER OVERRULING STATE ENGINEER'S RULING 6287

A Proposed Order is attached hereto as Exhibit 1.

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Taggart & Taggart, Ltd.
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Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

Affirmation Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

TAGGART & TAGGART, LTD.

PAUL G. TAGGART
Nevada State Bar 6136
RACHEL L. WISE
Nevada State Bar 12303
TAGGART & TAGGART, LTD.
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Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of Proposed Order, as follows:

[X] By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

Justina Cavigila
Nevada Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701

[___] By U.S. CERTIFIED, RETURN RECEIPT POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed as follows:

[___] By ELECTRONIC DELIVERY, via:

DATED this day of _____, 20___.

_____
Employee of TAGGART & TAGGART, LTD.

Taggart & Taggart, Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
(775)882-9900 – Telephone
(775)883-9900 – Facsimile

EXHIBIT 1

EXHIBIT 1

Case No.: CV 20, 112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR, Petitioner, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	**ORDER ~~OVERRULING~~ GRANTING THE PETITION FOR JUDICIAL REVIEW OF STATE ENGINEER'S RULING 6287**

THIS MATTER came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "S Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed Opening Brief on December 8, 2014. Respondent, JASON KING, P.E., Nevada State Engine DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURA RESOURCES (hereinafter "State Engineer") filed an Answering Brief on January 22, 2015. St. Cl filed a Reply Brief on February 27, 2015.

Oral argument was heard by this Court on January 5, 2016 in the First Judicial District Courthou by stipulation of the parties. Petitioner is represented by Paul G. Taggart, Esq. and Rachel L. Wise, Es of Taggart and Taggart, Ltd. Respondent is represented by Attorney General Adam Laxalt and Depu Attorney General Justina Caviglia.

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This Court, having reviewed the record on appeal,[1] and having considered the arguments of t parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in tl matter, hereby ~~OVERRULES~~ **GRANTS the Petition for Judicial Review of** Ruling 6287 ~~in part~~; bas upon the following findings of fact, conclusions of law and judgment.

FACTS AND PROCEDURAL HISTORY

St. Clair owns real property located in Humboldt County, Nevada, (Assessor's Parcel Numbe ("APN") 03-491-17), which was purchased in August, 2013. On November 8, 2013, St. Clair filed tw documents with the State Engineer. The first was a Proof of Appropriation, V-010493, claiming a veste right to an underground water source for irrigation of 160 acres of land. The second was Applicatio No. 83246T to change the point of diversion of the vested water claim. To support the vested claim, S Clair presented evidence of the application of the water to beneficial use prior to March 25, 1939, th operative date for the State Engineer to consider for vested claims to groundwater.

In Ruling 6287, the State Engineer found that St. Clair ~~had~~ presented evidence sufficient tc demonstrate a pre-statutory rights to the underground percolating water which ~~were~~ vested prior tc March 25, 1939.[2],[3] The State Engineer stated that "[t]ogether, these facts evidence that underground waters [V-010493] were appropriated by the drilled well and used beneficially . . . prior to March 25, 1939."[4] The following facts support the State Engineer's decision:

(1) A land patent was acquired by Mr. Crossley pursuant to the Homestead Act of 1862 for the St. Clair property;

(2) A well was constructed with technology which ceased to be utilized in the mid-1930's;

(3) Aerial photographs exist for the property for the years 1968, 1975, 1986, 1999, 2006, and 2013;[5]

~~(4) Lack of any evidence of the failure to pay taxes and assessment fees for the right to use the~~

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[1] *See Respondent's Summary of Record on Appeal* ("SE ROA"); ~~*see also Petitioner's Appendix; see also Petitioner's Requ for Judicial Notice in Support of Petitioner's Reply Brief ("Request for Judicial Notice").*~~

[2] SE ROA 0006.

[3] As stated in the State Engineer's ruling, the State Engineer was not adjudicating the vested right, but only examining it to determine whether the right appeared valid to support granting a change application.

[4] SE ROA 004-006.

[5] These documents were not included in the State Engineer's ROA and were not subject to review by this Court.

~~water right;~~

~~(5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa with groundwater using drilled wells;~~

(6) A report created by Stanka Consulting, LTD., stating that on February 19th, 1924, George Crossley signed the Testimony of Claimant as part of the final paperwork required to complete the Homestead Act land acquisition which described the water right;[6]

(7) A patent from President Calvin Coolidge dated April 21st, 1924 describing the water right granted to St. Clair;[7]

(8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933[8] was found on the property; and

(9) A chain of title from St. Clair's predecessors-in-interest that does not include any conveyances by tax or foreclosure sales.[9]

The State Engineer's determination that the evidence described above St. Clair's ~~water rights~~supported the existence of a ~~were~~ valid pre-1939 vested rights was not appealed. However, the State Engineer then declared that 502.4 acre-feet annually ("afa") of a vested water right was abandoned by the holder of the right.[10] ~~Notably, this declaration of abandonment was the first time in Nevada's history that the State Engineer declared a vested groundwater right abandoned.[11]~~ In doing so the State Engineer placed the burden of proof on St. Clair to demonstrate a lack of intent to abandon Vested Claim 010493. Specifically, the State Engineer stated that, "[a]t minimum, then, proof of continuous use of the water right should be required to support a finding of *lack* of intent to abandon."[12] Also, the State Engineer repeatedly referred to evidence of non-use of the underground water as constituting evidence of St. Clair's intent to abandon their water rights.[13]

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[6] SE ROA 0037.
[7] SE ROA 0045.
[8] SE ROA 0102.
[9] SE ROA 0038-0066.
[10] SE ROA 008 – 009.
[11] ~~Petitioner's Reply Brief, Exhibit 1.~~
[12] *Id.* (*emphasis in the original*) (*citing U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[13] SE ROA 007- 009.

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St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287 regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that the intent to abandon a water right must be shown by more than mere non-use evidence.[14] St. Clair also argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to abandon the water rights without conducting a formal adjudication.

DISCUSSION

The State Engineer's holding that "Applicants' admission the water has not been us continuously coupled with the admission they are without knowledge of when it was, or was not used . find that Proof of Appropriation V-010493 has been abandoned" is overturned because it is arbitra capricious, contrary to law and not supported by substantial evidence.[15] The State Enginee misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair demonstrate lack of intent to abandon the water right.

STANDARD OF REVIEW

A party aggrieved by an order or decision of the State Engineer is entitled to have the order decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is "in nature of an appeal," and review is ~~generally~~ confined to the administrative record.[16] The role of reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discreti or if it was otherwise affected by prejudicial legal error.[17] A decision is arbitrary and capricious if it

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[14] *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 10 (9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782 Nev. 782, 786, 603 P.2d 262, 2 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

[15] SE ROA 005.

[16] NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

[17] *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), *citing Shetakis Dist v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992) ("[a]s a general rule, a decision of an administrative agency will not be disturbed unless it is arbitrary and capricious")).

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"'baseless'" or evidences "a sudden turn of mind without apparent motive...."[18] With regard to fact findings, the court must determine whether substantial evidence exists in the record to support the St Engineer's decision.[19] Substantial evidence is "that which a 'reasonable mind might accept as adequate support a conclusion.'"[20] With regard to purely legal questions, such as statutory construction, standard of review is de novo.[21]

~~**ST. CLAIR'S REQUEST FOR JUDICIAL NOTICE.**~~

~~As a preliminary matter, on February 27, 2015, St. Clair filed Petitioners' Appendix. Petitione Appendix included twenty-six (26) previous rulings by the State Engineer between 1984 and 2012 whi demonstrate the State Engineer's prior application of the law of abandonment to water rights. The rulin are public documents capable of review maintained by the State Engineer at his office and online. (June 3, 2015, St. Clair submitted a Request for Judicial Notice in Support of Petitioners' Reply Br ("Request for Judicial Notice") to this Court. The Request for Judicial Notice contained three exhibits:~~

~~(1) the State Engineer's July 24, 2002 *Appellee Nevada State Engineer's Answering Brief* in the Ninth Circuit Court of Appeals, Case Nos.: 01-15665; 01-15814; 01-15816; of the case *United Sta of America, and Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Company, et.,* (*("Alpine Decree")*; the Nevada State Engineer appeared as a Real Party in Interest/Appellee in the *Alpi Decree* and filed the above-referenced Answering brief in the matter that resulted in the decision that published at 291 F.3d 1062;~~

~~(2) the State Engineer's Ruling on Remand 5464-K, issued as a result of the Ninth Circ District Court's Decision at 291 F.3d 1062; and~~

~~(3) the Nevada State Engineer's Answering Brief filed in the Ninth Circuit District Court Appeals, Case No.: 06-15738, filed on or around November 22, 2006, relating to the *Alpine Decree.*~~

~~This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorab Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance~~

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[18] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).
[19] *Id.*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert v Ray*, 95 Nev. at 786, 603 P.2d at 264.
[20] *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (*quoting State, Employee Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).
[21] *In re Nevada State Eng'r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

~~impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition~~ ~~Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judic~~ ~~Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility~~ ~~Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included~~ ~~the Request for Judicial Notice exist or are public documents.~~

~~The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court furth~~ ~~finds that all documents submitted are public documents capable of accurate and ready determination~~ ~~resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that~~ ~~documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are enter~~ ~~onto the record of this Court for this case pursuant to NRS 47.130-150.~~

EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.

Nevada follows a ~~bright line~~ rule of law to guide courts and the State Engineer in determining a analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the ow *with the intent* to "forsake and desert it."[22] Intent is the necessary element the State Engineer is required prove in abandonment cases.[23] ~~This is the standard the State Engineer has previously relied upon.[24]~~ ~~fact, the State Engineer has explained that "Nevada case law discourages and abhors the taking of wa~~ ~~rights away from people," and that is why abandonment must be proven by clear and convinc~~ ~~evidence.[25]~~

Abandonment requires a union of facts and intent to determine whether the owner of the wa right intended abandonment.[26] ~~As intent to abandon is a subjective element, T~~the courts utilize surrounding circumstances to determine the intent.[27] Because ~~subjective~~ intent to abandon is a necess element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Enginee

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[22] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.
[23] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315;*Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek* 77 Nev. at 354, 364 P.2d at 1075;and *Revert*, 95 Nev. at 786, 603 P.2d at 266.
~~[24] *See* Petitioner's Appendix at 00001-0000135.~~
~~[25] Petitioner's Appendix at 000030-000037.~~
[26] *Revert*, 95 Nev. at786, 603 P.2d at 264.
[27] *Alpine*, 291 F.3d at 1072.

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burden because nonuse does not necessarily mean an intent to forsake.[28] Thus, if a vested water ri holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occ ~~For this reason, the State Engineer has previously ruled that "bare ground by itself does not constit abandonment."[29] Also, t~~The Ninth Circuit has upheld the position that bare ground must be coupled wit use inconsistent with irrigation to show intent to abandon.[30] The standard of proof for demonstrati abandonment is clear and convincing evidence, and the burden of proof is on the party advocati abandonment, which in this case is the State Engineer.[31]

The Ninth Circuit has consistently upheld and endorsed Nevada's rule of law for abandonment the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated "from surrounding circumstances," and not only non-use evidence.[32] The surrounding circumstances t although not exhaustive, has definitively produced ~~one~~ a ~~bright line~~ rule regarding abandonment of wa rights under Nevada law. That ~~bright line~~ rule is that non-use alone is not enough to prove abandonme This Court reiterates the canon that a water right may not be abandoned absent the showing of "subject intent on the part of the holder of a water right to give up that right."[33]

This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and such, indirect and circumstantial evidence may be used to show intent of abandonment.[34] The m consistent element in Nevada water law that applies to abandonment cases is the determination that nc use of the water is not enough to constitute abandonment.[35] The Ninth Circuit Appeals Court, wh analyzing Nevada case law, has continually recognized that Nevada's abandonment rules indicate t non-use alone is not enough to constitute abandonment.[36] Nevada requires non-use evidence to

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~~[28] Petitioner's Appendix 0000131-0000135; *See also* Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.~~

~~[29] Petitioner's Appendix 000051-000054.~~

[30] *Orr Ditch, 256 F.3d at 946.*

[31] *Orr Ditch,* 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.,* 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).

[32] *Alpine* 291 F.3d at 1072.

[33] *Orr Ditch,* 256 F.3d at 944-45.

[34] *Id.*

[35] *In re Manse Spring, 60 Nev* at 288,108 P.2d at 317; *Orr Ditch,* 256 F.3d at 941, *Alpine,* 291 F.3d at 1072, *Franktown Cree 77 Nev.* at 354, 364 P.2d at 1075; *Revert,* 95 Nev. at 786, 603 P.2d at 266.

[36] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.

coupled with other evidence to determine the subjective intent of the water user.[37] This well-develop rule was originally taken from Nevada's mining law.[38] The Ninth Circuit, while applying Nevada st law, has held that the following factors ~~should~~ may be considered to determine whether a water owner h the intent to abandon a water right: (1) substantial periods of non-use, (2) evidence of improveme inconsistent with irrigation, and (3) payment of taxes and assessments.[39]

Here, St. Clair is currently using water from another water right on the land which is the place use for Vested Claim 010493, and that evidence proves that there are no improvements inconsistent w irrigation on the property. Also, there is no evidence that St. Clair or their predecessors in interest failed pay taxes and assessments. St. Clair filed a Report of Conveyance which demonstrated a clear chain title for the vested claim, and that chain of title did not rely on any tax sales or foreclosures based failure to pay assessments.

Further, St. Clair filed a Change Application for the place and manner and use, and clearly present-day intent to use the water right. As such, St. Clair demonstrated a lack of the subjective inten the subjective water right owner to abandon the water right.[40] ~~Previously, the State Engineer has held t this type of evidence (i.e. filing of a Change Application and a Report of Conveyance) is evidence tha party does not intend to abandon their water right, and can be enough to demonstrate the lack of subjective intent of abandonment.[41] The State Engineer has declined to declare a water right abandone an applicant filed a change application, stating that filing an application is "evidence that the Applic does not intend to abandon its water right…"[42]~~ This Court concludes that by this action alone, St. C demonstrated he did not intend to abandon his water rights.

~~Also, the State Engineer deemed that action over and above mere nonuse (i.e. failure to maint corporate status, relinquishment of grazing rights or right-of-way, lack of communication with S~~

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[37] *Id.*
[38] *Mallet v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 204-05, 1865 WL 1024 (1865).
[39] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.
[40] *Orr Ditch*, 256 F.3d at 945-946; *Alpine* , 291 F. 3d at 1072; Petitioner's Appendix at 00015-00020, 000091-000096.
[41] Petitioner's Appendix at 000084-000090, 000128-0000130; *See also* Petitioner's Appendix .
[42] Petitioner's Appendix at 0000115-0000121; See also Petitioner's Appendix at 000015-000020.

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Engineer's office) was necessary to show abandonment.[43] None of these facts are present in this case.

The State Engineer's determination of abandonment regarding Proof of Appropriation V-0104 was based only on evidence of non-use. The State Engineer references only evidence that shows non-u such as the decayed condition of St. Clair's well, that a pump was pulled out of St. Clair's well, and t failure of St. Clair to submit evidence of continuous use. Further, there was no field investigati conducted by the State Engineer to show when the water right was last used, or when the pump w removed from the well. In total, the only evidence before the Court was that of non-use. The St Engineer's reliance solely on non-use evidence was improper. Therefore, the State Engineer's conclusi that St. Clair's water right was abandoned in not supported by substantial evidence, and was therefo arbitrary, capricious, and is overruled.

THE STATE ENGINEER UNLAWFULLY IMPAIRED ST. CLAIR'S WATER RIGH BY APPLYING A RULE THAT IS STRICTER THAN THE WATER STATUTES.

Vested water rights are "regarded and protected as property."[44] The term vested water rights often used to refer to pre-statutory water rights, i.e. rights that became fixed prior to the enactment Nevada's statutory appropriation system. *Id.*; NRS 533.085. Because a vested water right is deemed have been perfected before the current statutory water law, the State Engineer does not have powers alter vested water rights.[45] Thus, the State Engineer cannot apply a rule to a vested water right unless tl rule existed at common law. The State Engineer has recognized this limitation in the past, holding tl applying a rebuttable presumption standard would further undercut the stability and security of pre-19 vested water rights.[46]

Here, the State Engineer applied a more restrictive law of abandonment than existed prior to t adoption of the Nevada water statutes. At common law, the subjective intent to abandon must be sho to prove abandonment. In this case the State Engineer attempted to apply current statutory rules to

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[43] *See* Petitioner's Appendix at 0000131-0000135; 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000080; 000104-000106; 000081-000083.
[44] *In re Filippini*, 66 Nev. 17, 22, 23, 202 P.2d 535, 537-38 (1949).
[45] *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
[46] Petitioner's Appendix 000021-000025.

Clair's vested water right. Nevada Revised Statute 534.090(1) requires the State Engineer to provide water right owner with a notice of forfeiture before the water right can be forfeited.[47] A water right own can then cure the forfeiture.[48] Yet here, the State Engineer did not give St. Clair any notice of forfeitu nor did he allow St. Clair an opportunity to cure the forfeiture. Thus, the law as applied to St. Clair w more restrictive than that of forfeiture; however St. Clair through his vested water right is entitled to a le restrictive law than forfeiture. Therefore the State Engineer's conclusion that St. Clair's water right w abandoned was arbitrary and capricious, and as such is overruled.

THE STATE ENGINEER IMPROPERLY SHIFTED THE BURDEN OF PROOF TO S CLAIR TO PROVE LACK OF INTENT TO ABANDON.

This Court follows the clear rule of law, set forth by clear precedent, and uniformly rejects t assertion that Nevada has created a rebuttable presumption of abandonment that shifts the burden of prc to a party defending a water right from abandonment.[49] In the *Alpine* case, the Ninth Circuit upheld t ruling in *Orr Ditch* that concluded "although a prolonged period of non-use may raise an inference intent to abandon, it does not create a rebuttable presumption."[50] Nevada maintains the rule that there no rebuttable presumption regarding the intent to abandon a vested right. Nevada's statutory scheme a long-standing case law clearly demonstrate that no burden-shifting exists under Nevada law based on or non-use evidence when considering the intent element of abandonment.[51]

The State Engineer correctly identified the standard that "[n]on-use for a period of time *m* inferentially be *some* evidence of intent to abandon a water right,"[52] and the State Engineer correc stated that a prolonged period of non-use "does not create a rebuttable presumption of abandonment." However, in the very next sentence, the State Engineer mischaracterized the leading case law on po

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[47] *Town of Eureka*, 108 Nev. At 168.
[48] *Id.*
[49] *Orr Ditch*, 256 F.3d at 945-946.
[50] *Alpine*, 291 F.3d at 1072, *see also Orr Ditch*, 256 F.3d at 945.
[51] *Id. See also In re Manse Spring*, 60 Nev. 283, 108 P.2d at 316,; *United States v. Alpine Land and Reservoir Co.*, 27 F.Supp.2d 1230, 1239-1241 (D.Nev. 1998) (a protestant alleging forfeiture or abandonment "bears the burden of proving clea and convincing evidence" to establish that fact); *see also Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 951 (1992).
[52] SE ROA at 0007; (*citing Franktown Creek*,77 Nev. at 354).
[53] SE ROA at 0008; *Orr Ditch,* 256 F.3d at 945.

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when he stated that "proof of continuous use of the water right should be required to support a finding *lack* of intent to abandon."[54] The State Engineer hinged his abandonment determination of tl misstatement of law.

~~The Ninth Circuit's statement *continuous use* specifically applied to only the unique circumstan of intrafarm transfers. Intrafarm transfers were predicated on a misunderstanding between the federal a state government regarding change applications for a change in place, manner and use of water rights the Newlands Project prior to 1983.[55] The *continuous use* language the State Engineer relied on is in t Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers."[56] In that section, t Ninth Circuit was specifically analyzing whether equitable principles should apply to protect or *intrafarm* transfers from abandonment. The reasoning in that section of the Ninth Circuit opinion has bearing on the current instance because this case does not involve the circumstance that existed in t Newlands Project, or an intrafarm transfer.~~

The State Engineer's actions in the current action clearly demonstrate an attempt by the Sta Engineer to shift the burden to St. Clair to prove continuous use of the subject water right. Such burde shifting is directly contrary to clearly established rules of law. The burden of proof, in this case, lies c the State Engineer to show abandonment, and it was improper to shift that burden to St. Clair. The Sta Engineer has not provided clear and convincing evidence of an intent to abandon, and the shifting of tl burden of proof was contrary to law, and is, therefore, arbitrary and capricious.

~~THE STATE ENGINEER DECLARATION OF ABANDONMENT WAS ARBITRAR AND CAPRICIOUS BECAUSE HE APPLIED THE WRONG RULE OF LAW.~~

~~This Court recognizes that the State Engineer is not bound by stare decisis. However, his sudde turn of mind without apparent motive demonstrates the State Engineer's decision is arbitrary ar capricious.[57] Previously, the State Engineer continually upheld the standards for abandonment that we established in the *Alpine* and *Orr Ditch* Decrees. The State Engineer presented argument in the *Alpi*~~

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[54] At 5; v. *Alpine*, 291 F.3d at 1077.
[55] *Alpine*, 291 F.3d at 1073-74.
[56] *Id.*
[57] ~~*City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).~~

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~~*Decree* proceeding that was relied upon by the Court and which recognized the principles abandonment under Nevada law, as well as the fact that abandonment in intrafarm transfers presents specialized circumstance.[58] The State Engineer later demonstrated a keen understanding of t application of the *Alpine Decree* to intrafarm transfers.[59] Yet, in the current instance, the State Engine completely changed course without evidence or facts in the record to explain his action.~~

~~Therefore, Ruling 6287 represents a severe and sudden turn of mind by the State Engineer th cannot remedy his sudden and improper application of well-settled Nevada water law. This Court h already discussed the lack of evidence of intent to abandon produced by the State Engineer in Ruli 6387. However, the State Engineer's sudden departure from his application of the *Alpine* and *Orr Dit* Decree was also arbitrary and capricious.~~

CONCLUSIONS OF LAW

This Court, having reviewed the record on appeal,[60] and having considered the arguments of t parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in th matter, hereby ORDERS as follows:

1. Ruling 6287 is AFFIRMED in part where Ruling 6287 determines that St. Clair has vested water right under V-010493;

2. Ruling 6287 is ~~OVERRULED~~ REJECTED in part to the extent it declares V-0104 abandoned; and

3. This case is remanded to the State Engineer to process ~~The State Engineer is directed grant~~ Application No. 83246T.

IT IS SO ORDERED.

Senior District Court Judge

~~[58] *See Request for Judicial Notice* at 3.~~
~~[59] *Id.*~~
~~[60] *See* SE ROA; *see also Petitioner's Appendix; see also Petitioner's Request for Judicial Notice.*~~

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EXHIBIT 2

EXHIBIT 2

Justina A. Caviglia

From: Paul Taggart <Paul@legaltnt.com>
Sent: Monday, March 14, 2016 6:04 PM
To: Justina A. Caviglia; 'srkosach@gmail.com'
Subject: RE: Jungo Ranch v. State Engineer
Attachments: Proposed Order Overruling State Engineer's Ruling 6287 (Jungo) - Final D....docx; State Engineer Redline to Proposed Order.pdf

Judge Kosach: Please find the proposed order and the alternative proposed order that was provided by counsel for the State Engineer. Due to the objection by the State Engineer, I included both proposed orders for your consideration. Counsel for the State Engineer objected to my proposed order because she claimed I included arguments and findings that you did not make in your oral ruling. My intention was to provide a proposed order that presents your findings with all the arguments that support those findings. Every argument that is included in the proposed order was made by me in oral argument.

Also, Ms. Caviglia objected because I included in the proposed order a ruling that addresses the State Engineer's Opposition to Jungo's Request for Judicial Notice. I included this because findings in the matter are based, in part, on the documents that were included in the Request for Judicial Notice, and it appeared to me that the Court denied the State Engineer's opposition. However, if that is not the case, we are prepared to attend a hearing to resolve that motion.

Please contact me with any other questions or concerns regarding the proposed order.

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From: Paul Taggart
Sent: Wednesday, December 02, 2015 5:06 PM
To: 'Justina A. Caviglia (JCaviglia@ag.nv.gov)'; 'srkosach@gmail.com'
Subject: Jungo Ranch v. State Engineer

Justina: This will confirm that we have an informal meeting with Judge Kosach to discuss this case on Wednesday, December 9, 2015, at 1:00 pm. The meeting will be held in my office at the below address.

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Case No.: CV 20, 112

Dept. No. 2

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IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

[PROPOSED] ORDER OVERRULING STATE ENGINEER'S RULING 6287

A Proposed Order is attached hereto as Exhibit 1.

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Affirmation Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the soci security number of any person.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRS 533.450, I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of Proposed Order, as follows:

[X] By U.S. POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City Nevada, in the ordinary course of business, addressed as follows:

Justina Cavigila
Nevada Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701

[___] By U.S. CERTIFIED, RETURN RECEIPT POSTAL SERVICE: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business addressed as follows:

[___] By ELECTRONIC DELIVERY, via:

DATED this day of _____, 20___.

_____
Employee of TAGGART & TAGGART, LTD.

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EXHIBIT

EXHIBIT

Case No.: CV 20, 112

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR, Petitioner, vs. JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	**ORDER OVERRULING STATE ENGINEER'S RULING 6287**

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THIS MATTER came before the Court on Petitioner, RODNEY ST. CLAIR's (hereinafter "
Clair" or "Petitioner") Petition for Judicial Review of State Engineer's Ruling 6287. St. Clair filed
Opening Brief on December 8, 2014. Respondent, JASON KING, P.E., Nevada State Engine
DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATUR
RESOURCES (hereinafter "State Engineer") filed an Answering Brief on January 22, 2015. St. C
filed a Reply Brief on February 27, 2015.

Oral argument was heard by this Court on January 5, 2016 in the First Judicial District Courtho
by stipulation of the parties. Petitioner is represented by Paul G. Taggart, Esq. and Rachel L. Wise, E
of Taggart and Taggart, Ltd. Respondent is represented by Attorney General Adam Laxalt and Dep
Attorney General Justina Caviglia.

This Court, having reviewed the record on appeal,[1] and having considered the arguments of tl parties, the applicable law, State Engineer's Ruling 6287, and all pleadings and papers on file in th matter, hereby **OVERRULES** Ruling 6287 in part; based upon the following findings of fact, conclusio of law and judgment.

FACTS AND PROCEDURAL HISTORY

St. Clair owns real property located in Humboldt County, Nevada, (Assessor's Parcel Numbe ("APN") 03-491-17), which was purchased in August, 2013. On November 8, 2013, St. Clair filed tw documents with the State Engineer. The first was a Proof of Appropriation, V-010493, claiming a veste right to an underground water source for irrigation of 160 acres of land. The second was Applicatio No. 83246T to change the point of diversion of the vested water claim. To support the vested claim, St Clair presented evidence of the application of the water to beneficial use prior to March 25, 1939, th operative date for the State Engineer to consider for vested claims to groundwater.

In Ruling 6287, the State Engineer found that St. Clair had pre-statutory rights to the underground percolating water which were vested prior to March 25, 1939.[2] The State Engineer stated that "[t]ogether, these facts evidence that underground waters [V-010493] were appropriated by the drilled well and used beneficially . . . prior to March 25, 1939."[3] The following facts support the State Engineer's decision:

(1) A land patent was acquired by Mr. Crossley pursuant to the Homestead Act of 1862 for the St. Clair property;

(2) A well was constructed with technology which ceased to be utilized in the mid-1930's;

(3) Aerial photographs exist for the property for the years 1968, 1975, 1986, 1999, 2006, and 2013;[4]

(4) Lack of any evidence of the failure to pay taxes and assessment fees for the right to use the water right;

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[1] *See Respondent's Summary of Record on Appeal* ("SE ROA"); *see also Petitioner's Appendix; see also Petitioner's Requ for Judicial Notice in Support of Petitioner's Reply Brief ("Request for Judicial Notice").*

[2] SE ROA 0006.

[3] SE ROA 004-006.

[4] These documents were not included in the State Engineer's ROA and were not subject to review by this Court.

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(5) Newspaper articles were published in the early 1920's discussing the irrigation of alfalfa with groundwater using drilled wells;

(6) A report created by Stanka Consulting, LTD., stating that on February 19th, 1924, George Crossley signed the Testimony of Claimant as part of the final paperwork required to complete the Homestead Act land acquisition which described the water right;[5]

(7) A patent from President Calvin Coolidge dated April 21st, 1924 describing the water right granted to St. Clair;[6]

(8) An Armstrong Manufacturing Company: Waterloo IA drill rig dated pre-1933[7] was found on the property; and

(9) A chain of title from St. Clair's predecessors-in-interest that does not include any conveyances by tax or foreclosure sales.[8]

The State Engineer's determination that St. Clair's water rights were valid pre-1939 vested rights was not appealed. However, the State Engineer then declared that 502.4 acre-feet annually ("afa") of a vested water right was abandoned by the holder of the right.[9] Notably, this declaration of abandonment was the first time in Nevada's history that the State Engineer declared a vested groundwater right abandoned.[10] In doing so the State Engineer placed the burden of proof on St. Clair to demonstrate a lack of intent to abandon Vested Claim 010493. Specifically, the State Engineer stated that, "[a]t minimum, then, proof of continuous use of the water right should be required to support a finding of *lack* of intent to abandon."[11] Also, the State Engineer repeatedly referred to evidence of non-use of the underground water as constituting evidence of St. Clair's intent to abandon their water rights.[12]

St. Clair argued that the State Engineer's determination of abandonment in Ruling 6287

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[5] SE ROA 0037.
[6] SE ROA 0045.
[7] SE ROA 0102.
[8] SE ROA 0038-0066.
[9] SE ROA 008 – 009.
[10] Petitioner's Reply Brief, Exhibit 1.
[11] *Id.* (*emphasis in the original*) (*citing U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[12] SE ROA 007- 009.

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regarding Vested Claim 010493 is contrary to long-standing Nevada precedent which holds, in part, that the intent to abandon a water right must be shown by more than mere non-use evidence.[13] St. Clair also argued that the State Engineer improperly shifted the burden of proof to St. Clair to prove lack of intent to abandon, made incorrect and unsupported findings of fact, and did not have substantial evidence to support his conclusions. Finally, St. Clair argued that the State Engineer did not have the power to abandon the water rights without conducting a formal adjudication.

DISCUSSION

The State Engineer's holding that "Applicants' admission the water has not been us continuously coupled with the admission they are without knowledge of when it was, or was not used . find that Proof of Appropriation V-010493 has been abandoned" is overturned because it is arbitra capricious, contrary to law and not supported by substantial evidence.[14] The State Enginee misapplication of Nevada law is two-fold: (1) non-use alone is not enough to demonstrate abandonment a water right; and (2) the burden is on the State Engineer to show intent to abandon, not on St. Clair demonstrate lack of intent to abandon the water right.

I. STANDARD OF REVIEW

A party aggrieved by an order or decision of the State Engineer is entitled to have the order decision reviewed, in the nature of an appeal, pursuant to NRS 533.450(1). Judicial review is "in nature of an appeal," and review is generally confined to the administrative record.[15] The role of reviewing court is to determine if the decision was arbitrary or capricious and thus an abuse of discreti or if it was otherwise affected by prejudicial legal error.[16] A decision is arbitrary and capricious if i "'baseless'" or evidences "a sudden turn of mind without apparent motive...."[17] With regard to fact

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[13] *U.S. v. Orr Water Ditch Co.*, 256 F. 3d 935, 95 (9th Cir. 2001); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1((9th Cir. 2001); *Det. Of Relative Rights in and to the Waters of Franktown Creek Irr. Co., Inc. v. Marlette Lake Co. and State Engineer of the State of Nevada*, 77 Nev. 348, 354 (1961); *Revert v. Ray*, 95 Nev. 782 Nev. 782, 786, 603 P.2d 262, 2 (1979); *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 284, 108 P.2d 311, 315 (1940).

[14] SE ROA 005.

[15] NRS 533.450(1), (2); *Revert*, 95 Nev. at 786, 603 P.2d at 264.

[16] *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 751, 918 P.2d 667, 702 (1996), *citing Shetakis Dis v. State, Dep't Taxation*, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992) ("[a]s a general rule, a decision of an administrative agency will not be disturbed unless it is arbitrary and capricious")).

[17] *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

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findings, the court must determine whether substantial evidence exists in the record to support the St Engineer's decision.[18] Substantial evidence is "that which a 'reasonable mind might accept as adequate support a conclusion.'"[19] With regard to purely legal questions, such as statutory construction, standard of review is de novo.[20]

II. ST. CLAIR'S REQUEST FOR JUDICIAL NOTICE.

As a preliminary matter, on February 27, 2015, St. Clair filed Petitioners' Appendix. Petitioner Appendix included twenty-six (26) previous rulings by the State Engineer between 1984 and 2012 whi demonstrate the State Engineer's prior application of the law of abandonment to water rights. The rulin are public documents capable of review maintained by the State Engineer at his office and online. (June 3, 2015, St. Clair submitted a Request for Judicial Notice in Support of Petitioners' Reply Bri ("Request for Judicial Notice") to this Court. The Request for Judicial Notice contained three exhibits:

(1) the State Engineer's July 24, 2002 *Appellee Nevada State Engineer's Answering Brief* in the Ninth Circuit Court of Appeals, Case Nos.: 01-15665; 01-15814; 01-15816; of the case *United Stat of America, and Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Company, et.,* ("*Alpine Decree*"); the Nevada State Engineer appeared as a Real-Party-in-Interest/Appellee in the *Alpi Decree* and filed the above-referenced Answering brief in the matter that resulted in the decision that published at 291 F.3d 1062;

(2) the State Engineer's Ruling on Remand 5464-K, issued as a result of the Ninth Circ District Court's Decision at 291 F.3d 1062; and

(3) the Nevada State Engineer's Answering Brief filed in the Ninth Circuit District Court Appeals, Case No.: 06-15738, filed on or around November 22, 2006, relating to the *Alpine Decree.*

This Court set a hearing date for this matter on October 22, 2015. On that date, the Honorab Judge Montero recused himself in the interest of fairness and justice and to avoid any appearance impropriety. After that hearing date, on November 11, 2015, the State Engineer filed their Opposition

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[18] *Id.*; *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Revert v Ray*, 95 Nev. at 786, 603 P.2d at 264.
[19] *Bacher v. State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (*quoting State, Employee Sec. Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).
[20] *In re Nevada State Eng'r Ruling No. 5823*, 277 P.3d 449, 453, 128 Nev. Adv. Op. 22, 26 (2012).

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Petitioner's Request for Judicial Notice in Support of the Petitioner's Reply Brief ("Opposition to Judici Notice"). The State Engineer's Opposition to Judicial Notice did not challenge the admissibility Petitioners' Appendix. Also, the State Engineer did not oppose that fact that the documents included the Request for Judicial Notice exist or are public documents.

The State Engineer's Opposition to Judicial Notice is **DENIED** as untimely. This Court furth finds that all documents submitted are public documents capable of accurate and ready determination l resort to sources whose accuracy cannot be reasonably questioned. Accordingly, Court finds that documents submitted by St. Clair in the Petitioner's Appendix and Request for Judicial Notice are enter onto the record of this Court for this case pursuant to NRS 47.130-150.

III. EVIDENCE DOES NOT SUPPORT FINDING OF INTENT TO ABANDON.

Nevada follows a bright line rule of law to guide courts and the State Engineer in determining a analyzing whether a water right is abandon. Abandonment is the relinquishment of the right by the owi *with the intent* to "forsake and desert it."[21] Intent is the necessary element the State Engineer is required prove in abandonment cases.[22] This is the standard the State Engineer has previously relied upon.[23] fact, the State Engineer has explained that "Nevada case law discourages and abhors the taking of wa rights away from people," and that is why abandonment must be proven by clear and convinci evidence.[24]

Abandonment requires a union of facts and intent to determine whether the owner of the wa right intended abandonment.[25] As intent to abandon is a subjective element, the courts utilize surrounding circumstances to determine the intent.[26] Because subjective intent to abandon is a necess element to prove abandonment, mere evidence of nonuse is not enough to satisfy the State Enginee burden because nonuse does not necessarily mean an intent to forsake.[27] Thus, if a vested water ri

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[21] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315; *Orr Ditch*, 256 F.3d at 941.
[22] *In re Manse Spring*, 60 Nev. at 284, 108 P.2d at 315;*Orr Ditch* 256 F.3d at 941; *Alpine*, 291 F.3d at 1077; *Franktown Creek* 77 Nev. at 354, 364 P.2d at 1075;and *Revert,* 95 Nev. at 786, 603 P.2d at 266.
[23] *See* Petitioner's Appendix at 00001-0000135.
[24] Petitioner's Appendix at 000030-000037.
[25] *Revert*, 95 Nev. at786, 603 P.2d at 264.
[26] *Alpine,* 291 F.3d at 1072.
[27] Petitioner's Appendix 0000131-0000135; *See also* Petitioner's Appendix 0000122-0000127; 000047-000050; 000076-000080; 000097-000100; 000073-000075; 000104-000106; 000081-000083.

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holder does not use their water right, but does not intend to forsake it forever, abandonment cannot occ For this reason, the State Engineer has previously ruled that "bare ground by itself does not constit abandonment."[28] Also, the Ninth Circuit has upheld the position that bare ground must be coupled wit use inconsistent with irrigation to show intent to abandon.[29] The standard of proof for demonstrat abandonment is clear and convincing evidence, and the burden of proof is on the party advocat abandonment, which in this case is the State Engineer.[30]

The Ninth Circuit has consistently upheld and endorsed Nevada's rule of law for abandonmen the *Orr Ditch* and *Alpine* decisions by confirming that abandonment must be demonstrated "from surrounding circumstances," and not only non-use evidence.[31] The surrounding circumstances t although not exhaustive, has definitively produced one bright line rule regarding abandonment of wa rights under Nevada law. That bright-line rule is that non-use alone is not enough to prove abandonme This Court reiterates the canon that a water right may not be abandoned absent the showing of "subject intent on the part of the holder of a water right to give up that right."[32]

This Court recognizes that the subjective intent of abandonment is difficult to demonstrate, and such, indirect and circumstantial evidence may be used to show intent of abandonment.[33] The m consistent element in Nevada water law that applies to abandonment cases is the determination that nc use of the water is not enough to constitute abandonment.[34] The Ninth Circuit Appeals Court, wh analyzing Nevada case law, has continually recognized that Nevada's abandonment rules indicate tl non-use alone is not enough to constitute abandonment.[35] Nevada requires non-use evidence to coupled with other evidence to determine the subjective intent of the water user.[36] This well-develop rule was originally taken from Nevada's mining law.[37] The Ninth Circuit, while applying Nevada st

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[28] Petitioner's Appendix 000051-000054.
[29] *Orr Ditch, 256 F.3d at 946.*
[30] *Orr Ditch,* 256 F.3d at 946; *United States v. Alpine Land & Reservoir Co.,* 27 F. Supp. 2d 1230, 1245 (D. Nev. 1998).
[31] *Alpine* 291 F.3d at 1072.
[32] *Orr Ditch,* 256 F.3d at 944-45.
[33] *Id.*
[34] *In re Manse Spring, 60 Nev* at 288,108 P.2d at 317; *Orr Ditch,* 256 F.3d at 941, *Alpine,* 291 F.3d at 1072, *Franktown Cree 77 Nev.* at 354, 364 P.2d at 1075; *Revert,* 95 Nev. at 786, 603 P.2d at 266.
[35] *Orr Ditch, 256 F.3d* at 945; *Alpine*, 291 F.3d at 1072.
[36] *Id.*
[37] *Mallet v. Uncle Sam Gold & Silver Min. Co.,* 1 Nev. 188, 204-05, 1865 WL 1024 (1865).

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IN THE SUPREME COURT OF THE STATE OF NEVADA

TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellant, vs. RODNEY ST. CLAIR, Respondent.	Electronically Filed May 01 2019 10:45 a.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 77651

JOINT APPENDIX

VOLUME III of V
(JA 481–720)

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DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
11/16/18	Affidavit of Timothy O'Connor in Support of Motion for Attorneys' Fees	V	1077–1079
12/06/18	Case Appeal Statement	V	1132–1136
12/06/18	Ex Parte Motion for Order Shortening Time on Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1141–1143
12/09/16	Joint Appendix, Volume I of II (JT APP 001–556), *Jason King v. St. Clair*, Case No. 70458	I–III	1–560
12/09/16	Joint Appendix, Volume II of II (JT APP 557–844), *Jason King v. St. Clair*, Case No. 70458	III–IV	561–852
08/09/18	Memo as to Court Date (Hearing set for 10/19/18)	IV	907–908
12/06/18	Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1137–1140
12/06/18	Notice of Appeal	V	1112–1131
12/03/18	Notice of Entry of Order Granting Motion for Attorneys' Fees	V	1096–1111
12/26/18	Notice of Entry of Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1151–1158
06/28/18	Notice of Motion and Motion for Attorneys' Fees	IV	855–870
12/07/18	Notice of Non-Opposition to Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1144–1146

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
07/16/18	Opposition to Motion for Attorneys' Fees	IV	871–884
12/18/18	Order Granting Motion for Stay of Attorneys' Fees Judgment Pending Appeal	V	1147–1150
10/19/18	PowerPoint Presentation (St. Clair's)	IV	909–936
10/19/18	PowerPoint Presentation (State Engineer's)	IV–V	937–989
11/16/18	[Proposed] Order Granting Motion for Attorneys' Fees (St. Clair's)	V	1080–1095
05/04/18	Remittitur and Clerk's Certificate/Judgment, *Jason King v. St. Clair*, Case No. 70458	IV	853–854
07/20/18	Reply in Support of Motion for Attorneys' Fees	IV	885–899
07/23/18	Request for Submission	IV	900–906
01/02/19	Request for Transcript	V	1159–1161

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DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
10/19/18	Transcript of Hearing on Motion for Attorneys' Fees	V	990–1076

RESPECTFULLY SUBMITTED this 30th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 30th day of April, 2019, I served a copy of the foregoing JOINT APPENDIX and DOCUMENTS JA 1–1161, by electronic service to:

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/s/ Dorene A. Wright

neither the United States nor PLPT have made any attempt to meet their burden of showing that the doctrines of perfection, abandonment, or forfeiture apply.

"The law of Nevada, in common with most other Western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land." *Nevada v. United States*, 463 U.S. 110, 126 (1983), *quoting, Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 159-61, 140 P. 720, 722 (1914). As a consequence, to prove that the water rights appurtenant to on-farm ditches have never been perfected, the United States and PLPT must make two assumptions. First, that the ditches at issue existed at the time the water rights were created and that they have never moved since, and second, that the use of those ditches was not a beneficial use of water. As has already been discussed above, the use of water in the on-farm ditches is in fact a beneficial use. *Hage III*, 42 Fed. Cl. at 251. Even if one assumes for the sake of argument, however, that the use of water in the on-farm ditches is not a beneficial one, the United States and PLPT have failed to show, and have in fact not attempted to show, that no use of water was ever made on the lands at issue. Absent evidence that the on-farm ditch at issue has existed since the farm has been under irrigation and has never moved since, the very likely possibility remains that the land was at one time *not* covered by an on-farm ditch and, therefore, was irrigated and the associated water right perfected.

In regards to abandonment, the United States and PLPT have the burden of showing, by clear and convincing evidence, that the applicants voluntarily relinquished the right with the intention to forsake and desert it. *Manse Spring*, 60 Nev. at 287, 108 P.2d at 315. No evidence has been offered, however, to indicate that any farmer in the Newlands Project intended to abandon water rights to land covered by an on-farm ditch that was by necessity only temporary in nature. Clearly, there could have been no such intention on the part of the water rights holders since after a ditch is moved they would again irrigate the land previously covered by the on-farm ditch. To conclude otherwise would be to assume that a water rights holder intended to abandon water rights every time an on-farm ditch was moved. This certainly cannot be the case since the irrigated land of the farm would then be incrementally decreased in size every time an on-farm ditch was moved until a significant portion of the farm had been abandoned. There is simply no evidence in the record that would indicated that any of the applicants had such an intent, and it would of course be ridiculous to assume that they would.

In regard to forfeiture, the United States and PLPT have the burden of showing that there were five consecutive years of nonuse, NRS 533.060 (amended 1999). There would likewise be no forfeiture if there has been subsequent use of the water such as would constitute a cure. *Town of Eureka*, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992). Again, as was noted above, the use of the water in the

on-farm ditches is a beneficial use, and there is therefore no evidence of nonuse at all. This fact notwithstanding, the United States and PLPT have failed to show any other evidence of five years of nonuse, a fact that cannot merely be assumed given the transient nature of on-farm ditches. PLPT and the United States have therefore failed to meet their burden of proving forfeiture.

Merely arguing that the use of water in an on-farm ditch is not a beneficial use does not immediately lead to the conclusion that there are no water rights appurtenant to on-farm ditches. The temporary and transitory nature of on-farm ditches requires that some theory be identified as to why the land covered by the on-farm ditches does not retain its appurtenant water rights granted to it by the Court. The United States and PLPT have failed to do this. Just as importantly, the United States and PLPT have clearly failed to meet their burden of proof for the theories of perfection, abandonment, or forfeiture.

The United States has also argued that the inclusion of conveyance loss in the duty under the *Alpine Decree* in some way eliminates any argument that the on-farm dirt-lined ditches do not have appurtenant water rights. United States' Opening Brief at 30-31. This argument in no way resolves the issue of beneficial use since it both assumes that the use is not beneficial, a factual question for which

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they offer no evidence, and misinterprets the significance of the "on-farm efficiency" that was included as part of the duty available to each water righted acre.

The fact that the duties assigned to bench and bottom lands under the *Alpine* and *Orr Ditch Decrees* take into account conveyance and on-farm efficiencies in no way alters the fact that on-farm ditches have appurtenant water rights, since, as was discussed above, the use of the water in the ditches is beneficial independent of the transport of water. This being the case, the fact that the decree has accounted for on-farm efficiencies in setting the duty does not alter the fact that there are appurtenant water rights any more than it would affect land elsewhere on the farm. Likewise, on-farm efficiencies by definition include the loss of water on the entire farm, not only in ditches, and are necessary because more water must be applied on the upgrade side of a parcel to ensure that sufficient water will flow to the downgrade side. This is the case regardless of whether the water is conveyed in a ditch or is merely flowing across the field. This inclusion of on-farm efficiencies in the water duty cannot, therefore, be assumed to address the issue of beneficial use since it applies to every acre of land irrigated within the project whether it is ditch or some other type of irrigated land.

The State Engineer correctly concluded that the General Regulations included on-farm ditches within the irrigable acreage of the Applicants, and that

conclusion is consistent with Nevada law, the *Alpine* and *Orr Ditch Decrees*, and the physical realities of on-farm dirt-lined ditches. Just as importantly, PLPT and the United States have failed to identify what legal theory would invalidate these water rights and have failed to meet their burden of showing that the water rights were never perfected, were abandoned, or were forfeited. Ruling 4798 must therefore be affirmed in regard to the conclusions related to on-farm dirt-lined ditches.

D. The Issue of Whether the Ditches at Issue Are On-Farm Dirt-Lined Ditches, and Whether Their Use Constitutes a Beneficial Use of Water, Is a Factual as Well as a Legal Question, and Since No Evidence Was Received Below on This Issue, It Would Be Inappropriate for This Court to Rule on This Issue at This Time.

There is no dispute that the District Court did not address the validity of the State Engineer's statements in regard to on-farm ditches. FER at 379-83. In spite of this fact both the United States and PLPT do not contend that the issue should be remanded, but instead argue that the issue of the on-farm dirt-lined ditches and beneficial use are purely legal ones and may be addressed by this Court without consideration by the District Court or development or consideration of any facts regarding the physical nature of the ditches, how they are used, or the manner in which the State Engineer has dealt with them elsewhere in the State. United States' Opening Brief at 23. The Appellants are mistaken, however, in asserting that this issue is purely a legal one. To the contrary, this issue is primarily factual

in nature. As a consequence, should this Court question the State Engineer's holding that on-farm ditches are water righted, the appropriate course of action is not to announce a general rule of law without any relation to the actual facts and history of use of the ditches that would impact not only the water users in the Newlands Project but water rights users throughout the State of Nevada, but rather, to remand the question to the State Engineer for additional development of a record on this very important state-wide issue.

A review of relevant case law, the actual physical nature of on-farm ditches and the Appellants' own arguments show that the question of whether the on-farm ditches have associated water rights is primarily a factual one.

As was discussed above, the United States Court of Claims has recognized that ditches and easements have historically been used for grazing in the State of Nevada. Such grazing, and consequently use of water in the ditches, is a beneficial use.

> The court notes the undisputed historical use of the ditches and water at issue for stockwatering and livestock maintenance. . . .
>
> The court holds that the extent of the right to forage around an Act of 1866 ditch is contiguous with the scope of the ditch right-of-way: *the ground occupied by the water* and fifty feet on each side of the marginal limits of the ditch.

////

Hage III, 42 Fed. Cl. at 251. As the *Hage III* court's findings make clear, the use of on-farm ditches is not strictly limited to the conveyance of water, and the actual nature of the use of the ditches is a factual one. The analysis of beneficial use will be impacted by facts such as whether the ditch is used for forage, how often it is used to convey water, its physical size, etc. Also, depending on which specific legal doctrine the United States and PLPT are relying on to support their contention that the on-farm ditches do not have appurtenant water rights, i.e. lack of perfection, forfeiture, or abandonment, additional facts such as when the ditch was constructed, whether it has ever been moved, and how often it has been moved, as well as other facts related to intent and use, will be significant.

The arguments of the United States in regard to beneficial use of water in on-farm dirt-lined ditches do not support their ultimate conclusion that this is a question of law rather than fact. As duly noted by the United States, water is beneficially used when applied to a given tract of land to produce crops. United States' Opening Brief at 29, *citing Alpine I*, 697 F.2d at 854. The critical issue is, therefore, how and where the water is actually used. How and where water is used is a question of fact, not law. As noted in *Hage III* and the discussion above, the use and history of any given on-farm ditch may involve far more than the mere transport of water. This fact is implicitly recognized by the United States by its inability to identify what theory would justify denying the Applications at issue.

United States' Opening Brief at 32-33. The United States cannot merely assume that the only use of the dirt-lined on-farm ditches is for the conveyance of water, that the ditches have never moved, or that the Applicant had the intent to abandon water rights.

It is clear that the question of beneficial use turns on the question of how water was used. This is a factual and not a legal question. Should this Court determine that the State Engineer in some manner erred in regard to his ruling related to on-farm dirt-lined ditches, the appropriate course for this Court would be to remand the question for further consideration.

E. The State Engineer Correctly Determined That PLPT Had Failed to Show Nonuse of the Water By Clear and Convincing Evidence as Is Necessary to Establish Forfeiture or Abandonment.

Pursuant to Nevada law, clear and convincing evidence is necessary to prove abandonment or forfeiture. *Town of Eureka v. State Engineer*, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992). PLPT argues that this Court should remand Application 49109, parcel 1; Application 49110, parcel 1; Application 49120, parcel 3; Application 49122, parcels 3, 4, and 5; Application 50010, parcels 1 and 2; and Application 51738, parcels 4 and 6, on the grounds that the State Engineer's finding that PLPT had failed to meet its burden of proof of nonuse of water for purposes of forfeiture and abandonment was in error. PLPT cites to this Court's Decision in *Orr Ditch*, 256 F.3d at 948, to support this proposition. PLPT's

Opening Brief at 14-19. Contrary to PLPT's contention, the State Engineer did not misinterpret the clear and convincing evidence standard by holding that PLPT had failed to meet its burden of showing nonuse in respect to these applications.

In regard to Application 49109, parcel 1, the State Engineer found that PLPT's evidence showed this parcel was described as bare land and natural vegetation. FER at 124. Other evidence indicated, however, that in 1986 the land was described as a pasture and that there was actual observation of irrigation in 1971 through 1977. There was likewise evidence of payment of taxes and assessments. From this the State Engineer found that there was no clear and convincing evidence of nonuse of the water or an intent to abandon. *Id.* at 125. PLPT's contention that the State Engineer misapplied the clear and convincing evidence standard both misinterprets the *Alpine V* decision and ignores this Court's holding in *Orr Ditch*.

This Court has recognized that an extended period of nonuse of water, by itself, does not create a rebuttable presumption of abandonment. *Orr Ditch*, 256 F.3d at 945. The Court adopted the view of the District Court, which had held:

> Where there is evidence of both a substantial period of nonuse, combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. *If, however, there is only evidence of*

> *nonuse, combined with the finding of a payment of taxes or assessments, the court concludes that the Tribe has failed to provide clear and convincing evidence of abandonment.*

Id. at 946 (emphasis added). These are the very facts that are presented by Application 49109, parcel 1. Although there is some evidence of periods of nonuse interrupted by periods of actual irrigation, there was no evidence of any improvements inconsistent with irrigation. There was, however, evidence of the payment of taxes and assessments. Consequently, according to the holding of *Orr Ditch*, PLPT has failed to meet its burden of proof, and the Application was correctly granted.

In addition, this Court's statement in *Alpine V* regarding the clear and convincing standard of proof was based in large part on the perception that there was no evidence in the record contradicting PLPT's evidence in regard to the parcels at issue there. As is readily apparent here, however, there was contradictory evidence offered in regard to Application 49109, parcel 1, showing use of the land as pasture and numerous years of actual irrigation. Accordingly, the State Engineer did not err in concluding that PLPT had failed to meet its burden of proof, and since the State Engineer did not find that equitable relief was appropriate as to this application, there is no reason to remand this application.

In regard to Application 49110, parcel 1, the State Engineer found that the parcel had been described at various times as bare land, trees, and partially

irrigated. The descriptions mention undescribed structures on the property in 1962, 1972, and 1977 but also indicate that there were no structures in 1973, 1974, 1975, and 1980-1984. At the hearing in 1986 the Applicants described the 1948 use as a pasture and the current use as a church. FER at 128-29. The application to change the place of use was filed on June 5, 1985, however. *Id.* at 126. From this evidence the State Engineer concluded that PLPT did not prove nonuse and the intent to abandon with clear and convincing evidence. *Id.* at 128-29. This finding is consistent with *Orr Ditch* in that there is insufficient evidence of nonuse and improvements inconsistent with irrigation to shift the burden of proof. Likewise, the State Engineer cannot be said to have misinterpreted the clear and convincing evidentiary standard since there was contradictory evidence as to the use of the land. The State Engineer's findings regarding Application 49110, parcel 1, must therefore be affirmed, and no remand of that application is necessary.

In regard to Application 49120, Parcel 3, the State Engineer found that the land at issue was described from 1948 to 1977 as irrigated or partially irrigated. There was therefore no evidence of nonuse for those years. FER at 174. There was evidence that a portion of the parcel had been converted to residential use but where that portion was and how much land was involved was not identified in any way by PLPT. *Id.* at 174-75. The State Engineer correctly concluded as a result that PLPT had failed to meet its burden of showing nonuse as to those portions

which were not developed and that it failed to meet its burden as to the remaining portions of the parcel where development had occurred by failing to identify in any way their location or the amount of land involved. *Id.* at 175. There is no dispute that PLPT had the burden of showing nonuse and development inconsistent with irrigation, and it is likewise clear that PLPT failed to meet that burden since the State Engineer was unable to identify any specific piece of land whose water rights the State Engineer could declare forfeited. Remand of this application is therefore unnecessary.

Application 49122 involved the consideration of the three parcels. In regard to each of these parcels, the State Engineer found that all of the evidence described this land as bare land, natural vegetation or irrigated. FER at 184-87. There was no evidence of any development inconsistent with irrigation. For purposes of abandonment, then, the burden did not shift and there was insufficient evidence to prove intent.

The evidence presented as to Application 50010, parcels 1 and 2, described the land at various times at bare land, natural vegetation road, and canal. The evidence gave no indication what area might be covered by the road and canal, however. FER at 270. Since there was inadequate evidence to allow the State Engineer to conclude what land had been covered by improvements and no evidence that the remainder of the land was used for purposes inconsistent with

irrigation, the State Engineer correctly concluded that PLPT had failed to meet its burden of proof. *Id.* at 271. The State Engineer is not free to guess at the location and amount of land that may have been used for improvements and refusing to do so does not mean that he has misapplied the clear and convincing evidence standard.

Similarly, Application 51738, parcel 4, was described as farm yard, road, and partially irrigated. FER at 364. Most importantly, PLPT's own witnesses testified that 0.45 of an acre was irrigated out of the total parcel of 0.50 of an acre. *Id.* at 365. The entire parcel became a city lot after the Change Application was filed. *Id.* at 365. As to parcel 6 of Application 51738, the State Engineer found that the land use description over the years was irrigated land or partially irrigated land, with a structure appearing in an undisclosed location in 1980. *Id.* at 365. Since PLPT had not proved nonuse for any specifically identifiable portion of the parcel, the State Engineer correctly concluded that PLPT had failed to meet its burden of showing nonuse and the intent to abandon. *Id.*

The contention of PLPT that the State Engineer misapplied the clear and convincing evidence standard is not supported by the record here. Unlike the applications referred by this Court in *Alpine V*, there is disputed evidence in regard to many of these applications. As to the remainder of the applications, PLPT has failed to show that there were any improvements inconsistent with irrigation. The

State Engineer was therefore correct to conclude that PLPT had failed to meet its burden of proof under the holding of *Orr Ditch*. The decision of the State Engineer as to these applications should therefore be affirmed.

Unlike the Change Applications addressed by the *Orr Ditch* Court, the evidence presented by PLPT as to the nonuse of water *is* disputed and contradicted by other evidence. As the finder of fact, the State Engineer is required to consider all of the evidence and give it the weight he deems appropriate. In light of the contradictory evidence presented as to these applications, the State Engineer correctly concluded that PLPT had failed to show forfeiture or abandonment by clear and convincing evidence. The circumstances that caused the *Orr Ditch* Court to comment on the standard of proof are simply not present in this Ruling, and no remand is necessary to address the burden of proof.

F. There Is Substantial Evidence in the Record to Support the State Engineer's Finding of Abandonment as to Applications 47809, 49111, and 49285.

In Ruling 4798 the State Engineer found that the water rights associated with Application 47809, parcels 4 and 5 (Louis A. Guazzini, Jr.); Application 49111, parcel 1 (Isabelle E. Winder); and Application 49285, parcel 1 (Darrel W. and Patricia A. Norman) have been abandoned.[5] FER at 85, 135, and 202. The finding

[5] These appellants will be cumulatively referred to hereafter as the "Applicants," and will be referred to individually as "Applicant."

of abandonment has been appealed by each of the Applicants above. The primary question on review of these applications is whether there was substantial evidence in the record to support the State Engineer's finding of abandonment. *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991). A review of the record indicates that the State Engineer did in fact rely on substantial evidence in finding that these rights have been abandoned. The State Engineer's decision must therefore be affirmed.

In regard to Application 47809, parcels 4 and 5, the State Engineer specifically found the land at issue had been described as bare land and large structures from 1962 through 1984. FER at 84. Furthermore, at the 1985 administrative hearing, the Applicant described the land use of both parcels as a school. *Id.* at 84-85. Based on the Applicant's own evidence that the parcels were now occupied by a school, the State Engineer was correct in concluding that this was a use incompatible with irrigation and that the burden of proof therefore shifted to the Applicants to show facts that would indicate that they did not have the intent to abandon the water rights appurtenant to those parcels. *Alpine V*, 279 F.3d at 1198-99. Since no evidence was offered by the Applicant that would indicate that they did not intend to abandon the water appurtenant to these parcels, the State Engineer correctly concluded that PLPT had made a sufficient showing of abandonment.

The Applicants have argued, however, that the transfer moratorium put in place by the United States from 1973 to 1984 precluded the Applicants from forming the intent to abandon their water rights. Although the State Engineer does not necessarily disagree that the moratorium has a significant bearing on the issue of intent, this issue was not presented to the State Engineer in the proceedings below and were on that account not addressed in Ruling 4798.[6]

As a consequence, there is substantial evidence to support the State Engineer's determination that the water rights appurtenant to parcels 4 and 5 of Application 47809 have been abandoned, and the State Engineer's Ruling to that effect should be affirmed.

The State Engineer found that the water rights appurtenant to parcel 1 of Application 49111 had been abandoned based on evidence that showed that no water had been placed on the land for 22 years and that the land use is inconsistent with irrigated agriculture. FER at 134. The Applicant argues that the State Engineer erred in refusing to admit certain documents that would have indicated that the water rights at issue here were subject to the intrafarm transfer rule. Although the State Engineer asserts that it is well within his right as the finder of

[6] The Applicants likewise argue that 43 C.F.R. § 426.4 defines irrigable acreage and that certain of the uses described therein supports their contention that water rights have not been abandoned. The State Engineer admits that he did not address the import of that regulation below since it was not presented to him for consideration .

fact to exclude documents from evidence that were not produced to opposing counsel in a timely fashion as required by hearing procedures, that issue has since become moot in light of this Court's ruling in *Alpine V* that there can be no blanket application of an equitable remedy and that equity does not apply to abandonment. *Alpine V*, 279 F.3d at 1202-1204.

As to Application 49285, parcel 1, the State Engineer found that no water had been applied to the parcel for at least seven years and that it was occupied by a church and an adjacent dirt parking lot. FER at 201. The State Engineer concluded that these uses constituted improvements inconsistent with irrigation and that the Applicants failed to show a lack of intent to abandon the water right. Based on these facts there can be little argument that there is substantial evidence to support the State Engineer's conclusion.

There is substantial evidence supporting the State Engineer's findings of abandonment as to Application 47809, parcels 4 and 5, Application 49111, and Application 49285, parcel 1, and Ruling 4798 should be affirmed in regard thereto.

VIII. CONCLUSION

The *Alpine V* decision, which was decided since the entry of Ruling 4798, overruled the District Court's conclusion that equity could be applied to all intrafarm transfers. Where the intrafarm transfer rule was the sole basis for granting the application, it is therefore necessary to remand such applications to

determine whether the facts of each individual case justify the invocation of equitable relief. Likewise, *Alpine V* mandates the remand of these applications for a factual determination of intent. However, Nevada law does not limit the facts that may be considered by the State Engineer to determine intent. Finally, the State Engineer correctly concluded that on-farm dirt-lined ditches do have appurtenant water rights as they do throughout the State of Nevada. Ruling 4798 should therefore be sustained as to its holding related to on-farm dirt-lined ditches and be remanded for determinations regarding equity and abandonment consistent with the holding of *Alpine V*.

DATED this 22nd day of July, 2002.

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BRIEF FORMAT CERTIFICATION PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1, I certify that

_xx_ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

_xx_ Proportionately spaced, has a typeface of 14 points or more and contains 13,553 words,

or is

_____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text.

DATED this 22nd day of July, 2002.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the parties are directed to list related cases now pending before the Ninth Circuit. Cases related to this matter include: *United States v. Alpine Land & Reservoir Co.*, Case Nos. 01-16224 and 01-16241; and *United States v. Alpine Land & Reservoir Co.*, Case Nos. 01-16694 and 01-16789.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 22nd day of July, 2002, I served two copies of the foregoing APPELLEE NEVADA STATE ENGINEER'S ANSWERING BRIEF by mailing true and correct copies, first class mail, postage prepaid, to the following persons:

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I also certify that on this date I mailed the foregoing APPELLEE NEVADA STATE ENGINEER'S ANSWERING BRIEF by first class mail, postage prepaid, to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Pamela Young
Pamela Young

EXHIBIT 2

EXHIBIT 2

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION 53662) RULING ON REMAND

GENERAL #5464 - K

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*[291] and *Alpine VI*[292] and the Federal District Court's Order of February 25, 2004,[293] which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV, V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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[291] 291 F.3d 1062 (9th Cir. 2002).

[292] 340 F.3d 903 (9th Cir. 2003).

[293] *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V* and *VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.

7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.

8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.

9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.

10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

II.

In State Engineer's Ruling No. 5005, the State Engineer was addressing three parcels of land. The Tribe alleged forfeiture and abandonment as to Parcels 1 and 3, and partial forfeiture and partial abandonment as to Parcel 2. The State Engineer found that all three parcels had contract dates post-1913; therefore, the forfeiture provision of NRS § 533.060 is applicable.

As to Parcel 1, the State Engineer found taking both the Applicant's and Tribe's land use descriptions that the land use was a drain ditch, that no water was placed to beneficial use on that parcel from 1948 to 1989, and the land use is inconsistent with irrigation.

As to Parcel 2, the State Engineer found taking both the Applicant's and Tribe's land use descriptions that no water was placed to beneficial use on 2.08 acres of the 13.70 acres of the existing place of use from 1948 to 1989, and the land use on the 2.08 acres is inconsistent with irrigation.

As to Parcel 3, the State Engineer found taking both the Applicant's and Tribe's land use descriptions that the land use was

a drain ditch, that no water was placed to beneficial use on that parcel from 1948 to 1989, and the land use is inconsistent with irrigation.

At the hearing on remand, the new holder of the water rights argued that drain ditches should fall under the category of on-farm, dirt-lined ditches; therefore, the State Engineer should allow the Applicant to show beneficial use of water on the drain ditch. However, the Applicant did not provide any evidence to support its contention that drain ditches were considered a water-righted area. The State Engineer refers to the General Findings of Fact Applicable to All Applications Under Consideration in State Engineer's Ruling No. 5005 and specifically Finding X in which the State Engineer notes that waste ditches and drains were not considered part of the irrigable acreage. The State Engineer never made a finding that drain ditches were considered irrigable areas, and the matter was not remanded or the hearings reopened to raise new arguments this far into the cases. Further, the purpose of the remand was not to revisit the State Engineer's land use determinations. The State Engineer affirms his original findings and recommends the Federal District Court also affirm those findings, and not accept the new issue that drain ditches are irrigated or irrigable areas.

The State Engineer finds the Applicant did not present any evidence addressing the standards required by the Ninth Circuit Court of Appeals or by the Federal District Court on remand to the State Engineer. The State Engineer recommends the Federal District

Court find the water rights appurtenant to Parcels 1 and 3 and a portion of Parcel 2 be declared forfeited and abandoned.

Respectfully submitted,

HUGH RICCI, P.E.
State Engineer

HR/SJT

Dated this 14th day of December, 2004.

EXHIBIT 3

EXHIBIT 3

06-15738

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, And PYRAMID LAKE PAIUTE TRIBE OF INDIANS, Plaintiff—Appellant, RICHARD BASS, Petitioner—Appellee, v. ALPINE LAND & RESERVOIR COMPANY, a corporation; et al, Defendant, NEVADA STATE ENGINEER, Respondent.	)	DC NO. CV-73-00184-RCJ Nevada (Reno)

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FEDERAL STATUTES AND RULES

NEVADA STATUTES

I. STATEMENT OF JURISDICTION

The District Court maintains ongoing jurisdiction of *United States v. Alpine Land & Reservoir Co.*, Case No. D-184-LDG, of which this case is a part, under 28 U.S.C. § 1345. *See United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 879 (D. Nev. 1980), *substantially aff'd*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983); *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1219 n.2 (9th Cir. 1989), *cert. denied*, 498 U.S. 817 (1990) (*Alpine II*). This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

II. ISSUES PRESENTED FOR REVIEW

A. Whether the Pyramid Lake Paiute Tribe's sovereign immunity has been waived for purposes of the administration of the *Alpine Decree* by the McCarran Amendment and by the Tribe's involvement in this litigation.

B. Whether the District Court has continuing jurisdiction over the water rights at issue in this case and properly exercised that jurisdiction.

C. Whether the Carson Water Subconservancy District's determination that the proposed match transaction met the criteria for the A.B. 380 settlement program is final and therefore binding on the District Court and other agencies dealing with those water rights.

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III. STATEMENT OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case presents an appeal of the Order of the District Court for the District of Nevada (District Court) entered March 30, 2006. That Order held that respondent Richard Bass (Bass), the owner of water rights that are the subject matter of Nevada State Engineer's Change Application 51060 (the Application or Application 51060), could participate in Nevada's A.B. 380 program and required the Pyramid Lake Paiute Tribe of Indians (the Tribe) to withdraw its protests to the Application. Excerpt of Record of Appellants Pyramid Lake Paiute Tribe of Indians (EOR) at 97-101.

Application 51060 is one of several applications in what has been referred to by the Nevada State Engineer (State Engineer) as "Group 6" in this transfer litigation. A public administrative hearing was held on Application 51060 on February 16 and 22, 1989, in Reno, and Carson City, Nevada. Supplemental Excerpts of Record of the Nevada State Engineer (SEOR) at 2-3. As part of those proceedings the parties stipulated to incorporate the record of previous administrative hearings in regard to other change applications into the record of this matter. SEOR at 3. The application was originally approved by State Engineer's Ruling No. 3598. SEOR at 4. On July 7, 1989, the Ninth Circuit Court of Appeals addressed an appeal of related change applications in *United States v. Alpine Land and Reservoir Co.*, 878 F.2d 1217 (9th Cir. 1989), *cert. denied*, 498

U.S. 817 (1990) (*Alpine II*). As a result of that decision Application 51060 was remanded to the State Engineer by the District Court on July 25, 1990. SEOR at 4. Following a hearing at which no additional evidence was taken the State Engineer issued Ruling on Remand 3778 on February 8, 1991, SEOR at 4 n.12, and once again granted the Application. Other change applications were similarly affirmed by the State Engineer in Ruling 3868 on January 30, 1992. SEOR at 5.

The Tribe and the United States appealed both Ruling 3778 and Ruling 3868 to the District Court. On April 20, 1992, the District Court issued a minute order granting a joint motion by The Tribe, the United States, the State Engineer, and the Truckee-Carson Irrigation District to stay the appeal pending the consideration of other rulings of the State Engineer that were on appeal to the Ninth Circuit Court of Appeals. SEOR at 5.

During the pendency of the stay the Ninth Circuit Court of Appeals decided *United States v. Alpine Land and Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993) (*Alpine III*). In light of that decision, the District Court remanded both Ruling 3778 and Ruling 3868 to the State Engineer together with all other pending Change Application appeals on October 4, 1995, for consideration of the issues of perfection, abandonment, and forfeiture. SEOR at 8. In response to the District Court's remand, the State Engineer conducted further hearings on various dates between October 1996 and January 1999. SEOR at 13-15. As a result of an appeal

of State Engineer's Ruling No. 4591, which dealt with related change applications, the District Court entered an order on September 3, 1998, *United States v. Alpine Land and Reservoir Co.*, 27 F. Supp. 2d 1230 (D. Nev. 1999) (*Alpine IV*), addressing the issues of abandonment, forfeiture, and equity, as well as other issues. SEOR at 16-18. As a result of that Order the State Engineer reopened the proceedings on certain change applications and entered Ruling on Remand 4798 on September 24, 1999. *Id.* The Tribe and the United States appealed Ruling 4798 to the District Court which affirmed the Nevada State Engineer's Ruling by order entered February 22, 2001. The State Engineer reopened proceedings on other change applications and entered Ruling on Remand 4825 on December 21, 1999. *Id.* The District Court affirmed Ruling 4825 by order entered on April 18, 2001, which the Tribe then appealed. The State Engineer specifically addressed Application 51060 as part of Ruling on Remand 5047 entered on August 9, 2001. SEOR at 21-31.

The Ninth Circuit Court of Appeals reversed Ruling 4798 in part and remanded for further proceedings in *United States v. Alpine Land and Reservoir Co.*, 291 F.3d 1062 (9th Cir. 2002) (*Alpine V*). Ruling 4825 was reversed in part and remanded by the Ninth Circuit in *United States v. Alpine Land and Reservoir Co.*, 340 F.3d 903 (9th Cir. 2003) (*Alpine VI*). Following the remands in *Alpine V* and *Alpine VI* the District Court entered an Order on February 25, 2004, remanding

to the Nevada State Engineer all applications pending as part of State Engineer's Ruling Nos. 4591, 4750, 4798, 4825, 5005, and 5047. EOR at 27.

On December 14, 2004, the State Engineer entered Ruling on Remand 5464-E and recommended to the District Court that it declare the water rights at issue in Application 51060 to be abandoned. EOR at 34. That same month, following the entry of Ruling on Remand 5464-E, Bass elected to participate in the A.B. 380 settlement program. On September 9, 2005, Bass filed a Motion to Enforce Settlement Agreement and Enter Judgment Thereon Consistent with NRS Chapter 533, 533.040, 533.060 as Amended in 1999, or in the Alternative, for Leave to File Late Objection (Appeal) to Ruling 5464-E (Motion to Enforce Settlement). EOR at 97. On March 10, 2006, the District Court affirmed Ruling on Remand 5464-E. EOR 53-97. On March 30, 2006, the District Court granted the Bass Motion to Enforce Settlement and ordered the Tribe to withdraw its protest to Application 51060. EOR at 101. The Tribe appealed the March 29, 2006, Order by Notice of Appeal filed April 10, 2006.

IV. STATEMENT OF FACTS AND SUMMARY OF HISTORY OF THE NEWLANDS PROJECT AND THE *ALPINE* LITIGATION

The water rights at issue in Application 51060 are appurtenant to lands irrigated in the Newlands Project, a federal reclamation project in Nevada. The Newlands Project is supplied with water from both the Truckee River and Carson River, although only the Carson River flows directly into the Newlands Project.

Water is diverted from the Truckee River at the Derby Dam, where it flows through the Truckee Canal to Lahontan for Newlands Project use. *Nevada v. United States*, 463 U.S. 110, 115-16 (1983).

Upon passage of the Reclamation Act of 1902, the Secretary of the Interior withdrew 232,800 acres in western Nevada, which ultimately became the Newlands Project. The Newlands Project's goal was to turn wasteland into farmland with irrigation water supplied from the Carson and Truckee Rivers. *Id.*

In 1913 the United States initiated *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 4, 1944), in an attempt to settle the competing claims to the waters of the Truckee River. The United States initiated separate litigation to adjudicate claims to the water of the Carson River, which concluded with the entry of a final decree in 1980. *See United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), *substantially aff'd*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983).

This appeal is the result of protracted litigation and administrative hearings before the Nevada State Engineer beginning in the mid-1980s with respect to applications for the transfer of water rights from existing places of use to proposed places of use by farmers within the Newlands Project. This litigation has primarily addressed questions of whether and how the State Engineer and the federal courts are to determine when a water right proposed for transfer was perfected by placing

that water to a beneficial use, the date on which the water right was considered to be initiated for purposes of forfeiture, and whether or not the water rights have been forfeited or abandoned as those doctrines are applied under Nevada law.

In *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983) (*Alpine I*), the Ninth Circuit Court of Appeals confirmed in accordance with the *Alpine Decree* and the Reclamation Act of 1902, 43 U.S.C. §§ 371–390, that Nevada law governed the transfer of water rights within the Newlands Project. Then, as a result of a collateral attack on the *Orr Ditch Decree*, the United States Supreme Court in *Nevada v. United States*, 463 U.S. 110 (1983), rejected the contention that the United States is the owner of the water rights in the Newlands Project or that the *Orr Ditch Decree* could be reopened to allow the Tribe to make claims for additional water.

As a result of the decisions in *Alpine I* and *Nevada v. United States*, and at the advice of the United States, numerous project farmers began filing applications with the State Engineer consistent with the laws of Nevada to transfer those water rights from the historic places of use to proposed places of use. Many of the applications were protested pursuant to Nevada law by the Tribe.

The first challenges to the change applications resulted in *Alpine II*, 878 F.2d 1217. Of 129 transfer applications that were considered by the Nevada State Engineer, 25 were validly challenged by the Tribe and the United States on the

grounds of forfeiture and/or abandonment. In *Alpine II* this Court reaffirmed that Nevada law applied to the transfer applications and held that it was appropriate for the State Engineer to adjudicate the issues of perfection, abandonment, and forfeiture. The Ninth Circuit also held that water rights that have not been put to beneficial use may not be transferred and that issues of forfeiture and abandonment could not be raised on appeal if the change application was not protested on those grounds before the State Engineer.

On the remand of *Alpine II* the District Court upheld the State Engineer's prior determinations with respect to the forfeiture and abandonment of water rights. *Alpine III*, 983 F.2d at 1491. That ruling was appealed, resulting in the *Alpine III* decision. In *Alpine III* this Court held that the State Engineer and the District Court abused their discretion by failing to make proper factual findings with respect to the issues of forfeiture and abandonment. *Id.* at 1496-97. With respect to abandonment, the *Alpine III* Court held that the decision of the State Engineer shall be *prima facie* correct and the burden of proof shall be on the party challenging the decision but concluded that the proper inquiry was not as to the intent of the project water users as a whole, but rather the intent of the specific applicant. The *Alpine III* Court also rejected the Tribe's argument that nonuse of water by the owner of a water right gives rise to a rebuttable presumption of intent to abandon under Nevada law. *Id.* at 1494 n.8. As to forfeiture, the Court held that

under Nevada law the forfeiture statute does not apply to water rights that vested or were initiated prior to the statute's enactment on March 22, 1913. *Id.* at 1495-96.

On remand the Nevada State Engineer issued Interim Ruling Nos. 4411 and 4591, concluding therein that an extended period of nonuse of water does not by itself create a rebuttable presumption of abandonment under Nevada law. SEOR 11-13. Also, the State Engineer held that, since it was universally believed within the Newlands Project that the United States owned the water rights until 1983 and the United States at all times prior to 1983 had conducted itself and held itself out as the owner of the water rights, no one within the project could formulate an intent to abandon a water right he or she did not believe they owned. SEOR 16-18. Finally, the State Engineer found that if the lands being stripped of water rights were simultaneously replaced by irrigated lands within the same farm unit or contract area there could not be a forfeiture or abandonment. *Id.*

The District Court affirmed Ruling 4591 and, consistent with *Alpine II*, held that traditional equitable principles govern whether the strict requirements of Nevada water law are to be relaxed. The District Court found that "intrafarm transfers within the Newlands Reclamation Project should be upheld as a matter of equity," *Alpine IV*, 27 F. Supp. 2d at 1244, and remanded several of the applications to the State Engineer for additional consideration regarding abandonment and forfeiture. This Court specifically directed the State Engineer to

identify any other applications that involve intrafarm transfers so the court could affirm those transfers. *Id.* at 1245 n.13.

On remand the Nevada State Engineer issued Supplemental Ruling on Remand 4750 (Ruling 4750). That ruling confirmed that three of the applications involved intrafarm transfers and as such the law of forfeiture and abandonment did not apply. The State Engineer identified intrafarm transfers as those in which the existing place of use and proposed place of use were owned by the same person. Ruling 4750 was affirmed by order of the District Court on February 14, 2000. The District Court's order affirming Ruling 4750 was appealed and sustained in part and reversed in part by this Court in *Alpine V*, 291 F.3d 1062 (9th Cir. 2002).

In *Alpine V* this Court upheld the District Court's findings as to the evidentiary standards to be applied to abandonment, citing to the then recently decided opinion *United States v. Orr Water Ditch Co.*, 256 F.3d 935 (9th Cir. 2001) (*Orr Ditch*). The *Alpine V* Court specifically noted that (1) a prolonged period of nonuse does not create a rebuttable presumption of abandonment, (2) that abandonment is to be determined from all of the surrounding circumstances, and (3) where there is evidence of a substantial period of nonuse and evidence of improvements inconsistent with irrigation, the payment of assessments and taxes alone will not defeat a claim of abandonment. *Alpine V*, 291 F.3d at 1072-73. The *Alpine V* Court also held that a blanket equitable exemption was contrary to *Alpine*

II but noted that "equitable relief might be appropriate on a case-by-case basis to prevent individual transfer applicants from losing their water rights." *Alpine V*, 291 F.3d at 1076. Finally, the *Alpine V* Court concluded that equitable relief was unavailable to avoid abandonment since a showing of a lack of intent would avoid abandonment as a matter of law. *Alpine V*, 291 F.3d at 1077.

The Nevada State Engineer entered Ruling 4825 on December 21, 1999, SEOR at 18, prior to both the *Orr Ditch* and *Alpine V* decisions. In that Ruling the State Engineer determined that some additional applications were subject to the "intrafarm" exemption to forfeiture and abandonment. The State Engineer also found that certain of the parcels at issue in that ruling were on-farm dirt-lined ditches and were therefore not subject to forfeiture or abandonment. *Alpine VI*, 340 F.3d at 907. The District Court affirmed Ruling 4825 in its entirety. *Id.* The District Court's order affirming Ruling 4825 was appealed to the Ninth Circuit by the United States and the Tribe.

In *Alpine VI* the Ninth Circuit affirmed its findings in *Alpine V* in regard to equitable relief from forfeiture and the evidence necessary to show an intent to abandon and remanded so that findings of fact could be made on a case-by-case basis. *Alpine VI*, 340 F.3d at 908, 914, 916-19. The Ninth Circuit likewise overruled the State Engineer's finding that on-farm dirt-lined ditches within the irrigable area of an existing place of use are a per se beneficial use of water on the

parcel covered by the ditch. The Ninth Circuit remanded for determination on an individual basis as to whether there had been "beneficial use of the water as it relates to all parcels claiming an appurtenant right due to the transfer of the water through a dirt lined ditch." *Alpine VI*, 340 F.3d at 925.

In response to the holdings of *Alpine V* and *Alpine VI* the District Court remanded all of the pending applications to the Nevada State Engineer for further findings, which resulted in entry of State Engineer's Ruling 5464 and Rulings 5464-A through 5464-K. Ruling 5464-E specifically addressed Application 51060, and the State Engineer found in regard to that Application that "no evidence was presented as to continuous use of the water rights. Therefore, the State Engineer finds the Application did not meet the standards required by the court and must recommend the District Court declare the water rights abandoned." EOR at 34.

Following the entry of Ruling 5464-E, Bass elected to participate in the A.B. 380 Settlement Program. EOR at 98. That program is administered by the Carson Water Subconservancy District (CWSD) and not by the Nevada State Engineer. Assembly Bill No. 380, Section 4(2) and Section 5. EOR 14, 98. On July 20, 2005, CWSD held a meeting to consider the Bass request to participate in the A.B. 380 Settlement Program. CWSD voted to consider the State Engineer's conclusions as "recommendations" since they were referred to as such by the District Court and Ruling 5464-E, and to allow Bass to participate in the settlement

program. EOR at 48. No appeal was taken from that decision of CWSD. The Tribe refused, however, to "sign off" on the proposed A.B. 380 match that would have allowed the State Engineer to approve the change in place of use proposed by Application 51060. EOR at 52.

In response to the Tribe's refusal to sign off on the Bass request to participate in the A.B. 380 program, Bass filed his Motion to Enforce Settlement on September 9, 2005. EOR at 97. On March 10, 2006, the District Court affirmed Ruling on Remand 5464-E. EOR 53-97. On March 30, 2006, however, the District Court granted the Bass Motion to Enforce Settlement and ordered the Tribe to withdraw its protest to Application 51060. EOR at 101.

V. SUMMARY OF THE ARGUMENT

Although it is generally true that Indian tribes enjoy immunity from suit in state or federal court, that immunity exists at the sufferance of Congress and may be waived. In addition, an Indian tribe may itself consent to suit.

Congress has expressly waived tribal immunity under the circumstances of this case by passage of the McCarran Amendment, 43 U.S.C. § 666. The McCarran Amendment expressly waives the United States' and Indian tribes' sovereign immunity for purposes of administration of general stream adjudications such as the *Alpine Decree*. The actions taken by the District Court in its Order of March 30, 2006, constituted administration of the *Alpine Decree* since they were

necessary to the determination of whether certain water rights were valid and water could be delivered to the proposed places of use. The Tribe therefore incorrectly asserts that its sovereign immunity was violated by the District Court's March 30, 2006, Order which was entered as part of its administration of the *Alpine Decree*.

The Tribe has similarly waived its immunity by participating for over twenty years in the administrative and judicial proceedings addressing the validity of the water rights at issue in Application 51060 and over 300 other change applications. The District Court's interpretation of A.B. 380 was a necessary part of determining the validity of the Application 51060 water rights and whether water may be delivered to the proposed places of use. The Tribe cannot waive its immunity for the purposes of challenging a proposed change in place of use based on the state law principle of abandonment but then assert in the same proceedings that it has not waived its immunity for purposes of the interpretation of another principle of state law that also directly bears on the validity of those rights.

The Tribe has likewise asserted that the District Court was without jurisdiction to interpret A.B. 380. The argument may not be accepted. It is a well established principle that the District Court has continuing jurisdiction over the *Alpine Decree* and that such jurisdiction is not limited merely to the review of decisions of the Nevada State Engineer on change applications, but extends to administration of all provisions of the *Alpine Decree* and interpretation of

applicable Nevada law. To conclude otherwise would be to render express provisions of the *Alpine Decree* null and unenforceable and would restrict the District Court from making the most basic of determinations under the *Decree*: may water be delivered to the original or new places of use for the Application 51060 water rights?

Even if it is assumed for the sake of argument that the District Court was without jurisdiction to interpret A.B. 380 or that the Tribe was immune from suit, CWSD, the sole entity granted authority to administer the A.B. 380 program, determined that the transaction proposed by Appellee Bass complied with the terms of that statute, and no appeal has been taken from that decision. Since that decision has not been appealed to or challenged in any other forum, that decision must be considered final and is binding upon the District Court and any administrative entity that is required to address the validity or status of the water rights at issue under Application 51060. The District Court and the Nevada State Engineer would, therefore, be required to take action consistent with CWSD's decision in dealing with the Application 51060 water rights.

The District Court's Order of March 30, 2006, must, as a consequence of the above, be affirmed in its entirety.

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VI. STANDARD OF REVIEW

Nevada law governs the issues presented by this case. "The Supreme Court has held, in *California v. United States*, 438 U.S. 645, 57 L. Ed. 2d 1018, 98 S. Ct. 2985 (1978), that state law will control the distribution of water rights to the extent there is no preempting federal directive." *Alpine I*, 697 F.2d at 858.

State law controls as to procedure as well as to substantive issues. "The *Alpine* decision necessarily contemplated that state law would control both the process and the substance of a proposed transfer of water rights." *Alpine II*, 878 F.2d at 1223. As a consequence, "all Nevada change applications will be directed to the State Engineer and will be governed by Nevada law." *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 893 (D. Nev. 1980), *substantially aff'd*, 697 F.2d 851, 858 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983). "We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer." *Alpine I*, 697 F.2d at 863.

Determinations regarding personal jurisdiction are reviewed *de novo*. *Schwartzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1317 (9th Cir. 1998). Whether a district court has subject matter jurisdiction is similarly reviewed *de novo*. *Coyle v. P.T. Garuda Indonesia*, 363 F.3d 979, 984 n.7 (9th Cir. 2004). However, factual

findings on jurisdictional questions are reviewed for clear error. *Id.* Questions of tribal sovereign immunity are reviewed *de novo*. *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002).

A district court's interpretation of state law is reviewed *de novo*. *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003). In reviewing questions of state law, this Court must determine what meaning the state's highest court would give the statute in question. *Goldman v. Standard Insurance Co.*, 341 F.3d 1023, 1026 (9th Cir. 2003).

A district court's interpretation of the meaning of contract provisions are questions of law reviewed *de novo*. *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1264 (9th Cir. 2003). When an interpretation of a contract is premised upon extrinsic evidence, then the court's findings of fact must be upheld unless clearly erroneous. *Id. See also DP Aviation v. Smiths Industries Aerospace and Defense Systems Ltd.*, 268 F.3d 829, 836 (9th Cir. 2001).

To the extent that this appeal may involve the review of an order or decision of the Nevada State Engineer, the *Alpine Decree* and Nevada law provide, "that the decision of the Engineer 'shall be prima facie correct, and the burden of proof shall be upon the party challenging the Engineer's decisions.' *Alpine Decree*, Administrative Provisions Par. 7; *See also* NRS 533.450(9) (same)." *Alpine III*, 983 F.2d at 1494. The function of this Court is to review the evidence on which

the Nevada State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the Court is bound to sustain the Nevada State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

Review of a decision of the Nevada State Engineer is in the nature of an appeal. NRS 533.450(1). The Nevada Supreme Court has interpreted NRS 533.450 to mean that a petitioner does not have a right to *de novo* review or to offer additional evidence at the District Court. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943); *State Engineer v. Curtis Park*, 101 Nev. at 32, 692 P.2d at 497; *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992); *United States v. Alpine Land & Reservoir Co.*, 919 F. Supp. 1470, 1474 (D. Nev. 1996).

VII. ARGUMENT

The Tribe has asserted that the District Court erred in entering its Order of March 30, 2006, both because the Tribe was immune from suit and because the District Court did not have jurisdiction over the question presented by the Bass Motion to Enforce Settlement.[1] The Tribe's arguments regarding immunity and

[1] The Tribe has likewise raised issues regarding the interpretation of A.B. 380. Because the State Engineer is not charged with the administration of the A.B. 380 water settlement program, he takes no position in regard to that statute's

jurisdiction are incorrect and must be rejected. First, Congress has by passage of the McCarran Amendment expressly waived tribal immunity for the purposes of the general adjudication of water rights and their subsequent administration. The Tribe has also waived its immunity to suit by participating in this litigation for over 20 years. Likewise, the District Court maintains ongoing jurisdiction over the water rights at issue here and did not err in interpreting and applying state law that will affect the status and use of those rights and, therefore, the administration of the *Alpine Decree*. Finally, the decision of CWSD has not been appealed by any party and, as a final decision of the agency charged with the administration of A.B. 380, may be relied upon by the District Court and other agencies.

A. Tribal Immunity Has Been Waived for the Administration of the *Alpine Decree* by the McCarran Amendment and by the Tribe's Own Actions.

Although it is true that as "a general proposition, Indian tribes are immune from suit in state or federal court," *United States v. State of Oregon*, 657 F.2d 1009, 1012 (9th Cir. 1982), that immunity "exists only at the sufferance of Congress and is subject to complete defeasance." *Id.* at 1013. In addition, Indian tribes may themselves consent to suit without express Congressional authority. *Id.* Here Congress has expressly waived the Tribe's immunity for purposes of the

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interpretation or administration, except as to limited issues set forth below. By doing so the State Engineer does not impliedly agree with or acquiesce to the interpretation advocated by any party.

administration of the *Alpine Decree*. Likewise, the Tribe's actions in challenging the validity of water rights adjudicated by the *Alpine Decree* in the District Court, before the Nevada State Engineer, and before CWSD constitute a waiver of its immunity for purposes of the administering the *Alpine Decree*.

1. The McCarran Amendment Waives the Tribe's Immunity From Suit Under the Circumstances of This Case.

By the passage of the McCarran Amendment, 43 U.S.C. § 666, Congress expressly waived the immunity of the United States for purposes of administering general stream adjudications such as the *Alpine Decree*. The McCarran Amendment states in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights. . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable. . . .

43 U.S.C. § 666(a).

By passage of the McCarran Amendment Congress not only expressly waived the United States' sovereign immunity but also waived the sovereign immunity of Indian tribes for purposes of the adjudication *and the administration* of water rights.

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> *United States v. District Court for Eagle County*, 401 U.S. 520 (1971), and *United States v. District Court for Water Div. 5*, 401 U.S. 527 (1971), held that the provisions of the McCarran Amendment, whereby "consent is . . . given to join the United States as a defendant in any suit (1) for the adjudication . . . or (2) for the administration of [water] rights, where it appears that the United States is the owner . . . by appropriation under state law, by purchase, by exchange, or otherwise . . .," subject federal reserved rights to general adjudication in state proceedings for the determination of water rights. More specifically, the Court held that reserved rights were included in those rights where the United States was "otherwise" the owner. [Citation omitted]. Though *Eagle County* and *Water Div. 5* did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed, *Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the Amendment.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 809 (1976). The Court specifically noted: "The Government has not abdicated any responsibility fully to defend Indian rights in state court, and *Indian interests may be satisfactorily protected under regimes of state law.*" *Id.* at 812. As a consequence, the Tribe's sovereign immunity has been waived for purposes of the administration of the *Alpine Decree* just as it has been waived for the United States.

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This Court has also held that the waiver of immunity provided for by the McCarran Amendment applies to the administration of water rights and not only for their adjudication.

> We agree with the conclusion of United States District Judge Roger D. Foley expressed in *United States v. Hennen* 300 F Supp. 256 (D. Nev. 1968), that Congress intended a waiver of immunity under subsection (2) only after a general stream determination under subsection (1) has been made: "to administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language. Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of § 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgment, orders and decrees of the court having jurisdiction."

South Delta Water Agency v. United States, 767 F.2d 531, 541 (9th Cir. 1985). Likewise, this Court has held that the terms of the McCarran Amendment are retroactive in application.

> We hold that the McCarran Amendment waives the United States's immunity from suit, not only for the administration of water rights acquired after the statute's enactment, but also for the administration of water rights acquired before the law came into effect. Hence, even though the Humboldt Decree predates the Amendment by nearly two decades, the Amendment governs this case.

State Engineer v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians of Nevada, 339 F.3d 804, 813 (9th Cir. 2003). The terms of the McCarran

Amendment therefore apply to the *Alpine Decree* and to all parties to the *Decree*, including the Tribe.

The actions taken by the District Court as part of its Order of March 30, 2006, constitute the administration of rights adjudicated as part of a general stream adjudication and, therefore, fall under the provisions of the McCarran Amendment. The central issue of all of the litigation involving the changes in place of use of water rights within the Newlands Project, from *Alpine II* to *Alpine VI*, is whether the applicants have valid water rights under Nevada law and whether, as a consequence, water may be delivered for the irrigation of the lands to which those rights are appurtenant. Determining whether water may be delivered to a specific parcel of land is the basic act in executing a decree, and determining that water may not properly be delivered to a parcel of land is the basic act in enforcing the provisions of a decree. By determining that Application 51060 could be granted pursuant to Nevada law and water delivered to the identified land, the District Court was administering the *Alpine Decree*. "[T]o administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." *South Delta Water Agency*, 767 F.2d at 541. The District Court's determination that Application 51060 could be granted because the application had complied with the matching provisions of A.B. 380 was an act of administering the *Alpine Decree*, making the McCarran Amendment,

and its waiver of tribal immunity, applicable to this case. The Tribe's contention that it is immune from the Court's Order of March 30, 2006, must be rejected as a consequence.

2. The Tribe Has Waived Its Sovereign Immunity By Challenging the Validity of the Water Rights At Issue Here in Administrative Forums and the District Court.

Not only has Congress expressly waived the Tribe's sovereign immunity for purposes of the administration of the *Alpine Decree*, but the Tribe has by its participation in the change application proceedings and all of the subsequent appeals waived its immunity for purposes of determining the validity of those rights.

The Tribe's involvement in the enforcement and administration of the *Alpine Decree* dates from the very beginning of what is sometimes referred to as the "transfer cases." The Tribe first appeared as an amicus curiae in the *Alpine I* appeal, where it was established that change applications for water rights within the Newlands Reclamation Project should be filed with and addressed by the Nevada State Engineer pursuant to Nevada law. *Alpine I*, 697 F.2d at 857. Shortly after that decision, water right holders began filing change applications with the State Engineer, and the Tribe filed protests to those change applications pursuant to Nevada law. The first of these applications, Change Application 47797, was filed March 14, 1984. The Tribe protested that application, and since the last day of

publication of notice for that application was June 3, 1984, and the last day on which protests could be filed with the State Engineer was July 3, 1984, NRS 533.365(1), the Tribe's first involvement in the administrative consideration of the change proceedings for Newlands' water rights was at the very latest July 3, 1984. SEOR at 32.

The Tribe has been directly involved in all of the administrative and review proceedings for the approximately 317 change applications at issue in the *Alpine* transfer proceedings. This has involved numerous administrative hearings, as well as appellate arguments before the District Court and this Court, and resulted in this Court's *Alpine II*, *Alpine III*, *Alpine V*, and *Alpine VI* decisions. As this Court has held, "Indian Tribes may, in certain circumstances, consent to suit by participation in litigation." *McClendon v. Unites States*, 885 F.2d 627, 630 n.2 (9th Cir. 1989). The Tribe has directly and intentionally interposed itself and participated in the change application proceedings for over 20 years and has therefore waived its immunity for purposes of the proceedings seeking the changes in place or manner of use of those rights and the determination of their ongoing validity.

The Tribe contends, however, that the District Court's interpretation of A.B. 380 is in some way unrelated to the consideration of Application 51060 or the

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administration of the *Alpine Decree* and is therefore not included within the Tribe's waiver of immunity in those proceedings. The Tribe's contention is incorrect and cannot be accepted.

First, a major purpose of the transfer proceedings, and the primary purpose of the Tribe's protests and involvement in the litigation, is to determine whether the water rights at issue are valid pursuant to Nevada law. Although the focus of that question has been on the doctrines of perfection, forfeiture, and abandonment, A.B. 380 also has direct bearing on that question, since a right that has complied with the matching provisions of that statute will be entitled to the requested change in place of use and to the delivery of water at that new place of use. The District Court did not merely interpret and enforce the provisions of A.B. 380, but applied that law to the administration of *Alpine Decree* water rights, and the Tribe has waived its immunity for purposes of enforcing the *Alpine Decree* in these proceedings.

In addition, this Court has consistently held that *Alpine Decree* and *Orr Ditch Decree* water rights are to be administered pursuant to Nevada law. "The Supreme Court has held, in *California v. United States*, 438 U.S. 645, 57 L. Ed. 2d 1018, 98 S. Ct. 2985 (1978), that state law will control the distribution of water rights to the extent there is no preempting federal directive." *Alpine I*, 697 F.2d 851, 858. "The *Alpine* decision necessarily contemplated that state law would

control both the process and the substance of a proposed transfer of water rights." *Alpine II*, 878 F.2d at 1223. State law has been applied to the administration of the Tribe's Truckee River water rights as well. *United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081-82 (9th Cir. 2004). This Court has not placed any limitation on what Nevada water laws are to be considered in the administration of *Alpine Decree* water rights. As a consequence, since A.B. 380 directly applies to *Alpine Decree* water rights and has a direct impact on the administration of the rights at issue in this appeal, the District Court properly applied and interpreted its provisions as part of these change proceedings. The Tribe's contention that it has not waived its sovereign immunity for purposes of interpreting and enforcing A.B. 380 must be rejected since the District Court properly looked to all applicable laws bearing on the question of the validity of the subject water rights and the delivery of water to the proposed places of use as part of its authority to administer the *Alpine Decree*.

Furthermore, the Tribe's reliance on this Court's decision in *McClendon v. Unites States*, 885 F.2d 627 (9th Cir. 1989), is misplaced. In that case the United States sought to establish permanent title in trust for the Colorado River Indian Tribal Council to certain lands in California. That case was settled with title passing to the United States and the tribe and the defendants obtaining a long-term lease of the land. *Id.* at 628. The lawsuit was then dismissed, and no waiver of

immunity was found in the stipulated judgment. This Court found under the facts of that case that there was no waiver of immunity in a later action to enforce the terms of the lease agreement. *McClendon* differs from the case at hand in several important aspects. In *McClendon* the original lawsuit had been terminated and dealt with the title to land and not with the terms of the lease at issue in the subsequent lawsuit. This is, of course, not the case here. In the case at hand the District Court maintains ongoing jurisdiction over the water rights at issue, and the validity of those rights is the very issue raised by the filing of the Tribe's protests as well as the District Court's interpretation of A.B. 380. Consequently, the interpretation of A.B. 380 is a necessary issue "to decide the action brought by the tribe." *Id.* at 630.

The facts of this case are, rather, much more akin to those of *United States v. State of Oregon*, 657 F.2d 1009 (9th Cir. 1982), which was discussed at some length by the *McClendon* court. In that case the United States initiated an action to establish and protect fishing rights for Indian tribes in the Columbia River basin. As a result of sharp declines in the number of spawning salmon the State of Washington sought an injunction against Yakima tribal fishing of spring Chinook salmon. *Id.* at 1011. The District Court granted that injunction. *Id.* at 1012. The Yakima Tribe appealed that decision asserting, among other things, that it was immune from suit and the district court lacked subject matter jurisdiction. *Id.* In

response to these arguments this Court held that an Indian tribe may consent to suit even without explicit Congressional authority. *Id.* at 1013. This Court then held that the Tribe had waived its sovereign immunity by intervening in the lawsuit and that its waiver of immunity included the later action taken by the district court in issuing the preliminary injunction. This Court noted several facts justifying the finding of waiver of tribal immunity that apply directly to the case at hand.

First, it noted that the district court had retained jurisdiction to modify its decree. *Id.* at 1015. Similarly, in this case the District Court, as the *Alpine Decree* court, has retained jurisdiction to administer and interpret the *Alpine Decree*. *Alpine II*, 878 F.2d at 1219 n.2.

Second, the Court noted that equitable decrees particularly require flexibility in their enforcement. "To hold at this stage that tribal immunity blocks modification of an equitable decree would impermissibly violate a central tenet of equity jurisprudence, that of flexible decrees. By seeking equity, this Tribe assumed the risk that any equitable judgment secured could be modified if warranted by changed circumstances." *State of Oregon*, 657 F.2d at 1015. The *Alpine Decree* is, like the decree in *State of Oregon*, an equitable decree, *Nevada v. United States*, 463 U.S. 110, 143 (1983), and the Tribe's claim of immunity will interfere with the operation of that *Decree*. By challenging the validity of water rights in this case the Tribe similarly assumed the risk that certain of those rights

would be declared valid pursuant to Nevada law, whatever the source of that law might be.

Third, the *State of Oregon* Court found the fact that the decree involved *in rem* jurisdiction to be significant in concluding that the tribe had waived its immunity. This Court stated:

> In such an action, a "court possessed of the *res* in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with the custody." [Citations omitted]. Here, Washington alleged that the very resource sought to be protected, the anadromous fishery, was in jeopardy. Since the existence of the salmon was inextricably linked to the res in the court's constructive custody, the court was empowered to enjoin interference with that custody.

State of Oregon, 657 F.2d at 1015-16. In this fact the *State of Oregon* decision is also similar to the case at hand. Just as the district court in *State of Oregon* maintained *in rem* jurisdiction over fishing rights, here the District Court maintains *in rem* jurisdiction over rights to the Carson River. As this Court has noted, the District Court's jurisdiction over the *Alpine* and *Orr Ditch Decrees* is, "best characterized as *in rem* jurisdiction." *United States v. Alpine Land Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999). This Court stated further: "the Supreme Court has noted that, although equitable actions to quiet title are technically *in personam* actions, 'water adjudications are more in the nature of *in rem* proceedings.'" *Id.* at 1014, *quoting Nevada v. United States*, 463 U.S. 110, 143-44

(1983). The District Court's *in rem* jurisdiction over the water rights at issue and the validity of those water rights is "inextricably linked" to the District Court's custody over and administration of the waters of the Carson River. There was, in fact, no way for the Court to avoid the question of the application and interpretation of A.B. 380. If Bass is allowed to participate in the settlement program, then water will be delivered under the *Alpine Decree* to the land to which those rights will be appurtenant under Application 51060. If Bass cannot participate in the settlement program, then the rights at issue in Application 51060 are abandoned and no water may be delivered. In order for the District Court to administer the *Alpine Decree*, the status of those rights, which is the basis of the Tribe's participation in the transfer cases, must be decided.

Given the Tribe's waiver of its sovereign immunity for purposes of determining the validity of these water rights under the transfer proceedings, and the inextricable connection A.B. 380 has in relation to the validity of those rights, the Tribe must be considered to have waived its sovereign immunity for purposes of interpreting that provision of Nevada law as it applies to these *Alpine Decree* water rights.

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B. The District Court Has Continuing Jurisdiction Over the Water Rights at Issue in This Case and Did Not Err in Exercising That Jurisdiction.

This Court has repeatedly and continually held that the District Court maintains continuing jurisdiction over the administration of the *Alpine Decree*. This was first recognized in the initial appeal approving the *Decree*. "The district court maintains jurisdiction over this matter." *Alpine I*, 697 F.2d at 860. This Court restated the point some six years later: "The district court's jurisdiction is established as an adjunct to its jurisdiction over the quiet title action originally filed by the United States. We noted in our earlier decision affirming the *Alpine* decree that 'the district court maintains jurisdiction over this matter.'" *Alpine II*, 878 F.2d at 1219 n.2.

The Tribe contends, however, that the District Court's ongoing jurisdiction is limited to appeals of orders or decisions of the Nevada State Engineer on applications for changes in the place of use, point of diversion, or manner of use of *Alpine Decree* water rights. Opening Brief of the Pyramid Lake Paiute Tribe of Indians (Opening Brief) at 30. This argument must be rejected since no authority supports such limited jurisdiction on the part of the District Court. Furthermore, the Tribe's position is inconsistent with this Court's precedents and the terms of the *Alpine Decree*.

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Administrative Provision VII of the *Alpine Decree* is the only authority discussed by the Tribe to support its contention that the District Court's jurisdiction is limited to review of rulings of the Nevada State Engineer on change applications. Administrative Provision VII does not state, however, that District Court jurisdiction is limited by its provisions and does no more than provide the procedures for dealing with change applications. "Applications for changes in the place of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer." *Alpine Decree* at 161, SEOR at 37. This provision in no way limits the Court's jurisdiction over administration of the *Decree* in contexts other than change applications.

This Court has in fact recognized that the District Court maintains jurisdiction over the allocation of water under the *Decree* in contexts other than the review of change applications. "The instant dispute arises in the context of the continuing proceedings in the *Alpine* litigation. In the *Alpine Decree, the court retained continuing jurisdiction for water allocation and appointed a Watermaster.*" *United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 209 (9th Cir. 1989) (*Bench/Bottom Decision*) (emphasis added). The *Bench/Bottom Decision* did not involve the review of change applications from the Nevada State Engineer, but rather a determination of whether certain lands were entitled to the per acre duty of water provided for bottom lands under the *Decree* or the higher

duty of water per acre provided for bench lands. The State Engineer did not participate in those proceedings, since they did not involve change applications. This Court nonetheless determined that the District Court retained continuing jurisdiction over the allocation of water. The *Bench/Bottom Decision* therefore stands for the proposition that the District Court's continuing jurisdiction over the *Alpine Decree* applies to administration of all provisions of the *Decree* and not only the review of change applications.

Other terms of the *Alpine Decree* contradict the Tribe's narrow interpretation of the District Court's jurisdiction over the *Decree* and show that the Court's jurisdiction extends to the enforcement or interpretation of all provisions of the *Decree*. For example, the *Alpine Decree* specifically enjoins all parties to the *Decree*, claimants, or potential claimants from asserting any rights to the waters of the Carson River or from diverting or using water from the Carson River inconsistent with the findings of the Decree. *Alpine Decree* Administrative Provision III at 157-58. SEOR at 33-34. The *Decree* also provides:

> A Water Master shall be appointed by the Court to carry out and enforce the provisions of this Decree and the instructions and orders of this Court. If any proper order, rule or direction of the Water Master, made in accordance with and for the enforcement of this Decree, is disobeyed or disregarded, he is empowered and authorized to cut off the water from the ditch or canal owners who disobey or disregard the order, rule or

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> direction. If such a cutoff should occur the Water Master shall promptly report to the Court his actions and the circumstances surrounding the case.

Alpine Decree Administrative Provision VI at 159, SEOR at 35. The jurisdiction of the District Court clearly and necessarily extends to the enforcement or interpretation of any provision of the *Decree* and not only to review of decisions of the Nevada State Engineer on change applications.

In fact, if the Tribe's argument is to be accepted, it would mean that the District Court would be without jurisdiction to enforce any provision of the *Alpine Decree* other than the provisions of Administrative Provision VII. This, of course, cannot be the case and is not only inconsistent with the injunction issued as part of the *Alpine Decree* and with the Court's authority to appoint a Water Master, but with the obvious necessity of having some means of ensuring that water is distributed in an orderly manner and consistent with the findings and terms of the *Decree*. Contrary to the contentions of the Tribe, the District Court has ongoing jurisdiction over enforcement of all provisions of the *Alpine Decree* and not merely the provisions related to change applications.

In light of the District Court's continuing jurisdiction over the *Alpine Decree*, the District Court cannot be said to have exceeded its jurisdiction in interpreting A.B. 380 in the context of this case since interpretation of that statute was necessary to the ongoing administration of the *Alpine Decree*. As was noted

above, if the rights at issue in Application 51060 may be matched with other unchallenged rights in the Newlands Project as part of the A.B. 380 settlement program, then Bass will be entitled to the delivery of water under the *Alpine Decree*. If, however, Bass cannot participate in the A.B. 380 settlement program, then the Nevada State Engineer's determination that the rights at issue in Application 51060 are abandoned stands and no water may be delivered. As a consequence, the District Court was required to address and interpret A.B. 380 in order to administer the *Alpine Decree* over which it has continuing jurisdiction.

C. The Carson Water Subconservancy District Is the Agency Charged With the Administration and Interpretation of A.B. 380, and Its Decision Approving the Match for the Application 51060 Water Rights Is Final.

Even if it is assumed for the sake of argument only that the District Court was without jurisdiction to interpret A.B. 380 or that the Tribe is immune from suit in this instance, the decision of CWSD, which is the entity granted the authority to administer A.B. 380 and the settlement program, has already determined that the match proposed for the Application 51060 water rights complies with the terms of the statute. Since that decision has not been challenged in any other forum, if it was not properly reviewed as part of these proceedings then that decision is final and is binding upon the District Court and any other entity required to deal with the Application 51060 water rights.

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The Nevada Legislature gave authority over the administration and interpretation of the A.B. 380 Settlement Program exclusively to CWSD. A.B. 380 states:

> The Carson Water Subconservancy District shall not commit for expenditure any amount of the appropriation made by subsection 1 until the District determines that: (a) There is and will continue to be substantial compliance with the "Joint Testimony of Truckee-Carson Irrigation District, Pyramid Lake Paiute Tribe of Indians, City of Fallon, Churchill County and Sierra Pacific Power Company."

A.B. 380, Sec. 4(2), EOR at 13. A.B. 380 provides further: "[t]he Newlands Project Water Rights Fund is hereby established to be administered by the Carson Water Subconservancy District." A.B. 380, Sec. 5(2), EOR at 14. In addition, A.B. 380 provides: "[t]he Carson Water Subconservancy District shall establish a program for the acquisition of surface water rights to assist in the resolution of legal and administrative challenges . . . The District shall (a) Adopt criteria for the administration of the program. . . ." A.B. 380, Sec 5(4), EOR at 14. CWSD is the only agency granted the authority to administer A.B. 380.

It was pursuant to that authority that CWSD met on July 20, 2005, and acted on the water rights at issue here. EOR 46-48. It was noted at that meeting that CWSD had "sent a letter to the Tribe with copies to the State that the match has met all the criteria of our purchase procedures" and that the Tribe refused to withdraw its protest. EOR at 47. CWSD then voted, "to affirm the existing

policies toward the A.B. 380 program with regard to eligibility of participation in the program and that a State Engineer's 'recommendation' be treated as a recommendation." EOR at 48. No appeal has been taken from the CWSD decision, under the provisions of the Nevada Administration Procedures Act, NRS 233B.010–.150, by Petition for Writ of Mandamus, or otherwise, and over 16 months have passed since that decision was taken. As a consequence, CWSD's actions on July 20, 2005, are now final, and the District Court, if it is not authorized to independently interpret A.B. 380 as part of these proceedings, is nonetheless bound by that decision. The Nevada State Engineer would likewise be required to rely upon CWSD's decision in taking action on the Application 51060 water rights, even over the Tribe's objections.

VIII. CONCLUSION

The District Court did not err in exercising its jurisdiction in this case. Congress waived tribal immunity for purposes of administration of general stream adjudications such as the *Alpine Decree* by passage of the McCarran Amendment. In addition, the Tribe has waived its immunity from suit by challenging the validity of the Application 51060 water rights in proceedings before the Nevada State Engineer, the District Court, and this Court. Further, the District Court has continuing jurisdiction over the *Alpine Decree* and the rights adjudicated therein, and that jurisdiction is not limited to the review of decisions of the Nevada State

Engineer on change applications, but extends to all issues of administration of the *Alpine Decree*. Finally, CWSD is the agency charged with the administration of the A.B. 380 settlement program, and its decision that the water match proposed by Bass complies with that statute is a final decision that may be relied upon by the District Court and the Nevada State Engineer.

DATED this 22nd day of November, 2006.

GEORGE J. CHANOS
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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1, I certify that

xx 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

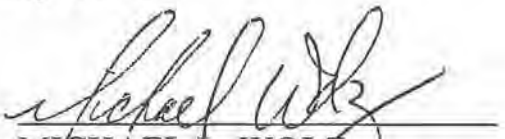
xx Proportionately spaced, has a typeface of 14 points or more and contains 10,860 words,

or is

_____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text.

DATED this 22nd day of November, 2006.

GEORGE J. CHANOS
Attorney General

By: 

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the parties are directed to list related cases now pending before the Ninth Circuit. There are no cases now pending that are related to this appeal.

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 22nd day of November, 2006, I served two copies of the foregoing **NEVADA STATE ENGINEER'S ANSWERING BRIEF** by mailing true and correct copies, first class mail, postage prepaid, to the following persons:

Don Springmeyer, Esq.
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U.S. Department of Justice
Environment & Natural Resources Division
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Sacramento, California 95814-2322

I also certify that on this date I mailed the foregoing **NEVADA STATE ENGINEER'S ANSWERING BRIEF** by first class mail, postage prepaid, to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Pamela Young
Pamela Young

EXHIBIT 4

EXHIBIT 4

DECLARATION OF RACHEL L. WISE, ESQ.

I, Rachel L. Wise, Esq., declare as follows:

1. I am an attorney at law duly licensed to practice before all the courts of the State of Nevada. I am an associate attorney with Taggart & Taggart, Ltd., counsel for Petitioner in this matter.

2. I have personal knowledge of the following facts. If called upon as a witness, I could and would testify competently as to the contents of this declaration.

3. Attached hereto as Exhibit 1 is a true and correct copy of State Engineer's July 24, 2002 *Appellee Nevada State Engineer's Answering Brief* in Ninth Circuit Court of Appeals Case Nos.: 01-15665; 01-15814; 01-15816; of the case *United States of America*, and *Pyramid Lake Paiute Tribe of Indians v. Alpine Land and Reservoir Company*, et. al., Defendants, and *Nevada State Engineer* ("*Alpine V*"), Real-Party-in-Interest/Appellee.

4. Attached hereto as Exhibit 2 is a true and correct copy of the State Engineer's Ruling on Remand #5464-K applicable to the *Alpine Decrees*.

5. Attached hereto as Exhibit 3 is a true and correct copy of the *Nevada State Engineer's Answering Brief* filed in the Ninth Circuit District Court of Appeals, Case No.: 06-15738, filed on or around November 22, 2006 relating to the *Alpine Decrees*.

Executed this 2nd day of June, 2015.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Appellant,

vs.

RODNEY ST. CLAIR,

Respondent.

Electronically Filed
Dec 09 2016 03:21 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 70458

JOINT APPENDIX

Volume II of II
(JT APP 557-844)

Docket 70458 Document 2016-38259

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
01/22/15	Answering Brief (Respondent's)	I	218-232
02/27/15	Appendix and APP 1-145 (Petitioner's)	I	255-429
11/19/15	Memorandum of Temporary Assignment (Judge Kosach)	II	560-561
01/05/16	Minutes - Oral Argument	II	587
08/22/14	Notice of Appeal	I	001-003
05/23/16	Notice of Appeal	II	823-844
04/29/16	Notice of Entry of Order	II	805-822
03/21/16	Objection to Petitioner's Proposed Order (Respondent's)	II	672-749
12/08/14	Opening Brief (Petitioner's)	I	198-217
11/19/15	Opposition to Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief	II	562-566
11/16/15	Order of Recusal (Judge Montero)	II	557-559
04/22/16	Order Overruling State Engineer's Ruling 6287	II	792-804

DATE	DOCUMENT DESCRIPTION	VOLUME	PAGE NOS.
08/22/14	Petition for Judicial Review	I	004-007
02/27/15	Reply Brief (Petitioner's)	I	233-254
12/01/15	Reply to Respondent's Opposition to Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief	II	567-586
06/03/15	Request for Judicial Notice in Support of Petitioner's Reply Brief	I	430-556
03/30/16	Response to State Engineer's Objection to Proposed Order (Petitioner's)	II	750-755
09/25/14	Summary of Record on Appeal and SE ROA 1-186	I	008-197
04/11/16	Transcript - Hearing on Objections to Proposed Order	II	756-791
01/05/16	Transcript - Oral Argument	II	588-671

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RESPECTFULLY SUBMITTED this 9th day of December, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 9th day of December, 2016, I served a copy of the foregoing JOINT APPENDIX, by electronic service to:

Paul G. Taggart, Esq.
Rachel L. Wise, Esq.
TAGGART & TAGGART
108 North Minnesota Street
Carson City, Nevada 89703

/s/ Dorene A. Wright

CASE NO. CV 20,112

DEPT. NO. 2

FILED
2015 NOV 16 PM 4:41
TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLT

-o0o-

RODNEY ST. CLAIR,

Plaintiff,

vs.

ORDER OF RECUSAL

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONVERSATION AND NATURAL,

Defendants.
_____/

SIXTH JUDICIAL DISTRICT COURT
HUMBOLDT COUNTY, NEVADA
MICHAEL R. MONTERO
DISTRICT JUDGE

GOOD CAUSE APPEARING, and in the interest of fairness and justice and to avoid even the appearance of impropriety, the undersigned does RECUSE himself. The basis for Judge Montero's recusal is due to three issues he disclosed to the parties. First, Judge Montero disclosed he is a minority shareholder in the Pine Forest Land & Stock Company, which hold a number of water rights and occasionally there are issues with the Division of Water Resources. Further, Judge Montero built a log cabin on the family ranch, in which the building plans required the approval of a structural engineer. Mr. King was the engineer who approved those

plans. Also, as a District Court Judge there have been times when the Attorney General's Office has represented Judge Montero in certain matters. Due these issues the parties requested that Judge Montero recuse himself from the case.

Therefore, pursuant to the Code of Judicial Conduct Rule 2.11, Judge Montero is disqualifying himself from deciding this matter and respectfully asks the Supreme Court to assign a Senior Judge to hear all further proceedings with regard to this case.

IT IS SO ORDERED this 16th day of November, 2015.

DISTRICT JUDGE

SIXTH JUDICIAL DISTRICT COURT
HUMBOLDT COUNTY, NEVADA
MICHAEL R. MONTERO
DISTRICT JUDGE

AFFIDAVIT OF MAILING

I, hereby certify that I am an employee of the Honorable Michael R. Montero and that on this 16th day of November, 2015, I deposited for mailing, first-class mail, postage prepaid at Winnemucca, Nevada 89445, a copy of the foregoing Order addressed to the following:

Paul G. Taggart, Esq.
108 North Minnesota Street
Carson City, Nevada 89703

Justina A. Caviglia
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701

Kathy Brumm
KATHY BRUMM
JUDICIAL ASSISTANT

SIXTH JUDICIAL DISTRICT COURT
HUMBOLDT COUNTY, NEVADA
MICHAEL R. MONTERO
DISTRICT JUDGE

--FILED--
Administrative Office of the Courts
Date: 11/19/15
By: Deborah Crews

SUPREME COURT OF THE STATE OF NEVADA
ADMINISTRATIVE OFFICE OF THE COURTS

IN THE MATTER OF THE ASSIGNMENT OF A SENIOR JUDGE

Order No. 16-00290

2015 NOV 19 AM 10:55
TAMI RAE SPERO
DIST. COURT CLERK
FILED

MEMORANDUM OF TEMPORARY ASSIGNMENT

WHEREAS, the Honorable Michael R. Montero, District Judge, is unable to hear the matter of *Rodney St. Clair v. Jason King, et al.*, Case Number CV 20112, now pending in the Sixth Judicial District, now therefore

IT IS HEREBY ORDERED that the Honorable Steven Kosach, Senior Judge, is assigned to hear any and all matters in *Rodney St. Clair v. Jason King, et al.*, Case Number CV 20112, and he shall have authority to sign any orders arising out of this assignment. The Court shall notify the parties of the assignment and provide Steven Kosach, Senior Judge with any assistance as requested.

Entered this 19 day of November 2015.

NEVADA SUPREME COURT

By: _____, Justice

Copy: The Honorable Steven Kosach, Senior Judge
The Honorable Michael R. Montero, District Judge, Sixth Judicial District Court

Rodney St. Clair, Plaintiff vs. Jason King, P.E., Et Al, Defendants.

Sixth Judicial District Court of Nevada, Case No. CV 20112

DECLARATION OF SERVICE

I am a citizen of the Untied States, over the age of 18 years, and not a party to or interested in this action. I am an employee of the Humboldt County Clerk's Office, and my business address is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following document(s):

Memorandum of Temporary Assignment

__X__ By placing in a sealed envelope, with postage fully prepaid, in the United States Post Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in the designated area for pick up by the United States Postal Service.

_____ By personal delivery of a true copy to the person(s) set forth below by placement in the designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative of said person(s) set forth below.

Paul G. Taggart, Esq.
Taggart & Taggart, Ltd
108 N Minnesota Street
Carson City, NV 89703

Justina A. Caviglia
Deputy Attorney General
Office of the Nevada Attorney General
100 N Carson Street
Carson City, NV 89701

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on November 19, 2015 at Winnemucca, Nevada.

Humboldt County Clerk

Case No. CV 20112

Dept. No. 2

COPY

FILED

2015 NOV 19 AM 11:34

RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER'S REPLY BRIEF

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Jason King, P.E., the State Engineer, in his capacity as the Nevada State Engineer, Department of Conservation and Natural Resources, Division of Water Resources ("Nevada State Engineer"), by and through counsel, Nevada Attorney General Adam Paul Laxalt and Deputy Attorney General Justina A. Caviglia, hereby files this Limited Opposition to Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief. This Limited Opposition is based upon the attached Points and Authorities and the pleadings and papers on file herein.

POINTS AND AUTHORITIES

I. INTRODUCTION

To the extent Petitioner Rodney St. Clair seeks to have this Court take notice and utilize supplemental documents for the purpose of considering Petitioner's Petition for Judicial Review, the State Engineer opposes Petitioner's effort to introduce evidence into the record for the purpose of this Court's review of the State Engineer's Ruling No. 6287. Accordingly,

the State Engineer objects to the consideration of the supplemental documents and records provided in Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief in this Court's review of the State Engineer's decision.

II. ARGUMENT

Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief seeks to present to the Court pleadings previously filed by the State Engineer in an entirely separate matter and a prior ruling. These documents were not a part of the record on review by the State Engineer in making his decision in Ruling No. 6287. This Court's review is strictly limited to the documents and evidence which were part of the record and considered by the State Engineer in making his decision.

Supplementation of the record by Petitioner is not proper and contrary to Nevada law as interpreted by the Nevada Supreme Court. NRS 533.450(1) states that actions to review decisions of the State Engineer are "in the nature of an appeal." The Nevada Supreme Court has interpreted NRS 533.450 to mean that a petitioner does not have a right to *de novo* review or to offer additional evidence at the district court. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). *See also Kent v. Smith*, 62 Nev. 30, 32, 140 P.2d 357, 358 (1943) (a court may construe a prior judgment, but cannot properly consider extrinsic evidence). As a result, the function of the court is to review the evidence on which the State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the court is bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985) (In reviewing the order for an abuse of discretion, our function is to review the evidence upon which the Engineer based his decision and ascertain whether that evidence supports the order. If so, this court is bound to sustain the Engineer's decision.).

"[N]either the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision." *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205

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(1991). That is whether the evidence which was considered by the State Engineer was sufficient to support the decision, not whether the State Engineer should have gone beyond the record to consider additional evidence not referenced or otherwise before him.

Nevada law provides that "the proceedings in every case must be heard by the court, and must be informal and summary, but full opportunity to be heard must be had before judgment is pronounced." NRS 533.450. This Court is not permitted to engage in a *de novo* review; rather, this Court's review is under the abuse of discretion standard. *Id.* *See also* *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979); *Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275, 278, 646 P.2d 549, 550 (1982); *State Eng'r v. Curtis Park Manor Water Users Ass'n*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985); *State Eng'r v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991); *Town of Eureka v. State Eng'r*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992); *Turnipseed v. Truckee-Carson Irrig. Dist.*, 116 Nev. 1024, 1029, 13 P.3d 395, 398 (2000); *Desert Valley Constr. v. Hurley*, 120 Nev. 499, 502, 96 P.3d 739, 502 (2004); *Bacher*, 122 Nev. at 1121, 146 P.3d at 800; *United States v. Alpine Land & Reservoir Co.*, 919 F.Supp. 1470, 1474 (D. Nev. 1996).

Here, the State Engineer considered only that evidence that was submitted in relation to Petitioner's application to change the point of diversion and proof of appropriation for claim V10493. SE ROA at 0001-186. It is inappropriate to allow the record to be supplemented with evidence that was not offered within the time constraints established in the proceedings before the State Engineer or considered by him in reaching his determinations. *See Revert*, 95 Nev. at 786, 603 P.2d at 264; *Kent*, 62 Nev. at 32, 140 P.2d at 358. The Court is only permitted to consider that evidence on which the State Engineer based his decision. NRS 533.450; *Curtis Park*, 101 Nev. at 32, 692 P.2d at 497.

Additionally, the State Engineer is not bound by stare decisis. *Desert Irrigation, Ltd. v. State of Nevada, State Engineer*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997). "The facts and circumstances of each case are to be considered on an individual basis, taking into account the nature of the task and the difficulties encountered." *Id.* quoting *Patria Bailey v. State of Nevada, State Engineer*, 95 Nev. 378, 385, 594 P.2d 734, 738 (1979). The State

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Engineer is not bound by arguments it made in separate, federal cases, involving bureau of reclamation projects, whose facts and circumstances are extremely distinguishable from those in this case. Additionally, the State Engineer is not bound by a separate ruling in a different proceeding, whose facts and circumstances differ than those presented in his decision with respect to Petitioner's application and proof of appropriation.

Consideration of Petitioner's exhibits is beyond the record considered by the State Engineer and an improper attempt to assert stare decisis against the State Engineer. This evidence cannot be contemplated as a part of this Court's determination as to whether substantial evidence within the record utilized by the State Engineer supports his decision. *Morris*, 107 Nev. at 701, 819 P.2d at 205.

III. CONCLUSION

Based upon the foregoing, the State Engineer respectfully requests that this Court not consider Petitioner's extrinsic evidence in considering Petitioner's Petition for Judicial Review. Therefore, to the extent Petitioner seeks to introduce this extrinsic evidence for consideration by means of this Request for Judicial Notice in Support of Petitioner's Reply Brief, the State Engineer requests this Court to deny Petitioner's request.

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 17th day of November 2015.

ADAM PAUL LAXALT
Attorney General

By: _____
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Counsel for Respondent,
Nevada State Engineer

Office of the Attorney General
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this this 17th day of November 2015, I served a true and correct copy of the foregoing Opposition to Petitioner's Request for Judicial Notice in Support of Petitioner's Reply Brief via United States Postal Service, Carson City, Nevada, to the following addresses:

Paul G. Taggart, Esq.
Rachel L. Wise, Esq.
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Dorene A. Wright

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Case No.: CV 20, 112

Dept. No. 2

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W. [illegible] SEENO
DIST. COURT CLERK

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IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * *

RODNEY ST. CLAIR,

Petitioner,

vs.

JASON KING, P.E., Nevada State Engineer, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,

Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER'S REPLY BRIEF

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TABLE CONTENTS

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CASES

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