Case No. 77651

**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.

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# RESPONDENT'S ANSWERING BRIEF

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## NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

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

DATED this 14th day of June, 2019.

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2. Whether the district court acted within its authority to issue an award of attorneys' fees pursuant to NRS 18.010(2)(b) for fees incurred on appeal where NRS 18.010(2)(b) does not prohibit such an award.

## STATEMENT OF THE CASE

Without notice to St. Clair, the State Engineer initiated an abandonment claim against St. Clair's vested water right in Ruling 6287, executed July 25, 2014. St. Clair appealed, and ultimately prevailed, through a long and contentious petition for judicial review. The district court, and later this Court, determined that there was no evidence in the record to support the State Engineer's claims.

After this Court's remittitur, the district court held a hearing and determined that the State Engineer should reimburse St. Clair for attorneys' fees expended for three separate (and groundless) litigation tactics taken by the State Engineer. The district court also found it proper to award St. Clair fees expended on preparing and arguing the motion for attorneys' fees. The State Engineer now appeals.

## STATEMENT OF FACTS

### I. The Merits Case

St. Clair owns a vested water right (V-10493) for groundwater used to irrigate portions of his real property. On July 25, 2014, the State Engineer issued Ruling

6287, in which the State Engineer, without hearing, found that St. Clair had abandoned the right at some unstated point in time.[1] St. Clair filed a Petition for Judicial Review ("PJR") in which he challenged Ruling 6287, claiming that the State Engineer did not have evidence to support the abandonment claim.

During the PJR litigation, the State Engineer took three separate litigation tactics that would later make him liable for attorney's fees according to the district court. First was an unacceptably late and groundless opposition to St. Clair's Request for Judicial Notice. On June 3, 2015, St. Clair filed a Request for Judicial Notice of previous State Engineer documents.[2] The State Engineer initially chose to not oppose St. Clair's request. However, on November 17, 2015, over five months after the Request for Judicial Notice was filed, the State Engineer filed an Opposition to Request for Judicial Notice.[3] The State Engineer did not file any motion for leave, request for enlargement of time, or similar permissive request to file. The State Engineer also did not consult St. Clair prior to filing his grossly untimely objection.

Second was the State Engineer's groundless objection to St. Clair's proposed order. After the hearing on the merits, the district court found that the State Engineer had no evidence to support his claim of abandonment.[4] The district court instructed

[1] JA 23.
[2] JA 434-560.
[3] JA 570-74.
[4] JA 825.

St. Clair to draft a proposed order reflecting the hearing, and exchange it with the State Engineer prior to providing it to the district court.[5] St. Clair abided by the district court's order. But after exchanging drafts with the State Engineer, the parties could not agree on the language of the proposed order. To remedy the issue, St. Clair sent both his own proposed order as well as the State Engineer's proposed order to the district court for consideration.[6] Nevertheless, the State Engineer filed an Objection to Petitioner's Proposed Order on March 18, 2016.[7] The State Engineer's objection was a seventy-eight-page, six-exhibit mammoth of a document that required an extensive response from St. Clair. On March 29, 2016, St. Clair filed a response[8] and, on April 11, 2016, the district court held a hearing on the State Engineer's objection. The district court overruled each of the State Engineer's arguments, and issued its Order Overruling Ruling 6287.[9] The district court explained in the Order Overruling Ruling 6287 that the State Engineer's record was devoid of any evidence regarding the critical element for abandonment – the water right owner's intent to abandon the water right. The district court explained that "[i]ntent is the necessary element the State Engineer is required to prove in

[5] JA 676-77.
[6] JA 687-747.
[7] JA 680-757.
[8] JA 758-63.
[9] JA 818-30.

abandonment cases. *This is the standard the State Engineer has previously relied upon.*"[10]

Third, although the State Engineer was corrected on the law by the district court, and though the State Engineer had no evidence he could point to which demonstrated abandonment, the State Engineer appealed the district court's Order Overruling Ruling 6287 to this Court.[11] This Court upheld with the district court's interpretation of the law, stating that "the party asserting abandonment bears the burden of proving, by clear and convincing evidence, that an owner of the water right intended to abandon it and took actions consistent with that intent."[12] When considering whether the State Engineer had any evidence to support his finding of abandonment, the Court found "no such evidence in the record."[13] The Court also rejected the State Engineer's arguments regarding his late objection to St. Clair's Request for Judicial Notice and his groundless objection to the proposed order.[14]

## II. The Attorneys' Fees Award

After this Court issued the remittitur, St. Clair filed a Motion for Attorneys' Fees before the district court pursuant to NRS 18.010(2)(b).[15] St. Clair's motion

[10] JA 805:7-8 (emphasis added).
[11] JA 831-53.
[12] *King v. St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314 (2018).
[13] *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314.
[14] *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314.
[15] JA 855-70.

requested fees for the three above-outlined groundless litigation tactics the State Engineer chose to employ: the State Engineer's objection, filed four months after the deadline, without leave of court; the State Engineer's objection and subsequent hearing on the proposed order; and defending the district court's order through appeal though the law of abandonment was well-settled, and the State Engineer had no evidence to maintain his claim of abandonment.[16]

On October 19, 2018, the district court held a hearing on St. Clair's Motion for Attorneys' Fees.[17] During that hearing, the State Engineer raised the same arguments he makes before this Court. The district court considered those arguments, and granted St. Clair's Motion for Attorneys' Fees. In doing so, the district court pointed out the State Engineer's "history of correctly implementing and analyzing the law of abandonment in Nevada,"[18] that the State Engineer was not unfairly prejudiced by the motion,[19] and that a balancing of the monetary implications of this case between the parties supported an award of attorneys' fees from the State Engineer to St. Clair.[20] The Court awarded St. Clair attorneys' fees totaling $50,025.00, which included the three above-described events, and fees

[16] JA 855-70.
[17] JA 990-1076.
[18] JA 1107:12-13.
[19] JA 1110.
[20] JA 1106.

incurred to prepare and argue the attorney's fee motion.[21] St. Clair did not oppose the State Engineer's Motion for Stay after consultation between the parties.

## SUMMARY OF THE ARGUMENT

Farming in the Nevada desert is not easy. The profit margins can be slim, and the work is demanding. But the job becomes much harder when the State Engineer, who is charged with implementing Nevada water law, maintains groundless claims of abandonment against valuable, necessary vested water rights. In St. Clair's case, the State Engineer turned his abandonment case into a war of monetary attrition. Despite the District Court Rules being clear, the State Engineer haphazardly filed paperwork when he found it convenient. Despite the facts and the law being against the State Engineer, he was able to take the case through appeal without worry for the cost because the Attorney General's office is obligated by statute to represent the State Engineer free-of-charge. The statutory playing field is uneven enough as it is, as the Legislature has granted the State Engineer deference in his decisions, there is no requirement for the State Engineer to abide by the Administrative Procedure Act ("APA"), and the State Engineer consistently tries to control what the judiciary may review during the PJR process.[22] For farmers and ranchers like St. Clair, if the State Engineer comes after their water rights without reasonable ground, regardless of

[21] JA 1075.
[22] *See, e.g.*, JA 570-74.

whether claims are made in good faith, the options are to either risk bankruptcy after losing the water rights, or risk bankruptcy trying to maintain its water rights.

In his Opening Brief, the State Engineer conflates four very important and distinct ideas into two half-truths. First, the State Engineer claims that the district court awarded St. Clair's attorneys' fees simply because the State Engineer was unsuccessful in the litigation.[23] Nowhere in his Opening Brief does the State Engineer even *mention* his late-filed opposition or his groundless objection to the Proposed Order, which were two of the four bases for the district court's attorneys' fees award. Second, the State Engineer conflates NRS 18.010(2)(a) with NRS 18.010(2)(b). The two subsections, while in the same statute, provide different remedies for different situations. The State Engineer continuously cites to NRS 18.010(2)(a) authority, while ignoring NRS 18.010(2)(b) authority. Upon inspection, the reasoning and rationale for the State Engineer's citations simply do not apply to NRS 18.010(2)(b).

The district court awarded St. Clair a reimbursement of certain – but notably not all – attorney's fees. St. Clair in fact chose not to request fees for the standard litigation practice before the district court, because it was St. Clair's initial belief that the State Engineer made a (albeit incomprehensible) mistake and the district court would correct mistake and end the issues. St. Clair only requested those fees

[23] *See* Appellant's Opening Br.

incurred before the district court for the State Engineer's inappropriate and groundless litigation tactics, and his unwarranted and baseless appeal of the district court's order. Thus, the district court did not punish the State Engineer for making a legal mistake – the district court awarded fees for the State Engineer's groundless choices made during these proceedings.

Simply put, the district court awarded two sets of fees. The district court awarded fees for certain litigation tactics that were taken while the case was in district court, and then awarded fees for expenses incurred during a groundless appeal. NRS 533.450 does not prohibit fees being imposed on the State Engineer, and NRS 18.010(2)(b) does not prohibit the granting of fees on appeal. Because the district court was not prohibited from granting these fees, and because the district court found a factual basis for these fees to be reimbursed to St. Clair, the district court's order should be upheld.

## STANDARD OF REVIEW

This Court has "consistently recognized that the decision to award attorney fees is within the district court's sound discretion . . . and will not be overturned absent a manifest abuse of discretion."[24] Facts pertaining to a grant of an attorneys'

[24] *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006) (quoting *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005)).

fee award are "entrusted to the sound discretion of the district court."[25] A party's eligibility for attorneys' fees is a matter of statutory interpretation, which is reviewed by this Court de novo.[26]

NRS 18.010(2)(b) provides in part that a court may award attorney fees to a party "when the court finds that the claim . . . of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." A groundless claim is one "not supported by any credible evidence" at the time the claim was brought.[27] NRS 18.010(2)(b) "targets only how the litigation itself is conducted" and ignores outside-litigation factors.[28]

Last year, this Court reaffirmed the long-standing rule that "[t]he court shall *liberally* construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations."[29] Undeniably, "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to [NRS 18.010(2)(b)] . . . in all appropriate situations."[30] NRS 18.010(2)(b) mandates an expansive

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[25] *In re Estate and Living Trust of Miller*, 125 Nev. 550, 552, 216 P.3d 239, 241 (2009).
[26] *In re Estate and Living Trust of Miller*, 125 Nev. at 552, 216 P.3d at 241.
[27] *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (internal quotations omitted).
[28] *In re 12067 Oakland Hills, Las Vegas, Nev. 89141*, 134 Nev. Adv. Op. 97, 435 P.3d 672, 676 (2018).
[29] *Capanna v. Orth*, 134 Nev. Adv. Op. 108, 432 P.3d 726 (2018) (internal quotations omitted).
[30] *Capanna*, 134 Nev. Adv. Op. 108, 432 P.3d 726 (citing NRS 18.010(2)(b)).

construction of the statute in favor of awarding fees "to deter frivolous claims and prevent clogging up the courts."[31]

## ARGUMENT

### I. The District Court Properly Awarded St. Clair Attorney's Fees Incurred Before The District Court.

The district court did not award St. Clair attorneys' fees solely because he was the prevailing party in the *King v. St. Clair*[32] case. The State Engineer is incorrect in that allegation.[33] The district court found that certain, specific litigation tactics employed by the State Engineer were groundless and unreasonable.[34] The State Engineer did not deny these facts in his Opening Brief, nor did he argue that his unreasonably late and unnecessary motions were otherwise permissible.

The district court, after a full hearing, determined as a matter of fact that no credible evidence existed in the record to support the State Engineer's claims. The State Engineer's claim that his office should not be responsible for attorneys' fees because he believed in his theory of the case is irrelevant to whether there was

[31] *NCP Bayou 2, LLC v. Medici*, Nos. 73122, 73820, 2019 WL 1324529 (Nev. 2019).
[32] *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d 314.
[33] Appellant's Opening Br. at 20-21.
[34] Of importance in this matter is that St. Clair *purposely* did not request attorney's fees for tens of thousands of dollars in fees incurred before the district court. Rather, St. Clair pursued only a small portion, consisting of those which St. Clair incurred by way of the State Engineer's groundless claims made during the district court litigation, including baseless motions and objections, and the State Engineer's appeal to this Court.

evidence to support his claims. As such, the State Engineer's claims were – by definition – groundless, and St. Clair is entitled to attorneys' fees pursuant to NRS 18.010(2)(b).

### A. The district court did not abuse its discretion in finding that the State Engineer's four-month-late opposition to St. Clair's request for judicial notice was groundless.

The district court properly found that the State Engineer did not have reasonable ground to object to St. Clair's Request for Judicial Notice four months late and without leave of court. Groundless claims are those which "are not supported by any credible evidence."[35] The district court's finding of fact that no credible evidence supported the State Engineer's claims is reviewed by this Court under a manifest abuse of discretion standard.[36] Here, the facts are undisputed. On June 2, 2015, St. Clair filed a motion requesting that the district court take judicial notice of several public documents in the State Engineer's files.[37] The State Engineer initially chose not to oppose the request. However, five months later, on November 17, 2015, the State Engineer (without any discussions with St. Clair or

[35] *Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993). *See also Allianz Ins. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993) (quoting *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1065-69 (Colo. 1984) (attorney's fees allowable if action is frivolous or groundless, i.e., is not supported by any credible evidence at trial)).
[36] Appellant's Opening Br. at 20-21.
[37] JA 434-560.

request for leave of Court) filed an opposition to St. Clair's request for judicial notice.[38]

The district court found that the four-month late opposition was in clear violation of District Court Rule 13(3), which requires a party to file any oppositions to motions within ten (10) days after the service of the motion. Ultimately, the district court held that "[b]ecause the filing was four 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."[39] The State Engineer offers no explanation as to why he considers the filing of an untimely opposition to be reasonable. Accordingly, the district court did not abuse its discretion in granting St. Clair attorneys' fees for the costs of litigating the State Engineer's egregiously untimely opposition. Thus, this Court should uphold the related attorneys' fees award.

### B. The district court did not abuse its discretion in finding that the State Engineer's objections to the proposed order were groundless.

Next, the district court awarded attorneys' fees to St. Clair for the State Engineer's erroneous objection to St. Clair's proposed order.[40] After the hearing on the merits, the district court found that the State Engineer did not produce any

[38] JA 570-74.
[39] JA 1105.
[40] JA 1105-06.

evidence to meet the element of intent under abandonment law.[41] The district court ordered St. Clair to prepare an order reflecting that finding, and others.[42] Indeed, even this Court recognized that "it is common practice for Clark County district courts to direct the prevailing party to draft the Court's order."[43]

When St. Clair drafted the proposed order, St. Clair provided a copy to the State Engineer for review and comment prior to submitting to the Court.[44] When the parties realized they could not agree on language for the proposed order, St. Clair submitted both his proposed order and the State Engineer's redline versions for the district court's consideration.[45] The district court found that the State Engineer's objections to the proposed order and related litigation were without reasonable ground, and therefore granted attorneys' fees to St. Clair for fees he expended on the proposed order litigation.[46] Because the district court did not abuse its discretion in awarding these specific fees, its decision should be affirmed.

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[41] *See* JA 805-07.
[42] JA 677:1-7.
[43] *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d at 318.
[44] *See* JA 676-77.
[45] JA 708.
[46] JA 1106.

### C. The district court did not abuse its discretion in granting attorneys' fees expended pursuing the attorneys' fees motion.

The district court also granted St. Clair fees associated with preparing for, and arguing, St. Clair's Motion for Attorneys' Fees.[47] The district court found that the facts and circumstances of the case, in combination with the broad legislative directive included in NRS 18.010(2)(b), warranted such fees.[48] The Court explained that "this was a meritorious claim on the part of Mr. St. Clair" and that the State Engineer's approach in this matter "increase[d] the cost of engaging in business" in an unreasonable way.[49] The district court's findings of fact are afforded deference by this Court, and should not be overturned.

### D. NRS 533.450 does not prohibit the district court from granting attorneys' fees requested pursuant to NRS 18.010(2)(b).

#### 1. NRS 533.450 expressly states that procedural rules like NRS 18.010(2)(b) apply to appeals of State Engineer determinations.

Petitions for judicial review brought pursuant to NRS 533.450 are subject to the rules of civil practice, including the allocation of attorney' 'fees when so warranted. The Legislature has expressly stated that "the practice in civil cases applies"[50] to judicial review of State Engineer decisions brought under NRS

[47] JA 1075:11-15.
[48] JA 1075:11-15.
[49] JA 1075:11-15.
[50] NRS 533.450(8).

533.450. The Legislature specifically indicated as such. The Legislature has also unambiguously stated that, in civil cases, a district court is authorized to award a party attorneys' fees in cases where the opposing party has advanced claims which are "brought or maintained without reasonable ground."[51] Finally, the Legislature has provided that in considering whether to award attorneys' fees under NRS 18.010(2)(b) a "court shall *liberally* construe the provisions of this paragraph in favor of awarding attorney's fees *in all appropriate situations*."[52]

The State Engineer's argument that "NRS 533.450 provides the exclusive means for challenging an order or decision of the State Engineer" and, thus, NRS 18.010(2)(b) is inapplicable, is at odds with the plain language of the statute.[53] A plain reading of NRS 533.450 reveals no statement, clause, or phrase supporting the State Engineer's contention. While NRS 533.450 grants protection against an award of *costs*, the statute is silent with respect to *fees*. The State Engineer conceded this important point before the district court.[54] In Nevada, attorneys' fees are separate and apart from costs, and statutes including costs do not necessary include fees.[55] NRS 533.450's prohibition of an award of costs does not extend to attorneys' fees,

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[51] NRS 18.010(2)(b).
[52] NRS 18.010(2)(b) (emphasis added).
[53] Appellant's Opening Br. at 9.
[54] JA 877:20-22.
[55] *See Rand Props., LLC v. Filippini*, No. 66933, 2016 WL 1619306, at *6 (Nev. 2016). *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 287, 890 P.2d 769, 776 (1995).

because it is well-settled that under "the principle of statutory construction []the mention of one thing implies the exclusion of another."[56]

### 2. The State Engineer is not bound by the Administrative Procedure Act, so protections afforded in the Administrative Procedure Act are irrelevant to the State Engineer's office.

The Nevada Administrative Procedure Act, NRS 233B, has been determined by this Court to contain "exclusive means" language which prohibits a grant of attorney's fees. The "exclusive means" language states in part that "the provisions of [NRS 233B.130] are the exclusive means of judicial review."[57] The State Engineer argues that this Court's interpretation of the "exclusive means" language of NRS 233B.130(6) should be applied to NRS 533.450. But the Legislature has made two conscious choices which invalidate the State Engineer's argument. And "it 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."[58]

First, the Legislature chose to exclude the narrow, "exclusive means" language found in NRS 233B.130(6) from NRS 533.450.[59] For NRS 533.450, the

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[56] *Rural Tel. Co. v. Pub. Utils. Comm'n*, 133 Nev. Adv. Op. 53 at 5, 398 P.3d 909, 911 (2017) (citing *Sonia F. v. Eighth Jud. Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009)); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012).

[57] NRS 233B.130(6).

[58] *McKay v. Bd. of Cty. Comm'rs of Douglas Cty*., 103 Nev. 490, 492, 746 P.2d 124, 125 (1987).

[59] *See Zenor v. State, Dep't of Transp*., 134 Nev. Adv. Op. 14, 412 P.3d 28, 29 (2018).

Legislature chose the opposite pathway, and expressly permitted a court to apply standard civil remedies to State Engineer proceedings.[60] The State Engineer cites to *Fowler*[61] and *Zenor*[62] for authority claiming they hold that the State Engineer's office is not subject to attorneys' fees. However, both of these cases interpret the "exclusive means" language found in NRS 233B.130(6), and neither involve NRS 533.450.[63] In *Fowler*, this Court placed special importance on NRS 233B.130(6)'s language, which provides that the provisions of NRS 233B provide the *exclusive* remedy in such actions and therefore no attorneys' fees could be awarded.[64] Similarly, in *Zenor*, this Court stated "the Legislature expressly stated that the provisions of NRS Chapter 233B 'are the *exclusive means* of judicial review of, or judicial action' when courts review agency determinations."[65] Accordingly, *Fowler* and *Zenor* are completely inapplicable to this case as those cases do not stem from the same branch of law and reasoning.

Second, the Legislature chose to exclude the State Engineer from the provisions of the NRS 233B, and instead crafted a unique process and set of remedies

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[60] NRS 533.450(8).
[61] *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 782, 858 P.2d 375, 375 (1993).
[62] *Zenor*, 134 Nev. Adv. Op. 14, 412 P.3d 28.
[63] *Fowler*, 109 Nev. at 782, 858 P.2d at 375; *Zenor*, 134 Nev. Adv. Op. 14, 412 P.3d 28.
[64] *Fowler*, 109 Nev. 782, 858 P.2d 375.
[65] *Zenor*, 134 Nev. Adv. Op. 14, 412 P.3d 28.

that apply specifically to the State Engineer.[66] Thus, the State Engineer is not required to, and in turn does not, abide by the APA.[67] The State Engineer seeks to have the best of both worlds in which he gets all the benefits of the APA, yet is unburdened by the protections afforded to the public under the APA. The State Engineer correctly notes that this Court has "repeatedly refused to imply provisions not expressly included in the legislative scheme."[68] Yet that is exactly what the State Engineer is asking this Court to do – presume that the Legislature intended to prohibit awards of attorneys' fees in cases brought under NRS 533.450 even though such an implication is completely untethered to the plain language of the statute.

This Court has already recognized the inherent differences between NRS 233B.130 and NRS 533.450. For example, this Court has held that NRS 233B.130(2)(a)'s requirement to serve notice on parties other than the agency being sued is both mandatory and jurisdictional.[69] By contrast, this Court has stated that NRS 533.450(3)'s notice provision is not jurisdictional.[70] The inherent difference in the language of NRS 533.450 and NRS 233B.130 regarding the means of review,

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[66] NRS 233B.039(j).
[67] For example, here, the State Engineer unilaterally "abandoned" St. Clair's water right without warning or a hearing on the issue. Under the APA, due process hearings would be required prior to the taking of a real property right.
[68] *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988).
[69] *Washoe County v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) ("to invoke a district court's jurisdiction to consider a petition for judicial review, the petitioner must strictly comply with the APA's procedural requirements.").
[70] *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988).

and available remedies, is also an important distinction between the two statutes. These facts, coupled with the Legislature's intent to have the judiciary "liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations,"[71] makes upholding the district court's award of attorney's fees for the specific and groundless actions of the State Engineer straight forward.

### 3. ***Rand*** **demonstrates exactly why the State Engineer is subject to NRS 18.010(2)(b) in this case.**

The State Engineer hinges his argument on *Rand*, an unpublished decision that discusses an award of attorneys' fees made pursuant to NRS 533.190(1) and NRS 533.240(3) [72]. These statutes govern proceedings initiated to adjudicate pre-1905 vested claims and, again, are entirely different than Petitions for Judicial Review brought under NRS 533.450. Indeed, NRS 533.190(1) does not incorporate the rules of civil procedure like NRS 533.450, and the parties in *Rand* did not pursue attorneys' fees under NRS 18.010(2)(b).

Nevertheless, *Rand* supports St. Clair's position. In *Rand*, this Court found the statutes at issue "specifically provide for an award of costs, but under Nevada law, attorney fees are not considered costs."[73] This Court thereby decided that under

[71] NRS 18.010(2)(b).
[72] *Rand Props., LLC*, 2016 WL 1619306 at *5.
[73] *Rand Props., LLC*, 2016 WL 1619306 at *6.

NRS 533.190 and NRS 533.240, the district court may award costs, but not fees. Here, the inverse is also true. While NRS 533.450 prohibits costs, it does not prohibit fees. The mention of a prohibition against costs implies the exclusion of any protection against attorney's fees.[74]

### E. The district court did not abuse its discretion in considering St. Clair's attorneys' fees motion.

#### 1. Cases interpreting the timeliness of NRS 18.010(2)(a) are inapplicable to NRS 18.010(2)(b) because the two statutes are substantively different.

The State Engineer claims St. Clair's request for attorneys' fees was untimely based on cases interpreting NRS 18.010(2)(a), but the Legislature divided NRS 18.010(2) into two subsections, each with a different purpose and a different test. Generally, under NRS 18.010(2)(a), if a party is awarded less than $20,000 in a final judgment from the Court, the party may also pursue attorneys' fees.[75] Comparatively, the Legislature, in 2003, stated that the Court should interpret NRS 18.010(2)(b) liberally "because [groundless] 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."[76]

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[74] *Rural Tel. Co.*, 133 Nev. Adv. Op. 53 at 5, 398 P.3d at 911 (quoting *Sonia F.*, 125 Nev. at 499, 215 P.3d at 708); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012).
[75] NRS 18.010(2)(a).
[76] NRS 18.010(2)(b).

Accordingly, while subsection (a) protects litigants that affirmatively seek righteous cases, subsection (b) protects the judiciary from unrighteous and groundless cases.

In *Collins*, this Court made clear that a core concern when determining the timeliness of a motion for attorneys' fees is unfair prejudice to the non-moving party.[77] In *Collins*, the district court held a bench trial regarding breach of contract, and ultimately issued an award for Murphy for $5,125.[78] Collins decided not to appeal because "it would cost more [. . .] to pursue even a meritorious appeal."[79] Murphy, after the time to appeal had run, relied upon the underlying order to request attorneys' fees of nearly $50,000.[80] The Court found that Collins was unfairly prejudiced by Murphy's delay in filing his motion for attorneys' fees because Collins had foregone appealing the $5,125 judgment, and was therefore unable to challenge the award less than $20,000 – subjecting him to fees under NRS 18.010(2)(a).[81]

The State Engineer now cites to *Collins* as authority that any motion made after the time to appeal has run is untimely. *Collins* is obviously distinguishable from the case at bar. First, the district court found that the State Engineer failed to even make a claim of unfair prejudice.[82] Thus, any argument of prejudice has been

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[77] *See Collins v. Murphy*, 113 Nev. 1380, 1384, 951 P.2d 598, 600 (1997) (citing *Davidsohn v. Steffens*, 112 Nev. 136, 911 P.2d 855 (1996)).
[78] *See Collins*, 113 Nev. 1380, 951 P.2d 598.
[79] *Collins*, 113 Nev. at 1384, 951 P.2d at 601.
[80] *Collins*, 113 Nev. at 1384, 951 P.2d at 601.
[81] *Collins*, 113 Nev. at 1384, 951 P.2d at 601.
[82] JA 1110:4-5.

waived. Second, even if this Court considers the State Engineer's claim of unfair prejudice, the State Engineer was not unfairly prejudiced by the timing of St. Clair's motion as the State Engineer chose to appeal the district court's order regardless of the attorney's fees motion.

### 2. The district court did not abuse its discretion in considering and subsequently granting St. Clair's motion.

Nevada law is well-settled 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" is a matter left to the discretion of the trial court.[83] Additionally, it is well known that the "exercise of discretion to reach the merits of [a] motion will not be disturbed on appeal."[84] No specific statutory provision exists in NRS 18.010(2)(b) which provides a deadline for attorneys' fees motions made pursuant to that statute. The State Engineer erroneously claims that NRCP 54 controls the timing of attorneys' fees motions made under NRS 18.010(2)(b). Case law and legal reasoning do not support the State Engineer's position.

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[83] *Bd. of Gallery of History, Inc. v. Datecs Corp*., 116 Nev. 286, 994 P.2d 1149 (2000) ("[t]here is no time limit specified in NRS 18.010 for application for fees . . . ."); *Farmers Ins. Exch. v. Pickering*, 104 Nev. 660, 662, 765 P.2d 181, 182 (1988); *see also White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 454, 102 S. Ct. 1162, 1167 (1982); *White v. Kaufmann*, 652 P.2d 127, 129 (Ariz. 1982); *see, e.g.*, *Kajioka v. Kajioka*, No. 66560, 2015 WL 8020898 (Nev. Ct. App. 2015); *see, e.g.*, *Barney v. Mt. Rose Heating and Air Conditioning*, No. 53971, 2011 WL 378781 (Nev. 2011).

[84] *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992).

In *Farmers*, this Court found that applying deadlines from the NRCP to NRS 18.010(2)(b) attorneys' fee motions was inappropriate.[85] The State Engineer incorrectly argues that *Farmers* has been "essentially abrogated" by amendments made to NRCP 54 in 2008.[86] Those amendments were made to ensure the unfair prejudice that was demonstrated in *Collins* for awards given pursuant to NRS 18.010(2)(a) are prevented. The State Engineer concedes this fact in his Opening Brief.[87] As discussed above, *Collins* is inapplicable to NRS 18.010(2)(b), and to this case in particular, as the State Engineer has faced no unfair prejudice. The *Collins* Court expressed their heightened concern about unfair prejudice, stating that "[t]he trial court's discretionary power to deny fee requests is a sufficient protection against a post-judgment motion [which] unfairly surprises or prejudices the affected party."[88] Thus, no strict deadlines are imposed for attorneys' fees motions. Rather, the focus is on whether the timing of the motion unfairly prejudices the non-moving party.

This legal holding was applied in two recent unpublished opinions that demonstrate the holdings are still sound. In the 2011 *Barney v. Mt. Rose Heating & Air Conditioning* case,[89] the Court relied on *Farmers* to find that "the district court

[85] *Farmers Ins. Exch.*, 104 Nev. at 662, 765 P.2d at 182.
[86] Appellant's Opening Br. at 27.
[87] Appellant's Opening Br. at 28.
[88] *Farmers Ins. Exch.*, 104 Nev. at 662, 765 P.2d at 182.
[89] *Barney*, 127 Nev. 1118, 373 P.3d 894.

did not abuse its discretion by finding Mt. Rose's request for attorney fees to be timely" when the statute did not have a time restriction.[90] Similarly, in the 2015 *Kajioka v. Kajioka* case,[91] this Court found that "the district court did not abuse its discretion in considering [the] motion for costs" though a motion was filed after the deadline imposed by statute.[92] Here, the district court considered the State Engineer's arguments pertaining to timeliness and decided it would consider the motion because NRS18.010(2)(b) does not specifically limit the time frame in which to file such motions. The district court's determination "that it would hear the [attorneys' fees motion] given the facts and circumstances of the case"[93] was sound and should be upheld by this Court based on its applicable legal precedent.

## II. The District Court Properly Awarded St. Clair Attorneys' Fees Incurred On Appeal.

### A. The district court properly found that the State Engineer's appeal was groundless.

After St. Clair prevailed at the district court, the State Engineer should have reconsidered the grounds for the abandonment claim, realizing that his office had made a mistake. This Court first announced the elements of abandonment that the

[90] *Barney*, 127 Nev. 1118, 373 P.3d 894.
[91] *Kajioka*, 2015 WL 8020898 at *6.
[92] *Kajioka*, 2015 WL 8020898 at *6.
[93] JA 1110.

State Engineer must prove in 1940.[94] The critical element of intent to abandon has always been clear. Even after the absence of any evidence of this critical element was pointed out by the district court, the State Engineer continued to pursue an unsupportable claim of abandonment against St. Clair. That decision cost the State Engineer nothing, but cost St. Clair tens of thousands of dollars.[95]

At no time did the State Engineer point to evidence which the district court misconstrued or ignored to support his claim. Instead, the State Engineer continued to claim he did not need to present evidence of intent to abandon. The State Engineer relied on the Ninth Circuit's *Alpine*[96] case, which interpreted equity rules regarding intrafarm transfers of water rights. The State Engineer previously demonstrated a keen understanding of the application of *Alpine* to intrafarm transfers.[97] But in this case, the State Engineer took the language of *Alpine* completely out of context to meet his goal of taking St. Clair's water away.[98] The State Engineer's appeal did

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[94] *In re Manse Spring and its Tributaries, Nye Cty*., 60 Nev. 280, 108 P.2d 311 (1940).
[95] JA 1077-79.
[96] *United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1077 (9th Cir. 2002).
[97] *See* JA 435-36.
[98] *See* JA 503-08. The "continuous use" language the State Engineer relied on in Ruling 6287 is in the Ninth Circuit's opinion under the section "Equitable Relief for Intrafarm Transfers." *Alpine*, 291 F.3d at 1073-74. In that section, the Ninth Circuit was specifically analyzing whether equitable principles should apply to protect "intrafarm transfers" from abandonment. In an intrafarm transfer, the owners of the water rights mistakenly abandoned the original place of use and resumed use at a new location without a change application. For the equitable solution to apply,

nothing more than cost St. Clair a small fortune, and "clog[ ] up the courts."[99] Therefore, the district court's decision to grant St. Clair's motion was not a manifest abuse of discretion and should be upheld by this Court.

Now the State Engineer claims that his appeal was not groundless because this Court stated in dicta that "assuming a prior owner has taken actions consistent with abandonment" the prior owner could potentially have abandoned a water right.[100] That argument is irrational for multiple reasons. First, the parties did not argue the issue of a hypothetical prior owner's intent at the district court. Second, the Court's dicta about a hypothetical prior owner was not "new precedent" as claimed by the State Engineer.[101] Third, even if the Court did create some new standard in abandonment law (which it did not), the State Engineer *still* maintained his abandonment case against St. Clair without reasonable ground. The *St. Clair* Court found that "no [intent to abandon] evidence exists in this record," and there exists no evidence that "St. Clair's predecessor intended to abandon the water right."[102]

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abandonment at the original place of use must be established under water law, then to overcome this proof of abandonment, the owner had to show they had actually used the water elsewhere. On remand from *Alpine*, the State Engineer fully understood that this equitable relief section of *Alpine* in no way altered the intent requirement for the initial determination of abandonment.

[99] *NCP Bayou 2, LLC*, 2019 WL 1324529.

[100] *St. Clair*, 134 Nev. Adv. Op. 18, 414 P.3d at 316.

[101] Appellant's Opening Br. at 21.

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

This Court should not permit the State Engineer to take groundless positions during litigation, and should not permit the State Engineer to pursue evidence-free cases without repercussions. NRS 18.010(2)(b) is available to ensure that does not happen.

### B. The district court correctly interpreted NRS 18.010(2)(b) to apply to fees on appeal.

In *Living Trust*,[103] this Court held that a district court has jurisdiction to award fees incurred on appeal unless the statute in question specifically states otherwise. The *Living Trust* Court primarily relied on *Rosenaur v. Scherer*.[104] The *Rosenaur* Court explained that "a statute authorizing an attorney fee[s] award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise."[105] In comparison, this Court in *Living Trust* found that "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."[106] *Living Trust*, written by Justice Pickering, and which garnered full concurrence from Justices Hardesty and Parraguirre, recognized that "states with fee-shifting rules or statutes similar to Nevada's have held that they apply to appellate fees" as well.[107]

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[103] *In re Estate and Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239.
[104] *Rosenaur v. Scherer*, 88 Cal. App. 4th 260 (Ct. App. 2001).
[105] *Rosenaur*, 88 Cal. App. 4th at 287.
[106] *In re Estate of Living Trust of Miller*, 125 Nev. at 555, 216 P.3d at 243.
[107] *In re Estate of Living Trust of Miller*, 125 Nev. at 555, 216 P.3d at 243.

The present case presents a similar question to *Living Trust*, and this Court should reach the same conclusion as it did in *Living Trust*. No language in the fees shifting provisions of NRS 18.010(2)(b) limits fees to only those incurred before the district court. To borrow and apply precise language from *Living Trust*, "nothing in the language of [NRS 18.010(2)(b)] suggests that their fee shifting provisions cease operation when the case leaves trial court."[108] Distinguishing between prohibitions and permissions of fee shifting statutes is also in step with the Legislature's recent directive to construe NRS 18.010(2)(b)'s fee shifting provisions *liberally and in favor of awarding attorneys' fees* when necessary.

While *Living Trust* interpreted the offer of judgment fee shifting provisions, the principles of statutory interpretation and application apply to fee shifting provisions beyond NRCP 68. Notably, *Rosenaur* did not involve offers of judgment, as claimed by the State Engineer in his Opening Brief.[109] Also, *Living Trust* recognized that this Court has "held that an attorney fees award includes fees on appeal" in other contexts beyond only offers of judgment, thereby implicitly acknowledging that its rule of statutory interpretation is broader than the State Engineer claims.[110] Indeed, this Court has explained that the fee shifting policies are

[108] *In re Estate of Living Trust of Miller*, 125 Nev. at 555, 216 P.3d at 243.
[109] Appellant's Opening Br. at 36-37.
[110] *In re Estate of Living Trust of Miller*, 125 Nev. at 555, 216 P.3d at 243.

"diminished if the party is forced to defend its rights on appeal at its own expense."[111] Because NRS 18.010(2)(b) contains no limitation on attorneys' fees incurred on appeal, coupled with the legislature's intent to "liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees,"[112] this Court should uphold the district court's award of attorney's fees to St. Clair.

### C. The State Engineer's relied-upon case law does not take into account the legislative changes to NRS 18.010(2)(b).

Despite the law being clear that NRS 18.010(2)(b) "shall be liberally construed," the State Engineer argues for a narrow and exclusive construction. The State Engineer argues *Berosini* and *Board of Gallery of History* prohibit the district court from awarding fees incurred on appeal, but the State Engineer's reliance on these cases is fatally flawed for multiple reasons.

First, this Court decided both *Berosini* and *Board of Gallery of History* nearly a decade prior to *Living Trust.* Since this Court decided those cases, the focus of statutory interpretation has been on whether a fee shifting statute *prohibits* a district court from granting fees incurred during appeal, not whether a fee shifting statute *permits* a district court from issuing appellate fees.[113] Second, the Legislature has amended NRS 18.010(2)(b) since *Berosini* and *Board of Gallery of History* were

[111] *Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477-478 (1988).
[112] JA 1109.
[113] *See In re Estate of Living Trust of Miller*, 125 Nev. 550, 216 P.3d 239.

decided. In 2003, after this Court decided *Berosini* and *Board of Gallery of History*, but prior to *Living Trust*, the Legislature added that "[t]he court shall *liberally construe* the provisions of [NRS 18.010(2)(b)] in favor of awarding costs, expenses and attorney's fees in all appropriate situations. *It is the intent of the Legislature that the court award costs, expenses and attorney's fees pursuant to this section . . .* ."[114]

Thus, since *Berosini* and *Board of Gallery of History* were decided, the Legislature has expanded the authority to a district court under NRS 18.010(2)(b). Accordingly, this Court's approach to statutory interpretation in *Living Trust* is more applicable to the instant matter. This Court should maintain the approach taken in *Living Trust*, and simultaneously live up to the intention of the statutory amendment, thereby approving the district court's award to St. Clair.

### D. The State Engineer's argument pertaining to NRCP 68 and NRAP 38 is irrelevant to the question at hand, as the district court awarded St. Clair attorneys' fees pursuant to NRS 18.010(2)(b).

Here, the district court did not award St. Clair attorneys' fees pursuant to NRCP 68, nor was St. Clair awarded fees under Nevada Rules of Appellate Procedure ("NRAP") 38. The district court's authority to award fees incurred on appeal does not supersede or otherwise limit this Court's jurisdiction under other fee shifting provisions in the NRCP or NRAP. NRCP 68 outlines rules specific to offers

[114] S.B. 250, 2003 Leg., 73rd Sess. (Nev. 2003).

of judgment and does not implicate groundless claims whatsoever. NRAP 38 permits this Court to award fees incurred during frivolous civil appeals *sua sponte* or by request. This Court has considered frivolous appeals to be those which are "made without a reasonable and competent inquiry."[115] Additionally, NRAP 38 permits an award of fees for appeals that have been taken for the sole purpose of delay, or when "the appellate process of the court ha[s] otherwise been misused."[116]

Comparatively, NRS 18.010(2)(b) is a more fact-driven analysis, which requires the district court to find that there is no evidence submitted that supports the claim made by the non-moving party.[117] This Court still retains authority to review such an award for a manifest abuse of discretion. As such, NRAP 38 is a different tool, with different standards, available in different situations than NRS 18.010(2)(b).

The district court was abundantly clear that it granted the attorneys' fees pursuant to the fee shifting provisions in NRS 18.010(2)(b) because of the State Engineer's untimely and baseless oppositions to St. Clair's motion and proposed order, as well as the State Engineer's maintenance of the abandonment case despite the record being devoid of any evidence of an intent to abandon the water right.

[115] *Bergmann*, 109 Nev. at 676, 856 P.2d at 564.
[116] NRAP 38.
[117] *See* NRS 18.010(2)(b).

Thus, the State Engineer's focus on the applicability of those two rules in his Opening Brief is erroneous and misplaced.[118]

## CONCLUSION

For the foregoing reasons, St. Clair respectfully requests that this Court uphold the district court's award of attorneys' fees.

DATED this 14th day of June, 2019.

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[118] *See* Appellant's Opening Br. at 35-38.

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this answering brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 7,532 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying answering brief is not inconformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of June, 2019.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this day, I served, or caused to be served, a true and correct copy of the foregoing Respondent's Answering Brief by electronic service to:

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