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1. [King v. St. Clair, 414 P.3d 314](#)

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King v. St. Clair

Supreme Court of Nevada

March 29, 2018, Filed

No. 70458

Reporter

414 P.3d 314 *; 2018 Nev. LEXIS 22 **; 134 Nev. Adv. Rep. 18

JASON KING, P.E., NEVADA STATE ENGINEER,
DIVISION OF WATER RESOURCES, DEPARTMENT
OF CONSERVATION AND NATURAL RESOURCES,
Appellant, vs. RODNEY ST. CLAIR, Respondent.

Prior History: **[**1]** Appeal from a district court order resolving a petition for judicial review in a water rights matter. Sixth Judicial District Court, Humboldt County; Steven R. Kosach, Senior Judge.

Disposition: Affirmed.

Core Terms

abandonment, water rights, district court, nonuse, underground water, intent to abandon, Appropriation, argues, clear and convincing evidence, substantial evidence, diversion, irrigated

Case Summary

Overview

HOLDINGS: [1]-A state engineer's finding of abandonment pursuant to *Nev. Rev. Stat. § 534.090(4) (2011)* was unsupported by substantial evidence because an extended period of nonuse of water did not in itself establish clear and convincing evidence that a property owner intended to abandon a water right connected to the property, and there was no additional evidence indicating an intent to abandon; [2]-The district court did not violate *Nev. R. Civ. P. 52* by adopting in full an order drafted by the property owner because the fact that the district court found the state engineer's objections to specific language within that order unpersuasive did not mean that the district court neglected its duty to make factual findings, and it was common practice for district courts to direct the prevailing party to draft the order.

Outcome

Decision affirmed.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

[HN1](#) **Standards of Review, Arbitrary & Capricious Standard of Review**

When a state supreme court reviews a district court's order reversing an agency's decision, the state supreme court applies the same standard of review that the lower court applied: the state supreme court determines whether the agency's decision was arbitrary or capricious. According to that standard, factual findings of the State Engineer should only be overturned if they are not supported by substantial evidence. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. The state supreme court reviews purely legal questions de novo.

Evidence > Burdens of Proof > Clear & Convincing Proof

Real Property Law > Water Rights > Groundwater

Real Property Law > Water Rights

[HN2](#) **Burdens of Proof, Clear & Convincing Proof**

A right to use underground water may be lost by abandonment. *Nev. Rev. Stat. § 534.090(4) (2011)*. 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. Clear and convincing evidence is beyond a mere preponderance of the evidence. Clear and convincing evidence need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference may be drawn.

Real Property Law > Water Rights

[HN3](#) **Real Property Law, Water Rights**

In the context of water rights, assuming a prior owner has taken actions consistent with abandonment, it is that owner's intent that controls. Otherwise, water rights could be abandoned by one property owner and then revived 50 years later by a subsequent owner, potentially resulting in over-appropriation of water. Subsequent efforts by current owners to put water rights to beneficial use cannot revive water rights already abandoned by previous owners.

Real Property Law > Water Rights

[HN4](#) **Real Property Law, Water Rights**

Nevada law does not presume abandonment of a water right from nonuse alone. Abandonment, requiring a union of acts and intent, is a question of fact to be determined from all the surrounding circumstances. It is necessary to establish the owner's intention to abandon and relinquish such right before an abandonment can be found. In 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.

Real Property Law > Water Rights

[HN5](#) **Real Property Law, Water Rights**

In the context of abandonment of water rights, to the extent that *United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035, 1038 (2007) suggests that nonuse evidence constitutes some evidence of abandonment that shifts the burden to the applicant, the Supreme Court of Nevada rejects that interpretation of Nevada law.

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

[HN6](#) **Motion Practice, Time Limitations**

D.C.R. 13(3) requires written opposition to be filed within ten days of service of the opposing party's motion.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

[HN7](#) **Reviewability of Lower Court Decisions, Preservation for Review**

A reviewing court may decline to consider issues improperly presented to the district court.

Counsel: Adam Paul Laxalt, Attorney General, and Justina A. Caviglia, Deputy Attorney General, Carson City, for Appellant.

Taggart & Taggart, Ltd., and Paul G. Taggart and Rachel L. Wise, Carson City, for Respondent.

Judges: Stiglich, J. We concur: Douglas, C.J., Cherry, J., Gibbons, J., Pickering, J., Hardesty, J., Parraguirre, J.

Opinion by: STIGLICH

Opinion

[*315] BEFORE THE COURT EN BANC.

By the Court, STIGLICH, J.:

This case concerns respondent Rodney St. Clair's entitlement to water rights connected to a property that he purchased in 2013. Upon finding an abandoned well on the property, St. Clair applied to the State Engineer for a permit to temporarily change the point of diversion

of the underground water source from that well to another location on his property. To support that application, St. Clair submitted a Proof of Appropriation, in which he claimed that a prior owner of the property had established a vested right to the underground water source. In ruling on St. Clair's application for a temporary permit, the State Engineer found **[**2]** that a prior owner had indeed established a right to appropriate underground water, but a subsequent owner abandoned that right through years of nonuse. Upon St. Clair's petition for judicial review, the district court overruled the State Engineer's decision, finding insufficient evidence that any owner of the property intended to abandon the property's water right. We affirm because nonuse evidence alone was insufficient to support a finding of an intent to abandon.

FACTS AND PROCEDURAL HISTORY

In 2013, Rodney St. Clair purchased real property in Humboldt County, Nevada. Upon finding remnants of a well casing on the property, St. Clair filed two documents with the State Engineer. The first was a Proof of Appropriation, in which St. Clair claimed a pre-1939 vested right to appropriate underground water. The second was an application for a permit to temporarily change the place of diversion of that water.

To support his Proof of Appropriation, St. Clair submitted documents establishing that the property in question was first acquired by George Crossley in 1924 pursuant to the Homestead Act of 1862. Several months later, Crossley deeded the land, with all appurtenances, to Albert H. Trathen. **[**3]** The Trathen family maintained ownership over the property until 2013, when St. Clair bought it. All property taxes were paid from 1924 to the present.

St. Clair's documentation also included Crossley's 1924 land patent application, in which Crossley indicated that a drilled well existed on the property. St. Clair submitted pictures of remnants of the well existing on the property in 2013. By that time, the well had become inoperable, and St. Clair admitted in his application that the land had not been irrigated recently and that he did not know when it was last irrigated.

In ruling on St. Clair's application, the State Engineer found sufficient evidence that Crossley had appropriated underground water and put it to beneficial use prior to March **[*316]** 25, 1939, thus vesting a pre-statutory right to appropriate underground water pursuant to [NRS](#)

[534.100](#).¹ However, the State Engineer also found that the water was not used continuously from 1924 to the present and that there was "no evidence pointing to a lack of prior owners' intent to abandon the water right." Based on those findings, the State Engineer concluded that the vested water right had been abandoned. The State Engineer therefore denied St. Clair's **[**4]** application seeking a temporary change of place of diversion on the basis that no appropriated water was available.

St. Clair petitioned for judicial review. While the district court accepted the State Engineer's findings that the well was inoperable and that water had not been put to beneficial use for some time, the court reasoned "that non-use of the water is not enough to constitute abandonment" of a water right. The district court noted that the property contained no improvements inconsistent with irrigation and the evidence indicated that all taxes and assessments on the property were paid from Crossley's time up until the present. Thus, the district court overruled the State Engineer's abandonment finding as being unsupported by substantial evidence and ordered the State Engineer to grant St. Clair's application for a permit to change the place of diversion. The State Engineer appeals.

DISCUSSION

[HN1](#)^[↑] When this court reviews a district court's order reversing an agency's decision, we apply the same standard of review that the lower court applied: we determine whether the agency's decision was arbitrary or capricious. See [Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.](#), [112 Nev. 743, 751, 918 P.2d 697, 702 \(1996\)](#). According to that standard, factual findings of the State Engineer **[**5]** should only be overturned if they are not supported by substantial evidence. See *id.* Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." [Bacher v. Office of the State Eng'r](#), [122 Nev. 1110, 1121, 146 P.3d 793, 800 \(2006\)](#) (internal quotation marks omitted). We review purely legal questions de novo. See [In re Nev. State Eng'r Ruling No. 5823](#), [128 Nev. 232, 238-39, 277 P.3d 449, 453 \(2012\)](#).

The State Engineer misapplied Nevada law in finding

¹The State Engineer appears to have erroneously cited to [NRS 534.080\(1\)](#) instead of [NRS 534.100](#).

that nonuse alone established a prior owner's intent to abandon water rights

[HN2](#) [↑] "A right to use underground water . . . may be lost by abandonment." *NRS 534.090(4)* (2011).² 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. See *Town of Eureka v. Office of the State Eng'r*, *108 Nev. 163, 169, 826 P.2d 948, 952 (1992)*. Clear and convincing evidence "is beyond a mere preponderance of the evidence." See *Albert H. Wohlers & Co. v. Bartgis*, *114 Nev. 1249, 1260 n.4, 969 P.2d 949, 957 n.4 (1998)* (internal quotation marks omitted); see also *In re Discipline of Drakulich*, *111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995)* (clear and convincing evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn" (internal quotation marks omitted)).

The State Engineer's primary argument is that the district court erroneously focused on St. Clair when it found insufficient evidence of an intent to abandon **[**6]** the water right connected to the property. The relevant intent, the State Engineer claims, is that of the previous landowners who allowed the well to fall into disrepair and failed to put the water to beneficial use.

The State Engineer is correct that, [HN3](#) [↑] assuming a prior owner has taken actions consistent with abandonment, it is that owner's **[*317]** intent that controls. Otherwise, water rights could be abandoned by one property owner and then revived 50 years later by a subsequent owner, potentially resulting in over-appropriation of water. See *Haystack Ranch, LLC v. Fazzio*, *997 P.2d 548, 554 (Colo. 2000)* ("[S]ubsequent efforts by current owners to put water rights to beneficial use cannot revive water rights already abandoned by previous owners.").

The question is what constitutes sufficient evidence of a prior owner's intent to abandon. The State Engineer argues that decades of nonuse were sufficient to establish that a prior owner intended to abandon the water right.

² *NRS 534.090* has been amended twice since 2013, when the State Engineer ruled on St. Clair's application. See 2017 Nev. Stat., ch. 147, § 1, at 656-58; 2017 Nev. Stat., ch. 517, § 9, at 3505-07. We cite to the version of *NRS 534.090* in effect in 2013.

Contrary to the State Engineer's argument, however, [HN4](#) [↑] "Nevada law does not presume abandonment of a water right from nonuse alone." *United States v. Alpine Land & Reservoir Co.*, *510 F.3d 1035, 1038 (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 **[**7]** 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.").

In this case, an extended period of nonuse is evidenced by the property's inoperable well and unirrigated land. However, that nonuse evidence alone does not shift the burden to St. Clair to prove an intent not to abandon the water right.³ To shift the burden on this issue, the State Engineer would have to show additional evidence indicating an intent to abandon—for example, evidence that an owner made improvements to the land inconsistent with irrigation, or evidence that the owner failed to pay property taxes during the period of nonuse. See *Revert*, *95 Nev. at 786, 603 P.2d at 264* (considering "delinquent taxes" as evidence supporting a finding of abandonment). We find no such evidence in this record.

Considering "all the surrounding circumstances," *id.*, there **[**8]** is not clear and convincing evidence that St. Clair's predecessor intended to abandon the water right. In concluding otherwise, the State Engineer misapplied Nevada law by presuming abandonment based on nonuse evidence alone. In so doing, the State Engineer acted arbitrarily and capriciously. Therefore, the district court correctly overruled the State Engineer's ruling with regard to abandonment.

³ [HN5](#) [↑] To the extent that *Alpine Land* suggests that nonuse evidence constitutes "some evidence of abandonment" that shifts the burden to the applicant, we reject that interpretation of Nevada law. See *510 F.3d at 1038, 1038 n.5*.

The State Engineer's additional claims lack merit

The State Engineer makes several additional claims. First, the State Engineer argues that the district court exceeded its authority when it ordered the State Engineer to grant St. Clair's temporary application, rather than remanding to the State Engineer to consider factors other than abandonment. Given that the temporary application expired on June 10, 2017, this issue is moot, and we decline to address it.⁴ See [Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno, 97 Nev. 56, 58, 624 P.2d 10, 11 \(1981\)](#).

Second, the State Engineer argues that the district court abused its discretion by expanding the record on review. In particular, the State Engineer argues that the court **[*318]** erred in granting a request from St. Clair to take judicial notice of legal briefs and prior State Engineer decisions in unrelated matters. In so doing, the State Engineer **[**9]** argues, the district court went beyond determining "whether substantial evidence *in the record* supports the State Engineer's decision." [Revert, 95 Nev. at 786, 603 P.2d at 264](#) (emphasis added). However, this issue is not properly before us because the State Engineer failed to preserve it with its opposition filed five months after St. Clair's request for judicial notice. The district court properly denied that opposition as untimely. See [HNG\[↑\] D.C.R. 13\(3\)](#) (requiring written opposition to be filed within ten days of service of the opposing party's motion). We therefore decline to address this issue. [Archon Corp. v. Eighth Judicial Dist. Court, 133 Nev., Adv. Op. 101, 407 P.3d 702, 708 \(2017\)](#) (noting that [HNT\[↑\]](#) this court may decline to consider issues improperly presented to the district court).

Third and last, the State Engineer argues that the district court violated [NRC 52](#) by adopting in full an order drafted by St. Clair. Prior to approving St. Clair's drafted order, the district court held a hearing to consider the State Engineer's objections to specific language within that order. That the district court found those objections unpersuasive does not mean that the court neglected its duty to make factual findings. It is common practice for Clark County district courts to **[**10]** direct the prevailing party to draft the court's

order. See [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.").

CONCLUSION

An extended period of nonuse of water does not in itself establish clear and convincing evidence that a property owner intended to abandon a water right connected to the property. In this case, there was no additional evidence indicating an intent to abandon, so the State Engineer's finding of abandonment was unsupported by substantial evidence. Therefore, we affirm the district court's decision.

/s/ Stiglich, J.

Stiglich

We concur:

/s/ Douglas, C.J.

Douglas

/s/ Cherry, J.

Cherry

/s/ Gibbons, J.

Gibbons

/s/ Pickering, J.

Pickering

/s/ Hardesty, J.

Hardesty

/s/ Parraguirre, J.

Parraguirre

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⁴By contrast, the issue of abandonment addressed above is not moot because the State Engineer's abandonment ruling remains in effect. At least as of November 7, 2017, St. Clair had another application to change the place of diversion pending before the State Engineer. The State Engineer's ruling of abandonment on St. Clair's Proof of Appropriation would have required that application to be rejected.