

weapon (NRS 200.380; NRS 208.070; NRS 193.165), and burglary with the use of a deadly weapon (NRS 205.060; NRS 193.165) must be dismissed because (1) illegal evidence was used to obtain the indictment, (2) the grand jury system is unconstitutional, and (3) insufficient evidence was presented to the grand jury to support the charge of burglary with the use of a deadly weapon.

Evidence presented to the grand jury indicates that Frost and two confederates engaged in a plan to rob Billie Ray Tyner of marijuana and money. Frost and his confederates drove to Tyner's apartment and Frost and one of his companions entered the apartment while the other companion waited outside in the car. In the attempted perpetration of the robbery inside the apartment, Frost shot and killed Tyner.

[Headnotes 1, 2]

All contentions herein raised by Frost are without merit, except his challenge to the burglary charge. As to that, we reverse the order of the district court insofar as it relates to the allegation that a deadly weapon was used in the commission of the burglary, since it appears from the grand jury transcript that the burglary was complete upon entry of the apartment and, therefore, could not have been perpetrated with the use of a deadly weapon. *Carr v. Sheriff*, 95 Nev. 688, 601 P.2d 422 (1979).

In all other respects the order below is affirmed.

ARTHUR REVERT, ROBERT A. REVERT, AND THE A.
REVERT TRUST, APPELLANTS, v. CLARA ALBERTA
RAY AND THEODORE T. RAY, AND GEORGE HEN-
NEN, STATE ENGINEER OF THE STATE OF NEVADA,
RESPONDENTS.

No. 10246

November 28, 1979

603 P.2d 262

Appeal from the judgment of the district court affirming the decision of the State Engineer; Fifth Judicial District Court, Nye County; William P. Beko, Judge.

The district court, entered judgment affirming State Engineer's decision granting applicants' application for appropriation of five cubic feet per second of water from certain springs, and opponents appealed. The Supreme Court, Mowbray, C. J., held that: (1) a party aggrieved by decision of State Engineer in an appropriation hearing is not entitled to a de

novo hearing in district court; (2) substantial evidence supported State Engineer's finding that water company had abandoned its rights to use waters emanating from springs; (3) State Engineer abused his discretion in failing to solve opponents' critical adverse possession claim that their predecessors in interest had adversely possessed waters flowing from springs for requisite period of time prior to date of water company's abandonment of right to use waters emanating from springs, so that opponents had vested interest in disputed waters; and (4) district court should have remanded case to State Engineer for proper determination of opponents' critical adverse possession claim rather than looking to post-review brief filed by State Engineer to supply missing findings.

Reversed and remanded with directions.

Denton & Denton, Las Vegas, for Appellants.

Richard H. Bryan, Attorney General, and *George Campbell*, Deputy Attorney General, Carson City, for Respondent State Engineer.

Gary A. Sheerin, Carson City, for Respondents Clara Alberta Ray and Theodore T. Ray.

1. WATERS AND WATER COURSES.

A party aggrieved by decision of State Engineer in an appropriation hearing is not entitled to a de novo hearing in district court. NRS 533.450, subds. 1, 2.

2. WATERS AND WATER COURSES.

With respect to a limited review "in the nature of an appeal," neither district court nor Supreme Court will substitute its judgment for that of State Engineer in an appropriation hearing; such courts will not pass upon credibility of witnesses nor reweigh evidence, but, rather, will limit themselves to determination of whether substantial evidence in record supports State Engineer's decision. NRS 533.450, subds. 1, 2.

3. WATERS AND WATER COURSES.

In proceeding on application for appropriation of five cubic feet per second of water from certain springs, substantial evidence supported State Engineer's finding that water company had abandoned its right to use waters emanating from such springs, and despite existence of some conflicting evidence in record, Supreme Court would not substitute its judgment for that of fact finder. NRS 533.450, subds. 1, 2.

4. WATERS AND WATER COURSES.

Abandonment of right to use waters emanating from certain springs, requiring a union of acts and intent, is a question of fact to be determined from all surrounding circumstances.

5. WATERS AND WATER COURSES.

Applicable standard of review of decisions of State Engineer in appropriation hearing, limited to inquiry as to substantial evidence, presupposes fullness and fairness of administrative proceedings, which occurs

when all interested parties have had full opportunity to be heard, State Engineer has clearly resolved all crucial issues presented, and decision maker has prepared findings in sufficient detail to permit judicial review, and when these procedures, grounded in basic notions of fairness and due process, are not followed, and resulting administrative decision is arbitrary, oppressive, or accompanied by manifest abuse of discretion, Supreme Court will not hesitate to intervene. NRS 533.450, subd. 2; U.S.C.A. Const. Amend. 14.

6. WATERS AND WATER COURSES.

In proceeding on application for appropriation of five cubic feet per second of water from certain springs, State Engineer abused his discretion in failing to resolve opponents' critical adverse possession claim that their predecessors in interest had adversely possessed waters flowing from springs for requisite period of time prior to date of water company's abandonment of right to use waters emanating from springs, so that opponents had vested interest in disputed waters.

7. WATERS AND WATER COURSES.

In proceeding on application for appropriation of five cubic feet per second of water from certain springs, district court should have remanded case to State Engineer for proper determination of opponents' critical adverse possession claim, rather than looking to post-review brief filed by State Engineer to supply missing findings, where State Engineer's brief amounted to nothing more than post hoc rationalization for his prior error of omission and was not type of "explicit and concise" finding of fact required by applicable statute; in short, brief was not part of record, and thus should not have been considered by district court. NRS 233B.125.

OPINION

By the Court, MOWBRAY, C. J.:

The instant appeal centers about the disputed right to use the waters emanating from the Beatty (also known as Revert) Springs. Clara and Theodore Ray, contending that those waters are public waters, applied to the State Engineer for an appropriation of five cubic feet per second of water from the springs. Claiming a vested right to use those waters, Arthur Revert, Robert A. Revert, and the A. Revert Trust opposed the Rays' application. Following a hearing, the State Engineer concluded that the Beatty Springs were in fact public waters and granted the Rays' application. The district court affirmed. The Reverts appeal, contending that, as a matter of law, these rulings are clearly erroneous. We agree.

The origins of this dispute predate the enactment of Nevada's water laws. 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 the waters flowing from the Beatty Springs. In 1905, Beatty conveyed his water rights, for consideration, to the 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 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 and 1920, without transferring or selling its water rights.

Prior to 1913, however, John K. Brunk homesteaded the land on which the Beatty Springs are located. Brunk applied for and ultimately received a U.S. patent for the land. During his stay in the Beatty area, Brunk, as well as all of his successors in interest, used the waters from the Beatty Springs openly, notoriously, and without any challenge at all. In 1913, Brunk sold his interests in the Beatty Springs and surrounding lands to E. E. and E. M. Palmer who, in turn, transferred their interests to W. E. Shirk in 1922. The Reverts, appellants herein, succeeded to Shirk's interests in 1930, and since that time have exercised exclusive dominion over the disputed waters and have, in fact, supplied the town of Beatty with its water needs from those springs.

At the hearing before the State Engineer, appellants vigorously contended that they had a vested right to use the waters of Beatty Springs, dating back to an alleged adverse possession of the springs by Brunk and the Palmers. Without reaching the issue of adverse possession, the State Engineer found that Bullfrog had abandoned its rights in Beatty Springs between 1915 and 1920 and, as a result, the water rights had reverted to the State and were now public waters subject to appropriation. The Reverts appealed this decision to the district court.

After rejecting the Reverts' request for a *de novo* hearing, the district court held a limited review of the proceedings before the State Engineer. The court found that the State Engineer's determination of abandonment on the part of Bullfrog was supported by substantial evidence, but expressed some concern over the State Engineer's apparent failure to consider the possibility that the Reverts' predecessors in interest had adversely possessed the springs prior to the time of abandonment. The district court then relied on a post-review brief filed by the State Engineer which, in conclusory terms, asserted that any use of the Beatty Springs by Brunk or the Palmers had been permissive and not adverse. Treating this brief as an actual finding of the State Engineer, the district court concluded that this "finding", though supported by "less than convincing evidence," was neither arbitrary nor clearly erroneous. As a result, the district court affirmed the decision of the State Engineer. This appeal followed.

On appeal, the Reverts contend that they were entitled to a *de novo* hearing in the district court and that the findings and conclusions of the State Engineer are either not supported by substantial evidence or are, as a matter of law, clearly erroneous. To those issues we now turn.

[Headnote 1]

Contrary to appellants' suggestion, a party aggrieved by a decision of the State Engineer in an appropriation hearing is not entitled to a *de novo* hearing in the district court. The relevant statutes specifically provide that any such review shall be "in the nature of an appeal" and that the proceedings in the district court shall be "informal and summary." NRS 533.450(1) and (2). Moreover, while the legislature originally provided for such a *de novo* review, 1913 Nev. Stats., ch. 140, § 75, that provision was explicitly repealed during the next legislative session, 1915 Nev. Stats., ch. 243, § 75.

[Headnote 2]

With respect to a limited review "in the nature of an appeal," neither 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. See, e.g., *No. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 429 P.2d 66 (1967) (and cases cited therein).

[Headnotes 3, 4]

Applying this standard to the present case, we find that the State Engineer's finding of abandonment is supported by substantial evidence. Abandonment, requiring a union of acts and intent, is a question of fact to be determined from all the surrounding circumstances. *Franktown v. Marlette*, 77 Nev. 348, 364 P.2d 1069 (1961); *In re Waters of Manse Spring*, 60 Nev. 280, 108 P.2d 311 (1940). 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. The recited evidence amply supports a finding of abandonment, and, despite the existence of some conflicting evidence in the record, this court will not substitute its judgment for that of the factfinder. See *No. Las Vegas v. Pub. Serv. Comm'n*, *supra*.

[Headnote 5]

Our conclusion that substantial evidence supports the findings of the State Engineer does not, however, dispose of the

instant appeal. The applicable standard of review of the decisions of the State Engineer, limited to an inquiry as to substantial evidence, presupposes the fullness and fairness of the administrative proceedings: all interested parties must have had a "full opportunity to be heard," see NRS 533.450(2); the State Engineer must clearly resolve all the crucial issues presented, see *Nolan v. State Dep't of Commerce*, 86 Nev. 428, 470 P.2d 124 (1970) (on rehearing); the decisionmaker must prepare findings in sufficient detail to permit judicial review, *id.*; *Wright v. State Insurance Commissioner*, 449 P.2d 419 (Or. 1969); see also NRS 233B.125. When these procedures, grounded in basic notions of fairness and due process, are not followed, and the resulting administrative decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion, this court will not hesitate to intervene. *State ex rel. Johns v. Gragson*, 89 Nev. 478, 515 P.2d 65 (1973).

[Headnote 6]

In this case, appellants argued before the State Engineer that their predecessors in interest, Brunk and the Palmers, had acquired, by adverse possession against Bullfrog, a vested interest in the waters of Beatty Springs. Resolution of this claim was essential to the full and fair determination of the instant appropriation application. If the alleged adverse possession had been effected and successfully completed prior to the date of Bullfrog's abandonment, then appellants would have established a vested interest in the disputed waters. The State Engineer, however, did not address this issue. Appellants were thus deprived of a full and fair determination of their claims. By failing to resolve appellants' critical adverse possession claim, the State Engineer manifestly abused his discretion. See *Nolan v. State Dep't of Commerce*, *supra*.

[Headnote 7]

The district court, unfortunately, compounded the State Engineer's error. Though it recognized the State Engineer's failure to address appellants' critical adverse possession claim, the lower court did not remand the case to the State Engineer for a proper determination of the issue; instead, the district court looked to a post-review brief filed by the State Engineer to supply the missing findings. This was error. The State Engineer's brief amounted to nothing more than a *post hoc* rationalization for the State Engineer's prior error of omission and is not the type of "explicit and concise" finding of fact required by NRS 233B.125. The brief, in short, was not a part of the record and, thus, should not have been considered by the district court. See *Johns v. Gragson*, *supra*; *City of Reno v. Folsom*, 86 Nev. 39, 464 P.2d 454 (1970).

The judgment of the district court must, therefore, be reversed and the instant case remanded to the State Engineer for a full and fair determination of appellants' adverse possession claim. In this regard, we note that the finding of abandonment on the part of Bullfrog is supported by substantial evidence. The precise question, then, before the State Engineer on remand is whether appellants' predecessors in interest, Brunk or the Palmers, had adversely possessed the waters flowing from the Beatty Springs for the requisite period of time prior to the date of Bullfrog's abandonment. Accordingly, the judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

THOMPSON, GUNDERSON, and MANOUKIAN, JJ., and GABRIELLI, D. J.,¹ concur.

AMERICAN FENCE, INC., A NEVADA CORPORATION, ROBERT V. STEUTEVILLE, AND JACK MATTHEWS & CO., REALTORS, A NEVADA CORPORATION, APPELLANTS, v. HARRY P. WHAM AND EDWIN DOTSON, AND ANTOINETTE WHAM, RESPONDENTS.

No. 10580

November 30, 1979

603 P.2d 274

Appeal from order granting summary judgment; Eighth Judicial District Court, Clark County; Michael E. Fondi, Judge.

Lessee/purchaser and its president brought action for specific performance of option to purchase real estate and real estate agency sought recovery of broker's commission allegedly due on the purchase price. The district court, granted owner/lessors' motion for summary judgment, and plaintiffs appealed. The Supreme Court held that notice of termination of the lease signed by co-lessor effectively terminated the lease, and termination of the lease effectively terminated the option as well.

Affirmed.

¹The Governor, pursuant to Nev. Const. art. 6, § 4, designated the Honorable John E. Gabrielli, Judge of the Second Judicial District, to sit in place of THE HONORABLE CAMERON M. BATJER, who was disqualified.