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THE STATE ENGINEER CAN MANAGE SURFACE AND GROUND WATERS TOGETHER, ADMINISTERING BASINS JOINTLY, WITHOUT BREACHING DUE PROCESS BY PROVIDING USERS WITH PROPER NOTICE AND A CHANCE TO BE HEARD.

Summary

The Nevada Supreme Court found that the State Engineer maintains the authority to conjunctively manage surface and ground waters and to jointly administer multiple water basins and was therefore able to issue Order 1309. Furthermore, the Court found that the State Engineer did not violate due process protections due to the fact respondents had notice and the opportunity to be heard on the matter.

Background

In 2001, the State Engineer considered pending groundwater appropriation applications from several basins north of Las Vegas, sourced from the carbonate rock aquifer system (LWRFS), whose recharge rate and boundaries were then uncertain. Concerned about potential inter-basin impacts, the State Engineer deferred these applications, issuing Order 1169 instead. The State Engineer opined that extracting groundwater from one basin might detrimentally affect others, including springs vital to the fully allocated Muddy River. A pump test in Coyote Springs Valley ensued, where water rights holders pumped over 50 percent of their permitted water rights over two years, revealing substantial declines in water flow to high-elevation springs and the Muddy River.

Recognizing the statutory obligation to protect prestatutory vested water rights, the State Engineer acknowledged potential adverse impacts on surface water rights holders and public interest. These findings extended beyond Coyote Springs Valley to neighboring basins, leading to the conclusion that all subject basins, except Kane Springs Valley and the Black Mountains Area, shared the same perennial yield with no unappropriated groundwater remaining.

Responding to concerns about over-appropriation, in 2019, the State Engineer issued Order 1303, designating the Subject Basins (excluding Kane Springs Valley) as a joint administrative unit named the Lower White River Flow System (LWRFS). This reordering aimed at unified water rights management based on respective priority dates throughout the entirety of the LWRFS. Subsequent reports were solicited from water rights holders covering various topics, followed by an interim order that announced a future administrative hearing, held applications for groundwater rights changes in abeyance, imposed a temporary moratorium on development and construction, and allowed for extensions of time to prevent forfeitures.

Order 1309 delineated the LWRFS, now including Kane Springs Valley, as a single superbasin, setting a maximum groundwater pumping limit to protect the Muddy River and the Moapa Dace. Challenges arose as the district court found that the State Engineer overstepped statutory authority by merging distinct basins and conjunctively managing surface water and groundwater. Due process concerns were raised regarding insufficient notice and opportunity for water rights holders to voice their concerns adequately. Though the factual findings weren't

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directly contested, the legality of Order 1309 came under intense scrutiny. Appeals ensued from various parties, leading to a consolidated review process for judicial resolution.

**Discussion**

**Prior Appropriate Doctrine**

The Nevada Supreme Court found that the State Engineer’s implied duty must come from statutes where the legislature has expressly or implicitly delegated authority. Nevada, being the driest state in the nation, utilizes the prior appropriation doctrine to manage its water resources. The Nevada Supreme Court found that this doctrine grants individuals the right to use a specific quantity of water for a specific beneficial purpose if it's available in the source without prior claims. Both surface water and groundwater are governed by this doctrine. Due to water scarcity, water rights are managed by the State Engineer on behalf of the public. Water rights in Nevada can be categorized as prestatutory "vested" rights, which existed before 1913 and are protected from impairment by statutory law, and statutorily granted rights, including permitted and certificated rights. Vested water rights can be regulated under Nevada's statutory system but cannot be impaired in quantity or value.

**The State Engineer has authority to delineate the LWRFS as a single hydrographic basin for conjunctive management and joint administration.**

The Nevada Supreme Court found that NRS 533.085\(^2\) gives the State Engineer statutory authority to manage surface and ground water. The State Engineer's authority is under scrutiny, with its scope being a matter of statutory interpretation subject to de novo review, as established in *Wilson v. Pahrump Fair Water*\(^3\). Nevada's legislative framework outlines a comprehensive scheme governing water rights acquisition, change, and loss. The State Engineer's powers are strictly defined by the legislature, either explicitly or implicitly. Implied authority exists only when essential to fulfilling an express duty, as outlined in *Stockmeier v. State, Bd. of Parole Commissioners*\(^4\). The court found that if science indicates that appropriations from one basin would reduce the flow of another then the State Engineer should manage these rights.

**The State Engineer has implied authority under NRS 533.085 to create the LWRFS and to determine the maximum amount that can be pumped.**

NRS 533.085 prohibits the impairment of vested water rights in Nevada, regardless of the water source. This protection extends to prestatutory vested rights, such as those under the Muddy River Decree, which were appropriated before 1913. To safeguard these rights, the State Engineer must assess groundwater resources to determine usage and ensure protection. The interconnectedness of water sources necessitates conjunctive management by the State Engineer, allowing them to jointly administer surface and groundwater across multiple basins. This approach is supported by legislative policy declarations requiring consideration of the best available science and conjunctive management principles. Therefore, the State Engineer possesses implied statutory authority to manage water resources across basins to prevent impairment of senior vested rights under NRS 533.085.

\(^2\) **NEV. REV. STAT. § 533.085 (2022).**


The State Engineer also has the authority to issue Order 1309 pursuant to a multitude of other statutory provisions.

The legal dispute over the State Engineer's authority centered on whether various statutes grant the power to manage water basins conjunctively and administer them jointly. Appellants cite statutes such as NRS 534.080(1), NRS 533.370(2), and NRS 534.030, arguing they empower the State Engineer to redefine or combine previously established basins. However, respondents contested this interpretation, asserting no statute explicitly permits such actions.

The court examined relevant statutes to determine the State Engineer's authority. The Court found that statutory provisions implicitly mandate conjunctive management and joint administration of water resources. By interpreting terms broadly and considering implicit authority, such as setting pumping limits and investigating inadequate groundwater replenishment, the court affirms the State Engineer's authority in this regard. Moreover, the court emphasizes the importance of a flexible interpretation that aligns with the State Engineer's duty to administer water resources effectively and protect existing water rights.

The Nevada Supreme Court clarified the State Engineer's authority to manage water resources conjunctively and administer basins jointly. By interpreting statutes comprehensively and recognizing implicit authority, the court recognized the State Engineer's ability to address complex water management issues while upholding existing legal frameworks and protections for water rights.

The State Engineer has the implied authority to determine the boundaries of the source of water to protect the Moapa Dace against future appropriations.

The Nevada Supreme Court found that the State Engineer has statutorily implied authority to make factual determinations pertaining to source of water boundaries. Appellants argue that defining the LWRFS boundary was vital to shield Nevada from liability under the Endangered Species Act (ESA) concerning the endangered Moapa Dace. They cite NRS 533.367 and NRS 533.370(2) to support the State Engineer's authority in protecting endangered species. Conversely, respondents dispute the State Engineer's power to merge basins for conservation purposes, contending that the statutes do not empower him to manage existing water rights. NRS 533.367 mandates ensuring wildlife access to water sources, implying the State Engineer's role in determining water availability. Similarly, NRS 533.370(2) requires him to reject applications that threaten public interest due to insufficient water supply. While respondents claim existing agreements protect the Moapa Dace, not all parties are involved, highlighting potential gaps in species conservation efforts. However, neither statute allows compromising existing water rights solely for conservation or ESA compliance.

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There is no Due Process violation because respondents received notice and had an opportunity to be heard on the State Engineer’s order.

The Nevada Supreme Court found that respondents due process rights were not violated considering respondents had adequate notice and an opportunity to be heard in proceedings. In the case of Order 1309, respondents argued that they were not sufficiently informed about the hearing topics, violating their due process rights. However, the court found that most respondents, except those from Kane Springs Valley, received proper notice. Even Kane Springs Valley respondents received formal notice well in advance of the hearing. The court ruled that all respondents had ample opportunity to present their case on factual issues without any infringement of property rights. Moreover, the court determined that there was no burden-shifting regarding the delineation of the LWRFS boundary. Additionally, the State Engineer was not obligated to disclose his evaluation criteria before the hearing, as due process does not necessitate pre-hearing explanation of evidence analysis methods. Thus, the court concluded that there were no due process violations throughout the proceedings, ensuring fairness in the legal process.

Conclusion

The Nevada Supreme Court affirmed in part, reversed in part and remanded. In the case of Order 1309, the State Engineer's issuance was deemed within his statutory authority as he has the power to combine multiple basins into a single hydrographic "superbasin" based on a shared water source. Furthermore, the court ruled that respondents' due process rights were not violated as they received proper notice and had the opportunity to present their arguments during the Order 1309 hearing. Consequently, the district court's decision granting respondents' petitions for judicial review was reversed. Similarly, the dismissal of petitions from SNWA, MVIC, and CBD was reversed, directing the district court to grant them based on the State Engineer's statutory authority as outlined in Order 1309. Additionally, the court affirmed the district court's decision regarding the adjudication of conflicts between groundwater pumping and rights under the Muddy River Decree, stating it exceeded the scope of the hearing notice. Therefore, the district court's decision to grant SNWA's petition and reverse the dismissal of MVIC's petition was upheld, with instructions to grant it in part on remand. The case was remanded for further review under NRS 533.450 to determine if substantial evidence supports Order 1309 and for subsequent proceedings. Furthermore, the court lifted the previously filed Order Granting Stay from October 3, 2022.