

**LITIGATION****Conjunctive Management/*Sullivan et al. v. Lincoln County et al.*****February 9, 2024  
Special Report #2595**

On January 25, the Nevada Supreme Court ruled in a 7-0 decision on the consolidated appeals of the State Engineer's Order 1309 regarding the redesignation of seven hydrographic basins as one "superbasin" for the purposes of managing surface and groundwater conjunctively. In *Sullivan et al. v. Lincoln County et al.* (#84739), the Nevada Supreme Court reversed the lower court order, affirmed the authority of the State Engineer to administratively combine the basins, and held that the State Engineer complied with due process in issuing Order 1309.

The seven basins just north of Las Vegas have a lengthy history of new water right application restrictions by the Nevada State Engineer going back to 2001. In June 2020, State Engineer Adam Sullivan issued Order 1309, determining that seven basins were interconnected and withdrawals from one affected water levels in other basins. He found that pumping groundwater from these basins may reduce availability to those with vested surface water rights, including rights to the Muddy River, which was fully appropriated prior to 1905. The Muddy River is also the only habitat of the Moapa Dace, a fish protected under the Endangered Species Act. The order combined the basins into one superbasin, and named it the Lower White River Flow System (LWRFS). Additionally, the order indicated that existing appropriations of water exceeded the rate of recharge in the superbasin. The State Engineer determined that 8,000 acre-feet per year was the maximum amount that could be appropriated from the LWRFS without affecting vested water rights and other public interests, and noted that it might be less.

Several water right holders appealed to the Clark County District Court (#A-20-816761-C) for judicial review of the decision, arguing that the State Engineer lacked authority to manage both surface and groundwaters conjunctively, and to manage multiple aquifers as a single basin. They also alleged that the State Engineer had violated their due process rights. In September 2020, the district court largely sided with the plaintiff water right holders, and granted their petitions for judicial review. The State Engineer, the Southern Nevada Water Authority, several irrigation districts, and the Center for Biological Diversity appealed the decision. The appeals were consolidated for the purposes of briefing, oral argument, and disposition.

The Nevada Supreme Court held that the State Engineer was within his authority to manage the waters conjunctively, and was empowered to issue Order 1309. The court held that the State Engineer has implied authority under NRS 533.085, which prohibits granting statutory water rights to the impairment of prior vested water rights. Water rights under the Muddy River Decree are protected, pre-statutory vested rights, and the State Engineer must be able to study and regulate groundwater resources feeding the Muddy River. "If statutory rights holders deplete groundwater resources such that the flow of water to the elevated springs that feed the Muddy River is reduced to the point of impairing vested rights, then the State Engineer has the authority to invoke NRS 533.085 to protect vested rights.... We likewise decline to hold that NRS 533.085 solely applies within a single previously delineated basin and cannot extend across multiple basins regardless of the location of the supply of water. Without this authority, junior rights holders could deplete the shared water resources according to their local priority and previously granted appropriation, regardless of the impact such appropriation has on vested rights holders outside the local basin. The result would be contrary to both NRS 533.058 and the prior appropriation doctrine because it could impair the most senior prestatutory vested rights that rely on this supply of water."

The court also pointed to NRS 533.024 which requires the State Engineer to consider the best available science in making decisions about available sources of water, and to manage the appropriation, use, and administration of all waters conjunctively. The court held that the "best available science" presented at the Order 1309 hearing established that the basins are interconnected. "If the best available science indicates that groundwater and surface water in the LWRFS are interrelated and that appropriations from one reduces the flow of the other, then the State Engineer should manage these rights together based on a shared source of supply." The court also found implied authority through several other statutes.

The court found that the State Engineer had provided adequate notice and opportunity to be heard at the Order 1309 hearing, and had met due process obligations. While the respondents took issue with the criteria the State Engineer used to determine the boundary of the basin, the "Due Process Clause does not require the State Engineer to explain how he will analyze and weigh evidence prior to the evidence being submitted at a hearing." Instead, it forbids an agency from using evidence in a way that "forecloses an opportunity to offer a contrary presentation."

The respondents had also raised concerns with a previous Interim Order 1303, which reordered and administered water rights throughout the entirety of the LWRFS, and issued a moratorium on development and construction in the basins. This moratorium was lifted and the interim order was partially rescinded. "No deprivation of priority property rights occurred because Order 1309 rescinded the portion of Interim Order 1303 that reordered priority rights. Additionally, there was no loss of flow to any respondent as a result of Order 1309, much less the 'possible outcome' of curtailment, because the findings of the State Engineer were purely factual."

The Nevada Supreme Court reversed the district court's order, dismissed the respondents' petitions for judicial review, and remanded to the district court for further proceedings.