

9-1-2012

Vander Houwen v. State Dep't of Ecology, 170 Wash. App. 1009 (Wash. Ct. App. 2012)

Holly Taylor

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Holly Taylor, Court Report, Vander Houwen v. State Dep't of Ecology, 170 Wash. App. 1009 (Wash. Ct. App. 2012), 16 U. Denv. Water L. Rev. 223 (2012).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Vander Houwen v. State Dep't of Ecology, 170 Wash. App. 1009 (Wash. Ct. App. 2012)

rights were “up-gradient” from the Jordan River and were in no way affected by water levels in Utah Lake.

In addition, the appeals court determined that there was no hydrological connection between Objectors’ water rights and the Utah Lake-Jordan River system. The appeals court also determined that Objectors did not show that a reasonable probability of future injury existed. Accordingly, the appeals court held that Objectors’ claims did not show a particularized injury, which is required to establish constitutional standing.

The appeals court, however, reversed the district court’s determination that Objectors also lacked alternative standing (standing based on an appropriate party raising issues of significant public importance). To establish alternative standing, the appeals court found Objectors were an appropriate party and the issues Objectors raised were of sufficient public importance to warrant standing. The appeals court held that Objectors were an appropriate party to the litigation because they had an interest necessary to aid the court in reviewing all relevant and factual issues. This interest stemmed from the fact that Objectors were water rights holders interested in preserving water resources and ensuring compliance with state laws and regulations.

Moreover, the appeals court found that Objectors were an appropriate party because no other objections had been filed regarding the State Engineer’s proposal. As such, the appeals court held that no other party with a stake in the matter was likely to raise the issue, contrary to the district court’s finding. The appeals court also determined that the issue was of sufficient public importance to warrant Objectors having standing, in part because no court in the State had yet decided whether imported water could be recaptured and reused in the manner recommended by the State Engineer.

Ultimately, the appeals court held that the dispute would resolve a novel issue in the State and had the potential to impact a significant portion of the community. Because Objectors were an appropriate party and because the public had an interest in having the issue litigated, the appeals court held Objectors properly established alternative standing.

Consequently, after affirming the district court’s determination that Objectors lacked constitutional standing, the appeals court reversed the district court and found that Objectors had alternative standing to challenge the State Engineer’s recommendation. The appeals court then remanded the case for further proceedings.

Ryan Coyne

WASHINGTON

Vander Houwen v. State Dep’t of Ecology, 170 Wash. App. 1009 (Wash. Ct. App. 2012) (holding the Department of Ecology may deny an application for a groundwater appropriation permit where it can be shown that withdrawal of groundwater would impair existing surface water rights or detrimentally affect the public welfare).

Mr. Vander Houwen (“Vander Houwen”) owns two parcels of land near Naches, Washington, one parcel with an existing groundwater well, and one parcel without. In 1992, Vander Houwen applied to the Washington Depart-

ment of Ecology ("Ecology") to increase his wellwater right in order to supply water to an expanded orchard. Ecology found no record of a water right for the existing well, and advised Vander Houwen to apply for a groundwater permit. Vander Houwen did not apply for a permit at that time and instead hired a well driller to deepen the existing well and drill a new well on the other parcel of land. Vander Houwen later applied for two water right permits to appropriate groundwater through each well ("applications").

Meanwhile, due to hydraulic continuity, pumping of Mr. Vander Houwen's wells diminished surface water supplies for both the Naches and Yakima Rivers. The Naches River, a tributary of the Yakima River, is over-appropriated, and during dry years, the river cannot satisfy all water rights. In response, the Bureau of Reclamation designed the Yakima River Basin Water Enhancement Program ("Program") to improve river flow, fish passage conditions, and fisheries in the Yakima River Basin. In support of the Program, the Washington legislature enacted a law removing all unappropriated surface water in the Yakima River Basin. Vander Houwen's original well pumped water from the Ellensburg Formation aquifer, creating a void that drew from, and resulted in water loss to, the Naches River.

In reviewing Vander Houwen's applications, Ecology relied on WASH. REV. CODE § 90.03.290(3), which requires that Ecology to consider the following when determining whether to issue a permit: whether (i) any water is available for appropriation; (ii) the proposed use is beneficial; (iii) the appropriation impairs existing water rights; and (iv) the appropriation will detrimentally affect the public welfare. Washington law provides these requirements are applicable to groundwater in addition to surface water. After considering these factors, Ecology denied Vander Houwen's applications in 1994 and issued two cease and desist orders against him for unauthorized water use.

Vander Houwen appealed Ecology's decision and orders to the Pollution Control Hearings Board ("Board"). The Board affirmed Ecology's decision and Vander Houwen then petitioned the Yakima County Superior Court ("superior court") for review. The superior court found insufficient evidence to show that the applications impaired existing water rights or detrimentally affected the public welfare. It remanded the issue back to the Board. The Board reaffirmed Ecology's decision to deny the permit applications based on evidence presented by Ecology, which showed hydraulic continuity between the wells and the Naches River. Vander Houwen then brought an appeal to the Court of Appeals of Washington ("appeals court").

The appeals court reviewed the various administrative decisions in accordance with the Washington Administrative Procedure Act and based its review on the administrative record. Accordingly, the appeals court addressed two issues: (i) whether the appropriation would impair existing water rights; and (ii) whether the appropriation would detrimentally affect the public welfare.

The appeals court examined the evidence presented by Ecology, the high level of appropriation of the river, the removal of unappropriated water, and the amount of water Vander Houwen requested. The appeals court held, because of the hydraulic continuity between the wells and the Naches River,

Vander Houwen's use of his wells would indeed diminish surface water during dry years and likely impair existing water rights.

The appeals court also considered the public's interest in the Yakima River and its investment in the Yakima River Basin Water Enhancement Program. The appeals court determined the reduction of surface water in the Naches River would detrimentally affect the Yakima River Basin and undermine the Program; thus, proving detrimental to the public welfare.

The appeals court accordingly concluded the evidence presented by Ecology supported the Board's determination and affirmed the Board's decision to deny Mr. Vander Houwen's applications for groundwater rights.

Holly Taylor

WYOMING

Garber v. Wagonhound Land and Livestock Co., 279 P.3d 525 (Wyo. 2012) (holding although petitioners proffered sufficient evidence to establish a transfer of their water right from one property to another upstream property would not exceed historic diversion or consumptive use or diminish return flows, and that the transfer would not injure other downstream appropriators, the Wyoming State Board of Control reasonably reduced the right available for transfer by four percent to account for loss of tributary inflow resulting from the transfer).

In fall 2007, Wagonhound Land and Livestock Co., VenJohn Oil, Inc., and Steven M. VenJohn ("Wagonhound" and "VenJohn", respectively, and collectively "Petitioners") petitioned the Wyoming State Board of Control ("Board") to change the place of use, point of diversion, and means of conveyance for water appropriations on 174.8 acres held by VenJohn for use on Wagonhound's property. Wagonhound's property is located approximately thirty miles upstream from VenJohn on the North Platte River. Two tributaries, LaBonte Creek and Wagonhound Creek, enter the North Platte between the historic and proposed points of diversion. These creeks are subject to low or no flow during the late summer. Wagonhound planned to use VenJohn's water rights to irrigate crops under three central pivot sprinklers—a system very similar to the system VenJohn historically used on his land.

Intervening landowners ("Objectors") objected to the petition and the Board held a contested hearing. The Board approved the transfer of water rights attached to 152.5 of the 174.8 acres, which included reductions to account for lands VenJohn historically irrigated with contract reservoir water and a four percent loss of tributary inflow resulting from the transfer. Objectors appealed the Board's decision to the District Court of Converse County, Wyoming ("district court"). The district court upheld the Board's decision and Objectors appealed to the Supreme Court of Wyoming.

Objectors first argued the transfer would violate a Wyoming law that prohibits using more than a water right's historic use. Objectors based their claim on the assumption that Petitioner would divert at the maximum allowable rate under the right for the entire irrigation season and thereby exceed Petitioner's historic diversion and use by 328 acre-feet. Objectors further argued granting the petition would decrease flows available to them because Petitioner's pro-