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Garber v. Wagonhound Land and Livestock Co., 279 P.3d 525 (Wyo. 2012)

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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-

posed diversion point was upstream from the historic diversion point and had contributions from intervening tributaries. Applying a substantial evidence standard of review, the Court rejected Objectors' arguments, noting that such maximum diversions would be highly unlikely or impossible. The Court held the Board correctly determined the amount available for transfer based on the acreage VenJohn historically irrigated and consistent with the duty of water.

Objectors next argued that granting the petition would violate Wyoming law governing changes in the place of use of a water right. Objectors based their claim on the fact that Wagonhound's complex irrigation system could apply water from the VenJohn right to any of the fields fed by the system, regardless of whether the land was attached to the VenJohn right. The Court rejected Objector's argument as speculative and dismissive of the ability of authorities to regulate water resources. Instead, the Court held that on-the-ground factors such as climate and soil type provided sufficient evidence to support the Board's decision.

Objectors then argued that transferring the VenJohn right would violate Wyoming law governing consumptive use by reducing return flows. Objectors proffered evidence that Wagonhound diverted water into lined ponds that would allow less return flow than VenJohn's unlined ponds. After considering other evidence showing both VenJohn and Wagonhound's systems allowed similarly low amounts of return flows, the Court held that the Board's decision was reasonable.

Objectors next argued that the transfer would cause injury to the rights of other appropriators. Objectors claimed that any reduction in flow resulting from the transfer would injure junior appropriators by increasing the likelihood juniors would have to temporarily discontinue their use in order to protect senior appropriators in times of water scarcity. The Court ultimately upheld the Board's decision that, based on expert testimony, the transfer would not result in measureable changes to the flow of the North Platte that could injure other appropriators.

Objectors also argued that the transferred right should be reduced by 7.6 percent to account for loss of tributary inflow resulting from the transfer, as opposed to the four percent reduction approved by the Board. Objectors based their reduction calculation on an historic average of annual flows at VenJohn's diversion point, while Petitioner's expert advocated a calculation based on historic median flow to better account for the disparity between dry months and flood events. The Court deferred to the Board's expertise and applied the four percent reduction, noting the complexity involved in such inflow calculations.

Finally, Objectors asked the Court to reverse the Board's decision to allow Petitioners to amend their petition to meet satisfy the requirement that a petition fully identify ownership of an appropriation or establish sole ownership by the petitioner. The original petition failed to identify the ownership interests of three individuals, and the Board had directed Petitioners to amend the petition maps to reflect these omitted interests. The Court upheld the Board's decision, noting Objectors failed to explain how the Board's process was inappropriate, in violation of statutory or Board rules, or injurious to other landowners.

Accordingly, the Court rejected Objectors' arguments and affirmed the Board's various actions allowing for the transfer of the reduced VenJohn right to Wagonhound.

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