

1-1-2007

Wayment v. Howard, 144 P.3d 1147 (Utah 2006)

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Ryan Malarky, Court Report, Wayment v. Howard, 144 P.3d 1147 (Utah 2006), 10 U. Denv. Water L. Rev. 528 (2007).

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down Hix's assertion that the existence of survey lines in the original patent barred the stream from being navigable. The court held that the trial court did not err when it granted summary judgment for the Robertsons based on evidence that Hog Creek, at an average width of more than 30 feet from the mouth up, fell within the definition of a statutory navigable stream. The trial court properly held that the Robertsons and the public have a right to use and enjoy the waters of the lake formed by the damming of Hog Creek.

The three other issues upon which Hix appealed related to deficiencies in the affidavits that identified the width measurements of Hog Creek. Hix argued that the affidavits failed to show that the engineers used the appropriate methodology to measure the stream. The court, however, found that there was no specific method for measuring a stream's width for the purposes of determining its navigability. The court further looked at the nature of the affidavit testimony and found that it was appropriate lay witness opinion evidence. The court only addressed one of the affidavits in question because it alone supported the trial court's ruling of summary judgment.

Finally, the court modified the portion of the trial court's judgment that stated that both Hog Creek and the lake in question were navigable waters by finding that the governing statute applied only to streams. The court affirmed the modified judgment, upholding the summary judgment and overruling the five issues Hix raised.

Emily Bright

UTAH

Wayment v. Howard, 144 P.3d 1147 (Utah 2006) (holding that a pumping and refilling cycle of a slough can be a protected method of appropriation for a water right and that a dike which obstructs or hinders that flow constitutes interference).

Glynn F. Wayment and Edward C. England (collectively "Wayment") were successors in a water right that allowed withdrawal of 0.5 cubic feet per second for irrigation from a slough which spanned both Wayment's and Lee R. Howard's ("Howard") adjacent property. The nature of the slough did not allow a consistent flow, so Wayment made use of the water by damming the northern end of the slough and pumping water out when it filled. This method was consistent with the original 1914 Application to Appropriate Water.

Howard did not own a water right but rather owned shares in an irrigation company that built a dike on Howard's property across the southern end of the slough. The dike impeded the flow of water onto Wayment's property and delayed the slough refilling process. Howard installed two pipes in the dike at the request of the United States Army Corps of Engineers, but the dike still impeded the flow. Witnesses at trial testified that Howard intended to collect water on his property.

Wayment dredged the slough on his own property in order to improve the flow, but Howard did not allow any dredging on his property. Wayment filed suit claiming interference with his water right and Howard counterclaimed for trespass, nuisance, and negligence. The Second District Court, Ogden Department, found in favor of Wayment. Howard appealed to the Utah Supreme Court, claiming the district court did not have sufficient evidence for a finding of interference.

The court noted that a finding of interference requires the district court to find facts concerning the alleged interference and then apply those facts to the specific water right at issue. Because the issue was highly fact dependent, the court gave extra deference to the district court's finding, and put the burden of proving the facts inconclusive on Howard. First, Howard challenged the district court's finding that the pumping and refilling cycle was a protected part of Wayment's water right. Howard argued that the dike did not disrupt the amount of Wayment's water right, but only impacted the flow. He further argued that unless the pumping and refilling cycle was a protected part of the water right, there was no evidence of interference. The court agreed with the district court's finding that the pumping and refilling cycle was the basis for the water right as described in the original application. Thus, the pumping and refilling cycle was a protected method of appropriation. Second, Howard disputed the district court's finding of interference and argued that Wayment received the amount of water stated in the water right. The court upheld the district court's finding that the dike was an obstruction and hindrance to Wayment's existing water right, and therefore constituted interference.

Finally, Howard counterclaimed for trespass, nuisance, and negligence stemming from Wayment's damming of the water before pumping for irrigation, which caused water to pool on Howard's property where it usually did not. The court accepted the finding that Howard's building of the dike and his refusal to dredge his property caused the pooling, and agreed with the district court's dismissal of these claims. In addition, the court noted that Wayment's damming the slough was a protected part of the method of appropriation. Accordingly, the court affirmed the district court's finding of interference by Howard and its dismissal of Howard's counterclaims for trespass, nuisance, and negligence.

Ryan Malarky

WASHINGTON

Thompson v. Dep't of Ecology, 150 P.3d 1144 (Wash. Ct. App. 2007) (holding that the ordinary-high-water mark under the Shoreline Management Act is the line where a river causes aquatic vegetation to grow).