

9-1-2005

Wien v. Delaware, 882 A.2d 183 (Del. 2005)

Andrew L. Ellis

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

Custom Citation

Andrew L. Ellis, Court Report, *Wien v. Delaware*, 882 A.2d 183 (Del. 2005), 9 U. Denv. Water L. Rev. 245 (2005).

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.

whether the Buccinos owned one percent of the underlying bed and the rights that accompany such ownership.

Michael Graetz

DELAWARE

Wien v. Delaware, 882 A.2d 183 (Del. 2005) (holding that a statute requiring a permit for wetland activity was not unconstitutionally vague because states have legitimate power to regulate private riparian rights and that requiring a permit for activity is not an absolute prohibition of access to navigable waters).

Under the Delaware Wetlands Act, portions of appellant Daniel Wien's land fell within the definition of "wetlands." The statute prohibits a person from constructing any structure on wetlands without a permit. Wien was aware of the wetland designation, but proceeded to build a concrete "erosion barrier" on a wetland portion of his land. The Department of Natural Resources and Environmental Control ("DNREC") issued a cease and desist order, but only after the barrier was over 400 feet long.

Following the receipt of a complaint about activities on Wien's wetlands, a DNREC officer determined that appellant did not have any permits for wetland activity, and went to observe appellant's property. From the road, the officer could see the barrier, which was made of forty-pound bags of concrete. The Superior Court charged and convicted Wien for conducting activity on wetlands without a permit.

On appeal to the Delaware Supreme Court, Wien contended that the statute at issue was unconstitutionally vague and overbroad. Wien asserted that the statute was vague and overbroad because (1) it unnecessarily restricted his constitutional right to access navigable waters, (2) it did not precisely define the term "construction," and (3) it did not provide minimum guidelines for enforcement. The court found that because Delaware has legitimate power to regulate private riparian rights, the Wetlands Act did not regulate constitutionally protected conduct. The statute does not *prohibit* access to navigable waters; it merely requires a landowner to obtain a permit before conducting activities on wetlands. The court also held that although the statute did not specifically define "construction," the general public understands the ordinary meaning of the term and the statute is therefore not unconstitutionally vague. Finally, by articulating six criteria that the DNREC must consider when issuing wetland permits, the statute satisfied the constitutional requirement that legislative mandates provide adequate standards to guide discretion. The court affirmed the Superior Court's conviction on all three counts.

Wien also asserted that the lower court made evidentiary errors and gave improper jury instructions, but the court dismissed these claims.

Andrew L. Ellis

IDAHO

A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist. (In re SRBA Case No. 39576), 118 P.3d 78 (Idaho 2005) (holding appellant's claim for superior enlargement of an existing groundwater right failed whether the water at issue was groundwater or waste or drain water because all proposed enlargements cause *per se* injury to junior appropriators, and therefore, even if the water was treated as groundwater, the statute required subordination of the enlargement to water rights established prior to the statute's enactment).

Appellant A & B Irrigation District ("A & B") had the right to divert 1,100 cubic feet per second ("cfs") of groundwater from the Eastern Snake River Plain Aquifer for the irrigation of more than 62,000 acres in Jerome and Minidoka Counties. Due to the geographic layout and soil conditions of A & B's land, A & B did not consume all of the 1,100 cfs for irrigation. A portion of the irrigation water became runoff and collected in ponds and drains at the end of A & B's fields. Beginning in March 1963, A & B used some of this captured runoff to irrigate land not included within the scope of its water right.

In November 1984, A & B and its predecessor in interest, the United States Bureau of Reclamation ("BOR"), filed an application with the Idaho Department of Water Resources ("IDWR") for an expansion of their right to irrigate an additional 2,363.1 acres of land with the excess run-off. A & B and BOR subsequently withdrew the 1984 application, due to the enactment of Idaho Code § 42-1416. This new statute provided a rebuttable presumption in favor of water right holders who expanded their water rights in violation of Idaho's statutory permitting scheme, but who caused no injuries to other water right holders in doing so. Seeking a formal decree of the enlarged right, A & B and BOR filed an application in the Snake River Basin Adjudication ("SRBA"). In 1992, IDWR recommended approval of A & B and BOR's requested enlargement, subject to determination of the enlargement's priority dates based on evidence of when A & B started using the extra water.

In February 1994, the SRBA court held Idaho Code § 42-1416(2) unconstitutional, and the Idaho Legislature subsequently enacted Idaho Code § 42-1426. Section 42-1426 granted amnesty for enlargements where there was no additional diversion and no injury to junior appropriators. Where either additional diversion or injury to junior appropriators occurs, section 42-1426 required subordination of the