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Thompson v. Dep't of Ecology, 150 P.3d 1144 (Wash. Ct. App. 2007)

Jonathan P. Long

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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).

The Washington Shoreline Management Act ("Act") requires all buildings within conservancy environments remain at least fifty feet away from the ordinary-high-water mark unless the Department of Ecology ("Department") granted a variance. Jack Thompson ("Thompson") applied to the Department for a variance and the Department rejected his application. The Department defined the ordinary-high-water mark as the point where aquatic vegetation transitioned to terrestrial vegetation. Both the Shoreline Hearing Board and the Grays Harbor County Superior Court affirmed the Department's definition of the ordinary high water mark.

On appeal to the Washington Court of Appeals, Thompson had the burden of demonstrating that the Department erroneously interpreted or applied the law. Thompson argued that, under the Act, the ordinary-high-water mark is the point where soil submerges under water so frequently that no vegetation grows. However, Thompson did not provide case law supporting this interpretation of the Act. The court held that the Act defined the ordinary-high-water mark as the area where water created a mark upon the soil giving it "a character distinct from that of the abutting upland, in respect to vegetation." The plain language of the Act used vegetation in defining the ordinary-high-water mark. The court held that Department acted reasonably when it interpreted "ordinary-high-water mark" by implying a distinction between aquatic and terrestrial vegetation. Therefore, the court affirmed the Department's definition of the ordinary-high-water mark and upheld the Department's denial of a variance.

Jonathan P. Long