[X] Hearing is set:
Date: Friday, April 2, 2010
Time: 1:30 p.m.
Judge: to be determined

FRANKLIN COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE CENTER FOR ENVIRONMENTAL LAW AND POLICY AND SIERRA CLUB,

Plaintiffs,

v.

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF ECOLOGY, and EASTERDAY RANCHES, INC.,

Defendants.

and

WASHINGTON CATTLEMEN'S ASSOCIATION, COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION, NORTHWEST DAIRY ASSOCIATION, WASHINGTON CATTLE FEEDERS ASSOCIATION, CATTLE PRODUCERS OF WASHINGTON, WASHINGTON STATE SHEEP PRODUCERS and WASHINGTON FARM BUREAU,

Intervenor-Defendants.

No. 09-2-51185-6

AGRICULTURAL ASSOCIATION INTERVENORS' MEMORANDUM OF LAW

IN SUPPORT OF AGRICULTURAL ASSOCIATIONS' CROSS-MOTION FOR SUMMARY JUDGMENT

AND

IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

1.1 Introduction

This brief[1] is submitted by the Washington State Dairy Federation, Northwest Dairy Association, Washington Cattle Feeders Association, Cattle Producers of Washington, Washington State Sheep Producers and Washington Farm Bureau (hereinafter referred as the "Agricultural Associations"). The Agricultural Associations have intervened because Plaintiffs' requested relief would interrupt livestock operations throughout the State, cause unprecedented economic loss by this State's livestock producers, and result in a loss of a way of life for scores of Washington dairy farmers and livestock operators.

Plaintiffs rely on a misinterpretation of RCW 90.44.050 to divest farmers and ranchers of longstanding stock-water rights. Contrary to the plain statutory text, Plaintiffs seek a declaration by the Court that agricultural users' vested rights to withdraw stock-water, obtained through the RCW 90.44.050 permit exemption, should be limited to 5,000 gallons per day ("gpd"), or, alternatively to "small" unspecified amounts.[2] Plaintiffs assert that as a result of their proffered interpretation of RCW 90.44.050, Defendant Easterday[3] should be enjoined from withdrawing amounts of water over 5,000 gpd for the watering of stock in the feedlot being developed by Easterday.[4] Plaintiffs also seek an injunction against the State of Washington to enforce Plaintiffs' subjective policy views statewide. [5]

Plaintiffs' attempt to restrict Defendant Easterday's proposed use is merely a vehicle for Plaintiffs' invitation for the Court to legislate Plaintiffs' policy program in order to curtail

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[1] This brief is submitted pursuant to the *Stipulation and Order Re Summary Judgment Briefing Schedule and Service by Electronic Mail* agreed to by the parties and entered by the Court on January 5, 2010, which alters the CR 56 summary judgment briefing schedules.

[2] *Plaintiffs' Memorandum in Support of Motion for Summary Judgment* (hereinafter *"Plaintiffs' Memorandum"*) p. 1, *ll.* 2-17; see also, *Plaintiffs' Complaint for Declaratory and Injunctive Relief* (hereinafter the *"Complaint"*), p. 11, *ll.* 10-16.

[3] Cody Easterday and Easterday Ranches is a member of the Washington Cattle Feeders Association.

[4] *Complaint,* p. 11, *ll.* 15-16.

[5] *Id.,* p. 11, *ll.* 18-20.

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livestock operations throughout the State. The Court should reject this attempt by Plaintiffs to impose a limitation on thousands of farmers' and ranchers' vested water rights.

1.2 Summary of Argument

In this case[6], the Agricultural Associations ask the Court to conclude as a matter of law that any withdrawal of groundwater for livestock is exempt from needing a permit. RCW 90.44.050 is a clear and unambiguous statute. It relates to the method by which a party can obtain a water right. RCW 90.44.050 is not a statute that restricts the use of water, rather it is a statute that specifies when a permit for a new water use will be required and certain situations in which the requirement for a permit is exempted. Washington farmers who use groundwater for stock-watering purposes have a water right on equal footing with other water rights documented by a permit or certificate issued by the Department of Ecology ("Ecology"). Disregarding the statute's function, Plaintiffs argue that RCW 90.44.050 is a "use" statute, and that the use of water for stock-watering purposes should be limited to 5,000 gpd or to some other arbitrary "small" amount. Plaintiffs' proffered interpretation is not supported by the plain wording of the statute or by the context of the statutory scheme. Further, even if the statute were ambiguous, Plaintiffs' interpretation is inconsistent with the scant evidence of legislative intent in the record.

The Agricultural Associations also ask the Court to rule, as a matter of law, that Plaintiffs are not entitled to an injunction against Ecology which would require Ecology to interpret that withdrawals of stock-water under RCW 90.44.050 are limited to 5,000 gpd or to some other arbitrary, undefined "small" amount. Plaintiffs' requested injunctive relief does not meet the criteria for injunctive relief in Washington and is nothing more than Plaintiffs' attempted judicial imposition of a broad policy restricting stock-watering use that the legislature has not adopted.

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[6] The Agricultural Associations' requested relief could be mooted if the Court grants Easterday and CSRIA's requested relief.

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II. FACTUAL BACKGROUND

2.1 The Agricultural Associations

The Agricultural Associations are all agricultural associations or agricultural cooperatives whose members have vested rights to withdraw ground water for stock-watering purposes pursuant to RCW 90.44.50. Each of these Agricultural Associations have a group of members who rely and depend on the rights to withdraw ground water to which they are entitled pursuant to RCW 90.44.050. The individual organizations are the Washington State Dairy Federation, the Northwest Dairy Association, the Washington Cattle Feeders Association, the Cattle Producers of Washington, Washington State Sheep Producers and the Washington Farm Bureau. This coalition of Statewide Agricultural Associations represents every segment of livestock operators in the State of Washington.

The members of the Statewide Agricultural Associations would be directly impacted by Plaintiffs' requested relief in this action. Jay Gordon, on behalf of the Washington State Dairy Federation, has testified the proposed exemption directly impacts the membership of the Washington State Dairy Federation that rely on water rights obtained through RCW 90.44.050. These members have long-established water rights under RCW 90.44.050 and will be directly impacted if Plaintiffs prevail in this litigation.[7] Steven Rowe, Senior Vice President and General Counsel of the Northwest Dairy Association, testifies that many of the Northwest Dairy Association dairy farmers, who collectively produce 4.7 billion pounds of milk per year, rely on and thus have vested rights established pursuant to the RCW 90.44.050 stock-water exemption.[8] These dairies have vested rights that will be directly impacted by Plaintiffs' requested relief. Seventy percent (70%) of the members of the Washington Cattle Feeders Association rely on water from exempt wells and therefore have water rights that would be directly impacted by

[7] *Declaration of Jay Gordon*, dated September 22, 2009, p. 2, *ll.* 18-23.

[8] *Declaration of Steven Rowe*, dated September 24, 2009, p. 2, *ll.* 10-11.

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Plaintiffs' requested relief in this litigation.[9] The Washington State Farm Bureau is the largest agricultural organization in Washington, representing a membership of over 38,000 farmers and ranchers, many of whom are directly dependent on water rights for stock-watering purposes created through the RCW 90.44.050 exemption.[10] Many of those 38,000 members will be directly and negatively impacted by Plaintiffs' requested relief.

Plaintiffs' requested judicial interpretation of RCW 90.44.050 would severely impact many agricultural operations throughout Washington because agricultural operations, which have relied on rights allowed by the statute, would have those rights revoked or diminished, and would no longer have access to water they have historically relied on for stock-watering purposes. The result is that if Plaintiffs' requested relief is granted, many agricultural producers will not only have their vested water rights curtailed but will also very likely be forced out of business.[11] When agricultural producers are forced out of business, it is not only devastating to those individual producers, in some cases families who have multi-generational operations, but also damaging to the economy and employment of the state.[12] The issues raised by Plaintiffs' requested declaratory relief are of critical importance to the Agricultural Associations. The Court's ruling on these issues will have far-reaching consequences.

2.2. Washington farmers and ranchers have long relied on stock-water rights obtained through the RCW 90.44.050 exemption.

The stock-water exemption recognizing the stock-water right is specifically set forth in RCW 90.44.050. The agricultural economy, important today, was even more important in 1945 when RCW 90.44.050 was enacted. Washington's dairy farmers and livestock producers have historically formed the backbone of the State's economy. Livestock were an integral part of

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[9] *Declaration of Ed Field*, dated September 22, 2009, p. 2, *ll.* 13-15.

[10] *Declaration of Patrick Batts*, dated September 23, 2009, p. 1, *l.* 21 to 25.

[11] See the *Declarations of Gloria Edwards, Don Floren, Art Groeneweg, Gene Jenkins, Ron Mauel, Art Swannack, Jim Werkhoven,* and the *Second Declaration of Jay Gordon*, filed herewith.

[12] *Id.*

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Washington's economy prior to statehood. The livestock industry accounted for some of Washington's first exports to other states and foreign countries. Prior to the 1890s most stock were grazed on what was then known as the "free range."[13] In the early 1890s the "free range" ended and Washington's livestock industry began its modern development.[14] Between the 1890s and 1945, the livestock industry transitioned towards more "on farm" production. In 1945 Washington had a thriving livestock industry.

The numbers of livestock and their use of water in 1945 and at present, while discussed below, are not offered to prove the quantities used. It is unnecessary for the Court to make any specific findings of fact as to quantities of water used by livestock. Instead these numbers are offered to show that in 1945 when the legislature made policy decisions in adopting the groundwater code it made a reasoned choice to exempt stock-water uses from the permit system because livestock use was (and is) a small use when compared to other uses of water. In 1945, the year RCW 90.44.050 was initially adopted, there were more dairy cows in Washington than at any time between 1900 and 1967.[15] In 1945 beef cows were at their highest numbers to date and there were a record number of hogs.[16] At or about the time of the 1945 enactment of the groundwater code, the numbers of livestock and their water consumption were approximately as represented in the following table[17]:

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[13] *Declaration of Jeff Slothower In Support of: Response to Plaintiffs' Motion for Summary Judgment and Agricultural Associations' Cross-Motion for Summary Judgment* (filed herewith, hereinafter referred to as the "*Slothower Declaration*"), Exhibit 1, p. 6.

[14] *Id.*, Exhibit 1, p. 6.

[15] *Id.*, Exhibit 1, p. 7.

[16] *Id.*, Exhibit 1, pp. 9 and 12.

[17] *Id.*, Exhibit 1, pp. 7, 9, 12, 14, 16; *Declaration of Chris Cheney* (filed herewith), Exhibit A. Numbers of stock in 1945 were obtained from "Washington Livestock," a Washington State Department of Agriculture publication which examined livestock in Washington since prior to statehood through 1967. *Slothower Declaration,* Exhibit 1, pp. 1-17. The per animal daily water needs was obtained from the USGS publication "Method for Estimating Water Withdrawals for Livestock in the United States, 2005." The numbers used represent the maximum water use coefficients as described in the study. *Slothower Declaration*, Exhibit 5, p. 9.

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1945		
Estimated Number/Type of Animals[18]	**Daily Water Consumption Rate (per animal)**	**Estimated Total Daily Water Consumption**
509,086 dairy cows	65 gpd	33,090,590 gpd
909,855 beef cattle	16 gpd	14,557,680 gpd
446,749 sheep	3.3 gpd	1,474,271 gpd
178,746 hogs	8.1 gpd	1,447,842 gpd
99,219 horses	15 gpd	1,488,285 gpd
	TOTAL:	**52,058,668 gpd**

Thus, in 1945 all livestock in Washington used approximately 19 billion gallons per year, or roughly 58.3 thousand acre-feet per year.[19] Today, livestock in Washington use significantly less water. Mr. Cheney, in material prepared for the Washington State Dairy Federation, estimates about 24,661 acre-feet per year of water is used, a decrease of almost 50%.[20] Below is an estimate[21] of present stock-water needs using Mr. Cheney's calculation of the number of stock in Washington, but using the higher USGS quantities of water for daily use.[22]

CURRENT		
Estimated Number/Type of Animals[23]	**Daily Water Consumption Rate (per animal)**	**Estimated Total Daily Water Consumption**
330,584 dairy cows	65 gpd	21,487,960 gpd
845,714 beef cattle	16 gpd	13,531,424 gpd
53,220 sheep	3.3 gpd	175,626 gpd
28,545 hogs	8.1 gpd	231,215 gpd
89,739 horses	15 gpd	1,346,085gpd
	TOTAL:	**36,772,310 gpd**

[18] *Slothower Declaration*, Exhibit 1, pp. 7, 9, 12, 14, 16.

[19] 52,058,668 gpd x 365 days = 19,001,413,820 gallons per year / 325,815 = 58,320 acre-feet. (There are 325,815 gallons of water in one (1) acre-foot of water.)

[20] *Declaration of Chris Cheney*, Exhibit A.

[21] For purposes of comparison, the same coefficients have been used in the table showing current stock-water use as were used in the table showing stock-water use in 1945, p. 6.

[22] This ignores the adjustment the USGS study suggests needs to be made to the coefficients to determine numbers for a particular state and instead uses the highest coefficient of use.

[23] This excludes poultry use, which Mr. Cheney estimates equals 460 acre-feet per year. *Declaration of Chris Cheney*, Exhibit A, p. 5.

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Thus, at present it is estimated that stock in Washington use approximately 13.4 billion[24] gallons per year, or 41,195 acre-feet per year.

When stock-water use is compared to other high uses of water, however, including municipal uses and irrigation uses, it becomes clear the amount of stock-water used in Washington is not a significant amount in a statewide policy context. Prior to Easterday's transfer of the Pepiot water right, the water right authorized the user to withdraw 316 acre-feet per year to irrigate 160 acres,[25] thus, the use allowed for 1.96 acre-feet to irrigate 1 acre of farmland.[26] In 2007 there were 1,675,898 acres irrigated in Washington State.[27] Thus, using the Pepiot per-acre quantity of 1.96 acre-feet per acre as an average, irrigated agriculture uses 3,284,760 acre-feet of water every year. The stock-water use of 41,195 acre-feet per year uses approximately 1 percent the water irrigated agriculture uses.[28] In 1945 there were 520,123 acres of irrigated farmland.[29] Again, using the Easterday water right as a guide, irrigated agriculture used 1,019,441 acre-feet in 1945. Thus, in 1945 stock used approximately 5.7% the water irrigated agriculture used.[30]

The above numbers become even more telling when you consider not all of the water that stock in Washington consume is supplied by water rights obtained through the RCW 90.44.050 exemption. Many stock-water users receive water from water rights acquired prior to 1945, through the permit system, from municipal water rights or from irrigation districts.

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[24] 36,772,310 gpd x 365 days = 13,421,893,150 gallons per year / 325,815 = 41,195 acre-feet.

[25] *Declaration of William L. Cameron*, dated October 26, 2009, Exhibit 1, p. 1.

[26] This ignores the fact that crops require different quantities of water, depending on soil, temperature, etc.

[27] *Slothower Declaration*, Exhibit 2.

[28] The percentage is arrived at by dividing the estimated acre-feet used per year by stock, 41,195, by the total acre-feet used by irrigated agriculture, 3,284,760 (41,195 / 3,284,760=0.0125).

[29] *Slothower Declaration*, Exhibit 4, p. 2.

[30] The percentage is arrived at by dividing the estimated acre-feet used per year by stock, 58,320, by the total acre-feet estimated to be used by irrigated agriculture, 1,019,441 (58,320 / 1,019,441=.057).

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The 1945 legislature could reasonably have concluded that all stock-watering use is "small" compared to other water uses such as irrigated agriculture. As is the case now, in 1945 the quantity of water used by livestock compared with other uses of water, such as irrigated agriculture, was not only small but was (and is) insignificant. As a result, the legislature made a reasoned policy decision in 1945 to exempt all groundwater used by livestock from the permitting process. This policy rationally focused Ecology's administrative resources on permitting larger and more significant water uses.

The Agricultural Associations believe it is important to see a cross-section of its membership's current and historic use of stock-water. The declarations submitted by the Agricultural Associations focus on several different types of stock-water use. As the Court can see from a review of the Declarations[31], some of the agricultural producers who have vested stock-water rights are large producers of beef cattle and operators of large dairies.[32] However, there are many more agricultural producers who are much smaller operators.[33] In Washington the vast majority of farms are less than 200 acres in size.[34] These range from cattle producers who have cattle on farm to small family-owned dairies that have operated for many generations to individuals who raise sheep.[35] All of these individuals have invested time and money into the development of livestock operations and livestock watering systems relying on the water rights acquired through the RCW 90.44.050 permit exemption.[36] Several of them have inquired to Ecology about the water right they have through the exempt well statute and the need for a

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[31] See generally, the *Declarations of Gloria Edwards, Don Floren, Art Groeneweg, Gene Jenkins, Ron Mauel, Art Swannack, Jim Werkhoven,* and the *Second Declaration of Jay Gordon.*

[32] *Declaration of Don Floren*, p. 2, *ll.* 11-12; *Declaration of Art Groeneweg*, p. 2, *ll.* 10-12; *Declaration of Jim Werkhoven*, p. 2, *ll.* 7-10; *Declaration of Art Swannack*, p. 2, *ll.* 10-11.

[33] *Declaration of Gloria Edwards* p. 2, *ll.* 12-13; *Declaration of Gene Jenkins*, p. 2, *ll.* 8-9; *Second Declaration of Jay Gordon*, p. 2, *ll.* 7-8, 12-13; *Declaration of Ron Mauel*, p. 2, *l.* 9.

[34] *Slothower Declaration*, Exhibit 2.

[35] See generally, the *Declarations of Gloria Edwards, Don Floren, Art Groeneweg, Gene Jenkins, Ron Mauel, Art Swannack, Jim Werkhoven,* and the *Second Declaration of Jay Gordon.*

[36] *Id.*

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permit. Those individuals have been told by Ecology that they do not need a permit.[37] These individuals relied on those representations by Ecology and have continued to operate, their livelihoods dependant on the right they have. The numbers of employees and the amounts of money that each of these individual operators put into their respective local economies across the State vary greatly.[38] The simple fact is none of these farmers have a ready solution that would allow them to stay in business should Plaintiffs' requested interpretation of the exempt stock-water provision be adopted. Smaller producers simply will not have the resources to go buy a water right, assuming they could find one, or attempt to change that water right, and thus will be constrained to reduce their herd size so that they do not use more than 5,000 gpd.[39] Those reductions may very well reduce the economies of scale to the point where small producers are forced out of business.[40] In at least one of those situations, when the producer goes out of business, a housing development would likely spring up and a way of life will be lost.[41] Thus, it is important for the Court to consider, as it works it way through this case, that this is not the theoretical argument Plaintiffs make it out to be, but is an issue impacting many individuals and economies. Further, while Plaintiffs assert that exempt stock-water wells impair Washington rivers, streams and water resources, they offer no evidence of that claim. Instead, based on general vague assertions, they ask the Court to deprive individuals and families of established stock-water rights relied on for their livelihood and way of life.

[37] *Declaration of Gloria Edwards*, p. 2, *ll.* 21-25; *Declaration of Don Floren*, p. 2, *ll.* 20-26.

[38] See generally, the *Declarations of Gloria Edwards, Don Floren, Art Groeneweg, Gene Jenkins, Ron Mauel, Art Swannack, Jim Werkhoven,* and the *Second Declaration of Jay Gordon.*

[39] *Declaration of Gene Jenkins,* p. 2, *ll.* 14-16.

[40] See generally, the *Declarations of Gloria Edwards, Don Floren, Art Groeneweg, Gene Jenkins, Ron Mauel, Art Swannack, Jim Werkhoven,* and the *Second Declaration of Jay Gordon.*

[41] *Declaration of Jim Werkhoven*, p. 2, *ll.* 24-25.

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III. LEGAL AUTHORITY AND DISCUSSION

3.1 Standards for Summary Judgment

The object and function of the summary judgment procedure is to avoid a useless trial where there are no issues of material fact; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.[42] The party opposing the motion for summary judgment must, by affidavit or other extraneous material, show specific facts demonstrating that there is a genuine issue of material fact for trial.[43] A material fact is one upon which the outcome of the litigation depends.[44] The Court, in ruling upon a motion for summary judgment is permitted to pierce the pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues.[45]

3.2 As a matter of law, water rights acquired through the RCW 90.44.050 permit exemption are not limited to 5,000 gpd.

3.2.1 The Groundwater Code and RCW 90.44.050

The State of Washington's groundwater code was codified as Chapter RCW 90.44 RCW in 1945.[46] The legislative history on RCW 90.44.050 and the entire groundwater code is nonexistent. There are no documents regarding the legislative history from when the Ground Water Code was enacted in 1945. House Bill 536 (Representative H. Rosellini) and Senate Bill 366 (Senator Albert Rosellini) were introduced on February 26, 1945. House Bill 536 was

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[42] *Fahn v. Cowlitz County*, 93Wn.2d 368, 610 P.2d 857 (1980), appeal after remand 95 Wn.2d 679, 628 P.2d 813 (1981); *Palmer v. Waterman S.S. Corp.*, 52 Wn.2d 604,328 P.2d 169 (1958), certiorari denied 359 U.S. 985, 79 S.Ct. 940, 3 L.Ed.2d 933 (1959).

[43] *Plaisted v. Tangen*, 72 Wn.2d 259, 432 P.2d 647 (1967); *Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 954, 421 P.2d 674 (1966); *Retail Store Employees Local 631 v. Totem Sales, Inc.*, 20 Wn. App. 278, 579 P.2d 1019 (1978).

[44] *Ruffer v. St. Frances Cabrini Hospital*, 56 Wn. App. 625, 784 P.2d 1288 (1990), review denied; *State v. Kelly*, 114 Wn.2d 1023, 792 P.2d 535 (1990).

[45] *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960).

[46] See generally, *State of Washington, Dept. of Ecology, Stockwater Working Group Report* (2009),http://www.ecy.wa.gov/programs/WR/hq/pdf/swtr/011010_stock-water_workingroup_finalreport.pdf.

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referred to the House Judiciary Committee and Senate Bill 366 was referred to the Senate Appropriations Committee. On March 2, 1945 the House Judiciary Committee reported the bill without recommendation. The House bill was read the second time on March 3, the second reading being considered the third, and the bill was placed on final passage. The bill passed with a vote of 96 yeas and 3 absent or not voting. On March 4, the Senate read House Bill 536 for the first time, suspended the rules and read the bill for the second time, and referred the bill to the Senate Judiciary Committee. The Senate Judiciary Committee reported the bill back with a do pass recommendation on March 6. The Senate passed the bill on third reading on March 7, with a vote of 42 yeas, 1 nay, and 3 absent or not voting. The Senate moved to postpone indefinitely Senate Bill 366 on March 8.

House Bill 536 was approved by the Governor on March 19 and took effect on June 7, 1945.[47]

The section of the groundwater code at issue in this case is RCW 90.44.050, which exempts from the permit requirement "any" withdrawal of water for stock-watering purposes. RCW 90.44.050 currently provides as follows:

> After June 6, 1945, no withdrawal of public ground waters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or

[47] See generally, *State of Washington, Dept. of Ecology, Stockwater Working Group Report* (2009),http://www.ecy.wa.gov/programs/WR/hq/pdf/swtr/011010_stock-water_workingroup_finalreport.pdf.

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> agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of ground waters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.[48]

Despite the three amendments to the statute, the legislature has never changed the language at issue in this case to wit: "any withdrawal of public ground waters for stock-watering purposes".

When originally enacted in 1945, RCW 90.44.050 read as follows:

> SEC. 5. After the effective date of this act no withdrawal of public ground waters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the Supervisor of Hydraulics and a permit has been granted by him as herein provided: *Except, however,* That any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a non-commercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand (5,000) gallons a day, or for an industrial purpose in an amount not exceeding five thousand (5,000) gallons a day, is and shall be exempt from the provisions of this act: *Provided, however,* That the Supervisor of Hydraulics from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and quantity of that withdrawal.[49]

The statute was amended in 1947. The 1947 Amendment added the language at the end of the section:

> PROVIDED, FURTHER, That at the option of the party making withdrawals of ground waters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same

[48] RCW 90.44.050 (emphasis added).

[49] *Declaration of Janette Brimmer* (hereinafter, the *Brimmer Declaration*), Exhibit I.

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> requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.[50]

The statute was amended a second time in 1987. The 1987 amendment, in the first sentence, substituted "department" for "Supervisor of Hydraulics" and "it" for "him," and, in the middle of the sentence substituted "department" for "Supervisor of Hydraulics."

The statute was amended again in 2003[51]. The 2003 amendment changed the list of exemptions to include the withdrawal of public groundwater for domestic use for certain types of residential development provided for in RCW 90.44.052. RCW 90.44.052 reads as follows:

> (1) On a pilot project basis, the use of water for domestic use in clustered residential developments is exempt as described in subsection (2) of this section from the permit requirements of RCW 90.44.050 in Whitman county. The department must review the use of water under this section and its impact on water resources in the county and report to the legislature by December 31st of each even-numbered year through 2016 regarding its review.
>
> (2) For the pilot project, the domestic use of water for a clustered residential development is exempt from the permit requirements of RCW 90.44.050 for an amount of water that is not more than one thousand two hundred gallons a day per residence for a residential development that has an overall density equal to or less than one residence per ten acres and a minimum of six homes. (3) No new right to use water may be established for a clustered development under this section where the first residential use of water for the development begins after December 31, 2015. [52]

The purpose of the Groundwater code is to regulate and control the groundwater of the State.[53] The Groundwater code also applied Chapter 90.03 RCW, which regulates surface

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[50] Laws of 1987, Ch. 109 § 108.

[51] Laws of 2003, Ch. 307 § 1.

[52] RCW 90.44.052.

[53] RCW 90.44.020.

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waters, to the appropriation and beneficial use of groundwater.[54] As the attorney general noted in AGO 2005 No.17, RCW 90.44.050 provides:

> (1) a general rule requiring a water right permit for any withdrawal of public groundwater; (2) a proviso excepting identified categories of withdrawals from the general rule—i.e., allowing them without a permit; (3) a second proviso allowing Ecology to require persons making withdrawals excepted from the permit requirement to provide information about the means and amounts of such withdrawals; and (4) a third proviso giving persons, authorized by the statute to withdraw less than 5,000 gallons a day without a permit, the option to obtain a water right through the generally applicable permit process.[55]

Once water is withdrawn and beneficially used under the exemption, including water withdrawn for stock-watering purposes, the water beneficially used is a water right.[56] Plaintiffs admit that an exempt withdrawal is a water right.[57] *Campbell & Gwinn* is a case in which the Supreme Court examined the domestic use exemption of RCW 90.44.050. In *Campbell & Gwinn*, the Supreme Court ruled that:

> While the exemption in RCW 90.44.050 allows appropriation of groundwater and acquisition of a groundwater right without going through the permit or certification procedures of chapter 90.44 RCW, once the appropriator perfects the right by actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected water rights. RCW 90.44.050. Thus, it is subject to the basic principle of water rights acquired by prior appropriation that the first in time is the first in right. " '[T]he first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants....' "[58]

The treatment of any withdrawal of water for stock-watering purposes as a water right subjects that right to the "basic principal of water rights acquired by prior appropriation that the first in

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[54] *Id.*

[55] AGO 2005 No.17.

[56] RCW 90.44.050; see also, *Ecology v. Campbell & Gwinn, L.L.C.,* 140 Wn.2d 1, 43 P.3d. 4 (2002).

[57] *Complaint*, p. 7, *ll.* 12-15.

[58] *Campbell & Gwinn* at 9 (emphasis added).

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time is the first in right.[59] Because an exempt stock-water withdrawal is subject to the first in time, first in right doctrine, and because RCW 90.44.020 subjected the surface water code to groundwater, a water right for stock-watering purposes created pursuant to RCW 90.44.050 is also subject to other protections and obligations afforded water rights in this State under Chapters 90.03 and 90.44 RCW.

3.2.2 RCW 90.44.050 exempts from permitting the withdrawal of any amount of groundwater used for stock-watering purposes.

3.2.2.1 The Law on Statutory Construction

In this case, the Court should determine and declare that RCW 90.44.050 allows unlimited withdrawals of water for stock-water purposes without a permit. Interpretation of a statute is a question of law.[60] This Court's purpose in this case is to ascertain and carry out the Legislature's intent.[61] If RCW 90.44.050's meaning is plain from the face of the statute, then effect must be given to the "plain meaning" of RCW 90.44.050 as an expression of the Legislature's intent.[62] To determine whether the meaning of RCW 90.44.050 is plain, one must consider the ordinary meaning of words, basic rules of grammar, the statutory context and the statutory scheme as a whole, including related statutes.[63] The plain meaning of RCW 90.44.050 should be determined by "what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."[64] In *Campbell & Gwinn*, the Supreme Court concluded the meaning of one of the RCW 90.44.050 exemptions, the domestic use exemption,

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[59] *Id;* see also, RCW 90.03.010.

[60] *In Re Forfeiture of One 1970 Chevrolet*, 166 Wn.2d 834, 215 P.3d 166 (2009).

[61] *Campbell & Gwinn* at 9.

[62] *Campbell & Gwinn* at 9-10; see also, *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

[63] *In Re Forfeiture of One 1970 Chevrolet* at 838-839; *Campbell & Gwinn* at 11-12.

[64] *Campbell & Gwinn* at 10-11.

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was apparent from the plain language of the statute and related statutes and that RCW 90.44.050 is not ambiguous.[65]

If, after considering "all that the Legislature has said", the statute is susceptible to more than one meaning, and it is therefore not plain, then the Court should apply other rules of statutory construction, including the review of legislative history to resolve the ambiguity and determine what the statutory language means.[66] A statute is not ambiguous merely because it is subject to more than one conceivable interpretation. Rather, ambiguity depends on the existence of more than one reasonable meaning.[67]

3.2.2.2 The meaning of RCW 90.44.050 is plain: Any withdrawal of water for stock-watering purposes is exempt from needing a permit and upon beneficial use becomes a perfected water right.

RCW 90.44.050 plainly states that groundwater withdrawals for stock-watering are exempt from the permit requirement. Under RCW 90.44.050, the exemption for stock-water is specifically not limited to withdrawals of less than 5,000 gallons a day. RCW 90.44.050's language creates four classes of water use which are exempt from needing a permit:

1. any withdrawal for stock-watering purposes,
2. any withdrawal for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area,
3. any withdrawal for single or domestic group uses in an amount not exceeding 5,000 gallons a day or as provided in RCW 90.44.052, or
4. any withdrawal for an industrial purpose in an amount not exceeding 5,000 gallons a day.[68]

Of these four categories of withdrawals, the single or group domestic use and the industrial use are expressly limited to withdrawals of less than 5,000 gallons a day. In other words, if the domestic or industrial use is over 5,000 gpd, the appropriation is not exempt from

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[65] *Id.* at 12.

[66] *In Re Forfeiture of One 1970 Chevrolet* at 839.

[67] *In Re Forfeiture of One 1970 Chevrolet* at 839.

[68] RCW 90.44.050 (emphasis added); see also, *Kim v. PCHB*, 115 Wn. App. 157, 61 P.3d 1211 (2003).

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the permit system and the appropriator, before using groundwater for domestic or industrial uses in an amount in excess of 5,000 gpd, must obtain a permit.[69]

The second category of water use exempt from needing a permit, watering a lawn or a noncommercial garden, is not limited by quantity of water used but is limited by acreage. Thus if the water is withdrawn and used to irrigate more than a half-acre of lawn and garden the withdrawal is not exempt from the permit system.

The exemption for "any" withdrawal for stock-watering purposes contains no language limiting the amount of the withdrawal, but instead is limited by purpose, i.e., stock-watering purposes. The grammatical structure and plain language of this section of RCW 90.44.050 indicates that groundwater withdrawals for stock-watering purposes are not limited. In *Cerrillo v. Esparza*[70], the Supreme Court decided a similar statutory interpretation issue. In *Cerrillo*, the court was examining an exemption to the Washington Minimum Wage Act for agricultural workers, which provides in part "Any individual employed... ."[71] The court noted that "Washington courts have consistently interpreted the word "any" to mean" every" and "all."[72] In interpreting RCW 49.46.130(2) the court concluded the use of the word "any" meant the exemption applied to "all workers who deliver agricultural commodities, not just those who work for farmers."[73] This is consistent with the dictionary definition of "any." "Any" means:

> ***adj***...1. one, no matter which, of more than two *[any* pupil may answer*]* 2. some, no matter how much or how little, how many, or what kind *[*he can't tolerate *any* criticism*]* 3. without limit *[*entitled to *any* number of *admissions]* 4. even one; the least amount or number of *[*I haven't *any* dimes*]* 5. every *[any* child can do it*]* 6. of considerable size or extent *[*we won't be able to travel *any* distance before nightfall*]* –***pron. sing. & pl.*** any one or

[69] *Campbell & Gwinn* at 12.

[70] 158 Wn.2d 194, 142 P.3d 155 (2006).

[71] *Cerrillo* at 200.

[72] *Id.* at 203.

[73] *Id.* at 203.

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> ones; any amount or number –***adv.*** To any degree or extent; at all *[*is he *any* better this morning?*]* [74] (emphasis added)

The word "any" had substantially the same meaning in 1945. The 1933 *Oxford English Dictionary* defines "any" as follows:

> …In affirmative sentences it asserts concerning being or thing of the sort named, without limitation as to which, and thus constructively of *every* one of them, since every one may in turn be taken as a representative…
>
> …With a specially quantitative force=A quantity or number however great or small. (When emphatic, expressed in French by the partitive article *du, de la, des.*)
>
> …esp. when the substantive to which it refers has already been expressed, or when it is followed by *of*, as 'any of these books, any of the liquid.'…[75]

Thus, the legislature's use of the word "any" in RCW 90.44.050 means withdrawal of stock-water in any quantity.

If the legislature had intended to limit withdrawal of water for stock-watering purposes to 5,000 gpd or to some other quantity (or purpose, i.e., withdrawal of water to provide water for stock-water purposes of 300 animals), the legislature could have used the same language used to limit domestic and industrial uses.[76] In *In Re Forfeiture of One 1970 Chevrolet*, the court noted the legislature has options in using different language when it noted "In fact, the legislature could have expressed its intent in a variety of ways. But the legislature chose to use the term "knowledge."[77] In RCW 90.44.050 the legislature chose to use the word "any" withdrawal for "stock-watering purposes" without any qualifying or limiting the language. The legislature chose the word "any," the legislature knew what the word "any" means and this Court should

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[74] *Webster's New World Dictionary of the American Language*, Second College Edition (1974).

[75] *Slothower Declaration,* Exhibit 5.

[76] 300 is the arbitrary number of cows Plaintiffs assert the exemption should be limited to. *Plaintiffs' Memorandum*, p. 27, fn. 20.

[77] *In Re Forfeiture of One 1970 Chevrolet* at 839.

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give effect to the use of the word "any" in the statute. It is also important to note that the legislature had opportunities to insert language to limit stock-water withdrawals in some manner as part of the amendments between 1947 and 2003. Instead, the legislature chose to leave the exemption limited to purpose, i.e., stock-water.

In statutory text, the express mention of one term implies exclusion of similar terms not mentioned by the legislature.[78] Applying this principle to the stock-watering exemption in RCW 90.44.050, the express mention of limitations on the other exemptions in RCW 90.44.050 for irrigation of lawn and garden, domestic and industrial uses means that no such limitation may be implied for stock-watering purposes. Reading the language of the statute it is clear the legislature intended quantity limits on some uses but not on the withdrawal of water for stock-watering purposes. With stock-water the legislature expressly said any withdrawal was exempt from needing a permit.

Finally, the unlimited stock-water exemption is consistent with the context of the statutory scheme. In *Campbell & Gwinn*, the court interpreted RCW 90.44.050 "in the context of the entire act" in which it appears.[79] When the legislature extended the administrative water rights system to groundwater in 1945, it integrated the surface water code in chapter 90.03 RCW with the groundwater code.[80] As a result, a range of statutory provisions applies to protect senior rights, prevent impairment, and generally manage competing interests in water resources according to the priority system (*i.e.*, "first in time is first in right"). For example, if groundwater becomes scarce or limited in a designated subarea, Ecology may regulate the use of groundwater so that uses are abated in inverse order of priority date.[81] There is a specific process

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[78] *Expressio unius est exclusio alterius* is a canon of statutory construction and means to express one thing in a statute implies the exclusion of the other. *In Re Detention of Williams*, 147 Wn.2d 476, 491 (2002) (citations omitted).

[79] *Campbell & Gwinn*, (quoting *Estate of Lyons v. Sorenson*, 83 Wn.2d 105, 108, 515 P.2d 1293 (1973)).

[80] RCW 90.44.020.

[81] RCW 90.44.130.

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in RCW 90.03.380 for change or transfer of a water right that includes a multipart test to protect against impairment of other water users. RCW 90.44.020 provides for a superior court adjudication to determine competing claims to a particular source of groundwater. Because RCW 90.44.050 provides for exempt withdrawals to be treated like other water rights, these and other provisions of the Water Code apply. Thus, exempt withdrawals – including stock-water – are not "wholly unregulated" as Plaintiffs claim; to the contrary, they fit in with the overall statutory scheme as the legislature intended.

3.2.3 As a matter of law, Plaintiffs are not entitled to injunctive relief against Ecology.

To obtain injunctive relief, a plaintiff must establish (1) a clear legal or equitable right; (2) that plaintiff has a well-grounded fear of immediate invasion of that right by the entity against which injunction is sought; and (3) the acts about which he complained of are either resulting or will result in actual and substantial injury to Plaintiff.[82] These three basic requirements must be satisfied regardless of whether the injunction sought is temporary or permanent.[83] The requirements to obtain an injunction are applicable when an injunction is sought against the State of Washington or one of its Departments.[84] Here, there are no material facts in dispute and as a matter of law Plaintiffs are not entitled to injunctive relief requiring the Department of Ecology to interpret the stock-water permit exemption as limited. Plaintiffs' failure to establish any of the three criteria results in the request for injunctive relief being denied.[85]

As a preliminary matter, we defer to Defendant Easterday to present the several factual and legal arguments against Plaintiffs' requested injunctive relief as to the Easterday Ranch. As

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[82] *Tyler Pipe Indus. v. Dep't of Revenue,* 96 Wash.2d 785, 792, 638 P.2d 1213 (1982).

[83] *Federal Way Family Physicians v. Tacoma Stands Up for Life,* 106 Wash.2d 261, 265, 721 P.2d 946 (1986).

[84] *Northwest Gas Ass'n v. Washington Utilities Transp.*, 141 Wn. App. 90, 168 P.3d 443 (2007); see also, *Tyler Pipe* at 785.

[85] *Federal Way Family Physicians* at 266.

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against Ecology, Plaintiffs have not met their burden to identify any legal or equitable rights that are at immediate risk of invasion. The first two prongs of the test cannot be satisfied by generalized concerns about streamflows.

Perhaps most significantly, Plaintiffs utterly fail to satisfy the third prong of the test: actual and substantial injury. Plaintiffs' bald assertion that stock-water wells harm the water resources of the State is insufficient. The Court should reject Plaintiffs' theory that actual injury may be presumed by operation of law, and the Court should require Plaintiffs to prove the stringent requirements for injunctive relief against the State. The Agricultural Associations submit that holding Plaintiffs strictly accountable is especially important where, as here, the requested relief is intended to have the drastic and far-reaching effect of depriving third-parties of vested property rights.

3.3 There are no genuine issues of material fact and Plaintiffs' Motion for Summary Judgment must be denied.

3.3.1 Plaintiffs' suggested interpretation of RCW 90.44.050 ignores the plain meaning of RCW 90.44.050 and the Chapter 90.03 and Chapter 90.44 RCW regulatory scheme.

Plaintiffs' strained argument that the plain language of RCW 90.44.050 limits the quantity of exempt withdrawals for stock-water fails. Plaintiffs ignore the legislature's use of the word "any" as well as basic rules of grammar. In order to construe the plain meaning of RCW 90.44.050 as Plaintiffs suggest the Court would be required to rewrite the statute. The Court should not add words or clauses that the legislature has chosen not to add.[86] The Court should assume the legislature meant exactly what it said.[87] Thus, the legislature's use of the word "any" means any withdrawal of water for stock-water, not just withdrawals of 5,000 gallons per day or less. The Court should not subject RCW 90.44.050, which is unambiguous, to statutory construction, as Plaintiffs suggest.[88] Even if the Court believes the legislature intended

[86] *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.2d 792 (2003).

[87] *Id.* at 727.

[88] *Cerrillo*, 158 Wn.2d at 201.

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something different that was not adequately expressed in the plain language the Court may not rewrite the statute to achieve that result.[89] Attempts by a court to legislate from the bench are strictly prohibited in Washington.[90]

Plaintiffs argue it makes no sense for the limited categories to exist with the "unlimited" stock-watering exemption.[91] The stock-water exemption makes perfect sense as a legislative compromise between those who wanted complete state authority and regulation of groundwater through the permitting system and those who did not want to encumber a defined group or type of use, a use providing a valuable product to society, which use is small when compared to higher and more intensive uses of water, with the trouble and expense of applying for a water right. This is reflected in the four exemptions enacted into the groundwater code. Plaintiffs point to what they refer to as the legislature's intent to protect and conserve groundwater resources as further support for their suggested interpretation of RCW 90.44.050.[92] Plaintiffs' statutory citations do not alter or modify the plain meaning of RCW 90.44.050. Plaintiffs again ignore the plain meaning of RCW 90.44.050, which is that with respect to one type of use – water for stock-water purposes – the legislature decided to exempt any withdrawal from the need to get a permit. Plaintiffs also ignore the fact that, once appropriated, any withdrawal of stock-water is treated exactly like any other water right in the State.

The context of RCW 90.44.050 indicates the legislature intended to exempt a type of use, withdrawal of groundwater for livestock watering purposes, from the permit system, but otherwise subject the rights to the surface water and groundwater regulatory scheme. The stock-water exemption does not, as Plaintiffs assert, "consume" the groundwater code because groundwater withdrawals are "wholly unregulated." The stock-water exemption is only an

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[89] *Cerrillo*, 158 Wn.2d at 201.

[90] *Id*; see also, *Delgado* at 727.

[91] *Plaintiffs' Memorandum*, p. 13, *ll.* 4-9.

[92] *Plaintiffs' Memorandum*, p. 18, *l.* 4 to p. 19, *l.* 10.

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exemption to the process of obtaining a water right once the water rights is acquired it is regulated like any other water right. Plaintiffs turn a blind eye to what the legislature said and what the Supreme Court recognized in *Campbell & Gwinn.* Once water is beneficially used under the exemption then it is a water right subject to every other facet of the groundwater code and surface water code, both of which have as a stated purpose to regulate the use of the waters, both surface and groundwater, of the State. The notion that the use is "wholly unregulated" is inaccurate.

3.3.2 Plaintiffs' assertion that the use of water for stock-watering purposes was included in the domestic exemption has been rejected by the Supreme Court and should be rejected by this Court.

Fatal to Plaintiffs' argument that the legislature intended the stock-water exemption to be included in the 5,000 gpd domestic exemption, is the fact that the Supreme Court in its decision in *Campbell & Gwinn* did not discuss, reference or consider, let alone rule, that the separate exemption for any stock-water withdrawal is part of the 5,000 gpd domestic use exemption.[93]

3.3.3 The last two provisos of RCW 90.44.050 do not change the plain meaning that any quantity of water withdrawn for stock-watering purposes is exempt from the permit requirement.

Plaintiffs incorrectly interpret the last two sentences of RCW 90.44.050.[94] First, the statute provides that Ecology may require information from any person making "any such small withdrawal" as to the means or amount of the withdrawal. It was reasonable for the 1945 legislature to view statewide stock-water withdrawals as "small" relative to other categories of water use, such as irrigation. This is still the case today. Second, RCW 90.44.050 also gives persons making withdrawals "not exceeding 5,000 gallons a day" without a permit the option of applying for and obtaining a permit. Neither of these two sections change, modify nor alter the legislature's clear use of the words "any withdrawal for stock-watering purposes." Neither of

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[93] *Campbell & Gwinn* at 10.

[94] *Plaintiffs' Memorandum*, p. 15, *l.* 4 to p. 19, *l.* 3.

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these two sections of RCW 90.44.050 limits the amount of groundwater that may be withdrawn without a permit for stock-watering purposes as Plaintiffs contend. One section allows Ecology to track withdrawals exempt from the permit requirement and to obtain information concerning any of these withdrawals. This section is consistent with the Agricultural Associations' argument that RCW 90.44.050 fits within the regulatory scheme set forth above.

3.3.3.1 Even if the Court concluded RCW 90.44.050 is ambiguous, the Court should conclude the legislature intended to allow unlimited withdrawals of water for stock-watering purposes.

If the Court were to disagree with and ignore the Supreme Court's decision in *Campbell & Gwinn* and conclude RCW 90.44.050 is ambiguous and thus it is appropriate to examine legislative history, the Court will arrive at the same result because there is no legislative history. In their Memorandum, Plaintiffs acknowledge this and then they suggest the Court look to the historical "context" and to Ecology's interpretation of RCW 90.44.050.[95] Plaintiffs incorrectly assert this in their discussion of the "plain meaning" of RCW 90.44.050. The Supreme Court's rulings on statutory construction in *Campbell & Gwinn*, *In Re Forfeiture of One 1970 Chevrolet* and *Cerrillo* do not suggest historical context, nor Ecology's interpretation, are appropriate in determining legislative intent from the plain meaning of a statute.[96] Rather, historical context, legislative intent and agency interpretation should only be reviewed in trying to determine what the legislature meant when and only when a statute is ambiguous.[97]

Historical context and background facts do not support Plaintiffs' argument. The materials submitted by Plaintiffs and discussed at length are not legislative history and are irrelevant.[98] Plaintiffs refer to numerous materials in their brief,[99] which they claim demonstrate

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[95] *Plaintiffs' Memorandum*, pp. 19-24.

[96] *Campbell & Gwinn* at 12; *In Re Forfeiture of One 1970 Chevrolet* at 838-839 and *Cerrillo* at 201.

[97] *Id.*; see also, *Fray v. Spokane County,* 85 Wn. App. 150, 157, 931 P.2d 918.

[98] *Plaintiffs' Memorandum*, p. 19, *l.* 12 to p. 23, *l.* 19.

[99] *Id.*, pp. 21-23.

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a legislative intent that is inconsistent with the literal, grammatical reading of the stock-watering exemption as unlimited. Plaintiffs do not include any committee reports, testimony by committee chairs, or testimony by legislators who sponsored or supported the law.

Among the materials supplied by Plaintiffs is the Association of Washington Cities publication titled "1945 legislative program of the Washington cities"[100], which is nothing more than a lobbyist's wish list. A proponent's legislative agenda is not evidence of legislative intent.[101] The reason for this rule is obvious: Proponents of legislation do not always get what they want. Nothing in the Association of Washington Cities publication acknowledges the need for or existence of any exemptions to the groundwater permit rule. The logical explanation is that as the bill went through the legislature, it was reworked to recognize other competing water uses, such as livestock producers. Accordingly, evidence regarding the Association of Washington Cities' goals is irrelevant to the legislative intent underlying the RCW 90.44.050 exemptions.

The 1946 report by the Department of Conservation and Development[102] ("DCD"), which discusses DCD's 1946 view of the groundwater exemption as it relates to domestic supply is similarly irrelevant to determining legislative intent. The statement does not discuss the contemporaneous legislative intent in passing the stock-watering exemption. Instead, it may be rationalization by an agency grappling with the implementation of the new groundwater regulatory scheme and implementing groundwater into the surface water regulatory scheme. The DCD also may have been trying to assert its positions through publication of a subsequent report in order to sway the legislature in the 1947 amendment.

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[100] *Brimmer Declaration*, Exhibits B and C.

[101] *King County v. Taxpayers,* 104 Wn.2d 1, 5, 700 P.2d 1143 (1985); see also, *Department of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).

[102] *Brimmer Declaration*, Exhibit F.

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Exhibit D to the *Brimmer Declaration* is a 1942 report on rural water supply[103], which was prepared by the Washington State Planning Council. This document deals exclusively with domestic use of water. It is notable that the report separated uses between domestic and stock-water. The report focuses mainly on dealing with the economics of providing water to an area to be newly developed in the State of Washington. The report recognizes one option is to "tap the underground supplies."[104] The report then recognizes that issues with "tapping the underground supplies have been assigned for special study to investigators of Problem No. 22."[105] In other words, there is another study that we do not have, which discusses the use of groundwater. Interestingly, the study references an average of 150 on-farm animals. However, the study acknowledges that number is based upon maps of development that had occurred in 1942. This ignores future development, the majority of which occurred in this part of the state in the 1950s, 1960s and early 1970s. Once again, this is not proper or admissible legislative history. Further, it would be surprising if the legislature relied on a "Tentative Draft" for any legislation without knowing what the final report actually stated.

Plaintiffs also provide a Farm Improvement Investigation of Problem 9, which was prepared after the groundwater code became law. The statement of problem 9 indicates it has nothing to do with stock-water and instead focuses on "what feasible means could be adopted or created (a) to help insure an adequate level of living, and (b) to minimize the financial commitments of needy settlers in providing suitable and essential improvements."[106] It deals with the leveling, clearing and fencing of the land. The report discusses machinery needs along with seeds and plants. Instead the focus is on the domestic water supply. In their discussion of the historical context, Plaintiffs make no mention of the fact that in 1945 there were more dairy

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[103] *Id.*, Exhibit D. The document specifically says it is a draft submitted for review and criticism. The full document is not in the record, so we do not know what changes the "review and criticism" resulted in.

[104] *Brimmer Declaration*, Exhibit D, p. 4.

[105] *Id.*

[106] *Id.*, Exhibit E, p. "x.'

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and beef cows in Washington than there ever had been since 1900.[107] They ignore that hogs were also at their highest number.[108] They ignore that when compared to irrigated agriculture stock-water use is small. The legislature was much more likely to be aware of the strength and vitality of Washington's livestock industry and its small water needs relative to municipal and irrigated agricultural needs in 1945 than the arcane and incomplete studies Plaintiffs cite. It is just as plausible to assume the livestock industry pushed back on the legislature after seeing the Washington Association of Cities' legislative agenda to exempt livestock from the permit system and prevailed.

3.3.3.2 Contrary to Plaintiffs' assertions[109], Ecology's interpretation that stock-water withdrawals are not limited is not a "new" interpretation.

The subject of Ecology's interpretation of RCW 90.44.050 is an interesting theoretical question but is simply irrelevant in this case. Ecology's interpretation of RCW 90.44.050 is not new. Throughout the case Plaintiffs repeatedly refer to the interpretation that an unlimited quantity of water may be withdrawn for stock-watering purposes under RCW 90.44.050 as a "new" interpretation by Ecology. That is simply not the case. The evidence is that Ecology's interpretation and enforcement of the exemption and whether it is limited or not has varied since 1945. In short, it has always depended upon whom you asked within the Department of Ecology and it has depended upon the region. The material from the *DeVries*[110] case is not evidence that is relevant to that issue. First, the Ecology memorandum is legal argument and not "facts" of the type to be considered in a summary judgment motion. Neither is the declaration of an Ecology employee. What Ecology may have done in one administrative case is not relevant to determining legislative intent in 1945.

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[107] *Slothower Declaration*, Exhibit 1, pp. 7-11.

[108] *Id.* at p. 13.

[109] *Plaintiffs' Memorandum*, p. 23, *ll.* 21 to p. 26, *l.* 11.

[110] *DeVries v. Dept. of Ecology*, PCHB No. 01-073 (2001).

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In addition, the *DeVries* materials are not representative of agency practice since 1945. In many instances, individuals made contact with Ecology in western and eastern Washington and with the Governor's office.[111] Those individuals were told they did not need a permit to withdraw water for stock-watering purposes and that they could not receive a water right because the stock-water exemption allowed unlimited quantities of water to be withdrawn.[112] Thus, Plaintiffs' claims that Ecology changed its position in 2005 when the attorney general issued an opinion that all stock-water use is exempt are without merit.[113]

3.3.4 RCW 90.44.050 stock-water exemption was not intended for small "homestead levels" of use.

Plaintiffs argue that the stock-water permitting exemption was intended to be one of a "bundle of uses necessary to sustain an average rural household."[114] They further assert it was never intended nor did the legislature contemplate use for large "industrial" operations like a 30,000 head feedlot.[115] Despite these unsubstantiated expressions of what the legislature intended, Plaintiffs then assert that Easterday is "an industrial operation" and not entitled to utilize the exemption.[116] Plaintiffs' argument is unsupported, without merit and should be rejected by this Court. In order to make this argument, Plaintiffs completely ignore the language and the plain meaning of the statute. They continue to insist that the stock-water exemption is somehow linked to the domestic and "nonindustrial" levels of use.[117] The linkage they assert exists was not recognized by the Supreme Court in *Campbell & Gwinn.*[118] They then assert that

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[111] *Declaration of Gloria Edwards*, p. 2, *ll.* 21-25; *Declaration of Don Floren*, p. 2, *ll.* 21-26; *Declaration of Art Groeneweg*, p. 2, *l.* 22.

[112] *Declaration of Gloria Edwards*, p. 2, *ll.* 21-25; *Declaration of Don Floren*, p. 2, *ll.* 21-26.

[113] See AGO 2005 No. 17; see also, *Brimmer Declaration*, Exhibit A.

[114] *Plaintiffs' Memorandum*, p. 26, *l.* 14.

[115] *Id.*, p. 26, *l.* 16.

[116] *Id.*, p. 26, *l.* 16.

[117] *Plaintiffs' Memorandum*, p. 26, *l.* 14.

[118] *Campbell & Gwinn* at 12.

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"reports before the legislature at the time provided for approximately 283 animals on a standard farm."[119] There is no indication that Table 1, contained within Exhibit D of the *Brimmer Declaration*[120] was in front of the legislature. In fact, Exhibit D of the *Brimmer Declaration* is a "tentative draft" submitted for review and criticism, not for publication. We do not know when it was finalized. We do not know if the legislature was aware of it. The stamp on the face of the tentative draft of the final report says "OFFICE COPY to be included with the preliminary draft of Subproblem 12, Problem No. 28."[121] We know from an examination of Exhibit E of the *Brimmer Declaration* that Problem 9 was not completed until June 15, 1945[122], which is after the groundwater code was passed and mere days after it took effect. It is not known whether Subproblem 12, Problem No. 28 was ever finalized. So, for Plaintiffs to make this argument, they have not only ignored the plain meaning of the statute, they have ignored their own evidence, however arcane.

Plaintiffs then point to "societal conditions."[123] When the legislature enacted the groundwater code dairy cows were at their highest number in a 67-year period. Beef cows were at their highest number that they had been at since 1900. It is equally plausible that the legislature specifically exempted any stock-water uses because of the critical importance of the agricultural economy to the State of Washington. It is also equally plausible that they looked at the collective quantity of livestock and concluded that any amount of water livestock would use is small and would have no impact, particularly when considered in context of the quantity of water used by irrigated agriculture.

Plaintiffs' cite to the *Kim* case, presumably as authority that the Easterday operation is characterized as an industrial use and therefore it is limited by 5,000 gallons. The *Kim* logic is

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[119] *Plaintiffs' Memorandum*, p. 26, *l.* 22.

[120] *Brimmer Declaration*, Exhibit D, p. 4.

[121] *Brimmer Declaration*, Exhibit D, cover page.

[122] *Id.*, Exhibit E, p. III.

[123] *Plaintiffs' Memorandum*, p. 26, *l.* 24.

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not applicable in this situation because the legislature specifically provided a permit exemption for water rights for livestock before it provided the permit exemption for water for industrial purposes. The argument is completely without merit and is contrary to the plain meaning of RCW 90.44.050.

IV. CONCLUSION

In sum, Plaintiffs disagree with the policy choice that the legislature made in 1945 and did not disturb in the 1947 and 2003 amendments. It may well be that Plaintiffs have some meritorious policy arguments that the groundwater laws should be reformed, but their subjective view of what the law should be does not entitle them to any judicial relief. Accordingly, the Agricultural Associations ask the Court to reject Plaintiffs' proffered interpretation of RCW 90.44.050, grant the Agricultural Associations' Cross-Motion for Summary Judgment and uphold the plain meaning of the statute. The Court should declare that the plain meaning of RCW 90.44.050 is that any withdrawal of groundwater used for stock-watering purposes is exempt from needing a permit.

DATED this 18 day of February, 2010.

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