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SUPERIOR COURT OF WASHINGTON FOR FRANKLIN COUNTY

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

Plaintiffs,

vs.

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

Defendants.

No. 09-2-51185-6

MOTION TO STRIKE DECLARATIONS

I. REQUEST FOR RELIEF

The defendant Easterday Ranches, Inc. moves to strike the declarations and portions of declarations indicated below for the reasons indicated. The declarations contain hearsay, non-expert opinion, conjecture, and other inadmissible evidence and should not be considered by the court. None of the declarations addresses the real issue before the court. While they all express some general angst over the supply of well water in Eastern Washington none points to any admissible evidence of injury in fact.

1 **II. PREVIOUS RULING**

2 The court previously considered a motion to strike much of the same information in
3 considering our motion to dismiss this case on the basis of standing because of the petitions'
4 failure to exhaust their administrative remedies. The court ruled, "(2) DENIES Easterday
5 Ranches' Motion to Strike in its entirety. The Court has reviewed the declarations and can
6 keep in mind the appropriate weight to be accorded those declarations as this case proceeds."
7 While courts have discretion to admit evidence, hearsay is inadmissible. ER 802. Five Corners
8 cannot admit lay opinion or technical information by way of declarations unless the declarant is
9 able and qualified to make the statement. While several of the historical documents are
10 authentic in accord with CR 44, they fail to meet the administrative test RCW 5.44.040. To the
11 extent such documents contain other than facts, they are inadmissible. *Steel v. Johnson*, 9
12 Wn.2d 347, 115 P.2d 145 (1941).

13 **III. DECLARATION OF SCOTT J. COLLINS**

14 Paragraphs 5, 6 and 10 of Mr. Collins declaration are hearsay. ER 802. While they are
15 unobjectionable for the purpose of historical continuity, it does not appear Collins was alive in
16 1930 or 1906. ER 803(a)(23).

17 Paragraph 11 other than the first sentence is inadmissible hearsay information from
18 John Coiner and the Department of Ecology. ER 802. To the extent that it consists of lay
19 opinion testimony, it is inadmissible under ER 701.

20 Paragraph 14 also is unsubstantiated opinion by a non-expert. ER 701. It is unsupported
21 by anything other than conjecture. The purpose of this section is to move to the conclusion that
22 Collins will be without water. It is inadmissible under ER 701 and to the extent that that it is
23 admissible as expert testimony it is unsupported by any factual basis and is inadmissible under
24 ER 703.

1 Paragraph 15 to the extent that it is not self-serving conjecture about Collins' plans is
2 hearsay evidence from the Department of Ecology and is inadmissible under ER 802.

3
4 **IV. DECLARATION OF JOE OSBORN, M.D.**

5 Dr. Osborn identifies himself as a medical doctor. He does not have any expertise in
6 either hydrology or geology and to the extent that he expresses any opinions concerning water
7 and aquifers, his testimony is inadmissible. ER 701 & 702.

8 Paragraph 6 is an attempt to introduce into evidence as fact a government report. While
9 report might well constitute the part of the basis of an expert opinion or be considered by an
10 expert in forming an opinion, its relevance to this case is neither explained nor appropriate. It
11 is inadmissible as an exception to the hearsay rule under ER 803.

12 Paragraphs 7 – 9, 13 – 14 are a recitation of CELPs participation in various litigation or
13 administrative hearings. It is irrelevant to any issue in this case. ER 402.

14 Paragraph 11 is inadmissible hearsay and expert opinion that is unsupported and
15 inadmissible under ER 802, 701, and 703.

16 Paragraph 14 is political commentary by CELP and also contains speculation and
17 conjecture about what will or will not happen with Columbia River water. It is likewise
18 unsupported. ER 402, 703.

19 Paragraphs 15 – 20 are political statements. They contain unsupported opinion
20 testimony as previously noted and matters that at best can be described as marginally relevant.
21 For example paragraph 19 refers to a Benton County Planning Commission decision involving
22 a dairy farm in Patterson. Patterson is 50 miles from Easterday's operation and separated by
23 the Horse Heaven Hills. Osborn does not connect the relevance of that decision to issue here.

24 Both paragraphs 20 contain opinion and hearsay concerning exempt wells and express
25 opinions for which Dr. Osborn does not appear to be qualified. ER 702. This section

1 condemns the practice of allowing exempt wells but all of the Five Corners plaintiffs rely upon
2 exempt wells.

3 Paragraphs 21 – 24 express opinions concerning Easterday Ranches operations for
4 which Dr. Osborn does not appear to be qualified. He repeatedly refers to inadmissible hearsay
5 evidence in the form of reports and studies that he has attached. ER 702, 803, 402.

6 Paragraph 28 asserts that CELPs only purpose in this litigation is to obtain a court
7 determination that the Attorney General’s opinion concerning RCW 90.44.050. That, however,
8 is not the issue before the court.

9
10 **V. DECLARATION OF PATRICIA A. SUMPTION**

11 The declaration of Patricia A. Sumption is apparently intended to demonstrate that the
12 Sierra Club has an interest in ground water in the State of Washington. To the extent, however
13 that Sumption expresses opinions and make statements concerning the allegation of ground
14 water she has stated no expertise in the matter and her declaration should be stricken to the
15 extent that it does. ER 701, 702.

16 Paragraphs 10 – 14 are conjecture and political speech concerning Ms. Sumption’s
17 position on various matters. They are irrelevant and should be disregarded and stricken by the
18 court. ER 402.

19 **VI. DECLARATION OF SHELIA POE**

20 Paragraph 3 of Ms. Poe’s testimony is hearsay concerning the history of her family in
21 Franklin County. ER 802 For the purpose of providing historical context for her declaration it
22 is not objectionable but to the extent it contains substantive matters it is hearsay.

23 Paragraph 7 attempts to introduce expert opinion by a lay witness concerning the
24 aquifers under her farm. It is inadmissible under ER 701, 702 and 703 as it is unsupported by
25 any relevant authority.

1 Paragraph 9 is unsupported conjecture even if we assume that it is proper opinion
2 testimony of an expert most of it is conjecture about her plans and would not be admissible
3 under ER 702.

4 Paragraph 12 is purely political speech and Ms. Poe's disingenuous position that
5 Easterday but not her should be required to obtain a permit. ER 402.

6
7 **VII. RALPH ALLEN JONES' DECLARATION**

8 Like Mr. Collin's, and Ms. Poe's declarations, Jones' declaration contains a good deal
9 of hearsay concerning the history of their agricultural activities. Insofar as it places his
10 statement in its historical context, it is acceptable but to the extent that it attempts to establish
11 facts it is inadmissible. ER 802. For example, in Paragraph 7 Mr. Jones relates his father
12 telling him he could not use any more than 5,000 gallons of water per day to water his 200 head
13 of stock without a permit. This is an effort to insert expert testimony by an unqualified
14 individual in the form of hearsay. ER 701, 702, 802.

15 Paragraph 8 is likewise just conjecture that his farm would not be economically viable
16 without water and it like the others is unsupported by appropriate bases for that testimony. It is
17 objectionable under ER 702 and 703.

18 Paragraph 9 contains hearsay by the Department of Ecology and these matters should
19 all be stricken. ER 802. Mr. Jones has observed "lakes, ponds and other surface waters dry up
20 due to the use of ground water resources in the area." As Easterday has not been drawing water
21 until now presumptively Mr. Jones, his neighbors and their permit exempt wells did the drying
22 up. This paragraph also contains a lay opinions of the locals and is inadmissible under ER 701.

23 **VIII. DECLARATION OF JANETTE BRIMMER DATED JANUARY 21, 2010**

24 **A. Exhibits A and C**

1 Are the Association of Washington Cities 1945 legislative program and these
2 documents lack relevance because they contain no specific proposals except the desire of the
3 city that state impose some regulation on ground water withdrawals. It can be conceded that
4 there were reasons for the legislature to take action, however, nothing in AWC's legislative
5 program indicates that it sponsored the bills or had any hand in their drafting. Nothing in this
6 submission relates to stock watering. ER 402.

7 **B. Exhibit E is labeled "a tentative draft."**

8 For whatever relevance it may have, Exhibit F is not an official report and does not
9 appear to have ever have been intended as an official report. It was collected from papers of
10 Governor Waldren and is apparently just a working copy.

11 **C. Exhibit F**

12 Exhibit F is a portion of an investigation prepared by the Dept. of Interior. Exhibit F
13 does not appear to bear any relevance to the issues in question because the statement of
14 problem is "What feasible means could be adopted or created (a) to help ensure an adequate
15 level of living and (b) to minimize the financial commitments of needy settlers and providing
16 suitable and essential improvements?" The report is dated June 15, 1945, and by its nature
17 clearly does not touch other than in the most tangential way on the matters related to stock
18 watering. It is not relevant. ER 402.

19 **D. Exhibit H**

20 Exhibit H should be stricken because it is not relevant to the discussion at hand.
21 McChesney recites adjudications made by the Dept. of Ecology and its predecessor, however
22 all of the adjudications were based upon the "carrying capacity of the land." ¶ 15. It would
23 seem that most of these adjudications predate feedlots which did not become common until the
24 1960s and 1970s. ER 402.

