

NO. 84632-4

**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Appellants,

v.

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

Respondents,

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-Respondents.

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AGRICULTURAL ASSOCIATIONS' RESPONSE  
TO OPENING BRIEF OF APPELLANTS

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## I. INTRODUCTION

The Agricultural Associations<sup>1</sup> intervened in this case because each association represents Washington farmers and family farms in the livestock industry who rely on stock-water to produce valuable commodities, add to the economy of this State and maintain a way of life. Appellants attempt to divest farmers, ranchers and dairies of longstanding stock-water rights. Contrary to the plain statutory meaning of RCW 90.44.050, Appellants sought a declaration by the trial 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 some "small" unspecified amounts. CP 790; see also, CP 1108. Relying on this interpretation Appellants asserted Respondent Easterday Ranches, Inc. ("Easterday")<sup>2</sup> should be enjoined from withdrawing amounts of water over 5,000 gpd for the watering of stock in a feedlot being developed by Easterday and that the Respondents the State of Washington and the Department of Ecology ("Ecology") (hereinafter collectively the "State Respondents") should be required to enforce Appellants' subjective policy views statewide. CP 1108.

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<sup>1</sup> This brief 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").

<sup>2</sup> Cody Easterday and Easterday Ranches is a member of the Washington Cattle Feeders Association.

In RCW 90.44.050 the legislature exempted a type of use from the water rights permitting process – water for stock-watering purposes – and provided that all water withdrawn for stock-watering purposes would be limited by beneficial use and regulated by both the surface water and groundwater codes. Appellants’ proffered interpretation of RCW 90.44.050 is inconsistent with the plain meaning of RCW 90.44.050, related statutes and basic water law concepts and is not supported by *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d. 4 (2002), or *Kim v. Pollution Control Hearing Bd.*, 115 Wn.App. 157, 61 P.3d 1211 (2003).

Appellants’ requested judicial interpretation of RCW 90.44.050 will, if adopted, severely impact the agricultural sector of the economy throughout Washington. Existing agricultural operations, which have relied on rights allowed by the statute, could have those rights placed in jeopardy under Appellants’ theory. The result is that if Appellants’ 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. See CP 237; CP 234; CP 220; CP 231 CP 223; CP 225; CP 227-228; and CP 218.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

The Franklin County Superior Court did not err because it correctly applied settled statutory construction law to conclude the plain meaning of RCW 90.44.050 is that “permit-exempt withdrawals of public

groundwater for stock-watering purposes are not limited to any quantity”.  
CP 23.

### III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

The issue in this case is: Is any quantity of water withdrawn from the ground exempt from the permitting requirements of RCW 90.44.050 when that water is withdrawn and used for stock-watering purposes?

### IV. PROCEEDINGS BELOW

Appellants originally commenced this case in Thurston County Superior Court. The Thurston County Superior Court granted Respondent Easterday’s motion to change venue to Franklin County Superior Court. The Franklin County Superior Court denied Easterday’s motion to dismiss. CP 821-822. The Franklin County Superior Court then signed stipulated orders allowing the Agricultural Associations and others to intervene. After intervention the parties filed cross motions for summary judgment. CP 520-521; CP 326-328; CP 819-820; CP 499-500. The court denied the Appellants’ motion for summary judgment. CP 19-25. The court granted and denied in part the motions for summary judgment filed by Easterday and CSRIA. CP 19-25. The court granted the State Defendants and Agricultural Associations’ motions for summary judgment, concluding as a matter of law “RCW 90.44.050 is unambiguous and the plain meaning of RCW 90.44.050 is that permit-exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity.” CP 19-25.

## V. STATEMENT OF THE CASE

### 5.1 The Agricultural Associations

The Agricultural Associations are agricultural associations or agricultural cooperatives whose members have vested water rights to withdraw ground water for stock-watering purposes pursuant to RCW 90.44.50. The members water rights are vested because the individual agricultural producers have withdrawn water from the ground, beneficially used the water withdrawn for stock-watering purposes, and therefore have a vested water right under the prior appropriation doctrine for withdrawals under the RCW 90.44.050 permit exemption. Each of these Agricultural Associations have 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 the dairy farmers, cattle producers, sheep producers and Washington farmers and ranchers who produce livestock in the State of Washington.

The members of the statewide Agricultural Associations would be directly impacted by Appellants' requested relief in this action. The RCW 90.44.050 permit exemption for stock-water directly impacts the membership of the Washington State Dairy Federation that relies on water

rights obtained through RCW 90.44.050 without a permit. CP 1195-1594<sup>3</sup> (Portion of *Record on Transfer of Venue: the Declaration of Jay Gordon*, dated September 22, 2009, p. 2, ll. 18-23). Dairy farmers like Jay Gordon, whose family has operated a family dairy since 1872 and Art Groeneweg, whose family has operated a family dairy since 1967 relied on the RCW 90.44.050 permit exemption to withdraw water to use in the operation of their dairy farms, put that water to beneficial use, and thus have vested stock-water rights. CP 216-218 and 219-221. Many other of the Northwest Dairy Association dairy farmers, who collectively produce 4.7 billion pounds of milk per year, rely on and have vested rights established pursuant to the RCW 90.44.050 stock-water exemption that will be directly impacted by Appellants' requested relief. CP 1195-1594 (Portion of *Record on Transfer of Venue: the Declaration of Steven Rowe*, dated September 24, 2009, p. 2, ll. 10-11).

Cattle producer Don Floren, a member of the Washington Cattle Feeders Association, relies on water rights obtained through the RCW 90.44.050 permit exemption to provide water for his 7,000-head cattle feeding operation. CP 233. Like Mr. Floren, seventy percent (70%) of the members of the Washington Cattle Feeders Association rely on water from exempt wells and therefore have water rights that could be directly

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<sup>3</sup> References to the record transferred from Thurston County Superior Court, identified by the Franklin County Superior Court in its Supplemental Index of Clerk's Papers on Appeal as "Record on Transfer of Venue," and numbered 1195-1594, are hereinafter numbered "CP 1195-1594," followed by the original document title and page number for the Court's ease of reference.

impacted by Appellants' requested relief in this litigation. CP 1195-1594 (Portion of *Record on Transfer of Venue: the Declaration of Ed Field*, dated September 22, 2009, p. 2, ll. 13-15). 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. CP 1195-1594 (Portion of *Record on Transfer of Venue: the Declaration of Patrick Batts*, dated September 23, 2009, p. 1, ll. 21-25). All of the Agricultural Associations members who rely on water rights obtained through the exemption could be directly and negatively impacted by Appellants' requested relief. Jay Gordon, Art Groeneweg and Don Floren do not have a ready solution that would allow them to stay in business should Plaintiffs' requested interpretation of the exempt stock-water provision be adopted. CP 217-218; CP 220; CP 234. 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 compelled to reduce their herd size. CP 223. These reductions may very well reduce the economies of scale to the point where small producers are forced out of business. CP 237; CP 234; CP 220; CP 231; CP 223; CP 225; CP 227-228; and CP 217-218. In Mr. Werkhoven's situation, if his family dairy goes out of business, a housing development would likely spring up and a way of life will be lost. CP 227.

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. CP 237; CP 234; CP 220; CP 231; CP 225; CP 227-228; and CP 217. The issues raised by Appellants' requested declaratory relief are of critical importance to the Agricultural Associations. The Court's ruling on these issues will have far-reaching consequences.

## 5.2 Stock-Water Use in Washington

The Agricultural Associations submitted evidence of a cross-section of their memberships' current and historic use of stock-water. The declarations submitted by the Agricultural Associations focused on several different types of stock-water use. Some of the agricultural producers who have vested stock-water rights are large producers of beef cattle and operators of large dairies. CP 233; CP 220; CP 227; CP 227. However, there are many more agricultural producers who are much smaller operators. CP 236; CP 231; CP 217; CP 223. In Washington the vast majority of farms are less than 200 acres in size. CP 269. 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. See generally, CP 235-237; CP 232-234; CP 219-221; CP 230-231; CP 222-223; CP 224-225; CP 226-229; and CP 216-218. 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. See generally, CP 235-237; CP 232-234; CP 219-221; CP 230-231; CP 222-223; CP 224-225; CP 226-229; and CP 216-218. 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. See generally, CP 235-237; CP 232-234; CP 219-221; CP 230-231; CP 222-223; CP 224-225; CP 226-229; and CP 216-218.

Over the years, agricultural producers have inquired to Ecology about the water right they have through the exempt well statute and the need for a permit. Those individuals have been told by Ecology that they do not need a permit. CP 236; CP 233; CP 220. These individuals relied on those representations by Ecology and have continued to operate, their livelihoods dependant on the water right they acquired through the RCW 90.44.050 permit exemption.

### 5.3 Stock-Water in the Context of the State's Agricultural Economy

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 and are an integral part of Washington's economy. The livestock industry accounted for some of Washington's first exports to other states and foreign countries. In the early 1880s Washington's livestock industry began its modern development. CP 256. Between the 1890s and 1945, the livestock industry transitioned towards more "on farm" production. In 1945

Washington had a thriving livestock industry. The Agricultural Associations' evidence submitted to the Superior Court as to stock numbers was not disputed and was 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. CP 257; CP 259; CP 262; CP 264; CP 266; CP 238-246<sup>4</sup> CP 251-267<sup>5</sup>; and CP 286.

The Agricultural Associations introduced undisputed evidence establishing the numbers of stock and the quantity of water consumed by stock at present and in 1945. 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. CP 257. In 1945 beef cows were at their highest numbers to date and there were a record number of hogs. CP 259 and 262. 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 (CP 257, 259, 262, 264, 266; CP 241-246):

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<sup>4</sup> 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.

<sup>5</sup> 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.

1945		
Estimated Number/Type of Animals (CP 257, 259, 262, 264, 266)	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
	<b>TOTAL:</b>	<b>52,058,668 gpd</b>

Thus, in 1945 all livestock in Washington used approximately 19 billion gallons per year, or roughly 58.3 thousand acre-feet per year.<sup>6</sup> 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%. CP 241-246. Below is an estimate<sup>7</sup> 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.<sup>8</sup>

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<sup>6</sup> 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.)

<sup>7</sup> 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.

<sup>8</sup> To be conservative, this estimate excludes 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.

<b>CURRENT</b>		
<b>Estimated Number/Type of Animals<sup>9</sup></b>	<b>Daily Water Consumption Rate (per animal)</b>	<b>Estimated Total Daily Water Consumption</b>
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	1,346,085 gpd
	<b>TOTAL:</b>	<b>36,772,310 gpd</b>

Thus, at present it is estimated that stock in Washington use approximately 13.4 billion<sup>10</sup> gallons per year, or 41,195 acre-feet per year. Appellants neither contested this evidence nor offered different evidence of historical or current livestock water usage.

When stock-water use is compared to other high uses of water, including municipal uses and irrigation uses, it is apparent the amount of stock-water used in Washington is not a significant amount in a statewide policy context. By way of example Mr. Easterday acquired a water right to satisfy his part of his livestock water needs (the “Pepiot Water Right”).<sup>11</sup> Prior to Easterday’s change and transfer of the Pepiot Water Right to his cattle feeding operation, the Pepiot Water Right had

<sup>9</sup> This excludes poultry use, which Mr. Cheney estimates equals 460 acre-feet per year. CP 245.

<sup>10</sup> 36,772,310 gpd x 365 days = 13,421,893,150 gallons per year / 325,815 = 41,195 acre-feet.

<sup>11</sup> The Pepiot water right transfer is not at issue in this case. Similarly, the type of water uses included within the phrase “stock-watering purposes” are not at issue even though the parties asserted differing interpretations below. CP 63; CP 126-127; CP 157. Resolution of what uses are included within the phrase “stock-watering purposes” is not necessary to resolution of the issues on appeal.

authorized the withdrawal of 316 acre-feet per year to irrigate 160 acres (CP 965) thus, the use allowed for 1.96 acre-feet to irrigate 1 acre of farmland.<sup>12</sup> In 2007 there were 1,675,898 acres irrigated in Washington State. CP 269. Thus, using the Peplot Water Right 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 is approximately 1 percent of the water irrigated agriculture uses.<sup>13</sup> In 1945 there were 520,123 acres of irrigated farmland. CP 276. Again, using the Peplot Water Right as a “consumption” guide, irrigated agriculture used 1,019,441 acre-feet in 1945. Thus, in 1945 stock used approximately 5.7% of the water that irrigated agriculture used.<sup>14</sup>

Moreover, 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, or since 1945, through the permit system, from municipal water rights or from irrigation districts. Thus the amount of water used for stock-watering purposes which is relied on by the RCW 90.44.050 exemption is even less.

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<sup>12</sup> This ignores the fact that crops require different quantities of water, depending on soil, temperature, etc.

<sup>13</sup> 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 ( $41,195 / 3,284,760 = 0.0125$ ).

<sup>14</sup> 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 ( $58,320 / 1,019,441 = .057$ ).

While Appellants assert that exempt stock-water wells impair local farmers in the Five Corners area, Washington rivers, streams and water resources, they offer no evidence of that claim. Appellants ignore the fact that their groundwater wells are senior in time to Easterday's and as a result Appellants have a wide range of available remedies if and when Easterday's use interferes with Appellants' use. See Section 6.2.4 herein. Instead, based on general vague assertions, Appellants ask the Court to deprive individuals and families of established stock-water rights relied on for their livelihood and way of life. It is important for the Court to consider, as it works its way through this case, that this is not the theoretical argument Appellants make it out to be, but is an issue impacting many individuals and economies.

5.4 The Groundwater Code and the RCW 90.44.050 Permit Exemption

The State of Washington's groundwater code was enacted in 1945 and codified as Chapter RCW 90.44 RCW.<sup>15</sup> The 1945 legislative history on RCW 90.44.050 and the entire groundwater code is nonexistent. There are no committee reports, no testimony before committees, no record of bill reports and no evidence of floor debates. There are no legislative documents regarding the legislative history from when the groundwater code was enacted in 1945 in the record.

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<sup>15</sup> 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\\_workinggroup\\_finalreport.pdf](http://www.ecy.wa.gov/programs/WR/hq/pdf/swtr/011010_stock-water_workinggroup_finalreport.pdf).

The record of enactment shows only that the legislature acted promptly to adopt the groundwater code. House Bill 536 (Representative H. Rosellini) and Senate Bill 366 (Senator Albert Rosellini) were introduced on February 26, 1945. House Bill 536 was 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.<sup>16</sup>

The purpose of the groundwater code was and is to regulate and control the groundwater of the State. RCW 90.44.020. The groundwater code also applied Chapter 90.03 RCW, which regulates surface waters, to the appropriation and beneficial use of groundwater. RCW 90.44.020.

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<sup>16</sup> See generally, *State of Washington, Dept. of Ecology, Stockwater Working Group Report (2009)*, [http://www.ecy.wa.gov/programs/WR/hq/pdf/swtr/011010\\_stockwater\\_workinggroup\\_finalreport.pdf](http://www.ecy.wa.gov/programs/WR/hq/pdf/swtr/011010_stockwater_workinggroup_finalreport.pdf)

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 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.

RCW 90.44.050 (emphasis added). 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.

CP 767. 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 requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

Laws of 1987, Ch. 109 § 108.

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. Laws of 2003, Ch. 307 § 1. 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.

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.

AGO 2005 No.17.

## VI. ARGUMENT

6.1 The Franklin County Superior Court correctly interpreted and applied RCW 90.44.050 as it relates to water withdrawn for stock-watering purposes.

The Court has before it *de novo* review of the Franklin County Superior Court's determination that RCW 90.44.050 does not limit the specific quantity of groundwater for stock-water purposes. Interpretation of a statute is a question of law. *In Re Forfeiture of One 1970 Chevrolet*, 166 Wn.2d 834, 215 P.3d 166 (2009). The Court's purpose in this case is to ascertain and carry out the 1945 Legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 9. If RCW 90.44.050's meaning is plain from the statutory text, then effect must be given to the "plain meaning" of RCW 90.44.050 as an expression of the Legislature's intent. *Id.* at 9-10; see also, *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). To determine whether the meaning of RCW 90.44.050 is plain, the Court must consider the ordinary meaning of words, basic rules of grammar, the statutory context and the statutory scheme as a whole, including related statutes. *In Re Forfeiture of One 1970 Chevrolet*, 166 Wn.2d at 838-839; *Campbell & Gwinn*, 146 Wn.2d at 11-12. 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.” *Campbell & Gwinn*, 146 Wn.2d at 10-11. In *Campbell & Gwinn*, this Court concluded the meaning of one of the RCW 90.44.050 exemptions, the domestic use exemption, was apparent from the plain language of the statute and related statutes and that RCW 90.44.050 was not ambiguous. *Id.* at 12. In *Campbell & Gwinn*, this Court adopted the plain meaning of RCW 90.44.050 as an expression of the Legislature’s intent. *Id.* at 12.

6.2 The plain meaning of the language in RCW 90.44.050 is that the permit exemption for withdrawals of water for stock-watering purposes is not limited to 5,000 gpd.

6.2.1 The “Plain Meaning” Analysis.

While Appellants suggest to the Court their interpretation is based upon a plain meaning analysis of RCW 90.44.050, it is not. In *Campbell & Gwinn*, this Court, in analyzing RCW 90.44.050 held as follows:

Under this second approach, the plain meaning is still derived from 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. Upon reflection, we conclude that this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent. Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to

resort to aids to construction, including legislative history.

*Campbell & Gwinn*, 146 Wn.2d at 12; see also *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994).

Later cases have followed *Campbell & Gwinn's* articulation of the plain meaning rule. In *Cerrillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006), the court concluded that in order to determine the meaning of RCW 49.46.130(2)(G)(ii), it must look to the language in the statute, and if the language is not ambiguous, it is appropriate to give effect to the plain meaning of the language in the statute. The court went on to note that “a statute is ambiguous if it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.” *Cerrillo*, 158 Wn.2d at 201. The *Cerrillo* court did not subject an unambiguous statute to statutory construction and “declined to add language to an unambiguous statute even if it believes the legislature intended something else but did not adequately express it.” *Id.* at 201. Similarly, in *In Re Forfeiture of One 1970 Chevrolet* the Court made it clear in construing a statute a court must “account for the ordinary meaning of words, basic rules of grammar, and the statutory context” to determine the meaning of a statute. *In Re Forfeiture of One 1970 Chevrolet*, 166 Wn.2d at 839.

Following prior decisions, this Court should conclude is that “any withdrawal for stock-watering purposes” does not mean “only withdrawals under 5,000 gpd,” as Appellants contend. The Court should give the plain meaning to the words “any withdrawal for stock-watering purposes” and not rewrite the statute to include other language. Rewriting of a statute is strictly the provenance of the Legislature. *Kim*, 115 Wn. App. at 163.

#### 6.2.2 The “Plain Meaning” Analysis Applied to RCW 90.44.050.

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.

RCW 90.44.050 (emphasis added); see also, *Kim*, 115 Wn. App. 157.

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 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. *Campbell & Gwinn*, 146 Wn.2d at 12.

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 language of this section of RCW 90.44.050 indicates that any groundwater withdrawals for stock-watering purposes are not limited. *Cerrillo* is useful authority regarding the legislature’s use of the word “any.” *Cerrillo* involved an exemption to the Washington Minimum Wage Act for agricultural workers, which provides in part “Any individual employed... .” *Cerrillo*, 158 Wn.2d at 200. The court noted that “Washington courts have consistently interpreted the word ‘any’ to mean ‘every’ and ‘all’.” *Id.* at 203. 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.” *Cerrillo*, 158 Wn.2d at 203. This is consistent with the dictionary definition of “any,” which means:

...of considerable size or extent...

*Webster's New World Dictionary of the American Language*, Second College Edition (1974). See also CP 312-313.

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

...With a specially quantitative force = A  
quantity or number however great or  
small...

CP 271-273. Thus, the legislature's use of the word "any" in RCW 90.44.050 means withdrawal of stock-water in any quantity. The holding in *Cerrillo* turned on the meaning of the word "any" and the necessity to give meaning and effect to the word.

The Court should reject Appellants' suggestion to ignore the legislature's use of the word "any". In effect, what Appellants say at page 22 to 24 of *Appellants' Opening Brief* is that the word "any" in the statute should be ignored. All language in a statute is to be given meaning and a court may not add or delete language to a statute. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Again, Appellants ignore the law to achieve their broad policy objectives.

In addition to asking the Court to ignore the word "any," Appellants want to insert a comma where the legislature chose not to in order to arrive at Appellants' proffered interpretation of RCW 90.44.050. To make their argument the Appellants argue "The State's only affirmative evidence for its case rests solely on the absence of a comma." *Appellants' Opening Brief*, p. 22.

The Appellants then argue that “to put this much weight on the absence of a comma requires the court to ignore the plainly stated intent of the legislature to regulate and control groundwater...” *Appellants’ Opening Brief*, pp. 22-23. The Appellants’ arguments are nothing more than a request to have this court rewrite legislation to fit Appellants’ legislative agenda.

To adopt Appellants’ arguments would result in the Court ignoring clear statutory interpretation rules and in essence rewriting the statute. This is contrary to existing law, and clearly not supported under *Cerrillo*. 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.<sup>17</sup> In *In Re Forfeiture of One 1970 Chevrolet*, this 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’.” *In Re Forfeiture of One 1970 Chevrolet*, 166 Wn.2d at 842. 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 1945 legislature chose the word “any,” the legislature knew what the word “any” means and this Court should give effect to the

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<sup>17</sup> 300 is the arbitrary number of cows Appellants assert the exemption should be limited to. CP 816.

use of the word “any” in the statute. The 1945 legislature chose where not to put commas and where to put commas. The legislature had the opportunity 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.<sup>18</sup> 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.

6.2.3 Existing case law interpreting RCW 90.44.050 confirms the plain meaning interpretation that the permit exemption for stock-watering purposes is not limited to 5,000 gpd.

*Campbell & Gwinn* held that the plain meaning of the exemptions was apparent from the language in RCW 90.44.050 and related statutes and there was no need to resort to legislative history because

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<sup>18</sup> *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).

RCW 90.44.050 is not ambiguous. *Campbell & Gwinn*, 146 Wn.2d at 12. The Court of Appeals in *Kim* relied on the plain meaning of RCW 90.44.050 to interpret the meaning of one of the permit exemptions. *Kim*, 115 Wn. App. at 160.

The court in *Campbell & Gwinn* acknowledged RCW 90.44.050 creates exemptions “excusing the applicant from permit requirements” but otherwise allows creation of a water right. *Campbell & Gwinn*, 146 Wn.2d at 9. While *Campbell & Gwinn* and *Kim* focused on the domestic use exemption and the industrial use exemption, the plain meaning analysis in those cases applies equally to the exemption for any withdrawals of groundwater for stock-watering purposes.

The plain meaning interpretation of RCW 90.44.050 results in four categories of permit exemptions. This interpretation is not inconsistent with basic water law concepts nor is it inconsistent with the statutory scheme designed to regulate ground water. The Court of Appeals in *Kim* rejected the same argument that Appellants make when it concluded the following about RCW 90.44.050:

The overall scheme of this statute is to require a permit except for certain “**small withdrawals.**” The 1945 legislature defined a “**small withdrawal**” as (1) **any** amount of water for livestock; (2) **any** amount of water for a lawn or for a noncommercial garden of a half acre or less; (3) not more than five thousand gallons per day for domestic use; and (4) not more than five thousand gallons per day “for an industrial purpose.”

*Kim*, 115 Wn. App. at 160 (Emphasis added).

In *Kim* the court was interpreting whether ground water withdrawn by the Kims for the irrigation of plants raised and sold in their commercial nursery fit within the industrial purpose exemption. *Id.* at 160. *Kim* held that the use did fit within the industrial purpose exemption. *Id.* at 163. The *Kim* case is instructive here because in that case the Pollution Control Hearings Board (PCHB) had concluded the plain meaning of RCW 90.44.050 did not matter and the PCHB should interpret RCW 90.44.050 in light of the “current scientific understanding of ground water and surface water continuity, the federal mandates to protect endangered salmon, and the increasing demand for water to serve our growing population and economy”, similar to the Appellants’ agenda in this case. *Id.* at 159. In other words the PCHB concluded that RCW 90.44.050 was outdated. Not surprisingly, the Court of Appeals rejected this notion and instead applied a plain meaning test noting that despite the controversial nature of the exemptions the legislature had failed to amend RCW 90.44.050 since 1995. *Id.* at 161. Finally the court concluded it would not rewrite RCW 90.44.050 as the PCHB had done, noting instead that was the job of the legislature. *Id.* at 163.

Appellants approach this case no differently than the PCHB in *Kim* when they ask this Court to ignore existing case law and instead rewrite the stock-water permit exemption to be limited to 5,000 gpd or an arbitrary number of animals. Appellants have presented no evidence nor advanced any argument that changes the *Campbell & Gwinn* court or the *Kim* court’s plain meaning interpretation of RCW 90.44.050.

6.2.4 The Franklin County Superior Court's stock-water ruling is consistent with the regulatory scheme of Chapters 90.44 and 90.03 RCW.

The groundwater exemption limited to water for stock-watering purposes is consistent with the context of the statutory scheme. In *Campbell & Gwinn*, this Court interpreted RCW 90.44.050 in the context of the entire act in which it appears. *Campbell & Gwinn*, 146 Wn.2d at 12. When the legislature extended the administrative water rights system to groundwater in 1945, it integrated the surface water code, Chapter 90.03 RCW, with the groundwater code. RCW 90.44.020. 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. RCW 90.44.050; see also, *Campbell & Gwinn*, 146 Wn.2d at 9. Appellants admit that an exempt withdrawal is a water right. CP 1104. *Campbell & Gwinn* is a case in which this Court examined the domestic use exemption of RCW 90.44.050. In *Campbell & Gwinn*, this Court held:

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....’ ”

*Campbell & Gwinn*, 146 Wn.2d at 9 (emphasis added). Because any withdrawal and use of groundwater for stock-watering purposes is a water right, that right is subject to the “basic principal of water rights acquired by prior appropriation that the first in time is the first in right. *Id.* at 9; see also, RCW 90.03.010. 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 obtained pursuant to RCW 90.44.050 is also subject to all of the other protections and obligations afforded water rights in this State under Chapters 90.03 and 90.44 RCW.

As a result, a range of statutory provisions apply to protect senior rights, prevent impairment, including impairment of Appellants’ rights, and generally manage competing interests in water resources according to the priority system (*i.e.*, “first in time is first in right”). For example, every groundwater use is entitled to a “safe sustaining yield” from its well. RCW 90.44.130. Moreover, 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. *Id.* There is a specific process 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. 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. RCW 90.44.050; see also, *Campbell & Gwinn*, 146 Wn.2d 1. 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 Appellants claim (*Appellants’ Opening Brief*, p. 19); to the contrary, they fit in with the overall statutory scheme as the legislature intended.

The language used in the other sections of RCW 90.44.050 and Chapters 90.44 and 90.03 RCW is not inconsistent with the interpretation that permit exempt withdrawals of water for stock-watering purposes are not limited to a specific number of gallons or animals. The existence of the exemption for any withdrawal of water for stock-watering purposes, and the literal meaning of the exemptions cannot be ignored based on Appellants’ general policy objectives, particularly when the legislature expressly states the water withdrawn under the exemptions, once applied to beneficial use, is a water right subject to regulation just as any other water right.

Appellants argue this interpretation is inconsistent with basic water law concepts. Appellants based their arguments below on the concept that “water law establishes that a water right is measured always by quantity, as well as by time and place of use.” CP 141. Appellants are incorrect in their interpretation of the proper measurement of a water right. Under

clear authority in Washington, the basis and the measure of a water right is beneficial use. *State Dept. of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993); *State, Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-590, 957 P.2d 1241 (1998); *Lawrence v. Southard*, 192 Wash. 287, 73 P.2d 722 (1937); *Ickes v. Fox*, 85 F.2d 294 (1936), affirmed *Ickes v. Fox*, 300 U.S. 82, 57 S. Ct. 412, 81 L.Ed 525 (1937); see also, *Neubert v. Yakima-Tieton Irr. Dist.*, 117 Wn.2d 232, 814 P.2d 199 (1991). The legislature, when it adopted RCW 90.44.050, recognized this because it indicated that once water withdrawn pursuant to one of the four permit exemptions was put to beneficial use it became a water right. RCW 90.44.050. Implicit in the statutory mandate is the water right acquired through the permit exemption is limited by (and to) the quantity of water beneficially used. The Supreme Court in *Campbell & Gwinn* recognized this when it ruled once water is appropriated under the RCW 90.44.050 permit exemption and put to beneficial use the water right is perfected. *Campbell & Gwinn*, 146 Wn.2d at 9.

The beneficial use doctrine limits permit-exempt groundwater usage by livestock. As a result, the Appellants' rhetoric that the permit exemption is "wholly unregulated" and "can be exploited" so that it "consumes the larger regulatory requirements" is overheated and should be disregarded. *Appellants' Opening Brief*, pp. 1 and 19. In addition to the limits or restrictions on permit-exempt water usage arising from the beneficial use doctrine, there are many other legal and practical constraints on development of dairy or livestock farms. Regional and local law and

regulation regarding zoning, land development, and growth management constitute community-based restrictions on siting and sizing of livestock operations. In addition, the business model for dairy or livestock farms have several prerequisites. Access to livestock feed and transportation are necessary. Land values exclude many areas or locations, and of course livestock or commodity market conditions play a limiting role. In short, access to water resources is only one of many legal and business limiting factors in the livestock sector of the agricultural economy.

The Legislature gave Ecology, in RCW 90.44.050, the ability to require information on the use of groundwater for stock-watering and other exempt withdrawals. Ecology can use the information for actions or decisions required or allowed in Chapters 90.03 and 90.44 RCW.

Thus while there is generally no review by Ecology prior to the withdrawal of water for stock-watering purposes pursuant to RCW 90.44.050, once a withdrawal is complete and the water applied to beneficial use the legislature provided for a water right created though the permit exemption to be subject to the other provisions of the water code similar to water rights created through a permit.<sup>19</sup> The exemption for stock-watering is also not inconsistent with the general policy of requiring permits for groundwater withdrawals in order to provide for an orderly and consistent administration of an important and limited public resource,

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<sup>19</sup> The Attorney General recently opined that Ecology has authority to close a water-short basin or area to any further appropriations of water, including permit-exempt groundwater withdrawals. AGO 2009 No. 6.

the State's water supply. It is not uncommon for the legislature to exempt certain activities from regulation. See e.g., Cerrillo, 158 Wn.2d 194. Such exemptions can be explained by a legislative judgment to prioritize scarce agency resources or by a legislative policy that the enforcing agency should not be burdened with enforcing a permit requirement against every livestock producer in the State.

6.2.5 The language in the last two sections of RCW 90.44.050 does not change the plain meaning of RCW 90.44.050.

The words “small withdrawal” and the reference to 5,000 gpd in the last two sections of RCW 90.44.050 do not change the plain meaning of the words “any withdrawal for stock-watering purposes.” The argument advanced by Appellants requires reading language into the last two sections that the sections do not contain, and reading language out of the first part of RCW 90.44.050 that it does contain, i.e., “any withdrawal” for stock-watering purposes.

The Attorney General, in AGO 2005 No. 17, provided a detailed analysis of whether the second or third sections of RCW 90.44.050 altered the plain meaning of the words “any withdrawal of water for stock-watering purposes.” Attorney General opinions, although not controlling, should be given considerable weight in interpreting a statute. *Bates v. City of Richland*, 112 Wn.App. 919, 51 P.3d 816 (2002); *Everett Concrete Products, Inc. v. Department of Labor & Industries*, 109 Wn.2d 819, 828, 748 P.2d 1112 (1988). This is especially true in this case where the legislature has chosen not to modify RCW 90.44.050 since the 2005

Attorney General Opinion. An Attorney General's opinion is notice to the legislature of that interpretation of the law and when the legislature does not act on that interpretation then the Attorney General's Opinion is entitled to even greater weight. *Washington Educ. Ass'n v. Smith*, 96 Wn.2d 601, 606, 638 P.2d 77 (1981); *Grabicki v. Department of Retirement Systems*, 81 Wn.App. 745, 755, 916 P.2d 452 (1996); see also *Bowles v. Washington Dept. of Retirement Systems*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993).

The Attorney General concluded neither the second or third sections of RCW 90.44.050 altered the meaning of the words "any withdrawal for stock-watering purposes." The second and third sections do not contain language that limits the amount of water that may be withdrawn without a permit for stock-watering purposes. The second section allows Ecology to track the amount and method of withdrawals. The Attorney General concluded the words "any such small withdrawals" or "minimal uses" were a reference by the legislature to withdrawals falling within the four permit exemptions listed in the first proviso of RCW 90.44.050. AGO 2005 No. 17, p. 6. This interpretation is consistent with the ruling in *Kim* that RCW 90.44.050 creates four separate exemptions for small withdrawals, one of which was any withdrawal for stock-watering purposes. *Kim*, 115 Wn. App. 157 at 160.

The third section, which does not reference "small withdrawals," but references "withdrawals of 5,000 gallons per day," is definitional and the third section applies only to those exemptions where the withdrawals

were limited to 5,000 gpd or less. There is no indication from the plain language of the third section that it somehow modifies the quantity of water that can be withdrawn without a permit for stock-watering purposes.

The 1945 Legislature very well could have considered withdrawal of water for stock-watering purposes as small in relation to many other types of groundwater withdrawal, or small in relation to all groundwater withdrawals as a whole. Since the legislature was clear when it limited the amount of other categories of withdrawals exempt from permitting, it is unlikely the Legislature would then change the meaning through references in the later sections. See *De Grief v. City of Seattle*, 50 Wn.2d 1, 11, 297 P.2d 940 (1956) (when similar words are used in different parts of a statute, the meaning is presumed to be the same throughout). This analysis of the last two sections of RCW 90.44.050 gives full meaning to each phrase contained in RCW 90.44.050.

The second and third sections of RCW 90.44.050 also do not create an ambiguity in RCW 90.44.050. A statute is not ambiguous merely because it is subject to more than one conceivable interpretation. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The second and third sections contain no words which limit the quantity of water that may be withdrawn for stock-watering purposes or which change the meaning of the phrase “any withdrawal for stock-watering purposes.” To interpret the second and third sections as including a limit on the quantity of water that may be withdrawn for stock-watering purposes would require

reading into the statute language which is not there and not giving effect to the language that is in the statute. Thus, Appellants' proposed interpretation of RCW 90.44.050 might be conceivable, but it is not reasonable and the Court should therefore reject it.

6.3 There is no need to resort to review of legislative history, the historical context, or Ecology's prior enforcement actions and even if there were a need to the review does not support Appellants' interpretations.

6.3.1 Introduction.

Appellants now assert the Department of Ecology's prior interpretation of RCW 90.44.050 together with Appellants "new" arguments on the legislature's use of a comma create an ambiguity. Appellants suggest that recent articles in 2007 and 2010, which call into question the use of commas in a sentence suggest the Legislature in 1945 did not mean what it said. The Appellants' attempts to "discredit" the comma are inconsistent with and were in effect rejected by Division II's interpretation of RCW 90.44.050 in *Kim*. Here, there is no ambiguity to resolve through a review of legislative intent. However, if there was ambiguity as Appellants assert, the evidence they presented did not reveal legislative intent.

6.3.2 There is no evidence of legislative intent.

The "evidence" of historical context submitted by Appellants is not relevant evidence. There are no bill reports, no committee reports, no testimony before the legislature and no statement from legislators involved in the bill passage. There is no evidence of legislative intent as Appellants

concede. Instead of providing evidence of Legislative intent, Appellants point to extrinsic evidence and historical documents, including newspaper articles, as evidence of what the Legislature intended the words “any withdrawal of public groundwater for stock-watering purposes” to mean. Appellants devoted below and now before this Court expend significant effort at discussing these historical documents and articles. Appellants mistakenly conclude that it is appropriate to interpret RCW 90.44.050 with an analysis of extrinsic evidence of legislative intent.

In justifying this analysis, one of the cases Appellants rely on to get to historical context is *Nurses Ass’n v. Medical Examiners*, 93 Wn.2d 117, 605 P.2d 1209 (1980). In that case what the court actually held was that a statute should be construed in light of the legislative purposes behind its enactment and “some” of those purposes can be found by examining the historical context in which a statute was passed to identify “the problem that the statute was intended to solve.” *Id.* at 121. Thus, the extraneous evidence of historical context should be limited to evidence of what problem the legislature was trying to solve. None of the evidence Appellants present is directed at a “problem” the Legislature identified and was trying to solve. The purpose of the groundwater code was to regulate groundwater use to the same extent as surface water. RCW 90.44.020. There is no indication the purpose of the legislation was to solve a problem the Legislature identified with the use of water for stock-watering purposes or the need to limit the use of water for stock-watering purposes. In fact, none of the Appellants’ “context evidence,” however arcane,

suggests use of water for livestock was a problem the Legislature was concerned about let alone trying to solve by enacting the groundwater code. Appellants acknowledge there is no evidence to suggest the Legislature was aware of the documents Appellants rely on prior to its consideration and adoption of the groundwater code. There is no evidence to suggest that these documents, some of which were finalized after the statute was enacted, are part of the “historical context,” which the Legislature would have taken notice of to identify problems the statute was trying to solve.

While Appellants argue that “contemporaneous newspaper accounts also provide historical context,” they fail to cite any case law which suggests the Court can determine legislative intent from a newspaper article. They do not cite case law because there is none to support that proposition. Appellants, however, discuss at length a newspaper article appended to the *Declaration of Rachael P. Osborn*, the article does not report on the legislative activities that occurred during the passage of the groundwater code and the article does not tell us what the Legislature intended. CP 177. Nor does the article identify a problem that the Legislature articulated must be solved by the act. Instead, the article is one unidentified reporter’s summary of an interview with the then Director of the Conservation and Development Department. Appellants boldly state that “it is unlikely Director Garton, on the heels of the legislative session and within days of implementing the law, got it wrong.” *Appellants’ Opening Brief*, p. 33. Yet Garton, or maybe the reporter, did

get it wrong because the article reports that water for “any purpose” is exempted when the quantity is less than 5,000 gpd. Under no interpretation of the language in RCW 90.44.050, including *Campbell & Gwinn* and *Kim*, can the permit exemption extend to water for “any purpose.” Instead, the exemptions are limited to 5,000 gpd for domestic supply, any quantity for irrigation of one-half acre of lawn and garden, water for industrial supply not exceeding 5,000 gpd, and any quantity for stock-watering purposes. *Kim*, 115 Wn. App. at 160. The reason courts do not rely on newspapers as a definitive authority of anything is because we have no way of knowing who got it wrong – Director Garton or the reporter, or whether both of them got it wrong.

Appellants argue that information by the Agricultural Associations provided regarding the total number of livestock is not indicative of legislative intent. They do this despite their admission that the numbers are accurate and their arguments that the Court should consider the historical context. It appears Appellants want the Court to only consider certain types of historical context and to ignore others. What was going on in the Washington State livestock industry, how many stock there were, and the quantities of water stock may or may not have been using in 1945 is more relevant evidence of historical context than what the U.S. Bureau of Reclamation was studying in its unfinished studies.

The information on livestock numbers supports an inference that the Legislature exempted livestock because stock-water uses were not a problem they sought to solve with the groundwater code. The Agricultural

Associations provided the un rebutted information on the quantity of stock then and now and the quantity of water those stock were using then and now to show that the quantity would have been and is small in the grand scheme of things and of little concern to the State for regulatory purposes and in 1945 could not be deemed a problem that the Legislature had specifically identified and sought to solve with the groundwater code.

6.4 Ecology's prior interpretation that stock-water withdrawals are not limited to a specific quantity is not a new interpretation, nor is it relevant.

Instead of presenting evidence of the Legislature's intent, Appellants suggest Ecology's interpretation of RCW 90.44.050 creates ambiguity. Ecology's interpretation of RCW 90.44.050 is not new. Throughout the case Appellants repeatedly refer to the interpretation that an unspecified quantity of water may be withdrawn for stock-watering purposes under RCW 90.44.050 as a "new" interpretation by Ecology. See *Appellants' Opening Brief*, pp. 24-27. However, the evidence is that Ecology's interpretation of the exemption in the *DeVries* case was a "new interpretation." *DeVries v. Dept. of Ecology*, PCHB No. 01-073 (2001). The material from the *DeVries* 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 in 2000 is not relevant to determining what the

legislature intended in its 1945 groundwater code, particularly here where the legislative intent is expressed in the plain meaning of RCW 90.44.050.

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. CP 236; CP 233; CP 220. 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. CP 236; CP 233. Thus, Appellants' 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.

Interestingly, when Appellants discuss testimony provided by the Agricultural Associations' members, Appellants assert the Court should give little to no weight to these claims as they are not evidence of the State's "actual official position." CP 151. The Agricultural Associations are uncertain how one would determine what the State's "actual official position" is. One way would be to call the State and ask the question, which is exactly what the declarants did. They called the State and asked the question and were given an answer.

The best the Court can conclude from the evidence presented is that Ecology and its predecessor agencies over time had varying interpretations of the issue. That is one of the reasons why the Attorney General issued its opinion. That opinion was not an agency interpretation,

rather it was the opinion of the Attorney General, and as discussed above, after the Attorney General's Opinion, the legislature chose not to change the statute. As a result, the Attorney General's Opinion is accorded great weight, and the issue of how Ecology has interpreted the statute over time is essentially irrelevant.

6.5 The stock-water permit exemption was not intended to be limited to small homestead uses as opposed to large stock operations such as Easterday.

Appellants argued below that the stock-water permitting exemption was intended to be one of a “bundle of uses necessary to sustain an average rural household.” CP 815. Before this Court they narrow the argument and assert the stock-water exemption in RCW 90.44.050 was never intended nor did the legislature contemplate use for large “industrial” operations like a 30,000 head feedlot. *Appellants' Opening Brief* at p. 45. Despite these unsubstantiated expressions of what the legislature intended, Appellants assert that Easterday's livestock operation is “an industrial operation” and not entitled to utilize the exemption. CP 815. Appellants' argument is unsupported, without merit and should be rejected by this Court. In order to make this argument, Appellants 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. CP 815. The linkage Appellants assert exists was not recognized by this Court in *Campbell & Gwinn*. *Campbell & Gwinn*, 146 Wn.2d at 12.

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 not necessary to subject to the administrative permit system, particularly when considered in context of the quantity of water used by irrigated agriculture or by municipal users.

Appellants' 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 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.

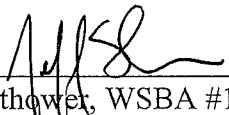
## VII. CONCLUSION

Appellants asserted and argued below that use of water for stock-watering purposes over 5,000 gpd or some other "small quantity" was "illegal." Appellants' aim in this action is to eliminate a segment of water use to further their policy objectives. Appellants' requested judicial interpretation of RCW 90.44.050 would severely impact many agricultural

operations throughout Washington because agricultural operations, which have relied on rights obtained through permit exemption in RCW 90.44.050, would have those rights revoked or diminished, and would no longer have access to water they have historically relied on for stock-watering purposes.

Yet the plain meaning of RCW 90.44.050 leads to the conclusion the agricultural producers are not using water illegally. Instead, once the water is withdrawn from the ground and used for stock-watering purposes, these individuals have a water right, which like the Appellants' water rights is subject to regulation under a well-settled statutory scheme.

DATED this 7<sup>th</sup> day of September, 2010.

  
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