

No. 84632-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE
CENTER FOR ENVIRONMENTAL LAW & 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.

**BRIEF OF INTERVENOR-RESPONDENT
WASHINGTON CATTLEMEN'S ASSOCIATION**

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INTRODUCTION

The Washington Cattlemen's Association (WCA) is the oldest and largest organization representing cow-calf producers in Washington State. The WCA was organized in the spring of 1926 and has represented the cattle industry in Washington State for over 84 years, including efforts to preserve historical ranching in an urbanizing landscape and to protect historical water rights and uses upon which ranching and grazing depend.

As of June 2009 the WCA represented 1,816 members state-wide in 29 counties: Whatcom, Skagit, Snohomish, King, Thurston, Clark, Kittitas, Douglas, Chelan, Okanogan, Ferry, Stevens, Pend Oreille, Spokane, Whitrnan, Lincoln, Garfield, Asotin, Columbia, Walla Walla, Franklin, Benton, Grant, Adams, Yakima, Thurston, Klickitat, Grays Harbor, and Clallam. WCA members account for 92,000 mother cows. Members represent the entire geographic and climatologic diversity of Washington. A substantial portion of these members rely on multiple, exempt livestock wells in one form or another. Decl. of John William Field. CP 391-393.

The relief proposed by Plaintiffs would eliminate the 1945 stockwater exemption and the water rights relied upon by hundreds of cow-calf operators in forage and rangeland grazing operations throughout Washington. As set forth in this brief, groundwater used in these

operations is self-limiting by practical realities like the grazing capacity of the land and other natural and seasonal limitations and demands. This lawful, historical use of groundwater on grazing lands is incompatible with the rigid daily limits proposed by the Sierra Club and the other Plaintiffs.¹ The invalidation—after the fact—of permit exempt water uses would have the effect of eliminating long established uses that otherwise have matured into senior water rights under the plain language of the statute.

There is no admissible evidence in the record that the 1945 Legislature set out to bring forage and livestock grazing operations into the new permit program it established, and especially not at the arbitrary limit of one well per ownership and a daily restriction rather than annual averages. There is simply no evidence that livestock water use was a problem the Legislature sought to address.

The limits that the Sierra Club wants to read into the statute some 65 years later would have caused widespread rebellion had they even been considered in 1945. The absolute silence in the record of any debate regarding livestock may be the loudest testimony that daily limits for livestock were never even considered.

¹ For ease of references the Plaintiffs are collectively referred to as the Sierra Club.

The trial court decision should be affirmed. The livestock exemption of RCW 90.44.050 is self-limiting. Any withdrawal of public groundwater for stockwatering purposes is exempt from the requirement to obtain a groundwater permit in advance of use.

STATEMENT OF THE CASE

To avoid duplication, WCA limits its response to the statutory construction of RCW 90.44.050 as it applies to forage and livestock grazing operations.

I. STATEMENT OF FACTS

The permit exemption for "any withdrawal of public groundwater for stock-watering purposes" in RCW 90.44.050 is one of four exemptions in the statute:

After June 6, 1945, no withdrawal of public groundwaters 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 groundwaters 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

(emphasis added). The stockwatering exemption has not changed since the original legislation in 1945.

Sixty years later, the Washington Attorney General issued AGO 2005 No. 17, which analyzed the statute in detail and concluded that the language "any withdrawal of public groundwaters for stock-watering purposes" was not ambiguous. Stockwater is exempt from the requirement to obtain a groundwater permit in advance, but stockwater does not stand outside the scope of other groundwater regulation and protections.

In the five years that have elapsed since AGO 2005 No. 17, the Washington legislature has not taken any action to revise, modify, or correct the Attorney General's interpretation of the statute.

II. PROCEEDINGS BELOW

This case has been exhaustively briefed by Plaintiffs, the State of Washington, Easterday Ranches, and six intervening agricultural and irrigation parties, including the Washington Cattlemen's Association. The trial court ruled on cross-motions for summary judgment that the stockwater exemption in RCW 90.44.050 is not ambiguous: Any withdrawal of water for stockwatering purposes is exempt from the requirement to obtain a groundwater permit and such withdrawals are not

subject to daily regulation or restricted to less than 5,000 gallons per day.
Order on Cross-Motions for Summary Judgment, ¶ 3. CP 22-23.

ARGUMENT

The trial court properly ruled that RCW 90.44.050 is not ambiguous and that exempt stockwater uses are not subject to a maximum daily limit of 5,000 gallons per day.

I. STANDARD OF REVIEW

Statutory interpretation is a question of law that the appellate court reviews *de novo*. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009). *Philippides v. Bernard*, 151 Wash.2d 376, 383, 88 P.3d 939 (2004).

II. RCW 90.44.050: "ANY WITHDRAWAL OF PUBLIC GROUNDWATER FOR STOCK-WATERING PURPOSES" IS CLEAR AND UNAMBIGUOUS

A. RCW 90.44.050 is unambiguous under the rules of statutory construction.

The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent and purpose. *In re Parentage of J.M.K.*, 155 Wash.2d 374, 387, 119 P.3d 840 (2005). When the meaning of statutory language is plain on its face, the appellate court gives effect to that meaning. *Post*, 167 Wn.2d at 310.

This Court has concisely summarized the steps in this inquiry in *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 229 P.3d 791 (2010).

"The court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wash.2d 359, 367, 89 P.3d 217 (2004). Statutory interpretation begins with the statute's plain meaning. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009). While we look to the broader statutory context for guidance, we "must not add words where the legislature has chosen not to include them," and we must "construe statutes such that all of the language is given effect." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003). If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). But if the statute is ambiguous, "this court may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent." *Rest. Dev.*, 150 Wash.2d at 682, 80 P.3d 598.

Id., 168 Wn.2d at 704-705.

There is no rule of statutory construction that says, "ignore the words" or "ignore the punctuation." The proper interpretation of RCW 90.44.050 does not hang merely on a comma, although the proper interpretation is consistent with the punctuation used. The Sierra Club and the other Plaintiffs go to excessive lengths to argue that the Legislature

must have made grammatical and punctuation errors, because what the Legislature wrote does not agree with the policy the Sierra Club would like the Legislature to adopt.

If the plain meaning of the statute is unambiguous under the analysis set forth in *Woodcreek Homeowners* and the result is not absurd, the inquiry should stop there. The stockwatering exemption in RCW 90.44.050 is clear and unambiguous. The Sierra Club asks the Court to read language into the statute that is not there, and it asks the court to ignore the ordinary meaning.

B. Only two of the four exemptions from groundwater permits are limited to 5,000 gallons per day.

When the Legislature wanted to condition an exempt use on daily withdrawal limits, the Legislature knew how to do it. RCW 90.44.050 creates four categories of permit exemptions. Two of the exemptions are subject to a 5,000 gallon a day limit, the other two—including the stockwater exemption—are not. The Court of Appeals has summarized these four exemptions as meeting the Legislature's own definition of "small withdrawals":

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 industrial purpose.

Kim v. Pollution Control Hearing Bd. 115 Wn.App. 157, 159, 61 P.3d 1211 (Div. 2, 2003).

Contrary to the Sierra Club's argument, there would be no need for any stockwater language in RCW 90.44.050 if stockwater was just a subset of the other exemptions, further restricted by other withdrawals, and limited to the immediate vicinity of the barnyard and the house.

C. Since 2005, the Legislature has acquiesced in the Washington Attorney General's Opinion, which thoroughly analyzed the statute and concluded that the exemption for "any" withdrawal for stock-watering purposes is clear and unambiguous.

The Washington Cattlemen's Association adopts the arguments of the State of Washington, Easterday Ranches, and the other agricultural intervenors that RCW 90.44.050 is not ambiguous and that RCW 90.44.050 is fully integrated and consistent with the other provisions of the water code. The WCA will not repeat those arguments or summarize the detailed and accurate statutory analysis presented in AGO 2005 No. 17, which concluded that RCW 90.44.050 unambiguously exempts "all withdrawals" for stockwater uses from the requirement to obtain a groundwater permit in advance.

Of paramount legal significance is the fact that five years have elapsed and the statutory analysis and conclusions in AGO 2005 No. 17

have not been rejected by the Legislature. Silence by the Legislature is deemed acquiescence by the Legislature and endorsement of the conclusions reached by the Attorney General.

Although not binding, opinions of the Attorney General in construing statutes are entitled to considerable weight. *In re Chi-Doo Li*, 79 Wash.2d 561, 488 P.2d 259 (1971); *Kasper v. Edmonds*, 69 Wash.2d 799, 420 P.2d 346 (1966). This is especially true in the instant case given the legislature's acquiescence to the Attorney General's interpretation of RCW 41.04.230 as evidenced by its failure, in subsequent legislative sessions, to modify the statute. See *White v. State*, 49 Wash.2d 716, 306 P.2d 230 (1957), appeal dismissed 355 U.S. 10, 78 S.Ct. 23, 2 L.Ed.2d 21; *State ex rel. Pirak v. Schoettler*, 45 Wash.2d 367, 274 P.2d 852 (1954).

Washington Educ. Ass'n v. Smith, 96 Wn.2d 601, 606, 638 P.2d 77, 80 (1981)(footnote omitted).

In the intervening five years since AGO 2005 No. 17 was issued, the Legislature has done nothing to modify the statute. In such a case, AGO 2005 No. 17 should be treated as the true expression of Legislative intent and the proper construction of the statute.

III. REGULATING DAILY LIVESTOCK USE WAS NOT A PROBLEM THE LEGISLATURE SOUGHT TO ADDRESS IN 1945; LIVESTOCK USE IS SELF-LIMITING AND UNLIKELY TO COMPETE WITH OTHER GROUNDWATER USE.

WCA joins the other agricultural intervenors in rejecting the supposed historical gloss on Legislative intent presented by the Sierra

Club. Under the guidance of *Nurses Ass'n. v. Medical Examiners*, 93 Wn.2d 117, 121, 605 P.2d 1209 (1980), the court can properly consider whether the drafters of the statute had identified stockwater use as a problem that needed to be addressed under the pre-withdrawal permit requirement the new groundwater code. The language in the statute, and the scant historical information in the record, leads only to the conclusion that stockwater was not an identified problem and stockwater withdrawals were not required to be submitted to the new permit scheme.

A. The largest segment of cattle producers in 1945 would have been defined as forage and livestock grazing operations.

The WCA rejects the notion that the Legislature's exemption of stockwater from the permit system was only directed at the barnyard capacity of a so-called "subsistence farm." A forage and grazing operation does not house its animals in a barnyard setting. The livestock involved are not part of a ragged menagerie with a handful of chickens, a litter of pigs, and three head of dairy cows.

Just the opposite is true. Forage and livestock grazing practices date back to territorial days, often involve hundreds of head of cattle, large tracts of land, and little change over time in the dependence on the unrestricted use of land and water as the basic natural commodities and an incident of land ownership. *See*, Dec. of Field, ¶ 7. CP 392.

According to the Field declaration:

Grazing and other forage-based operations represented the greatest number of cattle operations in 1945 when the stockwater exemption was written by the Legislature. In 1945, the WCA was already 20 years old and actively involved in preserving ranching as a way of life. Some livestock may have been kept as barnyard animals, but the majority of beef cattle were maintained on range land and not part of a domestic household and not capable of being watered and fed as part of a 1945 "subsistence" farming operation, to use the phrase coined by the Plaintiffs.

Id., ¶ 8. CP 392.

In evaluating stockwater use, the Court needs to consider the full range of stockwater uses and to distinguish the predominant livestock use that existed in Washington since territorial days from the more intense water requirements of modern Concentrated Animal Feeding Operations (CAFO's), like the Easterday feedlot. While the WCA believes that the Easterday feedlot falls clearly within the plain language of the stockwater exemption,² the exemption itself must be read in light of the broad and diverse number of livestock operations who must now rely on the exemption that are not CAFO's. These operations, by definition, are "small users." Having obtained their water use under the exemption, the

² No party has argued successfully that feedlots and CAFO's were outside the contemplation of the Legislature in 1945 when the "unlimited" stockwater exemption was written. Just because feedlots and dairies were not called CAFO's in 1945 does not mean they did not exist as a class of more intense stockwater uses that would have been known to the Legislature and could have been easily excluded from the statute if that had been the Legislature's intent.

Sierra Club position would strip them of those protections, force them to now start over in the permitting system, lose their existing priorities and rights, and cease operations in the hope that a permit might one day be issued.

In creating the "all withdrawals" stockwater exemption, the Legislature acted sensibly. According to Field, daily regulation at 5,000 gallons has always been unworkable for forage and livestock grazing operations because of the use of multiple wells, the need for water in remote locations, and irregular demand for water:

A substantial portion of these operations rely on exempt livestock wells in one form or another. Some historical operations have multiple wells in remote locations. Many rely on seasonal use of wells that, unlike domestic wells, may be used for days or weeks at a time for greater than 5,000 gallons per day even when the annual average use is less than an average of 5,000 gallons per day.

Decl. of Field, ¶ 6. CP 391-392.

To suddenly impose a permit requirement on every stockwater well that exceeds 5,000 gallons on a heavy demand day finds no support in the statutory scheme, defies the practical realities of stockwater use, and ignores the plain language of the exemption.

B. The natural restrictions on forage and grazing operations make daily limits for stock-watering unnecessary and unworkable.

The beneficial use of water on grazing lands is subject to natural restrictions and the requirements for flexible and changing uses.

Livestock use is inherently different than other exempt uses because of the low impact and natural limiting factors.

These natural limitations include the number of acres encompassed in an operation, the limited number of cattle per acre, the seasonal variability and scarcity of surface water, and the practical constraints, like the climate, terrain, and amount of forage. A larger ranch might support more cattle, and might use more water and need more wells, but ranch size does not increase intensity of use because of the other limiting factors that provide a natural barrier to the overuse of groundwater. Ranch size may increase the need for additional exempt wells in remote locations, but larger ranches only exist in less populated areas.

Decl. of Field, ¶ 11. CP 393.

No arbitrary limitation on the permit exemption was sensible or required because of the great diversity in operations and the automatic and natural limiting factors that forage and livestock grazing operations confront.

C. The allegation that some modern concentrated animal feeding operations (CAFO's) now strain the exemption provides no justification for the Court to eliminate the exemption as it applies to forage and livestock grazing operations.

The Sierra Club argues for the wholesale elimination of the stockwater exemption for all classes of stockwater users, when the focus of the litigation is on a single feeding operation that, according to the Sierra Club argument, strains the limit of the exemption.³

The Sierra Club tries to create a false choice for the Court between limiting the stock water exemption to the Sierra Club's view of "subsistence farming" in 1945 in order to avoid allowing the Easterday CAFO's to fall within the plain language of the exemption. In pressing the Court to make this false choice, the Sierra Club would force the Court to eliminate the exemption for the historical use of stockwater on grazing lands, which was one of the original purposes for the stock water exemption in 1945. Stockwater use on grazing lands is neither a 5,000 gallon per day "subsistence farm," nor is it a CAFO, but the plain language of the current statute applies equally to all.

The Sierra Club's real argument is that some of today's modern CAFO's may not have been within the contemplation of the Legislature when it wrote the "unlimited" stock water exemption in 1945. If so, the Sierra Club's real concern is a public policy argument that should be directed to the Legislature to specifically address CAFO's, *if the Legislature determines that the law should be changed*. The Sierra Club cannot properly request the Court to re-write the laws or gut the exemption for *all* historical forage and livestock grazing operations simply to address a perceived problem with CAFO's. The Sierra Club's argument that

³ The Sierra Club "solution" fails to document and identify the problem it seeks to address, referencing only hypothetical and speculative harms. The WCA fully supports and adopts the argument and the record developed by the other responding parties in regard to the specifics of the Easterday operation and the application of the exemption to stockwater use by Easterday Ranches.

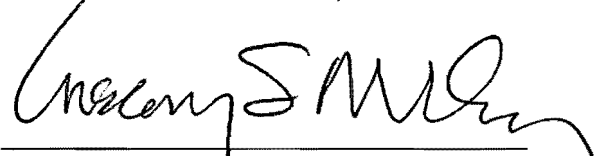
CAFO's stretch the exemption too far provides no authority to, in effect, judicially repeal the exemption.

CONCLUSION

The trial court decision should be affirmed. The livestock exemption of RCW 90.44.050 is self-limiting, and "any" withdrawal of public groundwater for stockwater purposes is exempt from obtaining a permit; the exemption is not limited to 5,000 gallons per day.

Respectfully submitted this 7th day of September 2010.

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A handwritten signature in black ink, appearing to read "Gregory S. McElroy", written over a horizontal line.

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CERTIFICATE OF SERVICE

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The undersigned, Gregory S. McElroy, declares under penalty of perjury of the laws of the State of Washington that the following is true and correct.

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 1808 N. 42nd Street, Seattle, Washington 98103.

On September 7, 2010, I filed with the Supreme Court of the State of Washington the following pleadings by USPS first class mail:

1. Brief of Intervenor-Respondent Washington Cattlemen's Association; and
2. Certificate of Service.

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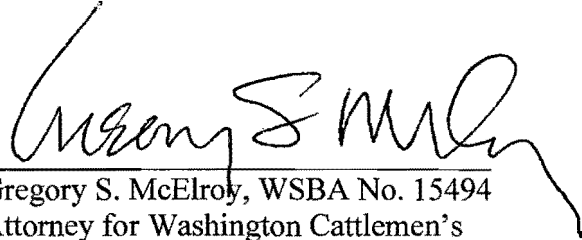
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