

## Case Law

There are a few cases that have interpreted the permit exemption in the Ground Water Code. These cases are discussed below. The permit exemption in RCW 90.44.050 states:

"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: 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 groundwaters 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."

In *Hillis v. DOE* 131 Wn. 2d 373 (1997), the court held that "[w]hile the policies and procedures adopted by the [Department of] Ecology in response to cuts in the funding of the permitting program were within the statutory authority of the agency and were not arbitrary or capricious, the decisions were nonetheless subject to the rule-making process of the APA. Therefore, when Ecology sets out priorities and establishes prerequisites to those decisions, the agency should engage in rule making so the public has some input into those decisions." *Hillis* more specifically dealt with agency policies regarding decision-making for surface and ground water right permits that the court felt should have been adopted as formal rules. However, the court did state in the opinion that "[a] water right permit is not required for withdrawal of public water in an amount not exceeding 5,000 gallons per day for single or group domestic uses or other specific purposes."

In *R.D. Merrill Co. v PCHB*. 137 Wn. 2d 118 (1999), the court held that approval of two unperfected groundwater rights was permissible under RCW 90.44.100, which, unlike RCW 90.03.380, does not require beneficial use of the appropriative right obtained. In order to build a cross country ski resort, R.D. Merrill sought to consolidate water rights for irrigation, domestic, and stockwatering purposes. Two of the change applications concerned unperfected groundwater permits issued in 1979 for domestic, stockwater, and irrigation uses. RCW 90.44.100 evidences legislative intent that the time for determining the availability of water subject to appropriation is the time a permit is applied for. The court held that RCW 90.44.100 had been satisfied in this case.

In *Harder Farms, Inc. v. Washington*. PCHB NOS. 98-132 (1999), the court held that a ground water claim for a use exempt from permitting requirements may not be filed under the claims registry period that was reopened in 1997 when the legislature passed SHB 1118. The court held that "exempt claims are not required because the claims registration period does not apply to such uses. It would be inappropriate to construe the language to mean that filing exempt use claims is permissive. To do so would defeat the very clear terms of HB 1118 that the reopened claims registry does not apply to claims for an exempt use."

In *Postema V. PCHB*. 142 Wn.2d 68 (2000) the court stated that a minimum instream flow of surface water as established by law constitutes an appropriation that may not be impaired by a subsequent withdrawal of groundwater that is in hydraulic continuity with such surface water. A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights. The court held that hydraulic continuity between groundwater and a surface water source with unmet minimum flows or which is closed to further appropriation is not, in and of itself, a basis on which to deny an application to withdraw groundwater. However, where there is hydraulic continuity and withdrawal of groundwater would impair existing surface water rights, including minimum flow rights, then denial is required. The court stated that when the Department of Ecology (Ecology) determines whether to issue a permit for appropriation of public groundwater, Ecology must consider the interrelationship of the groundwater with surface waters, and must determine whether surface water rights would be impaired or affected by groundwater withdrawals.

In *DeVries v. Washington* PCHB 01-073 (2001), the court interpreted the stock water exemption as limited to 5,000 gallons per day for all uses. The court felt that "[t]o read this section otherwise would result in an unlimited, and uncontrollable, potential withdrawal of groundwater." The court stated that "in construing a statutory exemption a court must narrowly construe the exemption in a manner that gives maximum effect to the objectives of the general rule from which the exemption is made." Additionally, the court stated that stockwatering is "all reasonable uses of water normally associated with the sound husbandry of livestock. This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them. But again, the total withdrawal is constrained by the 5,000 gallons per day limitation." The court also stated that "the use of water for washing the milk barn and milking equipment, suppressing dust, misting dairy cows, and providing for dairy worker sanitation is water used in an agricultural process as opposed to an industrial process."

In *State v. Campbell & Gwinn, L.L.C.*, 43 P.3d 4 (Wash. 2002), the court held that a group of commonly-owned lots only qualified for a total group domestic use of 5,000 gallons per day under the exemption. The court reasoned that the Legislature "did not contemplate use of the exemption as a device to circumvent statutory review of permit applications," and that the "developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use, and accordingly is entitled to only one 5,000 gpd exemption for the project."

In *Kim v. PCHB* 115 Wn. App. 157 (2003), the appellate court ruled that a commercial nursery fell within the statute's industrial purposes exemption, and thus the owners could lawfully take the 100-300 gallons per day they were currently using to directly water the plants that they raised and offered for sale to the general public without a permit. The court held that the words "for industrial purposes" must be applied according to their plain terms, and that their plain terms include the Kims' commercial nursery. Ecology attempted to argue that the "industrial purposes" provision exempted commercial nurseries but not noncommercial gardens. The court stated that each provision has its purpose and neither provision is superfluous.