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SUPERIOR COURT OF WASHINGTON FOR FRANKLIN COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 09 2 51185 6

MEMORANDUM IN SUPPORT OF
EASTERDAY'S MOTION FOR
SUMMARY JUDGMENT AND IN
RESPONSE TO FIVE CORNERS'
MOTION FOR SUMMARY
JUDGMENT

I. RELIEF REQUESTED

The Defendant Easterday Ranches, Inc. requests that the court dismiss this action in its entirety or in the alternative grant judgment to Easterday declaring its right to use sufficient water for its stock without a permit from the Department of Ecology. There is no material issue of fact and the defendant Easterday Ranches, Inc. is entitled to judgment as a matter of law.

II. STATEMENT OF FACTS

A. The Plaintiffs

Sheila Poe and Scott Collin own property with domestic wells. They are located well over a mile from Easterday Ranches feedlot. The Poe and Collin wells are 840 and 736 feet

1 deep and were dug in 1949 and 1900 respectively. Neither Poe, Collin nor their predecessors
2 in interest obtained permits for these wells. Decl. Collin §§ 10 & 11; Decl. Poe §7. These
3 wells are in the Wanapum Aquifer, Poe §7, and Easterday’s well will not impair theirs,
4 because it is cased and sealed through the Wanapum Aquifer and draws from the Grand
5 Ronde Aquifer. Decl. Cameron 10/26/09, Report of Thomas R. Buchholtz, P.E. The nearest
6 well to Easterday in the Grand Ronde Aquifer is 20,000 feet away. The closest domestic well
7 in the Wanapum Aquifer is 8000 feet away and owned by Randy Rupp. Collin’s well is some
8 13,000 feet or 2½ miles away. *Id.*

9 **B. The Defendant Easterday Ranches.**

10 Easterday Ranches is locating a 30,000 head feedlot in the Five Corners area of
11 Franklin County. Comp. ¶22 & 24. In order to establish this feedlot, Easterday Ranches has
12 drilled a well into the Grand Ronde aquifer for stock watering¹ purposes. *Id.* Under existing
13 state law, Easterday does not need a permit to drill such a well and did not seek or obtain one.
14 At the suggestion of the Department of Ecology, however, Easterday purchased certified
15 water rights from Pepiots, Inc., a neighboring farm. Easterday received approval from the
16 Franklin County Water Conservancy Board and Ecology approved the transfer for the
17 withdrawal of 316 acre-feet per year on the 11th day of June, 2009. Cameron Decl. 10/26/09,
18 Ex. 1. The entire feedlot operation will use about 505 acre-feet per year. *Id.* Ex. 1, p 10.

19 **C. The Stock Watering Exemption – the issue in this case.**

20 As we understand Five Corners’ cause of action, it claims the Washington
21 Groundwater Code exempts wells from Department of Ecology regulation for stock watering
22 only if those wells do not draw more than 5,000 gallons per day or about seven gallons per
23 minute. Five Corners wants declaratory relief that Ecology was required to issue or deny a
24

25 ¹ We have found “stock water” and its derivatives spelled “stock water” and “stock-water.” For consistency, we will spell out the words unless quoting material where it spelled otherwise.

1 permit for Easterday's well. Ecology did not issue or deny such a permit, because the State's
2 stock watering exemption is limited to the extent that the water must be used to water stock
3 and not some other use, and Ecology has not been authorized by the legislature to license or
4 regulate Easterday's well insofar as it is used to water stock. AGO 2005 No. 17. Once it
5 obtains the declaratory relief it wants, Five Corners will seek an injunction against Easterday
6 to limit its use of water to the water rights it purchased from Pepiot. Comp p. 11.

7 **D. Inaccurate statements in Five Corners Memorandum**

8 Five Corners repeatedly misstates the facts as it presents its case. First, it repeats
9 thirty times the false statement that Easterday's use of water from its well is "unlimited."
10 This statement is patently false. Easterday's use of water for stock watering is limited to an
11 amount sufficient to water its stock. It has never been "unlimited."

12 In harmony with this misstatement, Five Corners incorrectly claims, "Ecology began
13 allowing unlimited groundwater use for watering livestock." Mem. 3:23-23. This is an
14 untrue statement as evidenced by Ecology's transfer of water rights under the Pepiot permit of
15 June 11, 2009. Ecology was clearly aware that Easterday would be using its stock watering
16 exemption in addition to the Pepiot permit. *Id.* p.10.

17 Subsection C of Five Corners' memorandum, pp. 4-8, alleging it is "harmed" is
18 detailed and unnecessarily long, but nowhere does it describe some cognizable "harm." Five
19 Corners cannot blame Easterday for their current ills. Ralph Allen Jones even claims that he
20 and his ancestors have managed to suck dry "lakes, ponds and other surface waters" because
21 of their use. Declaration of Jones, ¶ 9. Five Corners disingenuously admits they and others
22 similarly situated have caused a problem, but they fail to point to a single harm or element of
23 damage caused by Easterday.

1 **E. Inadmissible Evidence**

2 In conjunction with this motion, we have renewed our motion to strike much of the
3 Plaintiffs’ declaration testimony. It is filled with inadmissible hearsay, lay opinion and
4 speculation. Much of Five Corners’ historical material to bolster its statutory construction
5 arguments is at best questionable.

6 **III. RESPONSE TO PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

7 **A. Standard for summary judgment.**

8 The purpose of summary judgment is to avoid useless trials on issues that cannot be
9 factually supported, or, if factually supported, cannot, as a matter of law, lead to a result
10 favorable to the non-moving party. *Burriss v. General Ins. Co. of America*, 16 Wn. App. 73,
11 553 P.2d 125 (1976). If the moving party shows the absence of a genuine issue of material
12 fact, the non-moving party must set forth specific facts showing a genuine issue for trial. In a
13 summary judgment motion, the moving party bears the initial burden of showing the absence
14 of an issue of material fact. *See, LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).
15 The moving party may meet this burden by merely pointing out to the court the absence of
16 evidence to support a non-moving party’s case. *Young v. Key Pharmaceuticals, Inc.*, 112
17 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is a defendant and meets this
18 initial showing, then the inquiry shifts to the party with the burden of proof at trial, the
19 plaintiff. If, at this point, the plaintiff fails to make a showing sufficient to establish the
20 existence of an element essential to its case, and on which that party will bear the burden of
21 proof at trial, then the trial court should grant the motion. *Young, supra*.

22 **B. Statutory Construction of the Stock Watering Exemption**

23 Five Corners sustains its analysis of RCW 90.44.050, the statute that exempts
24 Easterday from obtaining a permit for “stock-watering purposes” by never completely citing
25

1 it, Mem. 3:3-6, slicing it up like salami, 12:16-21, and chanting “unlimited withdrawals.” The
2 heart of its argument is that the stock watering exemption will “devour the whole of the
3 statutory scheme for regulating groundwater, based upon the potentially mistaken,
4 grammatically incorrect placement of commas.” Id. 17:8-11. This is table pounding, not
5 statutory analysis. RCW 90.44.050 provides as follows:

6 After June 6, 1945, no withdrawal of public groundwaters of the state shall
7 be begun, nor shall any well or other works for such withdrawal be
8 constructed, unless an application to appropriate such waters has been made to
9 the department and a permit has been granted by it as herein provided:
10 *EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-*
11 *watering purposes, or for the watering of a lawn or of a noncommercial*
12 *garden not exceeding one-half acre in area, or for single or group domestic*
13 *uses in an amount not exceeding five thousand gallons a day, or as provided in*
14 *RCW 90.44.052, or for an industrial purpose in an amount not exceeding five*
15 *thousand gallons a day, is and shall be exempt from the provisions of this*
16 *section, but, to the extent that it is regularly used beneficially, shall be entitled*
17 *to a right equal to that established by a permit issued under the provisions of*
18 *this chapter: PROVIDED, HOWEVER, That the department from time to time*
19 *may require the person or agency making any such small withdrawal to furnish*
20 *information as to the means for and the quantity of that withdrawal:*
21 *PROVIDED, FURTHER, That at the option of the party making withdrawals*
22 *of groundwaters of the state not exceeding five thousand gallons per day,*
23 *applications under this section or declarations under RCW 90.44.090 may be*
24 *filed and permits and certificates obtained in the same manner and under the*
25 *same requirements as is in this chapter provided in the case of withdrawals in*
excess of five thousand gallons a day. [emphasis added]

17 It is only the italicized portion of this statute that is in issue and its meaning is clear
18 and unambiguous. The Attorney General’s thorough and careful analysis leaves little to add.
19 AGO 2005 No. 17. We will address, however, Five Corners attempts to re-write the statute in
20 a different way.

21 RCW 90.44.050 extinguishes Washington citizens’ common law rights to appropriate
22 groundwater and substitutes the obligation to obtain a permit. Collin’s ancestors exercised
23 their common law right and Poe’s exercised the statutory exemptions. The four exemptions
24 from obtaining a permit are:

- 1 1. any withdrawal for stock-watering purposes,
- 2 2. [any withdrawal] for the watering of a lawn or of a noncommercial garden
- 3 not exceeding one-half acre in area,
- 4 3. [any withdrawal] for single or domestic group uses in an amount not
- 5 exceeding 5,000 gallons a day [or as provided in RCW 90.44.052], or
- 6 4. [any withdrawal] for an industrial purpose in an amount not exceeding
- 7 5,000 gallons a day.

8 None of the exemptions are “unlimited.” The first is limited to watering stock, the second to
9 noncommercial gardens of less than one-half acre and the last two to domestic and industrial
10 uses not exceeding 5,000 gallons per day. While legislators, much like environmental
11 lawyers, are prone to use more words than necessary, had they intended to limit the first two
12 exemptions to 5000 gallons per day it would have written “*EXCEPT, HOWEVER, That any*
13 *withdrawal of public groundwaters of less than 5000 gallons per day shall be exempt from the*
14 *provisions of this section,*” or perhaps “*EXCEPT, HOWEVER, That any withdrawal of public*
15 *groundwaters for domestic, agricultural or industrial use of less than 5000 gallons per day*
16 *shall be exempt from the provisions of this section.*” Instead the legislature limited the
17 exemptions for stock by number of head and gardens by acreage. Only domestic and
18 industrial uses are limited to 5,000 gallons per day. These are precise, clearly defined
19 distinctions that could not have been the product of careless drafting or sloppy grammar. The
20 cardinal rule of statutory construction is that a court will not look at a statute to create
21 ambiguity where none exists.

22 Our primary duty in interpreting any statute is to discern and implement the
23 intent of the legislature. Our starting point must always be “the statute’s plain
24 language and ordinary meaning.” When the plain language is unambiguous--
25 that is, when the statutory language admits of only one meaning--the legislative
 intent is apparent, and we will not construe the statute otherwise. Just as we
 “cannot add words or clauses to an unambiguous statute when the legislature
 has chosen not to include that language, we may not delete language from an
 unambiguous statute. [citations omitted]

1 *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Only by adding the phrase, “not
2 exceeding five thousand gallons a day” behind the first and second exemption do we arrive at
3 Five Corners’ interpretation of the statute. No rationale or tenant of statutory construction
4 exists for adding this language.

5 **C. Has Easterday Swallowed the Rule Whole?**

6 Reality is a marvelous check on Five Corners’ extrinsic fussing that groundwater must
7 be limited to 5,000 gallons per day without a permit. Mem. 12:2 – 19:10. When Washington
8 adopted the Groundwater Code in 1945, the most current decennial census revealed 1,736,191
9 humans. By the last census that number had tripled to 5,894,121.² This trend is not true for
10 stock animals. In 1945 there were approximately 509,000 dairy cows, 909,000 beef cattle and
11 calves, 178,000 hog and pigs, and 446,000 sheep and lambs. Consistent with our current
12 predilection for McDonalds and North Face and our greater aversion to lard, mutton chops
13 and Pendletons, by 2008 those numbers were 330,000, 845,000, 28,000, and 53,000
14 respectively.³ This represents a total decline in livestock of 786,000 head. There are 64,000
15 less beef cattle, representing a decrease of 7%. Assuming stock require about the same
16 amount of water now as they did in 1945, their water use is down, not up. Five Corners’
17 attempt to picture the stock water exemption as a large anaconda swallowing the calf of water
18 law whole is far removed from reality.

19 As with almost all of the Five Corners’ pseudo factual assertions, the underlying
20 premises are wanting. Five Corners can point to no injury to itself and no real impact on the
21 groundwater of the State. There are no “absurd results” or “inept drafting” to be overcome.
22 Mem. 17:3, 7. The legislature wrote the exemption to allow farmers and ranchers to dig wells
23 to water their stock without obtaining permits. At the time there were 3,036 ranches in
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25 ² Population figures may be obtained from <http://www.census.gov/prod/www/abs/decennial/index.htm>

³ Declaration Jeff Slothower, Ex. 1

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1 Washington that exceeded 1000 acres.⁴ The legislature could not have helped but know they
2 were adopting a measure that would benefit what we now call agribusiness or at least some
3 agribusiness. The language the legislature employed requires nurseries, orchardists and truck
4 farmers to obtain permits, but cattlemen, dairy farmers and shepherds are not burdened by
5 groundwater regulation. Nothing has changed to compel some different result.

6 **D. Legislative History is not relevant to nor does it support Five Corners’**
7 **interpretation.**

8 **1. The Legislative History of the Ground Water Code does not**
9 **support Five Corners’ interpretation.**

9 When a statute such as the stock watering exemption to the Groundwater Code is
10 clear, there is no need to resort to extrinsic evidence. *Parents Involved in Cmty. Schs v.*
11 *Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 72 P.3d 151 (2003) (No resort to voters’ pamphlet.);
12 *King County v. Taxpayers of King County*, 104 Wn.2d 1; 700 P.2d 1143; 1985) (No recourse
13 to allegedly misleading campaign statements.). Nonetheless, the most telling evidence is not
14 the unreported adjudications described by Douglas A. McChesney in his declaration, Brimmer
15 Decl. Ex. H, but the reaction from the Legislature when the Pollution Control Hearings Board
16 decided *DeVries v. Dep’t of Ecology*, PCHB 01-073 (2001). *Id.* Ex. 10. The letter to the
17 Attorney General of February 10, 2005, is a clear indication that the Legislators who signed it
18 do not consider the plain language of the law ambiguous nor out-of-harmony with their intent.
19 *Id.* Ex. K. It is no coincidence that the legislators who wrote this letter represent Eastern
20 Washington districts. While not evidence of intent in 1945, it is certainly evidence that the
21 legislature is satisfied with the plain meaning and in the intervening five years has made no
22 attempt to amend the language. “[T]he Attorney General opinion constitutes notice to the
23 Legislature of the Department’s interpretation of the law, and the Legislature has not acted
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25 ⁴ 1940 Census of Agriculture – Washington p. 536.

1 since 1976 to overturn the Department’s interpretation. Greater weight attaches to an agency
2 interpretation when the Legislature acquiesces in that interpretation.” *Bowles v. Wash. Dep’t*
3 *of Ret. Sys.*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993). Certainly, there are logical reasons
4 for exempting cattle, but not corn. An irrigation circle, one circle, would use twice the water
5 as all 30,000 of Easterday’s cattle. But in the end, the legislature made its decision politically.
6 The Groundwater Code took away the freedom of many of Washington’s citizens to just dig a
7 well when they needed water and substituted regulation. It is understandable that the
8 legislature would chose to not abridge that freedom for as many citizens as possible. We can
9 suppose ranchers and dairy farmers lobbied to retain the freedom to dig wells in 1945. The
10 reaction of their legislators to *DeVries* is both logical and understandable. If the legislature
11 imposes regulation in place of freedom, that choice will doubtless be a political decision,
12 because the amount of stock using water today is less than it was in 1945.

13 **2. Resort to extrinsic evidence is impermissible.**

14 Five Corners resorts to extensive extrinsic evidence without mentioning the word, let
15 alone justifying its use.

16 It is a well recognized rule of statutory construction that intrinsic and extrinsic
17 aids may be resorted to only when the meaning of a statute cannot be declared
18 from the statutory language to be construed. It follows, then, that, unless the
19 words tax credit, considered in connection with the context in which they are
20 found, be held ambiguous, intrinsic and extrinsic aids in determining the
21 meaning of the phrase may not be employed. As we stated in the case of *Ernst*
22 *v. Kootros*, 196 Wash. 138, 82 P.2d 126,

20 “When the language of the act is plain, free from ambiguity, and devoid
21 of uncertainty, it is unanimously held that there is no room for
22 construction.”

22 *State ex rel. Wash. Mut. Sav. Bank v. Bellingham*, 8 Wn.2d 233, 243, 111 P.2d 781 (1941).

23 Five Corners’ attempts to use extrinsic aids to show that the statute is ambiguous rather than
24 explain some ambiguity. “Whether this court considers the historic record as further
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1 illustration of the plain language of RCW 90.44.050 or examines the record to aid in
2 interpreting an ambiguous provision, the historic record supports limiting the amount of water
3 that can be used for watering livestock without a permit.” Mem. 19:21-20:2. This is just
4 backwards. We need not look at “the historic record” *i.e.* extrinsic evidence when the
5 language is clear. As we have shown the “historic record” does not support Five Corner’s
6 position in the first place.

7 Five Corners attempts to use contemporaneous material do not address the issues in
8 their case, because the very evidence to which they point is like the other three fingers on
9 their hands, pointing back at them. Each of Five Corner’s predecessors took full advantage of
10 his right to dig a well without obtaining the permission of the government. The evidence
11 upon which they now rely only proves that the Legislature of 1945 did not wash away those
12 rights wholesale. Five Corner’s twenty-first century “I already have my place in the country”
13 environmental concerns are just politically correct spin on the evidence.

14 **IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO EASTERDAY**

15 **A. Relief Requested.**

16 Easterday Ranches, Inc. requests that the court enter judgment in its favor. The
17 plaintiffs’ claims are amorphous and ill-defined. Five Corners seeks, “a declaration that the
18 stock-water exemption from permitting under the Groundwater Code is not unlimited in
19 amount or is not available to an industrial livestock operation like that proposed by defendants
20 Easterday Ranches, Inc.” Mem. 1:16-18. We believe their argument intends to limit
21 Easterday to 5,000 gallons per day in addition to the water rights transferred under the Pepiot
22 permit. Easterday does not contend its use of water is unlimited but limited only to that
23 appropriate for watering the stock maintained on the property. This is about 505 acre feet per
24 year, a figure consistent with good agricultural practice.

1 As alternate relief, the court should dismiss the plaintiffs' claims with prejudice. As
2 demonstrated below, the plaintiffs lack standing and any case they may have that their own
3 water rights have been damaged is not ripe. If the court goes no further than this, then
4 dismissal with prejudice is appropriate.

5 Because the plaintiffs claim that Easterday is violating the Groundwater Code by using
6 water necessary to raise beef cattle, Easterday is entitled to the costs of defending this action
7 under Franklin County's Right to Farm Ordinance and RCW 7.48.300 *et seq.*

8 **B. The Plaintiffs lack standing.**

9 To have standing to seek declaratory relief, Five Corners must demonstrate a
10 controversy ripe for a judicial determination. A party not directly affected lacks standing. In
11 *Yakima County Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245
12 (1993), a fire protection district challenged agreements between property owners and the City
13 of Yakima agreeing to annexation of their property into the City as a condition of providing
14 water service. Our Supreme Court found that the fire protection district had no standing,
15 because it could not make a case for an immediate injury or damage.

16 [E]ven giving RCW 7.24.020 a liberal construction as required by RCW
17 7.24.120, the Fire District does not have standing to take part in this
18 declaratory judgment action. The Fire District argues that its financial interests
19 are affected by the OUA's, in that it stands to lose a percentage of the value of
20 its assets equal to the percentage of its territory that is part of the proposed
annexation. However, as the trial judge repeatedly emphasized, the Fire District's
financial interests will be affected only if annexation is ultimately successful.

21 122 Wn.2d 379-380. Not one plaintiff can point to a single injury because of Easterday's well
22 and water use. While they fuss over the possibility of their own unpermitted water rights

1 being affected,⁵ none present any admissible evidence of damage, or even the possibility of
2 damage.

3 What the plaintiffs are asking this court to do is become the legislature and amend the
4 law as it now exists. Sheila Poe speaks of her lobbying efforts:

5 Because of my concern for water resources in eastern Washington and what
6 that means for my family and our way of life, I travelled to Olympia and spoke
7 to the Agriculture and Water Committee regarding my concern of an industrial
8 entity being allowed usage of millions of gallons of water with no permits, no
9 monitoring and blatant disregard of first water right owners in the driest area of
the State of Washington. I believe the State of Washington holds in its hands
the responsibility of all waters in the State of Washington. We ask to be
protected as human beings from losing even our drinking water in our homes.

10 Poe Decl. ¶12. Poe is quick to ask for regulation of others to ameliorate the deprivations of
11 her predecessors. She is correct to take her claim to the legislature, however, but it is not
12 appropriate in this court. Were it so, we would most certainly plead “he who seeks equity
13 must do equity” and the court should order the plaintiffs to themselves obtain permits were it
14 to accept their arguments. *Port of Walla Walla v. Sun--Glo Producers*, 8 Wn. App. 51, 56,
15 504 P.2d 324 (1972). As we discussed *supra*, the amount of water used for stock watering in
16 this State is not large in relation to other uses. It is for the legislature to amend the rules, not
17 this court. It is in Olympia that the plaintiffs have standing, not in Pasco.

18 Even Five Corners plays down any actual injury to its members. In its memorandum
19 in opposition to a motion to intervene filed August 11, 2009, Five Corners said,

20 This litigation is about the State of Washington’s interpretation and application
21 of RCW 90.44.050, allowing the unregulated, unpermitted withdrawal of
22 unlimited amounts of groundwater for the purposes of watering livestock, not
23 regulated irrigation rights. This litigation is not a water right dispute (there is
no assertion of senior rights or conflict of rights that must be adjudicated by
this Court), nor does this litigation involve the transferred water right for
Easterday, or any aspect or element of the transferred water right. A decision in

24 ⁵ “I am deeply concerned about the impacts of permit-exempt groundwater pumping.” Sumpton Decl. ¶11. “I
25 am concerned about how increases in groundwater pumping will adversely affect in stream flow values,
including salmon habitat, recreation, and other public uses of rivers.” ¶12 .

1 the Family Farmers' favor limiting application of unpermitted use of
2 groundwater for livestock watering will not affect permitted water rights
generally, or Easterday's permitted rights in particular.

3 5:10-18 [footnotes omitted]. If Easterday were required to get a permit, The Department
4 would either grant or deny that permit and Easterday would have its operation as planned or a
5 reduced operation with only the Pepiot permit. There is no extant controversy that such an
6 action would resolve. When Five Corners finally drains the Wanapum aquifer in their vicinity
7 and blames Easterday, then there will be a dispute that must be resolved. Five Corners pleads
8 no injury, presents evidence of no injury and shows no judiciable controversy. Five Corners
9 lacks standing.

10 **C. An Opinion of the Attorney General is entitled to considerable weight.**

11 An Attorney General opinion is not controlling, but is entitled to considerable weight.
12 *Bellevue Fire Fighters, Local 1604 v. Bellevue*, 100 Wn.2d 748, 751 n.1, 675 P.2d 592, *cert.*
13 *denied*, 471 U.S. 1015 (1984). "We review questions of statutory interpretation *de novo*. . . .
14 In reviewing a statute, we give effect to the legislature's intent, primarily derived from
15 statutory language. Where statutory language is plain and unambiguous, we ascertain the
16 meaning of the statute solely from its language. We read an unambiguous statute as a whole
17 and must give effect to all of its language." *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d
18 912, 919, 215 P.3d 185 (2009). The opinion of the Attorney General correctly applies these
19 principles to the Groundwater Code.

20 Under applicable rules, if a statute's meaning is plain from the face of the
21 statute, then effect must be given to its "plain meaning" as expressing the
22 Legislature's intent. [*Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146
23 Wn.2d 1, 9-10, 43 P.3d 4 (2002)]. To determine whether the meaning of a
24 statute is plain, one must consider the statutory scheme as a whole, including
25 related statutes. Plain meaning is "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." *Id.* at 10-11. If, after considering "all that the
Legislature has said", the statute is not plain (but rather is ambiguous), then the

1 court applies additional rules of statutory construction to resolve the ambiguity
2 and determine what the statutory language means. Notably, however, a statute
3 is not ambiguous merely because it is subject to more than one conceivable
4 interpretation. Rather, ambiguity depends on the existence of more than one
5 reasonable meaning. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030
6 (2001).

We conclude that the first proviso to RCW 90.44.050 makes it plain that
groundwater withdrawals for stock-watering are exempt from the permit
requirement, and that the exemption is not limited to withdrawals of less than
5,000 gallons a day.

7 2005 AGO No. 16, 7-8. We have discussed the reasonableness of the plain language in light
8 of both past and current agricultural practices, *supra*, at some length. It is not productive to
9 argue over clear language.

10 **D. Easterday is entitled to relief.**

11 **1. Dismissal.**

12 If the court finds that the plaintiffs lack standing, it must dismiss this action and should
13 not embark on any analysis of the Groundwater Code. *State ex rel. Quick-Ruben v.*
14 *Verharen*, 136 Wn.2d 888, 969 P.2d 64 (1998) (Quo Warranto). Lack of standing is a
15 jurisdictional defect and a party or court may raise the issue at any time. “If a plaintiff lacks
16 standing to bring a suit, courts lack jurisdiction to consider it.” *High Tide Seafoods v. State*,
17 106 Wn.2d 695, 702, 725 P.2d 411 (1986). In *Branson v. Port of Seattle*, 152 Wn.2d 862, 101
18 P.3d 67 (2004) the court found that the plaintiff lacked standing to bring declaratory
19 judgment, because he was not in the zone of interest protected by a statute. He had
20 challenged the applicability of airport concession fees charged to rental car companies
21 conducting business at Seattle Tacoma International Airport under the 1945 Revised Airports
22 Act, RCW 14.08. He sought both declaratory relief and damages. The Court concluded that
23 because the airport fees were charges to concessionaires, Branson lacked standing to
24 challenge the reasonableness, uniformity, or basis for establishing the fees and had not shown

1 that declaratory judgment in his favor would be appropriate given limitations imposed under
2 the Uniform Declaratory Judgments Act RCW 7.24.

3 In order to have standing to seek declaratory judgment under the act, a person
4 must present a justiciable controversy:

5 '(1) . . . an actual, present and existing dispute, or the mature seeds of
6 one, as distinguished from a possible, dormant, hypothetical,
7 speculative, or moot disagreement, (2) between parties having genuine
8 and opposing interests, (3) which involves interests that must be direct
9 and substantial, rather than potential, theoretical, abstract or academic,
10 and (4) a judicial determination of which will be final and conclusive.'

11 *To-Ro Trade Shows v. Collin*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)
12 (emphasis added) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d
13 811, 815, 514 P.2d 137 (1973)). Absent these elements, the court "steps into
14 the prohibited area of advisory opinions." *Walker v. Munro*, 124 Wn.2d 402,
15 411-12, 879 P.2d 920 (1994) (quoting *Diversified Indus.*, 82 Wn.2d at 815).
16 Inherent in the justiciability determination is the traditional limiting doctrine of
17 standing."

18 152 Wash.2d at 877.

19 Not every regulatory act is subject to challenge. For example, in order to operate a
20 motor vehicle on a public way, the legislature has determined to substitute regulation for
21 individual freedom and requires a license for this privilege. It has not, however, chosen to
22 regulate the operation of non-motorized vehicles or animal powered conveyances by requiring
23 a license. RCW 46.20.001. It is thus a futile act to petition a court to prohibit a 15 year old
24 from operating a tractor on his parents' farm, because his freedom to do that has not been
25 abridged by the legislature. It would be just as foolish to petition a court to review the
issuance of a license to the irresponsible 16 year old next door, because the legislature has not
provided for such an appeal. *Edgewater Liquors v. Liston*, 349 Md. 803, 709 A.2d 1301
(1998) (Disgruntled competitors could not challenge issuance of a liquor license in the
absence of a statute granting standing.) The petitioners must deal with the issue presented to
this court in the same way the disgruntled competitors in *Edgewater* did, convince the

1 legislature to change the law. 2000 Md. Laws 384; *see, Plein v. DOL, Licensing & Reg.*, 369
2 Md. 421, 800 A.2d 757 (2002). In the absence of petitioners who have demonstrated standing
3 to challenge Easterday’s operation, the court should avoid the temptation to reach the merits
4 of this controversy. The arguments, the issues and the alleged problem are political problems
5 best left to the legislature, not the courts.

6 **2. If the Court finds standing, Easterday is entitled to declaratory**
7 **relief.**

8 If the court finds that the petitioner have standing, there is little it can do other than
9 find that stock watering is or is not exempt from the requirement to obtain a permit, because
10 Easterday will use more than 5000 gallons per day to water 30,000 head of beef cattle.
11 Easterday is entitled to use “any amount of water for livestock” on its property. *Kim v.*
12 *Pollution Control Hearing Bd.*, 115 Wn. App. 157, 61 P.3d 1211 (2003). As the petitioners
13 have not raised the issue of what amount is reasonable and have not challenged Easterday and
14 Ecology’s determination of 505 acre feet per year, the court has no reason to resolve any issue
15 in this regard.

16 **3. Costs of this litigation.**

17 As have many agriculturally dependant counties, Franklin County has adopted a Right
18 to Farm ordinance. Franklin County Ordinance number 8-2008, entitled, “An ordinance
19 adopting the Franklin County ‘right to farm’ policy and repealing ordinance 23-29 adopted on
20 October 17, 1994” passed by the Franklin County commissioners on November 3, 2008. The
21 Ordinance defines “Agricultural activity” as “a condition or activity which occurs on a farm
22 in connection with the commercial production of farm products and includes, but is not
23 limited to . . . use of water for agricultural activities; . . . and conversion from one agricultural
24 activity to another The term includes use of new practices and equipment consistent with
25

1 technological development within the agricultural industry.” Ord. 8-2008 §4. Section 5 of the
2 Ordinance provides in relevant part:

3 (1) A farmer who prevails in any action, claim, or counterclaim alleging that
4 agricultural activity on a farm constitutes a nuisance may recover the full costs
5 and expenses determined by a court to have been reasonably incurred by the
6 farmer as a result of the action, claim, or counterclaim.

7 (2) A farmer who prevails in any action, claim, or counterclaim (a) based on an
8 allegation that agricultural activity on a farm is in violation of specified laws,
9 rules, or ordinances, (b) where such activity is not found to be in violation of
10 the specified laws, rules, or ordinances, and (c) actual damages are realized by
11 the farm as a result of the action, claim, or counterclaim, may recover the full
12 costs and expenses determined by a court to have been reasonably incurred by
13 the farmer as a result of the action, claim, or counterclaim.

14 (3) The costs and expenses that may be recovered according to subsection (1)
15 or (2) of FCC 5.12.060 and as hereinafter amended include actual damages and
16 reasonable attorneys' fees and costs. For the purposes of FCC 5.12.060, "actual
17 damages" include lost revenue and the replacement value of crops or livestock
18 damaged or unable to be harvested or sold as a result of the action, claim, or
19 counterclaim.

20 An allegation of injury for the withdrawal of ground water is an action for nuisance.
21 *Henderson v. Wade Sand & Gravel Co.*, 388 So. 2d 900 (Ala. 1980); *see, Bradley v. Amer.*
22 *Smelting & Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985) (merging the law of nuisance
23 and trespass). The ordinance further makes it clear that the damages “include actual damages
24 and reasonable attorneys’ fees and costs.” *Id.* §5. Franklin County’s provisions are
25 substantively identical to RCW 7.48.300-.320 which provides identical remedies. Easterday
Ranches is entitled to reasonable attorneys fees for defending this suit.

V. CONCLUSION

The court should dismiss this case with prejudice. The plaintiffs lack standing to bring
this action for want of any injury. Their construction of the stock watering exemption is
wrong. Easterday is entitled to judgment as a matter of law and to its reasonable costs of

1 defending this action including reasonable attorneys' fees under Franklin County's Right to
2 Farm Ordinance and RCW 7.48.300 *et seq.*

3 **VI. PROPOSED ORDER**

4 Proposed orders in the alternative are attached.

5 RESPECTFULLY submitted this 18th day of February, 2010.

6 LEE SMART, P.S., INC.

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8 By: 

9 William L. Cameron, WSBA No. 5108

10
11 By: 

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13 Attorneys for Defendant
14 Easterday Ranches
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