

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

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

Plaintiffs,

vs.

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

Defendants.

NO. 09-2-51185-6

NOTE FOR HEARING

*Noted for hearing:
April 2, 2010 (special set)*

Judge _____

Clerk's Action Required

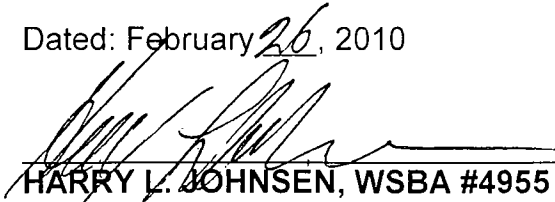
NOTE FOR HEARING WITH SPECIAL SET: Please take note that the issue in this case will be heard on the date set out in the margin and the Clerk is requested to note the same on the motion docket for that day.

Date of Hearing: April 2, 2010

Nature of Motion: Motion for Leave to Participate as *Amicus Curiae*

Dated: February 26, 2010

TO THE CLERK OF COURT and to the attorneys for Plaintiffs, Defendants, Intervenor and Amici set forth on attached list.


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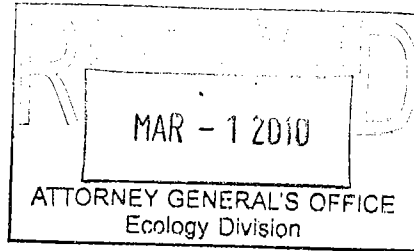
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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF FRANKLIN**

9 **FIVE CORNERS FAMILY FARMERS,**
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11 **ENVIRONMENTAL LAW AND POLICY,**
12 **and SIERRA CLUB,**

13 Plaintiffs,

14 vs.

15 **STATE OF WASHINGTON,**
16 **WASHINGTON STATE DEPARTMENT**
17 **OF ECOLOGY, and EASTERDAY**
18 **RANCHES, INC.,**

19 Defendants.

NO. 09-2-51185-6

**JOINT TRIBAL MOTION FOR
LEAVE TO PARTICIPATE AS
AMICUS CURIAE**

*Noted for hearing:
April 2, 2010*

Judge _____

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Come now the nine federally recognized Indian tribes listed below, by and through their attorneys, and respectfully move the Court to allow their participation in this matter as amicus curiae. This motion is made pursuant to CR 7(b) and is consistent with RAP 10.6. No civil rule specifically addresses amicus participation in Superior Court. It is within the sound discretion of the trial judge to allow participation if it may be helpful to the Court. *Parsons v. Dep't. of Social & Health Servs.*, 129 Wn. App. 293, 302 (2005) (upholding the discretion of trial courts to permit

1 participation of *amici*).

2 **Identity of Moving Parties**

3 This Motion is brought by the Lummi Nation, the Yakama Nation, the
4 Swinomish Tribal Community, the Puyallup Tribe, the Suquamish Tribe, the
5 Jamestown S'Klallam Tribe, the Port Gamble S'Klallam Tribe, the Quinault Indian
6 Tribe and the Colville Confederated Tribes (collectively, "the Tribes"). All of the Tribes
7 are federally recognized Indian tribes located within Washington State.
8

9 **The Tribes' Interest in the Matter**

10 This case involves a new interpretation by the Department of Ecology of a
11 water code permit exemption provision that has been in effect for over 60 years. The
12 new interpretation will allow unlimited ground water withdrawals without state permits
13 throughout the state. Because of the interrelationship between ground water and
14 surface water, the new interpretation will have a direct and substantial impact on the
15 water available in rivers and streams. Minimum stream flows in Washington are
16 reflected in water right decisions made by the Department of Ecology. Reduction in
17 stream flows has great potential for adversely affecting fish runs. The Tribes hold the
18 right to fish within their Reservations and, by treaty stipulation, on all runs that pass
19 through their "usual and accustomed" fishing areas, regardless of where those fish
20 runs originate. See *United States v. Washington*, 384 F.Supp. at 344 (treaty fishing
21 rights extend to all fish available for harvest in a tribe's usual and accustomed fishing
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*

1 grounds). Therefore, the Tribes have an interest in the State's management of both
2 ground and surface waters within the regulatory system created by the state water
3 code.

4 The Tribes' interest in participating in this case as *amici* is to assist the Court in
5 identifying the potential effects on vested water rights, including stream flows, that are
6 implicated by the permit exemption contained in RCW 90.44.050. The interpretation
7 of the stock water exemption provision of the Groundwater Code will impact the
8 efficacy of several other provisions of the Ground Water Code. A more detailed
9 description of the Tribes' interest and their analysis of statutory construction issues
10 involved in this case is set out in the Amicus Brief filed herewith.

11 12 **Issues to be Addressed**

13 A 2005 Attorney General Opinion rejected the longstanding interpretation of the
14 water code's permit exemption for stock watering, and opined that no quantity limit
15 applies to ground water withdrawals for that purpose. The Department of Ecology
16 subsequently reversed its own interpretation of that exemption, despite the fact that
17 Ecology's interpretation had been repeatedly upheld by administrative tribunals and in
18 water rights adjudications. The issue presented is whether the new interpretation
19 properly construes the statute in light of the wording of the statute, the purposes of
20 the statute and its statutory context, and the applicable rules of statutory construction.
21 The cumulative impact of an interpretive error will be felt throughout the state,
22
23

1 wherever the Tribes' rights to fish exist.

2 **Reasons Additional Information is Necessary**

3 Because the interpretation of this statute will have a significant statewide
4 impact to a comprehensive water regulatory scheme, the Tribes seek to direct the
5 Court's attention to the effects of an overly broad interpretation of the permit
6 exemptions. Any decision that undermines the state's ability to manage water
7 resources to protect in-stream flow water rights directly relates to, and may
8 significantly impair, the Tribes' economic and cultural interests in viable fisheries. Any
9 reduction in the State's water management abilities also affects cooperative
10 arrangements between the Tribes and the State.

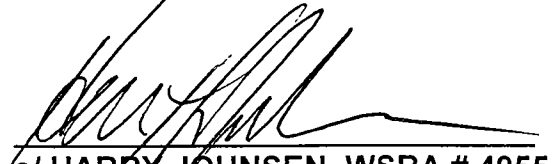
11 The original parties in the case understandably focus on the exemption
12 asserted by a particular Franklin County ranching operation. Several agricultural
13 interest groups have been granted intervention as full parties in the case, and they will
14 bring their own perspectives to the issues. In a much more limited role as amici, the
15 Tribes will provide the Court with their views on the potential adverse cumulative
16 effects on essential stream flows that will ensue from an inappropriately broad reading
17 of the stock watering exemption from the state's water regulatory system.
18

19
20 **Conclusion**

21 The Tribes respectfully request that the Court grant the Tribes' motion to
22 participate as amicus curiae in this matter and that the Court consider the arguments
23

1 set out in the Tribes' brief filed with this motion.

2
3 Respectfully submitted this 26 day of February, 2010, by:

4
5 
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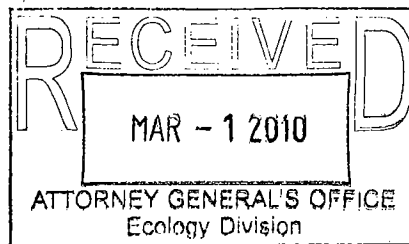
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PROPOSED

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RANCHES, INC.,

Defendants.

NO. 09-2-51185-6

ORDER ON MOTION FOR
LEAVE TO PARTICIPATE AS
AMICUS CURIAE

Noted for hearing:
April 2, 2010

Judge _____

This matter came before the Court on the Motion of the Lummi Nation, the Yakama Nation, the Swinomish Tribal Community, the Puyallup Tribe, the Suquamish Tribe, the Jamestown S'Klallam Tribe, the Port Gamble S'Klallam Tribe, the Quinault Indian Tribe and the Colville Confederated Tribes (collectively, "the Tribes"), for leave to participate in this case as *amicus curiae*. A hearing was held in open court on April 2, 2010.

ORDER ON TRIBAL MOTION TO
PARTICIPATE AS *AMICUS CURIAE*

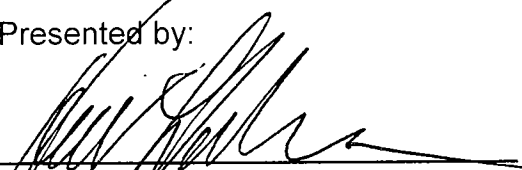
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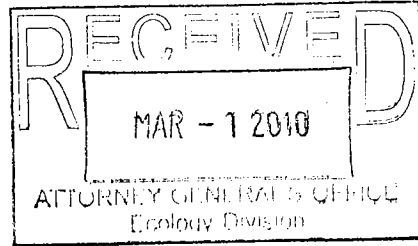
1 The Court has considered the materials provided by the parties, heard
2 argument, and is fully advised of the premises of the Motion. The Tribes' Motion for
3 Leave to Participate as *Amicus Curiae* is hereby _____ granted _____ denied (*choose*
4 *one*).

5 IT IS SO ORDERED this ____ day of April, 2010.

6
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8 _____
Superior Court Judge

9 Presented by:

10 
11 _____
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NO. 09-2-51185-6

JOINT TRIBAL
AMICUS CURIAE BRIEF

Noted for hearing:
April 2, 2010

Judge _____

INTRODUCTION

The *amici* are all federally recognized Indian tribes located in Washington State. Each of the Tribes holds fishing rights that were specifically reserved by treaty or are an integral part of the reservations that comprise their homelands. **United States v. Washington**, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. den.* 423 U.S. 1086 (1976), *aff'd in substantial part*, 443 U.S. 658 (1979); **Sohappy v.**

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1 **Smith**, 302 F. Supp. 899 (D.Or. 1969); **Colville Confederated Tribes v. Walton**,
2 647 F.2d 42, 48 (9th Cir. 1981), *cert. den.*, 454 U.S. 1092 (1981). The importance of
3 fish to the Tribes cannot be overstated. As early as 1905 the Supreme Court
4 characterized these rights as being “not much less necessary to the existence of the
5 Indians than the atmosphere they breathed.” **United States v. Winans**, 198 U.S.
6 371, 381 (1905). For the fish themselves, adequate stream flows literally are the
7 “atmosphere they breathe,” for without sufficient water in the spawning, rearing and
8 migration streams, there will be no salmon.

9 Thus, the Tribes have a vital interest in assuring that the provisions of state law
10 that support instream flows are honored and enforced. Because surface waters and
11 ground waters are inherently and inextricably linked through the natural hydrogeologic
12 cycle, the Tribes’ interest extends to ground water as well as surface water. See
13 **Postema v. PCHB**, 142 Wn.2d 68, 75 (2000). The interpretation of the state water
14 code that is at issue in this case – an interpretation that would allow unlimited and, in
15 many areas, unregulated ground water withdrawal for undefined “stock watering”
16 purposes – threatens to significantly undermine state law protections for instream
17 flows. For these reasons, the Tribes seek to make their views known as *amicus*
18 *curiae* to assist the Court in making a correct determination of the state law questions
19 involved here.
20

21 INTERESTS OF THE *AMICI*

22 The *amici* tribes are the Lummi Nation, the Yakama Nation, the Swinomish.

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1 Tribal Community, the Puyallup Tribe, the Suquamish Tribe, the Jamestown S’Klallam
2 Tribe, the Port Gamble S’Klallam Tribe, the Quinault Indian Nation and the Colville
3 Confederated Tribes (collectively, “the Tribes”). The Tribes are located throughout the
4 state and base their participation on the statewide impact of the matters being
5 considered in this case. The affected streams not only flow through or along the
6 borders of the Tribes’ Reservations, the Treaty Tribes hold the right to fish on all runs
7 that pass through their “usual and accustomed” fishing areas, regardless of where
8 those fish runs originate. See **United States v. Washington**, 384 F.Supp. at 344
9 (treaty fishing rights extend to all fish available for harvest in a tribe’s usual and
10 accustomed fishing grounds) The interpretation of the water code provisions at issue
11 in this declaratory judgment action will affect streams everywhere in Washington. The
12 interests of the Tribes are as geographically wide ranging as are the potential impacts
13 of the Court’s decision in this matter.

14
15 The Tribes have a direct and unique interest in the manner in which RCW
16 90.44.050 is interpreted. Unlimited and unpermitted ground water withdrawals that are
17 in hydraulic continuity to surface water will result in reduced in-stream flows. *Postema*,
18 *supra*. Reduced in-stream flows will impact fish production and productivity of the
19 watersheds. Reduced fish production in Washington’s rivers and streams will
20 detrimentally affect tribal economies, the livelihood of tribal members, and tribal
21 cultures.

22 Alarming declines in salmon runs in Washington and surrounding states have
23 caused great concern among federal, state and tribal fish managers, commercial and

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1 sports fishing interests, and environmental groups. Recent surveys have identified a
2 number of salmonid stocks at risk due to habitat loss, over fishing, loss of genetic
3 fitness and diversity, and reduced marine productivity.

4 The decline in stock status has led to the loss of fishing opportunities. In
5 recent years, the ocean coast of Washington has twice been closed to salmon fishing,
6 and fishing has been severely limited in the Columbia River, Strait of Juan de Fuca,
7 Puget Sound, and other traditional tribal fishing areas.

8 Inadequate stream flows are certainly not the sole factor in the decline of fish
9 runs in Washington, but they are an important factor. In the *Postema* litigation, for
10 example, Dr. Hal Beecher, a state's expert on the effects of low flows on fish testified:
11 "many studies related to fish production and instream flows show a positive
12 relationship between flow and fish, between flow and fish habitat, and between flow-
13 dependent habitat and fish."¹

14 If water is taken out of a stream for "consumptive" uses it is not available for
15 instream resources. Human activities have resulted in some streams being so over-
16 appropriated that they are nothing but dry streambeds during the low flow period in
17 the summer, a time that can be particularly crucial for salmon migration. In many other
18 streams, flows are reduced well below natural flow levels. Stream flows during
19 summer months are commonly supported by ground water discharges to the stream
20

21
22 ¹ Hal Beecher, Ph.D., testifying in *Jorgensen, et. al. v. PCHB*, one of the cases consolidated in
23 *Postema*. Dr. Beecher is an instream flow fishery biologist employed by the Washington
24 Department of Fish and Wildlife. He has been with Fish and Wildlife or its predecessor agencies
25 since 1979. He testified as an expert in the field of fishery biology, habitat needs for fish, and the
effects of low flows on fish.

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1 system. These ground water discharges to the stream can be reduced or eliminated
2 by pumping ground water wells (since the pumping both intercepts water that under
3 natural conditions would discharge to the stream) and by drawing the surface water in
4 the stream down into the aquifer. Over-appropriation conditions occurring in many
5 streams and rivers used by salmon can be found in at least 16 watersheds throughout
6 the state, representing about a quarter of the state's basins. These basins also
7 contain 65% of the state's population. Over-appropriation means more water is being
8 withdrawn from rivers and streams in those watersheds, especially in late summer
9 and early fall, when flows are naturally low and when fish need water for migration,
10 spawning or rearing. In some cases, flows that are too low can provide insufficient
11 spawning areas to accommodate all returning adult fish. Flows that are depressed
12 below natural low flows generally cause fish production to decline by reducing the
13 total amount of habitat and food sources available in the stream. Low summer flows
14 are also associated with higher water temperature and higher concentrations of
15 pollutants, which can be debilitating or even lethal to fish.

17 Flow targets are not met many days out of the year in virtually every basin
18 throughout the state where state instream flow rules have been established. The
19 Legislature has passed four different statutes relating to instream flow: Minimum
20 Water Flows and Levels, RCW 90.22; Water Resources Act of 1971, RCW 90.54;
21 Construction Projects in State Waters, RCW 75.20; and Watershed Planning, RCW
22 90.82. All four of the statutes direct the Department of Ecology to take some
23 affirmative action to ensure that minimum water flows remain in public waterways for

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1 the purpose of protecting fish, game, birds or other wildlife resources.

2 The Tribes can and will resort to the federal courts to protect their rights if
3 necessary. But the Tribes and the State have been working productively as co-
4 managers of the fisheries resources for several decades to ensure the return of viable
5 fish production in Washington's rivers and streams. For example, under the
6 Watershed Planning provisions of RCW 90.82, several tribes are participating in a
7 government-to-government manner with the State to "...develop a more thorough and
8 cooperative method of determining what the current water resource situation is in
9 each water resource inventory area of the state..." RCW 90.82.005. One of the
10 *amicus* Tribes, the Lummi Nation, has been working for several years with Ecology to
11 identify the necessary instream flow requirements within the Nooksack River Basin in
12 order to avoid protracted litigation, such as that taking place in the Yakima River
13 basin. These efforts have been partially funded by the State, staffed by the regional
14 Ecology office in Bellingham. Another effort directed at watershed planning is the
15 work done by the Jamestown S'Klallam Tribe and Ecology in WRIA 17 and WRIA 18
16 on the Olympic Peninsula. Central to the efforts by all these Tribes, Ecology and the
17 Legislature is the concept that a predictable, enforceable system of water rights is
18 essential to protection of all the interests involved.

19
20 An important tool in this effort is Washington's water regulatory system, which
21 includes minimum flow requirements in many streams, in part to support fisheries
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1 resources.²

2 The statutes plainly provide that **minimum flows**, once established by
3 rule, are **appropriations** which cannot be impaired by subsequent
4 withdrawals of groundwater in hydraulic continuity with the surface
5 waters subject to the minimum flows. *RCW 90.03.345; RCW*
6 *90.44.030*. A minimum flow is an appropriation subject to the same
7 protection from subsequent appropriators as other water rights, and
8 *RCW 90.03.290* mandates denial of an application where existing rights
9 would be impaired.

10 **Postema**, 142 Wn.2d at 82 (emphasis in original).

11 The treatment of instream flows as water rights within the state's water code
12 regulatory structure gives the Tribes some measure of protection for the Tribes'
13 interest in healthy fisheries. That protection is incomplete, of course, because the
14 Tribes' fishing rights date from time immemorial, whereas the state rights associated
15 with instream flow rules date only from the date the flows are established by rule.
16 Regardless of its shortcomings, however, the state's water code regulatory system
17 provides the Tribes with an important tool for the protection of stream flows necessary
18 for healthy fisheries.

19 One key to the usefulness of that tool is the water permit system that lies at the
20 heart of the state water code. *RCW 90.03.020*. Because "RCW 90.03.290 mandates
21 denial of an application where existing rights would be impaired", **Postema**, 142
22 Wn.2d at 82, any exemption from the permit application process deprives interested
23 parties of an opportunity for regulatory review of the potential impairment prior to
24 commencement of the withdrawal. This is especially important in the context of

25 ² The Tribes do not necessarily agree that the state's current minimum stream flow rules are
sufficient in quantity.

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1 ground water because the impacts of ground water withdrawals on surface waters
2 may be delayed. *Id. at 75-76.* Without an evaluation of potential impairment in
3 advance of actual withdrawals, the fisheries resources will suffer the consequences of
4 an impairing withdrawal for a considerable period of time before any legal action can
5 be taken to stop it. Even then, Ecology's legal authority to take enforcement action is
6 sometimes questioned, see ***Rettkowski v. Dept. of Ecology***, 122 Wn.2d 219 (1993),
7 leaving individual affected parties no speedy remedy and no alternative other than
8 litigation in the state or federal courts.

9 With this background in mind, the Tribes were surprised and distressed to
10 learn that in 2005 the Washington State Attorney General's Office had issued an
11 advisory opinion stating that permit-exempt ground water withdrawals for the purpose
12 of stock watering have no quantity limit associated with them. *AGO 2005-17.* This
13 opinion, which is contrary to the position the Attorney General's office had
14 successfully taken earlier on behalf of Ecology in litigation before the Pollution Control
15 Hearings Board, was subsequently adopted by Ecology. In doing so, Ecology
16 reversed the interpretation and application of RCW 90.44.050 that had been in effect
17 since the ground water statute was passed in 1945.

18 Unlimited ground water withdrawals for stock watering purposes have the
19 potential to dramatically impair instream flows necessary for health fish runs,
20 especially in small tributary streams where salmon spawning takes place. For
21 example, Whatcom County, where the Lummi Nation's reservation is located, has
22
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1 more dairy cattle than any other county in the state and most of these farms are
2 located in lowland areas where salmon spawning and rearing areas are also located.
3 Permit exemptions unlimited in size for these operations could greatly complicate
4 resolution of water rights in the Nooksack River basin. Other tribes have similar
5 concerns in other parts of the state. These concerns motivate the Tribes to present
6 their views to the court regarding the proper interpretation of RCW 90.44.050 as it
7 relates to stock watering.
8

9 **SUMMARY OF ARGUMENT BY *AMICUS CURIAE***

10 The issue presented is whether RCW 90.44.050 exempts large scale stock
11 watering from the permitting requirements of the state Ground Water Code. The
12 plaintiffs, Five Corner Family Farms *et al.*, are seeking a declaratory judgment
13 regarding a new and unprecedented interpretation and application of RCW 90.44.050
14 by the State and Ecology, that would ignore both the original intent of the statute and
15 sixty years of consistent interpretation and application of the statute. The Tribes
16 support the positions of the plaintiffs and have additional legal considerations for the
17 Court.
18

19 The plain language of RCW 90.44.050 demonstrates the intent of the
20 Washington State Legislature to limit permit-exempt uses of water in the state to small
21 withdrawals, with a ceiling for each category of 5,000 gallons per day. The legislative
22 history of the Ground Water Code demonstrates that RCW 90.44.050 was never
23

1 intended to allow for permit-exempt uses at unlimited amounts. Specifically, the
2 legislative history demonstrates that the stock watering exemption was limited to
3 water for small numbers of animals, such as a family farm. Here, Easterday Ranches
4 and the State are proposing that the court approve an exemption that would consume
5 the rule by allowing an industrial feedlot with tens of thousands of animals to operate
6 in a closed basin but effectively beyond the reach of state water permitting processes.
7 The plain language and legislative history of RCW 90.44.050 prevent the court from
8 accepting the Defendants' position.

9 If, however, the court concludes that it must look beyond the face of the statute
10 to determine the correct interpretation, it will be necessary to consider the impacts of
11 such a determination on other vital needs for water that the Legislature intended to
12 protect in the state. Permit-exempt ground water withdrawals are pervasive
13 throughout the state. But the number of stock watering withdrawals is dwarfed by the
14 magnitude of the withdrawals if the court concludes that the statutory 5,000 gallons
15 per day limit does not apply to them. Easterday, for example, apparently intends to
16 use approximately 100 times the 5000 gallon per day ceiling. The Washington State
17 Dairy Federation, Northwest Dairy Association, Washington Cattle Feeders
18 Association, Cattle Producers of Washington, Washington State Sheep Producers
19 and Washington Farm Bureau ("Collective Ag-interests") have averred in declarations
20 that, "[a]pproximately 70% of the members of the Washington Cattle Feeders
21 Association rely on water withdrawn from wells that are exempt from permitting under
22 RCW 90.44.050." *See Declaration of Ed Field in Support of Motion for Intervention.*

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1 These numbers will only increase if the court concludes that there is no limit on
2 permit- exempt stock watering withdrawals. The cumulative effect of the rampant and
3 widespread unpermitted use under the stock water exemption will result in harm to
4 instream flow rights that are protected by statute and case law. These withdrawals
5 are especially damaging when they occur in small tributary streams that are both vital
6 to salmon spawning and susceptible to depletion at crucial times of the year.

8 ARGUMENT

9 The waters of the state belong to the people of the state, except to the extent
10 that water rights have been obtained by compliance with applicable law. *RCW*
11 *90.03.010* (“Subject to existing rights all waters within the state belong to the public
12 . . .”). Individuals may obtain the right to *use* this public resource upon compliance
13 with the state water code, *Id.*, and those permitted uses will be protected against
14 impairment by future users. *Id.* (“ . . . as between appropriations, the first in time shall
15 be the first in right.”) Consistent with its responsibilities to the public in the
16 management of this public resource, the State Legislature has determined that some
17 portion of the natural flows in the state’s streams shall be preserved for in stream
18 uses that promote the public good. These uses include support for fisheries
19 resources, recreation, and water quality. (“It is the policy of the state to promote the
20 use of the public waters in a fashion which provides for . . . the retention of waters
21 within streams and lakes in sufficient quantity and quality to protect instream and
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1 natural values and rights.” *RCW 90.03.005*). Water rights established for these
2 instream uses have the same status in state law as water rights developed for out of
3 stream uses. *RCW 90.03.345*; ***Postema***, 142 Wn.2d at 81.

4 The Ground Water Code was enacted in 1945 at the request of Washington
5 municipalities as an integral part of the state water code. See *Washington Department*
6 *of Conservation and Development, Thirteenth Biennial Report of the Department of*
7 *Conservation and Development*, 44 (1946). The motivation for the Ground Water Bill
8 was to manage and regulate ground water use in the state on a basis comparable to
9 surface water regulation. *RCW 90.44.020* (ground water code “enacted for the
10 purpose of extending the application of such surface water statutes to the
11 appropriation and beneficial use of ground waters within the state”). The Ground
12 Water Code is based on a simple regulatory premise: there shall be no withdrawal of
13 ground water, nor development of any well for a ground water withdrawal without an
14 application to and permit to proceed from Ecology. *RCW 90.44.050*. In its role as
15 manager of the state’s public water resource, before it may issue a permit Ecology is
16 required to investigate and determine that (1) water is physically available, (2) the
17 proposed use qualifies as “beneficial use,” and (3) an appropriation will not impair
18 existing rights or (4) be detrimental to the public welfare. *RCW 90.03.290*. These
19 requirements apply to both surface water withdrawals and ground water withdrawals.
20
21 The Ground Water Code is clearly motivated by two concerns: first, ensuring that
22 there is regulatory management over the quantity of water that is both physically and
23

1 legally available for use; and second, ensuring that a new use will not impair or
2 adversely impact an existing, senior use. This is the background against which the
3 permit exemption for stock watering must be read.

4 Permits from the Department of Ecology are required for all surface water
5 diversions, regardless of size. *RCW 90.03.250; Postema, supra ; Neubert v.*
6 *Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232 (1991). The Ground Water Code
7 starts from the same premise, *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383
8 (1997), and Ecology must apply the same "four part test", *RCW 90.03.290*, in its
9 evaluation of whether to grant the permit. *RCW 90.44.060*. However, the Legislature
10 provided limited exceptions to the permitting regulatory regime for several categories
11 of small ground water withdrawals. Those limited exceptions are listed serially in *RCW*
12 *90.44.050*:

13
14 [A]ny withdrawal of public groundwaters for stock-watering purposes, or
15 for the watering of a lawn or of a noncommercial garden not exceeding
16 one-half acre in area, or for single or group domestic uses in an amount
17 not exceeding five thousand gallons a day, or as provided in *RCW*
18 *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 . . .

19 The statute immediately qualifies this permit exemption by providing that "the
20 department [of Ecology] from time to time may require the person or agency making
21 any **such small withdrawal** to furnish information as to the means for and the
22 quantity of that withdrawal." *Id.* (*emphasis added*). A second provision then allows
23

1 any "party making withdrawals of groundwaters of the state **not exceeding five**
2 **thousand gallons per day**" to apply for and obtain a permit and certificate for such
3 withdrawal if the owner chooses to do so. *Id.* (*emphasis added*).

4 Consistent with the express characterization of these exemptions as involving
5 "small withdrawal[s]," for 60 years Ecology uniformly interpreted of all the exemptions,
6 including the stock water provision, as having a 5,000 gallon per day ceiling. In fact,
7 the State, through Ecology, successfully argued on legislative history and plain
8 language, that the exemption language in RCW 90.44.050 addressing water for
9 livestock is limited to 5,000 gallons per day. *DeVries vs. Dep't of Ecology*, PCHB 01-
10 073 (2001).

11 The Ground Water Code includes "substantive provisions of water law but also
12 contains the administrative controls associated with having a permit system."

13 *DeVries*, PCHB 01-073, 3. The permitting system is central to the Ground Water
14 Code's purpose, which was directed at regulating the *quantity* of ground water use
15 and *protecting* senior water users from having their rights impaired by unlimited,
16 newer, water users. Ecology asked the "Board to find that the stock watering
17 exemption is limited to 5,000 gallons per day or alternatively that the stock watering
18 exemption is a small withdrawal and that "small" may be compared to other small
19 withdrawals." *Id.* at 4. The PCHB agreed with Ecology and concluded that the stock
20 water exemption is limited to 5,000 gallons per day. The Board reasoned that "[t]o
21 read this section otherwise would result in an unlimited, and uncontrollable, potential
22

1 withdrawal of groundwater." *Id.* at 8. In reaching its conclusion, the Board followed
2 the established tenet that "in construing a statutory exemption a court must narrowly
3 construe the exemption in a manner that gives maximum effect to the objectives of
4 the general rule from which the exemption is made." *Id.* at 12. When construing a
5 statute, the purpose of a statute should prevail over express but inept wording.

6 ***Whatcom Co. v. Bellingham***, 128 Wn.2d 537 (1996).

7 The ***DeVries*** holding is faithful to established Washington law. When courts
8 are required to interpret a statutory provision that is an exception to a general rule, the
9 exception is construed narrowly in order to give maximum effect to the policy
10 underlying the general rule and the legislative intent underlying the general provisions.

11 See ***Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire***
12 ***Fighters Ass'n***, 117 Wn.2d 655 (1991). The Supreme Court has expressly applied
13 this requirement to the Water Code. ***R.D. Merrill Co. v PCHB***, 137 Wn. 2d 118, 140
14 (1999), citing numerous cases.

15
16 The longstanding, consistent interpretation of the exemption statute came to an
17 abrupt end in 2005 when the Attorney General issued an opinion stating that no
18 quantity limit applied to the unpermitted use of ground water for watering livestock.
19 Following this opinion, Ecology abandoned its prior interpretation, upheld in ***DeVries***,
20 and began allowing unlimited ground water use for watering livestock without requiring
21 a permit.³

22 ³ The Supreme Court recently concluded "...where a statute has been left unchanged by the
23 legislature for a significant period of time, the more appropriate method to change the interpretation
or application of a statute is by amendment or revision of the statute, rather than a new agency

1 The Attorney General's 2005 opinion runs counter to the standards of statutory
2 interpretation, and it is inconsistent with the Attorney General's prior opinions relating
3 to the same statute. In contrast to the 2005 opinion, the Attorney General issued an
4 opinion on October 10, 1997, which concluded that:

5 [i]f the [ground water permit] exemption is read broadly, a significant
6 amount of water might be withdrawn "outside" the regulated water
7 system, undercutting the central purpose for enacting the water code.
8 Accordingly, we conclude that where water is withdrawn by a property
9 owner for a single housing development, within a reasonably short
10 period of time, a single "withdrawal" occurs for purposes of applying
11 RCW 90.44.050 and determining whether the withdrawal requires a
12 water rights permit, no matter how many individual wells or other
13 withdrawal mechanisms are employed.

14 *AGO 1997 No. 6.*

15 The Attorney General's 1997 reasoning and opinion was subsequently
16 validated by the Supreme Court in *Dept. of Ecology v. Campbell and Gwinn, LLC.* ,
17 146 Wn.2d 1 (2002). Significantly, in *Campbell and Gwinn* the court counseled that
18 statutory "meaning is discerned from all that the Legislature has said in the statute
19 and related statutes which disclose legislative intent about the provision in question."
20 146 Wn.2d at 11. By contrast, the 2005 opinion allows the inadvertent absence of a
21 comma to override the entire structure of the water code.⁴ The 2005 Opinion does

22 interpretation." *Dot Foods, Inc. v. Washington Dep't of Revenue*, 166 Wn.2d 912, 921 (2009). The
23 recent about-face by the Attorney General is based on tenuous legal reasoning and undercuts 60
24 years of consistent interpretation by Ecology, which has specialized knowledge of managing water
25 rights and resources.

26 ⁴ Under standard grammatical rules, if a comma were inserted after "domestic uses" the
27 subsequent phrase "in an amount not exceeding five thousand gallons a day" would unquestionably
28 modify each of the preceding enumerated uses, including stock watering. The Attorney General
29 opinion concludes that the phrase modifies only the use that immediately precedes it: domestic use.
30 That interpretation exalts a comma over the substance of an entire, comprehensive statutory

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1 not adequately address the underlying policies of the Ground Water Code while
2 reaching a conclusion that the exception in RCW 90.44.050 should be broadly applied
3 in the stock watering context.

4 ***Yakima Fire Fighters Assn.*** is instructive in this situation for several reasons.
5 First, that case was addressing interpretation of a proviso within a statute, as is the
6 case here. Second, the issue in ***Yakima Fire Fighters Assn.***, was presented to the
7 court after several interpretations of the same proviso at the administrative level.
8 Finally, the issue presented affected statewide interests that were based on
9 competing views of the underlying policy.

10 In ***Yakima Fire Fighters Assn.***, the issue was whether the City of Yakima
11 must engage in collective bargaining with its police and firefighters with respect to
12 matters that the City had delegated to its Civil Service Commission. State statutes
13 generally require that cities collectively bargain with their employees with respect to
14 personnel matters. *RCW 41.56.100, RCW 41.56.030(4)*. However, an exception
15 applies where the matter has been delegated to “any civil service commission or
16 personnel board similar in scope, structure and authority to” the state personnel
17 board. Yakima argued that the phrase “any civil service commission” must be
18 separated from the term “or personnel board” and that only the later entity had to be
19 similar in scope and authority to the state personnel board for the exception to apply.

20 ***Yakima***, 117 Wn.2d at 659. The court rejected this contention. In reaching its
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23 structure.

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1 conclusion, the court examined the entire statutory structure, the policies that the
2 Legislature sought to promote in recognizing employees' collective bargaining rights
3 and in the creation of civil service systems, and the rules of statutory construction in
4 order to determine the legislative intent.⁵

5 In the analysis of the question presented, the Court first noted that there were
6 several provisions in the Revised Code of Washington that address civil service laws
7 and establish an overall policy. Then the Court examined the overall purpose of the
8 Act, which was "to provide public employees with the right to join and be represented
9 by labor organizations of their own choosing." *Id.* at 669. Once the Court identified
10 the purpose of the statute at issue, it undertook an analysis of the situation by
11 "look[ing] to administrative and judicial constructions of the proviso as well as to other
12 aids in construing this exception." *Id.*

13 A similar analysis of RCW 90.44.050 is required. Two crucial elements of any
14 water right in Washington are the priority date and the quantity. *RCW 90.03.010*. The
15 entire water rights system is based on the maxim "first in time is first in right" (priority),
16 modified by the requirement to "use it or lose it" (quantity put to consistent beneficial
17 use). In a priority system where every right is affected by the priority and size of every
18 other right, allowing unlimited use by any participant is a recipe for chaos. Yet the
19 State would have the Court conclude that the Legislature intended this result. That
20 conclusion is not justified by either the wording of the statute or its context.

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22
23 ⁵ The court did not attach any significance to whether or not the two terms were separated by a
comma.

1 In the ground water context the general rule is the quantity of ground water
2 used is subject to advance analysis and regulation, except for "small withdrawals", to
3 ensure that senior rights are protected from overappropriation of the water. In fact,
4 the general rule to which this exception applies is that all withdrawals of ground water
5 must have a permit issued by Ecology. This is necessary in order for Ecology to
6 maintain a system of regulation for the distribution and use of the State's waters.
7 *RCW 90.44.020*. Based on *Yakima Fire Fighters Assn., R.D. Merrill Co.*, and
8 *Campbell and Gwinn*, the exceptions from permits in the Ground Water Code should
9 be interpreted narrowly so that the underlying goals of the Ground Water Code may
10 be interpreted broadly.

11 The only interpretation consistent with the original goals of the Legislature is to
12 interpret the stockwater exemption as being subject to the 5,000 gallons per day use
13 ceiling. Any stockwater use beyond that amount should fall under the regulatory
14 scheme of the Ground Water Code. The "small withdrawal" language of the first
15 proviso in *RCW 90.44.050* describes all of the foregoing permit exempt uses. That
16 necessarily means the 5,000 gallons per day use ceiling limit was intended to apply to
17 stock watering. Likewise, under the second proviso persons who use less than that
18 5,000 gallons per day are given the right to document their use and priority date
19 through a formal certificate. But if the statute is read to allow exempt stock watering
20 in excess of 5,000 gallons per day, those uses would **not** be eligible for a water right
21 certificate. Thus, the largest unpermitted users are not eligible for a certificate, while
22
23

1 smaller users are. It would be highly unlikely that Legislature intended that outcome.
2 Therefore, the 5,000 gallons per day withdrawal language in the second proviso is
3 another indication that the legislature intended for the 5,000 gallons per day limit to
4 apply to all the uses listed in the exemption sentence. In short, the second proviso in
5 RCW 90.44.050 is a shorthand reference to all the uses, further describing the limit on
6 the category to which the statute applies.

8 CONCLUSION

9 The Tribes ask the Court to rule in favor of the plaintiffs in this case.
10 Unregulated water withdrawals of any sort, including stock watering, impact the
11 federally protected interests of the Tribes. The Tribes have been seeking redress of
12 municipal water rights and permit-exempt residential wells based on the same
13 principle identified here, namely that having an unlimited right that is not subject to
14 any type of regulation is not a responsible action by a manager of a finite resource.
15 The situation presented by Easterday Ranches presents yet another troubling chapter
16 in the State's reluctance to act in a responsible manner when it comes water
17 regulation.

18 Respectfully submitted this ____ day of February, 2010, by:

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STATUTES:

- RCW 90.03.005
- RCW 90.03.010

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RCW 90.03.020

RCW 90.03.250

RCW 90.03.290

RCW 90.03.290

RCW 90.03.345

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RCW 90.44.050

RCW 90.44.060

RCW 90.82.005

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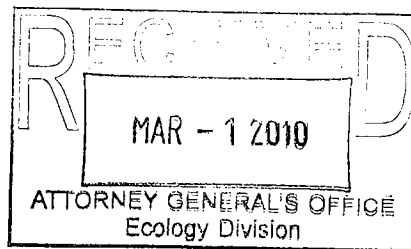
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OPINIONS OF THE ATTORNEY GENERAL:

AGO 1997 No. 6

AGO 2005-17

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

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

Plaintiffs,

vs.

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

Defendants.

NO. 09-2-51185-6

CERTIFICATE OF MAILING

I, Lynn S. Torno, hereby certify under penalty of perjury that, on the date set forth below, I placed a true and correct copy of (1) Note For Motion Calendar, (2) Motion for Leave to Participate as Amicus Curiae, (3) Proposed Order, (4) Amicus Brief, and (5) this Certificate of Mailing in the U.S. Mail, postage prepaid, addressed to the following persons:

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Dated this 26th day of February, 2010 at Bellingham, WA.


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