

1 EXPEDITE (if filing within 5 court days of hearing)
2 Hearing is set:
3 Date: Friday, April 2, 2010
4 Time: 1:30 p.m.
5 Judge: to be determined

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

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

11 Plaintiffs,)

12 vs.)

13 STATE OF WASHINGTON, WASHINGTON)
14 DEPARTMENT OF ECOLOGY, and EASTERDAY)
15 RANCHES, INC.,)

16 Defendants,)

17 and)

18 WASHINGTON CATTLEMEN'S ASSOCIATION,)
19 COLUMBIA SNAKE RIVER IRRIGATORS)
20 ASSOCIATION, WASHINGTON STATE DAIRY)
21 FEDERATION, NORTHWEST DAIRY)
22 ASSOCIATION, WASHINGTON CATTLE)
23 FEEDERS ASSOCIATION, CATTLE PRODUCERS)
24 OF WASHINGTON, WASHINGTON STATE SHEEP)
25 PRODUCERS and WASHINGTON FARM BUREAU,)

26 Intervenor-Defendants.)

NO. 09-2-51185-6

PLAINTIFFS' COMBINED
REPLY MEMORANDUM IN
SUPPORT OF SUMMARY
JUDGMENT AND IN
OPPOSITION TO MOTIONS FOR
SUMMARY JUDGMENT
AND/OR TO DISMISS BY
DEFENDANTS AND
DEFENDANT/INTERVENORS

PLAINTIFFS' COMBINED REPLY MEMORANDUM IN SUPPORT
AND IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT
AND/OR DISMISS (Case No.: 09-2-51185-6)

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1 **TABLE OF CONTENTS**

2 INTRODUCTION1

3 EVIDENCE RELIED UPON BY PLAINTIFFS (SUPPLEMENT)1

4 SUMMARY OF ARGUMENT2

5 ARGUMENT.....2

6 I. A PLAIN LANGUAGE ANALYSIS CONSIDERS THE
7 GROUNDWATER ACT AS A WHOLE AND DICTATES A NARROW
8 READING OF THE STOCKWATER EXEMPTION.2

9 II. DEFENDANTS’ PLAIN LANGUAGE ARGUMENTS MISDIRECT
10 THE INQUIRY AND ARE GENERALLY UNSUPPORTED BY THE
11 OVERALL INTENT AND PURPOSE OF WASHINGTON’S WATER
12 LAWS.5

13 A. The State’s Proffered Interpretations Rely On A Questionably
14 Pliable Definition Of The Word “Small.”.....5

15 B. The Argument In Favor Of Four Categories Of Permit Exemption
16 Is Inconsistent With Basic Water Law Concepts.....6

17 C. The Word “Any” Is Not At Issue.....7

18 III. THE LEGISLATIVE HISTORY SUPPORTS LIMITING THE
19 QUANTITY OF THE STOCKWATER EXEMPTION FROM
20 PERMITTING.8

21 A. Defendants’ Argument Regarding So-Called Extrinsic Historic
22 Evidence Is An Incorrect Application of Washington Law.....8

23 1. Historical context is relevant to the court’s analysis.8

24 2. The historical documents provide insight into the
25 legislature’s information and concerns.9

26 3. Contemporaneous newspaper accounts also provide
historical context.....12

B. Contrary To The State’s Arguments, The State Was Consistent In
Its Interpretation And Implementation Of The Law For Sixty
Years.13

C. The Groundwater Bill’s Passage Was Swift And Without
Amendment.....17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

D. The State Argues For An Insupportably Rigid Application Of The Last Antecedent Principle.....18

E. Information And Arguments Regarding Total Numbers Of Livestock And Current Unpermitted Groundwater Use Are Not Indicative Of Legislative Intent And Are Extraneous To The Issues That Must Be Determined In This Case.19

IV. INJUNCTIONS AND THE UNIFORM DECLARATORY JUDGMENT ACT.....22

V. THIS ACTION IS NOT SUBJECT TO THE STATE’S RIGHT TO FARM NUISANCE LAWS.....23

VI. PLAINTIFFS HAVE STANDING.....25

A. The Matter Of Plaintiffs’ Standing Has Already Been Decided And Is The Law Of The Case.25

B. Plaintiffs Have Adequately Demonstrated Standing To Bring Their Case.....25

CONCLUSION.....29

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 American Legion Post # 149 v. Department of Health,
4 164 Wn.2d 570, 192 P.2d 306 (2008).....26

5 Brown v. City of Yakima,
6 116 Wn.2d 556, 807 P.2d 353 (1991).....23

7 Buchanan v. Simplot Feeders, Ltd. Partnership,
8 134 Wn.2d 673, 952 P.2d 610 (1998).....24

9 CELP v. Department of Ecology,
10 PCHB No. 02-216 (June 4, 2003).....28

11 CELP v. Department of Ecology,
12 PCHB No. 96-165 (Jan. 7, 1998).....26, 28

13 Cantrell v. City of Long Beach,
14 241 F.3d 674 (9th Cir. 2001)26

15 Casebere v. Clark County Civil Service Commission,
16 21 Wash. App. 73, 584 P.2d 416 (1978).....25

17 Christensen v. Ellsworth,
18 162 Wn.2d 365, 173 P.3d 228 (2007).....3

19 Citizens for Better Forestry v. USDA,
20 341 F.3d 961 (9th Cir. 2003)26

21 City of Union Gap v. Department of Ecology,
22 148 Wash. App. 519, 195 P.3d 580 (2008).....4

23 City of Yakima v. International Association of Firefighters,
24 117 Wn.2d 655, 818 P.2d 1076 (1991).....17

25 Clark County Public Utility District Number 1 v. Washington Dep’t of Revenue,
26 153 Wash. App. 737, 222 P.3d 1232 (Wash. App. Div. 2, 2009).....18

Commissioner of Internal Revenue v. Clark,
489 U.S. 726, 109 S. Ct. 1455 (1989).....4

DeVries v. Department of Ecology,
PCHB No. 01, 073 (2001)10

1	<u>Department of Ecology v. Campbell & Gwinn, L.L.C.,</u>	
2	146 Wn.2d 1, 43 P.3d 4 (2002).....	3, 4, 8, 16
3	<u>Department of Ecology v. Grimes,</u>	
4	121 Wn.2d 459, 852 P.2d 1044 (1993).....	7
5	<u>Department of Ecology v. Theodoratus,</u>	
6	135 Wn.2d 582, 957 P.2d 1241 (1998).....	16
7	<u>Dot Foods, Inc. v. Washington Department of Revenue,</u>	
8	166 Wn.2d 912, 215 P.3d 185 (2009).....	13
9	<u>Grant County Fire Prot. District Number 5 v. City of Moses Lake,</u>	
10	150 Wn.2d 791, 83 P.3d 419 (2004).....	26
11	<u>Green River Community College v. Higher Education Personnel Board,</u>	
12	95 Wn.2d 108, 622 P.2d 826 (1980).....	13
13	<u>International Association of Firefighters, Local 1789 v. Spokane Airports,</u>	
14	146 Wn.2d 207, 45 P.3d 186 (2002).....	26
15	<u>John Hancock Mutual Life Insurance Co. v. Harris Trust & Sav. Bank,</u>	
16	510 U.S. 86, 114 S. Ct. 517 (1993).....	3
17	<u>Lujan v. Defenders of Wildlife,</u>	
18	504 U.S. 555, 112 S. Ct. 2130 (1992).....	26
19	<u>Melhaff v. Tacoma School District Number 10,</u>	
20	92 Wash. App. 982, 966 P.2d 419 (1998).....	13
21	<u>Nobelman v. American Sav. Bank,</u>	
22	508 U.S. 324, 113 S. Ct. 2106 (1993).....	18
23	<u>Okanogan Wilderness League, Inc. v. Town of Twisp,</u>	
24	133 Wn.2d 769, 947 P.2d 732 (1997).....	7
25	<u>Okanogan Wilderness League v. Department of Ecology,</u>	
26	PCHB No. 98-84 (Nov. 24, 1998)	26
	<u>Pacific Land Partners, L.L.C. v. Department of Ecology,</u>	
	150 Wash. App. 740, 208 P.3d 586 (2009).....	16
	<u>R.D. Merrill Co. v. Pollution Control Hearings Board,</u>	
	137 Wn.2d 118, 969 P.2d 458 (1999).....	4, 6

1	<u>Restaurant Development, Inc. v. Cannanwill,</u>	
2	150 Wn.2d 674, 80 P.3d 598 (2003).....	8
3	<u>Robinson v. Shell Oil Co.,</u>	
4	519 U.S. 337, 117 S. Ct. 843 (1997).....	3
5	<u>In re Smith,</u>	
6	139 Wn.2d 199, 986 P.2d 131 (1999).....	18
7	<u>Smith v. U.S.,</u>	
8	508 U.S. 223, 113 S. Ct. 2050 (1993).....	3
9	<u>State v. Costich,</u>	
10	152 Wn.2d 463, 98 P.3d 795 (2004).....	8
11	<u>To-Ro Trade Shows v. Collins,</u>	
12	144 Wn.2d 403, 27 P.3d 1148 (2001).....	26
13	<u>United States v. Treadwell,</u>	
14	593 F.3d 990 (9th Cir. 2010)	3
15	<u>Washington Economic Development Finance Authority v. Grimm,</u>	
16	119 Wn.2d 738, 837 P.2d 606 (1992).....	17
17	<u>Washington State Nurses Association v. Board of Medical Exam'rs,</u>	
18	93 Wn.2d 117, 605 P.2d 1265 (1980).....	8, 9

STATE STATUTES

19	RCW 7.24.080	23
20	RCW 7.48.300	23, 25
21	RCW 90.03	3
22	RCW 90.03.290	27
23	RCW 90.03.360	7
24	RCW 90.44	3
25	RCW 90.44.020	3
26	RCW 90.44.050	<i>passim</i>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

REGULATIONS

WAC 508-64-010.....7

MISCELLANEOUS

2A Norman J. Singer, Statutes and Statutory Construction § 48A:16 at 809-10
(6th ed. 2000).....3

Philip A. Talmadge, A New Approach to Statutory Interpretation in Washington,
25.....8

1 INTRODUCTION

2 The issue in this case is a narrowly-focused one: is the stock-water exemption for
3 groundwater permitting in RCW 90.44.050 unlimited in quantity or is it subject to, and part of,
4 the 5,000 gallons per day (“gpd”) requirement for exemptions set forth in that section? The issue
5 presents a pure legal question of statutory interpretation. The various peripheral and
6 diversionary facts and arguments of the state defendant and defendant-intervenors do not change
7 this core question and should not distract the Court from the inquiry at hand.

8 In 1945, the Washington Legislature passed the Groundwater Protection Code as a
9 supplement to the Water Code with the express intent of regulating and conserving Washington’s
10 groundwater resources through imposition of a permitting and regulatory system. In so doing,
11 the legislature carved out a set of exemptions, from the permitting requirement only, for certain
12 “small” uses, imposing a 5,000 gpd limit on the volume of all permit-exempt use. The only
13 question that needs to be decided here is whether the legislature intended drinking water for
14 livestock to be limited to 5,000 gpd either on its own or as part of a bundle of domestic (as
15 opposed to industrial) uses.

16 EVIDENCE RELIED UPON BY PLAINTIFFS (SUPPLEMENT)

17 In addition to the items set forth in the Plaintiffs’ Five Corners Family Farmers et al. (the
18 “Family Farmers”) initial brief in support of summary judgment, the Family Farmers base their
19 motion and responses on the following items:

20 1948 and 1950 Biennial Reports of the Department of Conservation, submitted
21 with the Declaration of Maia Bellon, State of Washington, dated February 18,
2010;

22 Department of Ecology Publication Number, 96-1804-S&WR, “Frequently Asked
23 Questions: Water Rights In Washington,” April 2008 (Exhibit M, Second
Declaration of Janette K. Brimmer, dated March 16, 2010);

24 Spokane Spokesman-Review, dated June 6, 1945 (Exhibit A, Declaration of

1 Rachael P. Osborn, dated March 12, 2010).

2 SUMMARY OF ARGUMENT

3 Limiting the stockwater permit exemption to 5,000 gallons per day comports with plain
4 language principles of interpretation and reasonable, coherent application of the law. The
5 interpretation of RCW 90.44.050 that is most consistent with the plain language of the
6 Groundwater Code, with the plain legislative intent to regulate and conserve groundwater
7 resources, and with a reasonable application of the stockwater permit exemption relative to the
8 other exemptions and water rights generally, is one that provides for two basic categories of
9 water use: (1) domestic use that includes livestock for a household or homestead, a modest lawn,
10 a vegetable garden for support of the household or homestead, and basic household uses such as
11 drinking, cleaning and sanitation; and (2) small commercial or industrial uses. Each of the two
12 basic categories is exempt from the need to obtain a permit as long as the total use under each
13 basic category is “small,” remaining at or below 5,000 gallons per day (“gpd”). As demonstrated
14 in the Family Farmer’s initial brief in support of summary judgment and below, this is the only
15 reasonable method of interpreting the stockwater exemption that is consistent across all methods
16 of analysis and the history surrounding the exemption’s passage and implementation.

17 ARGUMENT

18 I. A PLAIN LANGUAGE ANALYSIS CONSIDERS THE GROUNDWATER ACT AS A
19 WHOLE AND DICTATES A NARROW READING OF THE STOCKWATER
EXEMPTION.

20 In cases of statutory interpretation, a court does not read and interpret any provision in
21 isolation. See Plaintiffs’ Memorandum in Support of Summary Judgment, filed January 21,
22 2010, (“Plaintiffs’ Mem.”) pp. 11-12. Rather, the court will glean legislative intent by looking to
23 “all that the legislature has said” on the matter, reading the statute as a whole, within the context
24 of the larger body of law and relative to the policy or statutory scheme that the legislature sought

1 to further. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11-12, 43 P.3d 4
2 (2002); Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).¹ Washington's
3 approach comports with that of the U.S. Supreme Court. See, Robinson v. Shell Oil Co., 519
4 U.S. 337, 341, 117 S.Ct. 843, 846 (1997) (the Court must consider "the language itself, the
5 specific context in which that language is used, and the broader context of the statute as a
6 whole"); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95, 114
7 S.Ct. 517, 523 (1993) (each statutory provision should be read by reference to the whole act and
8 to its object and policy); Smith v. U.S., 508 U.S. 223, 233, 113 S.Ct. 2050, 2057 (1993)
9 (statutory interpretation is a "holistic" endeavor) (citation and quotation omitted). See also,
10 United States v. Treadwell, 593 F.3d 990, 1006-07 (9th Cir. 2010) ("[W]hen we look to the plain
11 language of a statute to interpret its meaning, we do more than view words or sub-sections in
12 isolation. We derive meaning from context, and this requires reading the relevant statutory
13 provisions as a whole.") (citation and quotation omitted).

14 The Washington Legislature passed the Regulation of Public Groundwaters, RCW 90.44,
15 in 1945 as a supplement to the surface water code, RCW 90.03, for the "purpose of extending the
16 application of such surface water statutes to the appropriation and beneficial use of groundwaters
17 within the state." RCW 90.44.020. To that end, the legislature strictly regulated the
18 appropriation and use of groundwater, requiring that there would be absolutely no withdrawal of
19 groundwater begun, nor well or other water works constructed, without the user first applying for
20 and being granted a permit from the State. RCW 90.44.050. The legislature provided for two

22 ¹ The plain meaning rule also provides that "background facts of which judicial notice can be
23 taken" (such as historic reports) "are properly considered as part of the statute's context because
24 presumably the legislature also was familiar with them when it passed the statute." Campbell &
Gwinn, 146 Wn.2d at 11 (quoting 2A Norman J. Singer, Statutes and Statutory Construction §
48A:16 at 809-10 (6th ed. 2000)).

1 limited categories of exemptions to the permitting requirement—5,000 gpd or less for certain
2 small domestic, or industrial, uses. See also Plaintiffs’ Mem. pp. 12-13; 15.

3 Each of the statute’s exempt categories, including the most recent addition in 2003,
4 specify a particular, limited amount of water per day that is exempt from groundwater
5 permitting. It would make no sense for these categories to exist along with an *unlimited* stock-
6 water exemption that could essentially swallow all other requirements whole. Indeed, the
7 Supreme Court recognized as much in the Campbell & Gwinn decision when it found that the
8 legislature clearly did not intend unlimited exempt uses, wholly unregulated, when the overall
9 goal of the Groundwater Code was to assure protecting of existing right, the public interest, and
10 protection of the resource as a whole. Campbell & Gwinn, 146 Wn.2d at 16. “The role of this
11 court is to preserve the general requirement of permitting, as the Legislature obviously
12 intended.” Id. at 17.

13 Moreover, a statute’s remedial provisions shall be liberally construed and its exceptions
14 narrowly confined. City of Union Gap v. Dep’t of Ecology, 148 Wash. App. 519, 527, 195 P.3d
15 580 (2008) and R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 140, 969
16 P.2d 458 (1999). This concept is also echoed in the federal case law. Commissioner of Internal
17 Revenue v. Clark, 489 U.S. 726, 739, 109 S. Ct. 1455 (1989) (Provisos and statutory exemptions
18 should be read narrowly.) Applying this principle, it is clear that the stockwater exemption must
19 not be allowed to devour the whole statutory scheme for regulating groundwater, based upon the
20 potentially mistaken, grammatically-incorrect placement of commas in RCW 90.44.050. Rather,
21 the plain language of the statute as whole must be interpreted to limit the stockwater exemption
22 to the 5,000 gpd allowed for domestic uses.

1 II. DEFENDANTS’ PLAIN LANGUAGE ARGUMENTS MISDIRECT THE INQUIRY
2 AND ARE GENERALLY UNSUPPORTED BY THE OVERALL INTENT AND
3 PURPOSE OF WASHINGTON’S WATER LAWS.

4 A. The State’s Proffered Interpretations Rely On A Questionably Pliable Definition
5 Of The Word “Small.”

6 The State’s plain language arguments in favor of a stockwater permit exemption for
7 unlimited amounts of groundwater use contradict the overall scheme and purpose of the
8 Groundwater Code, leading to an absurd result. The State attempts to redefine the word small in
9 order to explain away evidence of the legislature’s intent to limit non-permitted groundwater use.
10 As noted in the Family Farmers’ summary judgment brief, pp. 16-18, the provisos following the
11 exemptions set forth in RCW 90.44.050 refer to “any *such* small” exempt withdrawals (plainly
12 referencing the exemption categories) and that parties making withdrawals of 5,000 gpd may
13 apply for and receive a groundwater permit. Reading the statute as a whole, along with the
14 overall intent of the Groundwater Code, dictates that the legislature, in making these provisos,
15 did not intend the stockwater permit exemption to be unlimited in quantity and that all of the
16 listed exemptions were subject to the 5,000 gpd limitation. The State’s suggestion that the
17 legislature simply used the term “small” as “short-hand”² that encompassed an exemption
18 unlimited in quantity or as large as the one claimed in this case (600,000 gpd), is a stretch that is
19 implausible and unsupported. “Small” does not mean “unlimited” in anyone’s lexicon (and there
20 is no evidence it did in the 1945 Legislature’s).

21 Finally, as to the second proviso,³ the State’s explanation would lead to the absurd result

22 ² State Defendant’s Memorandum in Support of Cross Motion for Summary Judgment and
23 Response to Plaintiffs’ Motion for Summary Judgment (“State’s Mem.”) at p. 9.

24 ³ The second proviso states that at the option of “the party making withdrawals of groundwaters
of the state not exceeding five thousand gallons per day,” may file for and may receive permits
and certificates just like uses in excess of 5,000 gpd, in the same manner and utilizing the same
procedures as those larger uses.

1 that only those exemptions, (the domestic wells and small industrial uses), that the State argues
2 are limited by the 5,000 gpd can get water permits. State’s Mem. at p. 11-12. This is
3 inconsistent with the State’s own interpretation of the permit-exemption in RCW 90.44.050
4 which is that exempt uses are exempt only from permitting; that they are otherwise fully subject
5 to all other requirements and benefits of Washington’s water laws. Further, it is illogical to think
6 that the legislature carved out the permit-exempt stockwater use and the lawn and garden use as
7 not entitled to documentation by a valid water right permit. In fact, it is clear from the entirety of
8 the Water Code and the Groundwater Code that just the opposite is true: the legislature favored
9 and encouraged, and in almost all instances required, water permits for any surface or
10 groundwater use. The State’s attempt to explain away the provisos’ evidence of legislative intent
11 to limit the quantity of all permit-exempt uses must fail.

12 B. The Argument In Favor Of Four Categories Of Permit Exemption Is Inconsistent
13 With Basic Water Law Concepts.

14 The State and Intervenor Agricultural Associations’ (“Agricultural Intervenor’s”)
15 argument that RCW 90.44.050 should be read to provide for four types of permit-exempt
16 groundwater uses, each with its own unit of measurement,⁴ makes no sense in the larger context
17 of water rights and regulation and is inconsistent with the State’s own documents. Limiting the
18 exemptions, including stockwater, by volume is consistent with how water rights and permits are
19 measured, granted, monitored, and/or regulated under the Surface Water and Groundwater
20 Codes. The Washington Supreme Court has recognized that Washington water law establishes
21 that a water right is measured always by quantity, as well as by time and place of use. See R.D.

22 _____
23 ⁴ The suggestion is that stockwater is unlimited in quantity, but measured by the type of use; that
24 lawn and garden use is unlimited in quantity but limited by total area of use; and that domestic
and industrial uses are limited both by type and quantity of use. Agricultural Association
Intervenor’s Memorandum of Law (“Agricultural Intervenor’s Mem.”), p. 16; State’s Mem. p.14.

1 Merrill Company, 137 Wn.2d at 127; Okanogan Wilderness League, Inc. v. Town of Twisp, 133
2 Wn.2d 769, 777, 947 P.2d 732 (1997); and Dep’t of Ecology v. Grimes, 121 Wn.2d 459, 468,
3 852 P.2d 1044 (1993) (“The owner of a water right is entitled to the *amount* of water necessary
4 for the purpose to which it has been put...” (emphasis added.) To that end, the State’s Water
5 Rights Application form requires information regarding rate and volume of use. See
6 <http://www.ecy.wa.gov/pubs/ecy040114.pdf>. See also Ecology’s FAQ publication regarding
7 water rights, providing that a water right is a right to use *a certain amount of water*,
8 <http://www.ecy.wa.gov/pubs/961804swr.pdf>, attached to Brimmer Second Declaration, Ex. M.
9 A water right permit (whether surface or ground water) specifies the *amount* (in quantity) of a
10 water right. Id. Measuring or metering water use by quantity is an important component of
11 monitoring water use for the purposes of managing it and the natural resources dependent on it.
12 RCW 90.03.360. See also WAC 508-64-010 (“[A] satisfactory water management program can
13 be carried out only if surface and ground water withdrawals are closely monitored and accurately
14 measured.”). The argument that the legislature intended to impose different units of
15 measurement on different exempt uses (some with no quantity limit) is inconsistent with all other
16 aspects of water regulation in Washington and as such is not a supportable “plain language”
17 reading of the exemption provision.

18 C. The Word “Any” Is Not At Issue.

19 The Agricultural Intervenor’s lengthy discourse on the definition of the word “any”⁵ has
20 no bearing on the issues before the court and may be disregarded as one of the peripheral,
21 unfocused, and ultimately irrelevant arguments offered by the various defendants. The word
22 “any” is not in dispute. The question is whether any (and every) permit-exempt use of
23

24 ⁵ Agricultural Intervenor’s Mem., pp. 16-18.

1 groundwater for watering livestock is limited by the 5,000 gpd language of RCW 90.44.050.

2 The definition of “any” doesn’t enter into the question.

3 III. THE LEGISLATIVE HISTORY SUPPORTS LIMITING THE QUANTITY OF THE
4 STOCKWATER EXEMPTION FROM PERMITTING.

5 Reading the statute as a whole dictates rejecting all of Defendants’ “plain language”
6 arguments that favor a permitting exemption for stockwater that is unlimited in quantity.
7 Nonetheless, the history of the State’s interpretation of these provisions and the arguments
8 offered in this and previous cases may lead this Court to a conclusion that RCW 90.44.050 is
9 ambiguous such that it is appropriate to look beyond the language of the statute in an attempt to
10 glean legislative intent. This analysis also demonstrates that the stockwater exemption was
11 intended to be limited in quantity as part of the domestic use portion of the exemptions.

12 A. Defendants’ Argument Regarding So-Called Extrinsic Historic Evidence Is An
13 Incorrect Application of Washington Law.

14 1. *Historical context is relevant to the court’s analysis.*

15 Even in the case of an ambiguous statute, a court’s primary objective is to discern the
16 legislature’s intent. Campbell & Gwinn, 146 Wn.2d at 12. In so doing, a court may look to the
17 legislative history which includes the circumstances leading up to and surrounding the statute’s
18 enactment. Restaurant Dev., Inc. v. Cannanwill, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (citing
19 Philip A. Talmadge, A New Approach to Statutory Interpretation in Washington, 25 Seattle U. L.
20 Rev. 179, 203 (2001)); State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). The historical
21 context within which the statute was passed may also be examined to identify the problem the
22 legislature intended the statute to solve. Washington State Nurses Ass’n v. Board of Medical
23 Exam’rs, 93 Wn.2d 117, 121 605 P.2d 1265 (1980). Defendants are incorrect to reject
24 government reports that were drafted and/or published at the time of the statute’s passage or

1 contemporaneous newspaper accounts of its passage and meaning. Washington law regarding
2 the historical documents that may be reviewed by this Court explicitly includes these kinds of
3 contemporaneous documents and reports. In this case, the history supports limiting the quantity
4 of the stockwater exemption.

5 2. *The historical documents provide insight into the legislature’s information*
6 *and concerns.*

7 The documents from the Association of Washington Cities show the overall concern with
8 conserving and regulating groundwater resources: a concern echoed by the legislature throughout
9 the Groundwater Code and a concern that is inconsistent with unlimited groundwater use by any
10 entity or group. See Plaintiffs’ Mem., pp. 20-21. The Department of Interior, Bureau of
11 Reclamation (“BOR”) studies of the Columbia Basin were clearly an important part of the
12 historical context for the Groundwater Code as were the concerns of the sponsor, the Association
13 of Washington Cities. Id. at 21-23. Each of these documents supports the overall purpose and
14 intent of the Groundwater Code to carefully regulate and conserve groundwater resources. Each
15 of these documents supports an interpretation of RCW 90.44.050 that includes use of water for
16 livestock drinking purposes as part of a bundle of domestic rights explicitly limited to 5,000 gpd
17 in order to further the purposes of regulation and conservation. Indeed, some of the language
18 and concepts from the historic reports are clearly present in the statute itself. See e.g. Brimmer
19 Decl. Ex. D, p. 3 and Ex. E, p. 54. Defendants provide no reasonable arguments or evidence
20 contrary to the conclusions from these documents. Rather, they attack the evidence only from
21 the periphery, misquote the reports, and misdirect attention with complete speculation.

22 The Agricultural Intervenors suggest (without actually stating it outright) that the
23 legislature did not see, rely on, or know about the information in the BOR reports because one
24 was in “draft” form and one was finally published right after the Groundwater Code passed.

1 Agricultural Intervenors' Mem. pp. 26-27. The suggestion fails to recognize the documents'
2 worth as evidence of historical context that prompted the legislature to act. Subproblem 6, even
3 in its "draft" form (draft because it was part of the larger problem 9 of the final report) is part of
4 the state's records on the Columbia Basin Project. The certified copy of subproblem 6 was
5 obtained from the State Archives. See Brimmer Decl., Ex. D. Moreover, subproblem 6 was
6 incorporated in its entirety into the larger Columbia Basin Report on Problem 9, demonstrating
7 that the "draft" remained unchanged.⁶ Brimmer Decl. Ex. E. These same documents were relied
8 upon and referenced by the State and the Pollution Control Hearings Board in previous
9 administrative litigation (before the State changed its position) as evidence that the legislature
10 intended to limit the quantity of the stockwater permitting exemption. See generally, Brimmer
11 Decl. Ex. G (State's Memorandum in DeVries v. Dep't of Ecology), and PCHB decision in
12 DeVries v. Dep't of Ecology, PCHB No. 01, 073 (2001). Again, the worth of the documents to
13 this Court is to provide historical context for the discussions and concerns of the day and
14 identification of the problems and issues the legislature sought to address. To that end, the BOR
15 documents provide sound evidence that stockwater uses of groundwater were intended to be
16 those necessary to maintain a family homestead in 1945 and further support the Family Farmers'
17 interpretation of two basic categories of use, domestic and industrial. Defendants provide no
18 evidence to the contrary.

19 The Agricultural Intervenors also seek to discredit the BOR reports with an incomplete,
20 inaccurate, and ultimately misleading quote from the Washington State Planning Council report
21

22 ⁶ In footnote 103 of the Agricultural Intervenors' memorandum, the Agricultural Intervenors
23 imply that the Family Farmers chose to hide something by using portions of the BOR reports for
24 the sake of keeping needless paper to a minimum. The text of subproblem 6 used is the only
section relevant to wells and groundwater and it can be perfectly matched to Problem 9—there
were no amendments. Agricultural Intervenors' implications are unfounded and inappropriate.

1 on subproblem 6. The Agricultural Intervenors quote (incompletely) a portion of the report
2 referencing Problem No. 22 in an apparent suggestion that the Family Farmers have provided the
3 Court with inaccurate or incomplete information. Agricultural Intervenors' Mem. p. 26.

4 The full (and accurate) reference to Problem No. 22, is part of a section of the
5 subproblem 6 report titled "The Supply of Domestic Water" (which in turn includes a table
6 showing livestock use as part of domestic water use), and it provides in full as follows:

7
8 Irrigation ditches and canals, rivers and creeks, rain catchments, and underground
9 strata are possible sources of water. Ditches and canals could probably furnish
10 water only during the irrigation seasons, and, in common with supplies from rivers
11 and creeks, would require careful filtration and treatment to guard against possible
12 pollution. Except for areas adjacent to the Columbia River, Rocky Ford Creek,
13 and Moses Lake, the topography limits the possibility of these sources. Rain
14 Catchments are excluded by the low annual precipitation, the long-term average
15 for seven stations in or near the Basin being only 8.0 inches per annum. [footnote
16 to BOR letter citation omitted.]

17 The remaining choice is to tap the underground supplies. The occurrence,
18 movements, quantities, and qualities of these waters have been assigned for special
19 study to investigators of Problem No. 22. They report that residents of the Quincy
20 Basin and the Wahluke and Pasco slopes have stated that the ground waters are
21 pleasing to taste and satisfactory for all purposes including human consumption.
22 They also report that the underlying strata are capable of yielding sufficient
23 capacities to sustain community water systems. [second footnote citation omitted.]

24 Brimmer Decl. Ex. D, pp. 3-4. It is clear from this full and accurate quote that the report on
25 Problem No. 22 is not germane to the issue of how much water a household or homestead needs
26 generally or for livestock specifically, but rather related to the geology and geography of
27 groundwater supply in the Columbia basin.

28 While Defendants expend effort in misquoting and attacking the historic record, they fail
29 to actually provide any historical context that is contrary to or refutes the information in the
30 Association of Cities' and BOR documents that are from the same period as the legislature's

31 They provide no indication that any of the omitted portions are germane in any way to the case.

1 passage of the Groundwater Code and the exemption language of RCW 90.44.050. The
2 historical context demonstrates that conservation and regulation of groundwater was a legislative
3 concern as was providing adequate water at a reasonable cost for homesteads in the Columbia
4 Basin. The analysis of need for those homesteads indicated that something less than 5,000 gpd
5 would be adequate to provide all domestic uses, including lawn and garden watering and
6 drinking water for livestock. These were the issues and information before the legislature and at
7 its disposal when it passed the Groundwater Code.

8 3. *Contemporaneous newspaper accounts also provide historical context.*

9 While Defendants attempt to discount summaries of the bill from contemporaneous
10 newspaper accounts as not “legislative history,” such accounts of the legislation are important to
11 the court’s analysis of how the legislature and the public were thinking about water issues and
12 the legislation meant to address them. Further, a contemporaneous journalistic account of
13 legislation at the time of its passage would tend to be a more accurate reflection of what the
14 legislation meant at the time than most efforts to reconstruct the meaning 60 years later. The
15 Olympia paper reported on the legislation the day after it passed the Senate and described the bill
16 as exempting water uses of 5,000 gpd or less from the permit requirement. Brimmer Decl., Ex.
17 J. Similarly, shortly after the end of the 1945 legislative session and a few days before the law
18 was to take effect, the Spokane Spokesman-Review, June 5, 1945, carried a story headlined
19 “Hidden Water Under Control.” Declaration of Rachael P. Osborn, March 12, 2010, Ex. A. The
20 newspaper reported that “State control of water under the ground as well as flowing across it
21 starts Thursday...” and that “[f]uture development of the state will depend heavily upon thrifty
22 usage of subsurface water upon which a hundred towns and cities rely for domestic supply.” *Id.*
23 “Without control, the development of this resource could become competitive to the extent of
24 severe loss or damage to those who already make use of the ground water...*The statute exempts*

1 from administrative control the withdrawal of water for any purpose where the quantity is less
2 than 5,000 gallons a day. Garton called this sufficient to supply a family, including lawn,
3 livestock and noncommercial garden.” [quoting Director Garton of the Department of
4 Conservation and Development.] Id. (emphasis added.) It is unlikely that Director Garton, on
5 the heels of the legislative session and within days of implementing the law, got it wrong.

6 B. Contrary To The State’s Arguments, The State Was Consistent In Its
7 Interpretation And Implementation Of The Law For Sixty Years.

8 The Court should reject the State’s attempt at this late date to distance itself from 60
9 years of consistent application of a 5,000 gpd limit on the stockwater permit exemption. The
10 State’s claims are unsupported by the evidence, including evidence that the State itself has
11 proffered here and in previous litigation.

12 Where, as here, there are competing official interpretations, agency interpretations
13 contemporaneous with the law’s passage can aid a court’s assessment of historical context and
14 legislative intent. Melhaff v. Tacoma School Dist. No. 10, 92 Wash. App. 982, 987, 966 P.2d
15 419 (1998) (citing Green River Cmty. College v. Higher Educ. Personnel Bd., 95 Wn.2d 108,
16 117-18, 622 P.2d 826 (1980)). See also Dot Foods, Inc. v. Washington Dep’t of Revenue, 166
17 Wn.2d 912, 921, 215 P.3d 185 (2009) (court noted that it would not give deference to a new state
18 interpretation in the face of a long history of the opposite interpretation and that “[o]ne would
19 think that the Department had some involvement or certainly awareness of the legislature’s plans
20 to enact this type of statute” and “where a statute has been left unchanged by the legislature for a
21 significant period of time, the more appropriate method to change the interpretation or
22 application of a statute is by amendment or revision of the statute, rather than a new agency
23 interpretation.”).

24 As shown by Director Garton’s statements to the Spokane newspaper upon

1 implementation of the new groundwater law, the State immediately adopted an interpretation of
2 RCW 90.44.050 that limited the use of water for livestock to part of the bundle of domestic uses
3 at 5,000 gpd or less. This is consistent with the Department of Conservation's thirteenth biennial
4 report's description of the law in 1946. Brimmer Decl. Ex. F. It is also fully consistent with the
5 next two biennial reports issued by the Department. Bellon Decl. Ex. 8 and 9.

6 In 1948, the Department reported on the early education and implementation efforts
7 associated with the new groundwater law. Under the section titled "Individual Domestic Water
8 Supply Exempt," the Department noted the following:

9 The original Ground Water Code provided for the exemption of public ground
10 water where the amounts withdrawn were 5,000 gallons per day or less. This
11 exemption was provided to relieve users of small amounts of water of the
formalities of obtaining water for their household and domestic needs.

12 Bellon Decl. Ex. 8, p. 45. There is no mention of the specific categories of uses, in particular
13 there is no mention or singling out of livestock drinking water. On the following page, the
14 Department repeats twice that the exemption generally applies only to uses that are 5,000 gallons
15 per day or less. *Id.* at p. 46.

16 In 1950, the Department repeated its basic understanding that only uses of 5,000 gpd or
less were exempt:

17 [T]he demand for ground water for all purposes is continually increasing. Such
18 new rights in excess of 5,000 gallons per day can only be obtained by permit from
the Supervisor of Hydraulics. A permit is acquired by filing an application with
19 the Supervisor on a form provided by him.

20 The Ground Water Code provides that a water user withdrawing public
waters for stock-watering purposes, or for the irrigation of lawn or garden not
21 exceeding one-half acre in area, or for domestic or industrial uses not exceeding
five thousand (5,000) gallons per day, is not required to file an application for
22 such withdrawal, although he may do so at his option.

23 Bellon Decl. Ex. 9, pp. 33-34. The court should note that the State, in its efforts to claim that it
24 had inconsistent interpretations of the stockwater exemption, selectively quotes only the second

1 paragraph above, which paragraph obviously simply repeats the text of the law. See State’s
2 Mem. p. 23. This is misleading. Inclusion of the first paragraph above makes clear the State’s
3 continuing interpretation that all exempt uses were subject to a 5,000 gpd limitation. It is
4 significant that the only way the State can support its argument of “inconsistent” state
5 interpretations, is to only partially quote its own earlier statements.

6 In the years following, as shown by Douglas McChesney’s declaration submitted by the
7 State in the DeVries v. Department of Ecology case,⁷ the State, including various judges,
8 interpreted and applied the stockwater exemption as limited to 5,000 gpd or less and as part of
9 the bundle of domestic uses. Brimmer Decl. Ex. H. This included a number of water rights
10 adjudications involving exempt wells. Id. at attachments 1 and 2. As recently as 2000, the State
11 vigorously and successfully argued for the 5,000 gpd limitation on the stockwater exemption as
12 set forth in the DeVries litigation.

13 Finally, the Department of Ecology’s current publication on Frequently Asked Questions
14 regarding Water Rights Applications (website visited March 9, 2010) does *not* list stockwater as
15 distinct from the other exemptions or as unlimited. Rather, the FAQ publication generally
16 provides “you do not need to apply for a water right if you use a total of 5,000 gallons or less of
17 ground water from a well each day for any of the following combinations of uses: single or
18 group domestic purposes, industrial purposes; watering a lawn or noncommercial garden that is a
19 half acre or less in size.” Stockwater is not mentioned as an exemption distinct from the 5,000
20 gpd for either domestic or industrial purposes. <http://www.ecy.wa.gov/pubs/961804swr.pdf>

22 ⁷ The State cannot now claim that Mr. McChesney is not credible or knowledgeable in this
23 regard having held him out as the authority with respect to the State’s long-time interpretation of
24 RCW 90.44.050 in earlier litigation. Mr. McChesney’s long experience and sworn statements on
this matter, made in support of the State’s position in litigation, do not suddenly disappear
simply because the State chooses to adopt a new and different interpretation of the law.

1 Brimmer Second Decl. Ex. A, p. 2.⁸ There is no credible evidence offered by any of the
2 Defendants that the State has ever held any other position until the Attorney General opinion was
3 issued in 2005.

4 The Agricultural Intervenors claim inconsistent state interpretation, but fail to support it.
5 At best, their declarants offer hearsay (without even being able to identify the speaker) that
6 occurred at some unidentified point in the past, when someone told them their stockwater use
7 was exempt. Declarations of Don Floren, para. 8; Gorla Edwards, para.7. There is no context
8 offered for the alleged conversations with Department of Ecology staff, so there is no way to
9 know what staff actually knew about the claimed exempt use or what opinion was actually
10 offered. Other declarants cannot even come up with hearsay evidence, instead offering only that
11 “no one ever told them” that they couldn’t use unlimited quantities of well water for various
12 livestock uses without a permit. Declarations of Art Swannack, para. 7; Jim Werkhoven, para. 5.
13 Another declarant admits to being told that his stockwater use was limited. Declaration of Art
14 Groeneweg, para. 5. The Court should give little to no weight to these claims as they are not
15 evidence of the State’s actual official position⁹ and they are pure, unsupported, hearsay.

16 Defendants’ arguments regarding legislative acquiescence also find no support in the
17 actual history here. Defendants all make some version of an argument that legislative inaction in
18 the years since 1945 auger in favor of their claim to an unlimited quantity of groundwater for
19

20 ⁸ Ecology’s FAQ publication is also entirely inconsistent with the argument that the lawn and
21 garden portion of the exemption is not subject to the 5,000 gpd limit on quantity, but subject only
22 to an acre limitation. Agricultural Intervenors’ Mem. p. 16; State’s Mem. p. 7. Clearly, Ecology
23 properly interprets and applies the lawn and garden exemption as subject to the 5,000 gpd
24 limitation.

25 ⁹ Moreover, agency statements regarding a question or interpretation of law are not binding and
26 can never be used to argue equitable estoppel against the state. See Dep’t of Ecology v.
Theodoratus, 135 Wn.2d 582, 599 (1998); Campbell & Gwinn, 146 Wn.2d at 20-21; and Pacific
Land Partners, L.L.C. v. Dep’t of Ecology, 150 Wn. App. 740, 751, 208 P.3d 586 (2009).

1 watering livestock, free from permit requirements of the Groundwater Code.¹⁰ However that
2 same inaction more readily favors the Family Farmers’ interpretation of the exemption language.
3 For 60 years the State and various judges sitting on water adjudications interpreted the
4 stockwater permitting exemption as limited to 5,000 gpd or less. The State made its
5 interpretation widely known in newspaper interviews, official publications, and ultimately in the
6 DeVries litigation. The legislature took no action during that entire time (including post-
7 DeVries) to correct or change what the State was doing. Legislative inaction therefore is of little
8 to no value to the court here as no conclusion can be drawn either way.

9 The only credible evidence shows that the State consistently interpreted the stockwater
10 exemption as limited from the time of its passage through the next 60 years.

11 C. The Groundwater Bill’s Passage Was Swift And Without Amendment.

12 Despite the Agricultural Intervenors’ unfounded speculation to the contrary, the
13 Groundwater Bill, including the provision that was to become RCW 90.44.050, passed through
14 the Washington legislature in what today would be considered record time, and it did so
15 unchanged from its introduction. As reflected in Exhibit I to the Brimmer Declaration (copies
16 from the actual Bill Books at the Secretary of State’s Library), the bill was introduced with the
17 current exemption language regarding stockwater and the other original exemptions and passed
18 with no amendments. The bill language is the same as the final engrossed act. From passage to
19

20 ¹⁰ Easterday Ranches claims “the legislature” reacted to the DeVries decision by raising
21 objections with the Attorney General and that such reaction constitutes legislative intent in favor
22 of Easterday’s interpretation of RCW 90.44.050. This is simply wrong. A letter to the Attorney
23 General from four legislators is not action by the legislature or the “reaction” of the legislature.
24 See City of Yakima v. Int’l Ass’n of Firefighters, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991)
(statements by individual legislators not contemporaneous with passage of statute are not
legislative history, much less action by the legislature); Washington Economic Development
Finance Auth. v. Grimm, 119 Wn.2d 738, 756-57, 837 P.2d 606 (1992) (remarks of individual
legislators made during the relevant legislative session are not conclusive of legislature’s intent).

1 the Governor’s desk was about a month. Agricultural Intervenors’ speculation about what might
2 have happened with amendments in committees¹¹ is just that: pure speculation, utterly
3 unsupported by the actual copies of the original bill.

4 D. The State Argues For An Insupportably Rigid Application Of The Last
5 Antecedent Principle.

6 The State highlights the presence and absence of commas in the exemption language to
7 argue for application of the principle of the last antecedent in order to resolve any ambiguity in
8 the statute. The State’s argument, however, fails to recognize courts’ refusal to apply the
9 principle when to do so is contrary to the overall intent of the legislature or where it would lead
10 to untenable results. Clark County Public Utility Dist. No. 1 v. Washington Dep’t of Revenue ,
11 153 Wash. App. 737, 222 P.3d 1232,1239 (Wash. App. Div. 2, 2009) (courts do not apply the
12 last antecedent rule as inflexible or take it as binding and will examine the implications of its
13 application relative to the overall statutory scheme); In re Smith, 139 Wn.2d 199, 204-05, 986
14 P.2d 131 (1999) (court declines to apply last antecedent rule where to do so “makes no sense” or
15 “leads to absurd result.”) See also Nobelman v. American Sav. Bank, 508 U.S. 324, 330-31, 113
16 S. Ct. 2106, 2111 (1993) (court declines to apply rule where not practical.)

17 The Smith case is particularly instructive in light of the dispute here. In Smith, the court
18 was confronted with two phrases in the statute, neither of which was separated by a comma. The
19 Court found that interpreting the statute in accordance with the last antecedent rule was
20 problematic because either it had to be inconsistent in application of the rule for the statute to
21 make any sense at all, or, if it applied the rule, the resulting interpretation was unreasonable.
22 Smith, 139 Wn. 2d at 204-05.

23 There is no action by the legislature following the DeVries decision.

24 ¹¹ Agricultural Intervenors’ Mem. p. 25.

1 Here, rigid application of the rule will lead to the absurd result of an unlimited,
2 unpermitted use of water, exempt from the reach of the statute, the purpose of which is to
3 control, regulate, and conserve all but minimal uses of groundwater. Rigid application of the
4 rule is also clearly contrary to the historic record and the legislative intent evidenced by it.
5 Application further makes the State's position internally inconsistent. The State argues that the
6 5,000 gpd modified only the domestic uses exemption. However, the State's own FAQ
7 publication regarding water rights clearly states that it also modified the lawn and garden
8 exemption. Brimmer Second Decl. Ex. M. Finally, the exemption provisions, as in Smith,
9 actually have two modifiers within the exemption and applying the last antecedent consistently
10 leads to absurd results. If the 5,000 gpd only modifies the domestic exemption, then the half-
11 acre limitation can only modify the garden exemption, but not the lawn exemption. The State's
12 position with respect to application of the last antecedent rule quickly crumbles into an exercise
13 in nonsense. The only reasonable reading in accordance with all these considerations is that the
14 5,000 gpd modifies *all* the exemption provisions, including stockwater.

14 E. Information And Arguments Regarding Total Numbers Of Livestock And Current
15 Unpermitted Groundwater Use Are Not Indicative Of Legislative Intent And Are
16 Extraneous To The Issues That Must Be Determined In This Case.

16 The defendants spend significant text telling the court a lot about the agricultural industry
17 in this state, historically and currently. While interesting and possibly even true, the discussion
18 of these issues again simply diverts attention from the narrowly-focused question of statutory
19 interpretation this court must decide. Defendants provide no information that is useful to this
20 court in assessing legislative intent or parsing the language of RCW 90.44.050.

21 Defendants take great pains to point out that total Washington state livestock numbers
22 were higher in 1945 than they are today. They shower the court with tables and reports,
23 including a report from the State regarding the Brown Farm in the Nisqually Basin. Agricultural
24 Intervenors' Mem. pp. 5-6; State's Mem. pp. 17-18; Easterday Mem. p. 7. It is unclear to what

1 end this information is offered, but it appears to be in support of an argument that the legislature
2 thought that unlimited stockwater use was acceptable in total in 1945.¹² There is no support
3 other than livestock numbers given for this contention, but, more importantly, total livestock
4 numbers state-wide in 1945 say nothing about intensity and location of water use—facts that are
5 essential to understanding the impact of groundwater use on the resource.

6 Defendants fail to provide or discuss facts regarding where the livestock were located
7 then versus now, and how much water any given farm used for livestock. Livestock operations
8 now are likely much more consolidated into large, intensive operations, as opposed to small
9 homesteads as described in the BOR reports. Many of the operations in 1945 came within the
10 5,000 gpd limit as demonstrated by the BOR reports' conclusions based upon the citation to
11 studies showing total number of animals on a farm that would be supported by the 5,000 gpd
12 limit. See Brimmer Decl. Exs. D and E, pp. 4 and 54 respectively. If farms in 1945 mostly came
13 within the 5,000 gpd limit, then the conclusion implied by the Defendants regarding legislative
14 assumptions and intent would be false. The more-supportable conclusion is that the legislature
15 assumed all livestock would be amply supported with a 5,000 gpd domestic limit. Without the
16 additional information regarding location and intensity of use then and now, the total number of
17 livestock in the state is utterly meaningless for the question before the court.

18 The information provided by the State on the Brown farm also says nothing about water
19 use—did the farm use more than 5,000 gpd and if so, it may have had a water right. The State
20 provides no information in this regard. In fact, it is not even clear whether the Brown Farm used
21 groundwater as opposed to surface water. If surface water, no exemption was available and if it
22 was groundwater, it predated the permit requirements of the Code. The Brown Farm information
23 is of no value or relevance to the issue in this case.

24 The Family Farmers urge the court to disregard Defendants' efforts to divert the inquiry

25 ¹² This of course assumes that the legislature actually knew how many livestock animals were in
26 the state in 1945.

1 from the proper scope with incomplete and unconnected information regarding livestock
2 numbers.

3 The Agricultural Intervenors also provide declarations describing current unpermitted
4 groundwater use for livestock drinking as well as other non-exempt livestock-operation uses and
5 complain that a ruling in favor the Family Farmers will lead to economic ruin. First and
6 foremost, none of this information goes to the legislature's intent in 1945 and therefore is of little
7 benefit to the court in interpreting RCW 90.44.050.

8 Second, the Agricultural Intervenors mischaracterize (or misunderstand) the point of this
9 case. The issue is not whether the various livestock operations can use water or get a water right,
10 but rather whether they need a permit. If the court determines that the Family Farmers are
11 correct in their interpretation of RCW 90.44.050, livestock operations are not immediately
12 denied access to groundwater. It would simply mean that if a livestock operation was going to
13 use more than 5,000 gpd, it must apply for and obtain a permit or purchase or otherwise obtain
14 an existing water right, the same rule that governed livestock operations from 1945 to 2005. In
15 other words, livestock operators wishing to use more than 5,000 gpd of groundwater must follow
16 the rules that all other larger water users must follow, nothing more, nothing less. Further, it
17 appears from the declarations that some of the livestock operators will be unaffected by a ruling
18 in the Family Farmers' favor in this case because they come within the 5,000 gpd limit (just as
19 many of the Family Farmers have over the years when they raised livestock. See Declarations of
20 Scott Collin and Sheila Poe.)

21 Third, to the extent that some of the Agricultural Intervenors suggest that they will be
22 unable to obtain water permits if required to do so due to the scarcity and resulting expense of
23 water rights and permits, the Agricultural Intervenors emphasize the very heart of the problem
24 and the need for regulation of larger uses of groundwater. See e.g. Edwards Decl., para. 6;
25 Swannack Decl., para. 6; Second Declaration of Jay Gordon, para 3; Declaration of Ron Mael,

1 para. 6. If water is not available or in short supply, allowing unlimited pumping of groundwater
2 will obviously cause or exacerbate the very problem the Groundwater Code was meant to
3 address in 1945.

4 Finally, it should be noted that most of the Agricultural Intervenor declarants admit to
5 illegal unpermitted groundwater use before the change in interpretation in 2005, and outside of
6 the current interpretation by the State. Prior to the 2005 Attorney General’s opinion, use of
7 unpermitted groundwater for livestock operations in excess of 5,000 gpd was illegal as the State
8 interpreted RCW 90.44.050 as limited. See DeVries memorandum, Brimmer Decl. Ex. G.. It
9 appears that some of the uses outlined by the Agricultural Intervenors were illegal at that time
10 being in excess of 5,000 gpd, even though the State’s position and interpretation of the law had
11 been consistent. And, while the State currently allows unlimited, unpermitted groundwater use
12 for watering livestock, it has made clear that other non-drinking-water uses in a modern, large
13 livestock operation, such as washing, misting, or dust-control are not part of the livestock
14 exemption and must be permitted. See e.g. February 17, 2009 Letter from Jay Manning,
15 November 11, 2009 Brimmer Decl., Ex. A. Most of the declarants admit to using several
16 unpermitted groundwater wells for more than livestock drinking water in their operations,
17 demonstrating that many of these users need to obtain permitted water rights now for their
18 various uses, regardless of the outcome of this case. Se e.g. Werkhoven Decl., para 4 (for
19 “clean-up around the dairy”); Floren Decl, para. 7 (“for dust control and to clean equipment”);
20 Mauel Decl. para. 6.

21 IV. INJUNCTIONS AND THE UNIFORM DECLARATORY JUDGMENT ACT

22 The State and Agricultural Intervenors argue that the Family Farmers are not entitled to
23 injunctive relief against the State because they have not proven the three requirements for
24 injunctive relief. See e.g. Agricultural Intervenors’ Mem., p. 20. The Family Farmers believe it

1 is premature to fully address this issue now as the motion for summary judgment seeks relief on
2 the statutory interpretation matter and the Family Farmers have earlier made clear that they will
3 pursue injunctive relief, if necessary, only after the primary statutory interpretation issues in the
4 case are resolved. Therefore, Family Farmers will only briefly address this argument here.

5 Defendants confuse the requirements for preliminary injunctive relief with the provisions
6 allowing equitable relief under the Uniform Declaratory Judgment Act. (“UDJA”). The UDJA
7 provides that if a plaintiff is successful in obtaining relief in its favor regarding interpretation of a
8 statute or contract provision, the court may also then order further relief as may be necessary to
9 ensure that the court’s interpretation or ruling is fully realized and to ensure that plaintiff
10 receives full benefit of the ruling. RCW 7.24.080. If the Family Farmers are successful in this
11 motion, they have the right under the UDJA to request further relief from the Court that ensures
12 that the ruling will have meaning and will address the Family Farmers’ concerns. That includes
13 injunctive relief against the State to ensure that unpermitted uses of groundwater in excess of
14 5,000 gpd be required to obtain a permit.

15 V. THIS ACTION IS NOT SUBJECT TO THE STATE’S RIGHT TO FARM NUISANCE
16 LAWS.

17 This declaratory judgment action brought by a group of farmers against the State of
18 Washington (and necessarily, by virtue of the requirements of the UDJA, against Easterday
19 Ranches, Inc.) is not subject to the state’s so-called “right to farm” laws.¹³ The state’s so-called
20 right to farm laws are actually part of the Nuisances provisions of the Washington Code, chapter
21 7.48. RCW 7.48.300 makes clear that the purpose of the law is to address conflicts, subject to
22 nuisance lawsuits, between farmers and non-farmers in urbanizing areas. Specifically, the law is

23 ¹³ As Easterday Ranches recognizes, the county ordinance tracks the state law. Local ordinances
24 must yield to state law to the extent state law occupies the field and county ordinances can never

1 intended to protect agricultural activities from nuisance lawsuits by non-farmer homeowners or
2 businesses. See Buchanan v. Simplot Feeders, Ltd. Partnership, 134 Wn.2d 673, 678-79 and
3 681-82, 952 P.2d 610 (1998).

4 This case is not a nuisance lawsuit. It is a declaratory judgment action seeking
5 interpretation of a statutory provision of the Groundwater Code. No damages are sought and
6 injury is claimed only to demonstrate standing to request the statutory interpretation. This case is
7 also not about a conflict between farm and non-farm citizens in an urbanizing area. The Five
8 Corners Family Farmers and Scott Collin are life-time (indeed, generations-long) residents of the
9 Five Corners region, a wholly-agricultural, non-urbanizing area of the state. The Family Farmers
10 and Scott Collin are all farmers, many also raising livestock, and the properties in question are all
11 farms and ranches. In fact, the only reason that Easterday Ranches is a defendant in this action is
12 because the UDJA requires inclusion of the real party in interest in a real controversy in order to
13 avoid the court giving an advisory opinion on the statute. That requirement necessitates suit
14 against a farmer or rancher in this instance as the statute for which interpretation is sought is
15 utilized only by farming and ranching operations. In order for any party to obtain a ruling on the
16 proper interpretation of this statute, some action would have to be commenced against a farmer
17 or a rancher somewhere. Clearly, the right to farm law is not meant to bar legitimate claims for
18 declaratory relief on legitimate questions of statutory interpretation.

19 Further, there is no allegation that Easterday Ranches is violating existing law. The
20 Family Farmers recognize that Easterday Ranches is currently operating under the interpretation
21 of RCW 90.44.050 by the Attorney General. It is the interpretation by the State that the Family
22 Farmers seeks to correct in this action. Should the State's latest interpretation of the statute be
23

24 conflict with stat laws. Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991).

1 found correct, the Family Farmers agree that there is no violation of RCW 90.44.050.

2 This case is not the type of case that is covered by RCW 7.48.300 et seq. Therefore,
3 Easterday Ranches' claim that the Family Farmers are subject to damages and costs is incorrect,
4 and the Family Farmers ask the Court to deny any such request.

5 VI. PLAINTIFFS HAVE STANDING.

6 A. The Matter Of Plaintiffs' Standing Has Already Been Decided And Is The Law
7 Of The Case.

8 Plaintiffs' standing to bring this action has already been before this Court by virtue of the
9 Motion to Dismiss filed by Easterday Ranches on October 26, 2009. At the hearing on the
10 Motion to Dismiss on November 23, 2009, the Court denied the motion in its entirety, including
11 the objections to standing and denied the motions to strike the standing declarations. Order,
12 December 3, 2009. No party (or intervenor) moved to reconsider within the time required by the
13 Rules of Civil Procedure. No party has requested relief from the order based upon new evidence
14 or new law or other allowable basis for relief within the requirements of the Rules of Civil
15 Procedure. Standing cannot now be challenged by an intervenor to the action.¹⁴ If a party
16 wishes to raise standing on appeal of a final decision, the party is free to do so, but it is
17 inappropriate to raise it again here.

18 B. Plaintiffs Have Adequately Demonstrated Standing To Bring Their Case.

19 The Plaintiffs in this case are each within the zone of interests protected by the
20 groundwater code and will be injured by ecology's interpretation of the permit exemption for
21 livestock watering as unlimited. The Family Farmers incorporate their response to Easterday
22 Ranches' Motion to Dismiss and, to the extent relevant, their response to Easterday Ranches'

23 ¹⁴ Generally, intervenors must accept the original parties' pleadings and the status of the case as
24 they find them upon entry into the litigation. Casebere v. Clark County Civil Service Comm'n,
21 Wash. App. 73, 77, 584 P.2d 416 (1978) (citations omitted).

1 Motion to Strike, filed November 11, 2009 and November 19, 2009, respectively. The Family
2 Farmers provide a summary of their arguments here.

3 A party to a UDJA action must be within the “zone of interests to be protected or
4 regulated by the statute” in question. Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,
5 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (Grant County II). The party must have suffered, or
6 will suffer, an “injury in fact.” Id. (internal quotation marks omitted). See also To-Ro Trade
7 Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1148 (2001); American Legion Post # 149 v.
8 Department of Health, 164 Wn.2d 570, 593-94, 192 P.2d 306 (2008). An organization:

9 has standing to bring suit on behalf of its members when the following criteria are
10 satisfied: (1) the members of the organization would otherwise have standing to
11 sue in their own right; (2) the interests that the organization seeks to protect are
germane to its purpose; and (3) neither claim asserted nor relief requested requires
the participation of the organization’s individual members.

12 International Ass’n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-14, 45
13 P.3d 186 (2002). See also, Okanogan Wilderness League v. Dep’t of Ecology, PCHB No. 98-84
14 (Nov. 24, 1998), at 4 (holding that an interest in the wildlife of the Dungeness River qualified as
15 a cognizable interest upon which to base an injury in fact); CELP v. Dep’t of Ecology, PCHB
16 No. 96-165 (Jan. 7, 1998) (basing finding of injury in fact on CELP members’ enjoyment of
17 aesthetic, recreation, and wildlife values present in the Columbia and Walla Walla Rivers).

18 Plaintiffs asserting a procedural injury “need not show that the substantive environmental harm
19 is imminent.” Cantrell v. City of Long Beach, 241 F.3d 674, 679 n.3 (9th Cir. 2001); see Lujan v.

20 Defenders of Wildlife, 504 U.S. 555, 573 n.7, 112 S. Ct. 2130 (1992). Plaintiffs asserting
21 procedural injury must establish that “(1) the [defendants] violated certain procedural rules; (2)
22 these rules protect [plaintiffs’] concrete interests; and (3) it is reasonably probable that the
23 challenged action will threaten their concrete interests.” Citizens for Better Forestry v. USDA,
24 341 F.3d 961, 969-70 (9th Cir. 2003).

1 Scott Collin, Sheila Poe, and Randolph Jones are all members of Five Corners Family
2 Farmers and of CELP. Each of them live near and/or own property near the Easterday Ranches’
3 proposed feedlot (Ms. Poe, immediately across the road, Mr. Collin, less than a mile down
4 Gertler Road). They rely entirely on groundwater wells for their homes and property that are or
5 may be in the same aquifer as Easterday and/or affected by withdrawals from connected aquifers.
6 They are clearly within the zone of interests protected by the groundwater code—indeed,
7 Washington law specifically provides that no new withdrawals may injure their interests. See
8 RCW 90.03.290 and additional discussion of potential injury in Response to Motion to Dismiss
9 and Declaration of Ms. Poe and Messrs. Collin and Jones. Allowing unlimited, unpermitted use
10 of groundwater for watering livestock at Easterday Ranches or others in the area will allow users
11 that are later in the queue to injure farmers like Mr. Collin, Ms. Poe, or Mr. Jones who have
12 abided by the law and rules, including the “first-in-time, first-in-right” prior appropriation law.
13 Five Corners Family Farmers’ potential for injury in this case is real and extreme in nature. As
14 noted in the declarations, without well water, the homes and properties of the Five Corners
15 Family Farmers become uninhabitable. Collin Decl. para. 11; Poe Decl. para. 9; Jones Decl.
16 para. 8.

17 For Scott Collin, there is evidence that he is in the same aquifer as Easterday Ranches
18 claims it is in, the Grande Ronde. Collin Decl., para. 11. At a minimum, it cannot be said with
19 any assurance exactly which aquifer any of the wells are in due to the complete lack of
20 groundwater surveying and mapping in the area. Id.; See also Poe and Jones Decl. paras. 7 and 9
21 respectively. Ecology has stated repeatedly that the locations and depth of the aquifers in the
22 region is unclear; moreover Ecology itself treats all aquifers in the Columbia Basin as
23
24

1 connected.¹⁵ Ecology’s treatment of the Wanapum and Grande Ronde aquifers as connected is
2 completely supported by the U.S. Geological Survey maps (the state of the science regarding
3 these aquifers) showing groundwater flow across the Columbia Plateau. Those maps further
4 demonstrate flow from the Wanapum into the Grande Ronde indicating that withdrawals from
5 the Grande Ronde can affect the Wanapum aquifer. See Osborn Decl. Exhibit D. “[I]t is now
6 universally recognized that the ground water and the surface water *in any area* are
7 interconnected...such that pumping ground water will eventually draw down the surface streams
8 in the area...This relationship is called *hydraulic continuity*.” McDonald treatise “An
9 Introduction to Washington Water Law” January, 2000, pp. 10, see also pp. V:1-2.

10 Perhaps most importantly, waiting until Scott Collin’s or Sheila Poe’s wells dry up
11 defeats the entire purpose of the litigation and creates a situation where they can get no redress at
12 all from the courts. The point of groundwater regulation is to require permits and the analysis
13 that is part of the permitting process—assessing senior water rights, impairment risk, and the
14 broader public interest. The permit system protects senior rights and Washington’s water
15 resources before there is harm.

16 The organizational plaintiffs,¹⁶ whose interests include promoting sustainable water use
17 throughout the state to support wildlife, recreation, and responsible development, are clearly
18 within the zone of interests protected by the water code as well and have standing in this case.
19 See, e.g., CELP v. Dep’t of Ecology, PCHB No. 02-216 (June 4, 2003) (CELP had standing to
20 challenge the validity of a water rights application); CELP v. Dep’t of Ecology, PCHB No. 96-

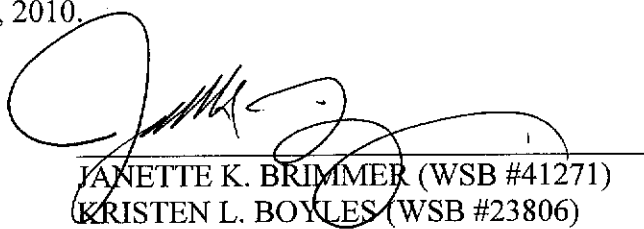
21
22 ¹⁵ Indeed, this was an important and specific finding in Ecology’s approval of the Pepiot
23 Transfer. In that instance, Ecology found that, despite the fact that the Easterday Ranches had
24 drilled their well much deeper than the original Pepiot well, the well should be considered as
drawing from the same aquifer, a necessary finding for the approval of the transfer. See approval
letter attached to Brimmer Decl., dated November 11, 2009, Ex. B.

1 165 (Jan. 7, 1998) (CELP members' enjoyment of aesthetic, recreation, and wildlife values
2 present in the Columbia and Walla Walla Rivers were the types of interests protected by the
3 Water Resources Act of 1971).

4 CONCLUSION

5 The interpretation of RCW 90.44.050 that is most consistent with the plain language of
6 the Groundwater Code, with the plain legislative intent to regulate and conserve groundwater
7 resources, and with a reasonable application of the stockwater permit exemption relative to the
8 other exemptions and water rights generally, is one that limits use of the stockwater exemption to
9 5,000 gpd or less as part of the domestic category of uses in RCW 90.44.050. Such an
10 interpretation is consistent with 60 years of interpretation and implementation by the State.
11 Defendants are unable to provide any argument or evidence that rationally leads to a different
12 conclusion. Plaintiffs respectfully request declaratory judgment in their favor, that the
13 stockwater exemption in RCW 90.44.050 is limited to 5,000 gpd or less.

14 DATED this 16th day of March, 2010.

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24 ¹⁶ See John Osborn Decl. generally and Declaration of Patricia Sumption, generally.