

NO. 84632-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents,

and

WASHINGTON CATTLEMEN'S ASSOCIATION, COLUMBIA
SNAKE RIVER IRRIGATORS ASSOCIATION, WASHINGTON
STATE DAIRY FEDERATION, NORTHWEST DAIRY
ASSOCIATION, WASHINGTON CATTLE FEEDERS ASSOCIATION,
CATTLE PRODUCERS OF WASHINGTON, WASHINGTON STATE
SHEEP PRODUCERS and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

**MOTION OF AQUA PERMANENTE FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

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I. INTRODUCTION

Aqua Permanente respectfully requests, pursuant to RAP 10.6(b), leave to file the attached brief as friend of the Court. Aqua Permanente believes the Court and its deliberations will benefit from the attached brief. The issue before the Court is whether the exemption from the water rights permitting process for groundwater used for “stockwatering” purposes under RCW 90.44.050, which by practice of the Department of Ecology has been limited to a maximum of 5000 gallons per day, should instead be available in unlimited quantities—without a water right permit—to large industrial cattle feedlot operations. Arguments are scheduled before the Court on June 16, 2011.

II. IDENTITY AND INTEREST OF AMICUS

Aqua Permanente (“AP”) is a non-profit limited liability corporation headquartered in Cle Elum, Kittitas County, Washington. AP is dedicated to protecting senior water rights in the Kittitas County portion of the Yakima Basin, particularly those held by small farmers. Water rights in the Yakima Basin are generally divided into pre-1905 water rights, and post-1905 water rights, with the 1905 date being significant because that is when the Bureau of Reclamation secured rights to all unappropriated water in order to construct and operate its Yakima

basinwide irrigation project. Stirred by a series of forced curtailments of water rights and uses in Kittitas County, local residents with post-1905 water rights formed Aqua Permanente to protect their water rights. These curtailments were and have been significant—for instance, in 2001 reducing those with post-1905 rights to 37% of their entitlements, and completely shutting down thousands of water users in the Yakima Basin. AP's core concern is and was the proliferation of new groundwater withdrawals from wells exempt from the state's water rights permitting requirements. AP believes that it is unjust that their members have been forced to curtail water use in times of shortage under their senior water rights while the state has allowed permit-exempt wells with junior rights to pump water unabated.

This concern led AP to petition Ecology in September 2007 to close the Upper Kittitas Valley to new groundwater withdrawals, pending completion of hydrogeologic studies assessing the impacts that future permit-exempt wells would have on the Basin. Ultimately, the Department of Ecology ("Ecology") on December 22, 2010, promulgated a final rule (WAC Ch 173-539A), that withdrew the Upper Kittitas Valley from new appropriations of groundwater, pending further hydrogeologic studies, and created groundwater management measures that would allow

the use of new exempt wells in Upper Kittitas County only if the new withdrawals were fully mitigated under a “water budget neutral” approach.

AP members are family farmers, with historic roots in the Upper Kittitas Valley. They are both water rights holders, and people who need water for their stock. This area has undergone dramatic changes in the past ten to fifteen years as rapid urbanization and residential growth have changed land use patterns and put stresses on the area’s resources—including its water resources. Because the Yakima Basin has been closed to new water rights under an Ecology moratorium since 1999, much of the residential growth has used permit-exempt wells to supply water for domestic and outdoor irrigation use. Because these wells do not undergo any review by the State for potential impacts to existing water rights—either out-of-stream uses, or instream uses protected by state rules—those withdrawals have proceeded unchecked, and without any oversight as to their aggregate effects on groundwater resources or the senior water rights held by longtime residents in the Upper Kittitas Valley.

AP and its members fully understand the needs of farmers to have adequate water available for stockwatering purposes, and the benefits of the traditional exemption for them under RCW 90.44.050 from the permitting requirements for groundwater use. AP and its members will be directly affected by the Court’s decision in this case because of the

potential that a decision affirming the Superior Court's reading of the statute, and allowing unlimited industrial feedlot use of groundwater without a water right permit, would aggravate an already tenuous situation with water supplies, and subject AP's members to increased risk of curtailment of their water use even though they have water rights senior to those of exempt well users. AP and its members do not support the idea that there should be a special class of users that who may use unlimited quantities of water without regard to impacts on senior water rights.

In addition, AP members have been fully engaged in Ecology's rulemaking process addressing exempt well use in the Upper Kittitas Valley, having filed formal comments with Ecology on various drafts, and having participated in an extensive set of meetings and public hearings. While some partial and temporary relief from prospective exempt well impacts has been achieved with Ecology's adoption of its final rule in WAC 175-539A, that rule is focused on pursuing additional studies that will inform a future management strategy for water use in the Upper Kittitas Valley, and does not address impacts from exempt wells that were drilled prior to the effective date of the rule. This Court's decision will likely directly affect the development of a management strategy for the Upper Kittitas Valley if it concludes that the exemption in RCW

90.54.050 allows unlimited use of groundwater by industrial feedlot operations, without the evaluation and oversight of a water right permit.

III. FAMILIARITY WITH PERMIT-EXEMPT WELL LAW AND POLICY

Aqua Permanente was formed in 2007 for the express purpose of advocating for the rights of existing water rights holders in the face of a proliferation of permit-exempt wells in the Upper Kittitas Valley. After petitioning the Department of Ecology in 2007 to withdraw the Upper Kittitas Basin from new groundwater withdrawals, including exempt wells, pending definitive groundwater studies that would determine whether and to what extent any water was available for further appropriation in the Yakima Basin, AP was a major participant in the forums, workshops, and rule development process that followed. This included participation by AP members in public meetings, and through written comments on multiple documents developed and proposed by Ecology and Kittitas County. These included comments (all submitted jointly with the Center for Environmental Law and Policy (“CELP”), a party to this case) on a November 2007 Agreement in Principle (“AIP”) between the Department of Ecology and Kittitas County to develop a Memorandum of Agreement (“MOA”) to address the issues raised by AP in the petition; comments in March 2008, on the draft MOA released by

Ecology; and, in February 2009, a 26-page detailed and documented set of comments on the draft rule. Ultimately, after a set of emergency rules with associated meetings and hearings in which AP participated, Ecology promulgated in December 2010 the final WAC Ch. 173-539A, reflecting a number of AP's comments. Since adoption of the rule, AP has continued to monitor its implementation.

Since its formation in 2007, AP has also actively fostered public education and understanding of exempt wells and their proper role in the state's water management scheme. It has developed informational materials and organized workshops and other meetings addressing exempt wells, including a statewide workshop that convened in Roslyn in August 2010. That workshop had over 60 attendees from different organizations and interests statewide, including tribal staff, environmental organization staff, and members of the Legislature. AP is currently planning a second such two-day workshop in August 2011.

AP has monitored legislation on exempt wells, and members have testified on various pieces of exempt well legislation that have been introduced in the Legislature since 2007.

IV. SPECIFIC ISSUES ADDRESSED IN AMICUS CURIAE BRIEF

Aqua Permanente's proposed *amicus curiae* brief addresses three issues related to the interpretation of the "stockwatering" exemption under RCW 90.54.050:

- (1) The Attorney-General's interpretation of RCW 90.44.050 would undermine the statutory scheme of prior appropriation that protects senior water rights and the legal uses under them, and would place an undue burden on small farmers in exercising their rights;
- (2) The same interpretation would interfere with, and undermine, the proper management of water resources, including exempt wells, being pursued at a watershed level with the adoption of WAC Ch. 173-539A; and
- (3) Allowing unlimited industrial feedlot water use without water rights permits is inconsistent with the public welfare and the fundamentals of Washington water law.

In addressing the foregoing issues, AP will argue that the Court should overturn the Superior Court's decision, and find that the Attorney-General's opinion that authorizes unlimited water use for industrial cattle feedlot operations under the "stockwatering" exemption of RCW 90.54.050 is a misreading of the law, and that stockwatering purposes are

limited to the 5000 gallon per day limit that was the state's consistent interpretation of the law from 1945 until 2005.

V. REASONS FOR ADDITIONAL ARGUMENT ON SPECIFIC ISSUES

Aqua Permanente's proposed brief is motivated by the desire to assist the Court in ensuring that the result is just, and that the outcome reflects a fuller understanding of the significant impact this decision will have on water management at both state and local levels.

In the four years since its creation in 2007, AP has assumed a leadership role on exempt well issues in this state. It has unique experience with the use of exempt wells in rural, agricultural areas that are becoming increasingly residential. It has members with senior water rights who operate family farms that need water for stockwatering. It has members who have deep roots in an area that historically has supported a multitude of activities and industries related to cattle operations, ranging from dairy herds to large cattle feeding operations. This general and extensive familiarity with rural and agricultural needs, and detailed understanding of the role of exempt wells in water supply and water management, makes AP uniquely expert in the issues before the Court in this case.


VI. REQUEST FOR PERMISSION FOR LATE FILING

Aqua Permanente's motion and proposed brief are filed on May 18, 2011, one day after the 30-day advance filing date for *amicus curiae* Briefing set forth in RAP 10.2(f). Aqua Permanente respectfully requests that the Court accept the filing, which was delayed due to document production difficulties encountered by counsel for Aqua Permanente (a sole practitioner). Counsel believes other parties will not be prejudiced, since they are being served on today's date (May 18, 2011) by either email or U.S. mail, or both.

VI. CONCLUSION

Aqua Permanente seeks leave to file the accompanying *amicus curiae* brief as a friend of the Court, and submits that the brief will assist the Court in reaching an appropriate result in this case. Accordingly, Aqua Permanente respectfully requests that the Court grant its motion for leave to file the accompany *amicus* brief.

Respectfully submitted this 18th day of May, 2011.



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CERTIFICATE OF SERVICE

On May 18, 2011, I filed with the State of Washington Supreme Court and served, in the manner indicated below, a true and correct copy of the (1) Motion of Aqua Permanente for Leave to File Amicus Curiae Brief, and (2) Brief of Amicus Curiae Aqua Permanente, and (3) Certificate of Service to the following:

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I, David L. Monthie, declare under penalty of perjury that the foregoing is true and correct. Executed on this 18th day of May, 2011, in Olympia, Washington.



David L. Monthie