

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.

**RESPONDENTS STATE OF WASHINGTON'S AND
DEPARTMENT OF ECOLOGY'S ANSWER TO BRIEFS OF AMICI
INTERESTED INDIAN TRIBES AND AQUA PERMANENTE**

ROBERT M. MCKENNA
Attorney General

MARY SUE WILSON, WSBA #19257
Sr. Assistant Attorney General
P.O. Box 40117, Olympia, WA 98504-0117
(360) 586-6770
Attorneys for Respondents
State of Washington
Washington State Department of Ecology

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT	3
	A. Permit-Exempt Stock-Watering Rights Are Neither “Unlimited” Nor “Unregulated” And Such Rights Can Be Regulated Before They Are Established.....	3
	B. Whether A Specific Basin Is Fully-Appropriated Is Determined By Basin-Specific Factual And Technical Data.....	5
	C. The Upper Kittitas Groundwater Rule Provides An Example Of Advance Regulation Applicable To Permit-Exempt Groundwater Withdrawals for Stock-Watering Purposes.....	6
	D. Permit Review Is Not The Only Policy Embraced By The Water Code. Other Policies Provide Alternative Methods For Protecting Senior Water Right Holders And Stream Resources	9

TABLE OF AUTHORITIES

Cases

Dep't of Ecology v. Campbell & Gwinn, LLC,
146 Wn.2d 1, 43 P.3d 4 (2002)..... 1

Dep't of Ecology v. Grimes,
121 Wn.2d 459, 852 P.2d 1044 (1993)..... 7

Postema v. Pollution Control Hearings Bd.,
142 Wn.2d 68, 11 P.3d 726 (2000)..... 4

Statutes

RCW 90.44.050 2, 3, 8, 9

RCW 90.54.050(2)..... 4

Regulations

WAC 173-539A-040..... 7

Other Authorities

Department of Ecology, *Concise Explanatory Statement Chapter
173-539A WAC Upper Kittitas Groundwater Rule* (2010)..... 6

I. INTRODUCTION

At its core, this case presents a single question of statutory construction. Neither the Tribes nor Aqua Permanente offer statutory construction arguments different from those already advanced by Appellants.

Applying the plain meaning rule announced by this court in *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002), the Attorney General in 2005 and the superior court in 2010 both concluded that the exemption from permitting for stock-watering purposes is not limited by quantity. Neither the policy arguments nor the factual contentions presented by Amici supports a different conclusion.

Amici argue that water rights held by senior users and instream flows put in place to protect stream resources such as fish life cannot be protected if the groundwater permit exemption for stock-watering purposes is not limited by quantity. As with the policy arguments advanced by Appellants, these arguments should be presented to the legislature in support of a request to revise the Water Code.

As to the factual assertions made by both the Tribes and Aqua Permanente, the information they describe is outside the record and not appropriately considered. Beyond that, general statements regarding potential impacts to senior water right holders and/or stream flows have no

bearing on the question before the court. This is because the questions of whether a new use of groundwater (for any purpose) may interfere with a senior water right holder's use of surface water or groundwater or with stream flow needs of a particular water body are fact specific and basin-specific and do not alter the plain meaning reading of RCW 90.44.050. Importantly, at the location of the Easterday feedlot, technical analyses contained in the record show little likelihood of impacts to area water rights.

Finally, Aqua Permanente cites to the Upper Kittitas Groundwater Rule recently enacted by the Department of Ecology and suggests the rule and the superior court's ruling in this case present the possibility of significant conflict. Aqua Permanente Br. at 6, 20. To the contrary, the rule is an illustration of a basin-specific water resource regulation whereby permitted uses of groundwater and permit-exempt uses (including stock-watering) are treated the same—and are regulated *prior to their establishment*. The regulation was enacted to address precisely the type of issues about which Appellants and their Amici express concern. Thus, the enactment of the rule and its application to permit-exempt uses—including stock-watering—confirms that such water uses are not “unregulated” as argued by Appellants and their Amici.

II. ARGUMENT

A. Permit-Exempt Stock-Watering Rights Are Neither “Unlimited” Nor “Unregulated” And Such Rights Can Be Regulated Before They Are Established

Both the Tribes and Aqua Permanente carry forward Appellants’ description of permit-exempt stock-watering as “unlimited” and “unregulated.” Tribes’ Br. 2-3; Aqua Permanente Br. at 14. The Tribes also argue that the “other remedies” offered by the State are inadequate, especially based on their assertion that the remedies occur “after-the-fact” and require an investment of resources before they can be implemented. As a preliminary note, the State did not describe the other legal principles applicable to permit-exempt uses in order to equate such principles to permit review, but rather to respond to Appellants’ incorrect assertions that permit-exempt uses are somehow exempt from all aspects of the Water Code. As explained in the State’s Response Brief, permit-exempt water rights, including those used for stock-watering purposes, are exempt only from the permit process and are otherwise “equal” to water rights established through the permit system. RCW 90.44.050; State’s Response Br. at 5-7, 38-39. This means that permit-exempt uses of groundwater for stock-watering purposes are subject to the Prior Appropriation Doctrine, are limited by beneficial use and prohibition of waste, and may be the subject of regulation by Ecology and/or senior water right holders. *Id.*

Beyond this, Amici are simply wrong in their assertion that other methods of regulation applicable to permit-exempt uses can only occur after a water right is established. Tribes' Br. at 18-19. As explained in more detail in section II.C below, Ecology may close a basin or withdraw a basin from new appropriations. RCW 90.54.050(2); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 80-98, 11 P.3d 726 (2000). Such action precludes thereafter the establishment of any kind of new water right, including permit-exempt rights, including those used for stock-watering purposes. This is quintessential up-front or "advance" regulation.

As to Amici Tribes' other point, it is no surprise that application of legal remedies, whether directed at permit-exempt, permitted, or both types of water uses, requires an investment of resources prior to their implementation. Whether the Department of Ecology enacts a basin closure or withdrawal rule, a senior right holder initiates an impairment action, or a superior court conducts an adjudication, each action will involve an investment of resources. Since each of these actions has the potential to affect existing property rights or preclude the establishment of new rights, it is neither surprising nor inappropriate that implementation would require an investment of resources designed to confirm that the proposed action is technically justified.

B. Whether A Specific Basin Is Fully-Appropriated Is Determined By Basin-Specific Factual And Technical Data

Both amicus briefs make general statements about the effect of permit-exempt groundwater withdrawals on senior water rights and stream flows. Aqua Permanente contends “water resources in this state are generally over-appropriated.” Aqua Permanente Br. at 23. The Tribes assert that “unlimited ground water withdrawals for stock watering purposes have the potential to dramatically impair instream flows necessary for healthy fish runs.” Tribes’ Br. at 8. What these assertions lack is the recognition that questions regarding the status of a particular stream, lake, or groundwater basin, such as whether a particular surface or groundwater body has the capacity to supply existing water rights and whether stream flows are sufficient to sustain fish life, depend on facts and technical information related to each specific water body or basin.

Amici Tribes express particular concern about the potential impact of stock-watering withdrawals to streams used by salmon in 16 fish-critical watersheds. Tribes’ Br. at 4 n.6. However, Appellants chose to plead their case in the context of a Franklin County feedlot, at a location that is not within a fish critical basin and where technical analyses contained in the record show little likelihood of impacts to area water rights. CP 402-403, 1049. As explained in more detail in the next section

in the context of the Upper Kittitas Groundwater Rule, if a particular water body is fully-appropriated or over-appropriated, such that new stream diversions or groundwater withdrawals present a risk of interfering with senior rights and stream flows, Ecology may preclude the establishment of new rights.

C. The Upper Kittitas Groundwater Rule Provides An Example Of Advance Regulation Applicable To Permit-Exempt Groundwater Withdrawals for Stock-Watering Purposes

The Upper Kittitas Groundwater Rule provides an example of advance regulation applicable to all permit-exempt groundwater uses. In response to chronic shortages of surface water and increased reliance on new groundwater withdrawals in the Upper Kittitas surface water and groundwater interconnected system, Ecology enacted a “basin withdrawal” rule that closed the basin to new unmitigated appropriations of groundwater pending additional study. Ecology explained its action as “designed to prevent new uses of water that negatively affect flows in the Yakima River and its tributaries while a groundwater study is performed.” Department of Ecology, *Concise Explanatory Statement Chapter 173-539A WAC Upper Kittitas Groundwater Rule*, at 1 (2010), available at <http://www.ecy.wa.gov/pubs/1011029.pdf>. Ecology further explained its action:

Until Ecology obtains results from these additional studies, Ecology has determined that the appropriate course of action is to stop any new unmitigated withdrawals under the authority of RCW 90.54.050(2) in order to prevent the current situation . . . from getting worse.

Id. at 3. Thus, as of July 2009, no new water rights, *including permit-exempt stock-watering rights*, may be established in the basin unless their impacts are fully mitigated. WAC 173-539A-040.

In an effort to show a conflict between the Upper Kittitas Groundwater Rule and the superior court's ruling in this case, Aqua Permanente misleads the court by suggesting that any existing stock-watering operation in Upper Kittitas County could expand its use of water without any restriction, even after the effective date of the withdrawal rule. Aqua Permanente Br. at 20-21. Aqua Permanente is incorrect. Because an existing stock-watering right is subject to the beneficial use doctrine (among other legal principles of water law), the scope of the right was defined by the amount of water put to beneficial use, or perfected, within a reasonable time. *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993). Thus, if a stock-watering right was established in Upper Kittitas County in 1980 to support a 10,000 head dairy, the scope of the 1980 water right is the amount necessary to water 10,000 dairy cows. If the operation decides to expand in 2011 and now raise 20,000 dairy cows, the new project (defined by the additional

10,000 animals) would represent a new water right, subject to the Upper Kittitas Groundwater Rule's mitigation requirements applicable to all new uses of groundwater that begin after July 16, 2009.

Aqua Permanente also argues that because cattle feedlots are designated a type of industry under certain classifications but no similar designation applies to the activity of stock-watering, stock-watering must be limited to family farms. Aqua Permanente Br. at 13. Aqua Permanente's argument parallels that of Appellants (that a use like Easterday's is industrial in character and should not be exempt from permitting). Appellants' Br. at 42. These arguments find no support in the language of RCW 90.44.050. The statute exempts from permitting the use of groundwater for stock-watering purposes. RCW 90.44.050. It does not limit stock-watering to only that which occurs in a setting that is not classified as an industry. Without any such qualifier, the only reasonable interpretation of the statute is that the exemption covers water that animals drink, are cooled with, and that is used to clean their barns, regardless of whether the animals are housed in a concentrated feedlot, a large dairy barn, or on a family farm. In other words, based on a plain reading of the

statute, watering of stock is watering of stock, regardless of where or how it occurs.¹

D. Permit Review Is Not The Only Policy Embraced By The Water Code. Other Policies Provide Alternative Methods For Protecting Senior Water Right Holders And Stream Resources

Amici argue that water rights held by senior users and instream flows put in place to protect stream resources such as fish life cannot be protected if the groundwater permit exemption for stock-watering purposes is not limited by quantity. This argument is based on the false premise that permit review is the only method of water rights regulation and the only policy embraced in the Water Code. State's Response Br. at 38-39.

Although Appellants and their Amici would prefer that all groundwater rights be established through the permit review process, the legislature did not enact a statute that embraces such a policy choice. Importantly, however, the legislature did provide that permit-exempt water rights are otherwise like permitted rights. RCW 90.44.050. Thus, they cannot impair senior rights, including stream flows, and new permit-exempt uses can be prevented altogether, as has been done in the Upper Kittitas.

¹ Of course not all water use associated with a large scale dairy or feedlot operation constitutes "stock-watering." In the state's view, "stock-watering purposes" does not include water to process milk or meat products. State's Response Br. at 2-3.

As with the policy arguments advanced by Appellants, the Amici parties' preference that all new uses of groundwater be permitted is not supported by a plain reading of the statute and so their arguments should be presented to the legislature in support of requests to revise the Water Code.

RESPECTFULLY SUBMITTED this 6th day of June 2011.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script, appearing to read "Mary Sue Wilson", written in black ink.

MARY SUE WILSON, WSBA #19257
Sr. Assistant Attorney General
Attorneys for Respondents
State of Washington
Washington State Department of Ecology

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.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 6th day of June 2011, I caused to be served a copy of State of Washington's and Department of Ecology's Answer to Briefs of Amici Interested Indian

Tribes and Aqua Permanente in the above-captioned matter upon the parties herein as indicated below:

GREGORY S. MCELROY
MCELROY LAW FIRM, PLLC
1808 NORTH 42ND ST
SEATTLE, WA 98103

U.S. Mail
 Overnight Express
 By Fax: (206) 654-4161
 By email:
gmcclroy@mcelroylaw.com

KRISTEN L. BOYLES
JANETTE K. BRIMMER
EARTHJUSTICE
705 SECOND AVENUE, SUITE 203
SEATTLE, WA 98104

U.S. Mail
 Overnight Express
 By Fax: (206) 343-1526
 By email:
kboyles@earthjustice.org
jbrimmer@earthjustice.org

WILLIAM L. CAMERON
LEE SMART P.S.
PACIFIC NW LAW OFFICES
1800 ONE CONVENTION PLACE
701 PIKE ST.
SEATTLE, WA 98101

U.S. Mail
 Overnight Express
 By Fax: (206) 624-5944
 By email:
wlc@leesmart.com

R. CRANE BERGDAHL
LAW OFFICES OF R. CRANE
BERGDAHL
6610 W. COURT ST., SUITE A
PASCO, WA 99301

U.S. Mail
 Overnight Express
 By Fax: 509/ 545-4959
 By email:
craanelaw@msn.com

JAMES L. BUCHAL
MURPHY & BUCHAL LLP
2000 SW 1ST AVENUE, SUITE 420
PORTLAND, OR 97201

U.S. Mail
 Overnight Express
 By Fax: (503) 227-1034
 By email:
jbuchal@mblp.com
ccaldwell@mblp.com

HARRY JOHNSEN
RAAS, JOHNSEN & STUEN, P.S.
1503 E. ST.
P.O. BOX 5746
BELLINGHAM, WA 98227

U.S. Mail
 Overnight Express
 By Fax: (360) 733-1851
 By email:
harryjohnsen@comcast.net

JEFFREY SLOTHOWER
LATHROP, WINBAUER,
HARREL, SLOTHOWER &
DENISON, LLP
201 WEST 7TH AVENUE
P. O. BOX 1088
ELLENSBURG, WA 98926

U.S. Mail
 Overnight Express
 By Fax: (509) 962-8093
 By email:
jslothower@lwhsd.com

DIANA BOB
OFFICE OF THE RESERVATION
ATTORNEY
2626 KWINA RD
BELLINGHAM, WA 98226

U.S. Mail
 Overnight Express
 By Fax: (509) 962-8093
 By email:
dianab@lummi-nsn.gov

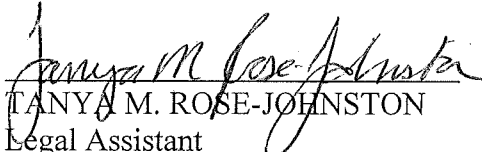
DAVID L. MONTHIE
DLM & ASSOCIATES
519 - 75th WAY NE
OLYMPIA, WA 98506

U.S. Mail
 Overnight Express
 By Fax: (509) 962-8093
 By email:

the foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 6th day of June 2011, in Olympia, Washington.


TANYA M. ROSE-JOHNSTON
Legal Assistant