

1 [] EXPEDITE (if filing within 5 court days of hearing)
[X] Hearing is set
2 Date: Friday, April 2, 2010
Time: 2:00 p.m.
3 Judge: TBD

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5
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR FRANKLIN COUNTY

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

11 Plaintiffs,

12 v.

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

15 Defendants,

16 WASHINGTON CATTLEMEN'S
17 ASSOCIATION, COLUMBIA SNAKE RIVER
IRRIGATORS ASSOCIATION,
18 WASHINGTON CATTLE FEEDERS
ASSOCIATION, CATTLE PRODUCERS OF
19 WASHINGTON, WASHINGTON STATE
SHEEP PRODUCERS AND WASHINGTON
20 FARM BUREAU,

21 Intervenor-Defendants.
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24
25
26

Case No. 09-2-51185-6

INTERVENOR THE COLUMBIA SNAKE
RIVER IRRIGATORS ASSOCIATION'S

MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF
EASTERDAY RANCHES' CROSS-MOTION
FOR SUMMARY JUDGMENT AND
RENEWED MOTION TO STRIKE

27 CSRIA's MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
28 MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS AND RENEWED MOTION TO
STRIKE
Case No. 09-2-51185-6

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1 **Summary of Argument**

2 Intervenor-defendant Columbia Snake River Irrigators Association (CSRIA) requests that
3 this Court deny the motion of plaintiffs for summary judgment, and grant the cross-motion of
4 Easterday Ranches for summary judgment dismissing plaintiffs’ complaint for lack of standing.
5 CSRIA joins in that cross-motion and also joins in the renewed motion of Easterday Ranches to
6 strike certain Declarations filed by plaintiffs).

7 First and foremost, as the Franklin County Water Conservancy Board expressly determined,
8 and as the Department of Ecology affirmed, plaintiffs suffer no injury by reason of the Easterday
9 well. Plaintiffs had a full and fair opportunity to argue their case to the contrary in the
10 administrative proceedings, lost, and did not appeal. As such they are collaterally estopped from
11 claiming any injury here, which is fatal to their standing. And even if they were not collaterally
12 estopped, they fail to offer any competent and admissible evidence of injury sufficient to establish
13 standing. Because there is no factual case whatsoever to believe that their rights in water are
14 impaired, they cannot sue to raise abstract questions about the interpretation of RCW 90.44.050. At
15 the least, there is a genuine issue of material fact as to whether the plaintiffs have standing to sue in
16 this action, requiring that plaintiffs’ motion for summary judgment be denied.

17 If there were any actual injury in this case, plaintiffs would have a complete and adequate
18 remedies at common law and in administrative proceedings before Ecology, quite apart from any
19 question of permitting, because their usage rights are senior to Easterdays. But they lack any
20 evidence whatsoever that could support relief halting Easterday’s use of water, because there is not
21 a shred of evidence that Easterday’s use interferes with their own. This Court can and should
22 dismiss the action in full confidence that when and if there ever were an appreciable impact of
23 Easterday’s water usage on plaintiffs—and there never will be—they will have an immediately
24 available choice of remedies.

25 In the event that this Court reaches the merits—and it should not—plaintiffs’ attempt to
26 induce this Court to reject the plain language of RCW 90.44.050 should be rejected. Where, as

1 here, a statute is utterly unambiguous, there is no cause to resort to the bizarre menagerie of extra-
2 statutory evidence the plaintiffs muster in an attempt to distract the Court. As the Court of Appeals
3 has explained, albeit in *dictum*, the plain meaning of the stock-watering exemption is that “any
4 amount of water” for stock-watering purposes is exempt from the permitting requirement.

5 And even if the Court were to venture beyond the plain language of the statute, a few stray
6 misconceptions of the statute over the years do not alter 60 years of consistent reliance upon the
7 scope of the exemption. Nor is there any policy reason to limit the scope of the exemption.
8 Ecology has full power to stop even exempt withdrawals that may affect the public interest, but has
9 not exercised such powers because nothing Easterday is doing could remotely implicate any of the
10 public policy concerns articulated by plaintiffs.

11 **Argument**

12 **I. PLAINTIFFS HAD A FULL AND FAIR HEARING CONCERNING THEIR**
13 **LEGALLY PROTECTABLE INTERESTS, ARE COLLATERALLY ESTOPPED BY**
14 **THE BOARD’S FINDING OF NO INJURY TO THOSE INTERESTS, AND LACK**
STANDING TO MAINTAIN THIS SUIT.

15 Plaintiffs, as parties moving for summary judgment, have the burden of proving their right
16 to sue as a matter of law. *MRC Receivables Corp. v. Zion*, 152 Wash. App. 625, 629-30 (2009).
17 Here, they lost their right to sue when, in prior proceedings, the Franklin County Board of Water
18 Conservancy and Ecology both determined that plaintiffs would suffer no injury whatsoever from
19 the Easterday project, and plaintiffs elected not to pursue an appeal of Ecology’s determination.

20 **A. Plaintiffs Exercised A Full and Fair Opportunity to Raise Claims of Injury from the**
21 **Easterday Well.**

22 It is vital for this Court to understand that all competent professionals involved in the
23 Easterday project recognized at all relevant times that the development of the feedlot, and *all* water
24 usage associated with it, *including exempt usage*, would not cause any adverse effects on other
25 water rights holders including plaintiffs. In order to secure regulatory approval for the transfer of
26

1 additional water rights, over and above the exempt usage now challenged by plaintiffs, a detailed
2 hydrological analysis was prepared.

3 The initial analysis, prepared October 8, 2008, begins with a detailed calculation of the total
4 water usage by a feedlot operation which “will entail the feeding of up to 30,000 head of cattle”.

5 (Olsen Decl. Ex. 1, at 1.) The analysis explains that

6 “To determine an average water use for the feedlot, we will consider the use of 600 GPM’s
7 [gallons/minute] continuously for the three hottest months of the year, and 200 GPM’s
8 continuously the remainder of the year. This yields a total volume of 158,112,000 gallons
9 pumped over the entire one year period. This is equivalent to pumping at a rate of 300
10 GPM’s continuously for the entire year. It is highly unlikely that this total volume will ever
11 be reached, as it is based upon a peak demand reached during the heat of the day during the
12 summer months, and when the cattle are active. . . Thus the following analysis is very
13 conservative in nature, and the impacts associated with it are likely to far exceed any that
14 will actually be experienced.” (*Id.*)

15 It should be noted that the transferred water quantity is 316 acre-feet (Olsen Decl. Ex. 1, at 1), or
16 103 million gallons/year,¹ such that the non-exempt, transferred water rights will be more than
17 adequate to serve the feedlot at all times except, perhaps, in the summer months. Plaintiffs’ wild
18 misrepresentations of the amount of exempt water use are all misleading extrapolations that do not
19 take account of the transferred water right.

20 The impairment analysis manifestly covered any and all water use at the feedlot, and then
21 some. Then, in order to provide even more insurance against impairment, the analysis assumed,
22 contrary to fact, that the Easterday well would be in the same aquifer as nearby wells. (*Id.* at 2-3.)
23 Nevertheless, the analysis concluded: “the worst case theoretical, and the actual anticipated impacts
24 to the existing wells in the area, fall well below the magnitude that can be described as impairment
25 to these adjacent well and water permit holders . . .”. (*Id.* at 5.)

26 Easterday presented this impairment analysis to the administrative agency charged by law
27 with making the initial determination concerning its application for transferred water, the Franklin
28 County Water Conservancy Board. There it was closely reviewed by the Board and Ecology. (*See*

¹ This Court can take judicial notice that one acre-foot equals 325,851.385 gallons.

1 Olsen Decl. ¶ 4.) Ecology agreed with the report’s conclusions (*id.* ¶¶ 4-6 & Ex. 3), and the report
2 was later changed to provide an “ultra, ultra conservative approach” by assuming an even higher
3 maximum pumping rate of 665 GPM. (*Id.* Ex. 4 at 1, 4.) But the conclusions remained the same:
4 there would be no impairment whatsoever of area wells such as those utilized by plaintiffs. (*Id.*
5 Ex. 4, at 5.)

6 The Board issued a detailed Report of Examination concerning both the transferred water
7 and the exempt use, and adopted the updated impairment analysis as its own, making it an Exhibit
8 to its Report of Examination. The Report of Examination addressed the “proposed use” of
9 Easterday to be evaluated by the agency as transferred water at a maximum rate of 500
10 gallons/minute and maximum 316 acre-feet/year, with an express finding that “[e]xempt well use
11 also will be applied to Stock Drinking Water.” (*Id.* Ex. 1, at 2.) The Board generally concluded
12 that

13 “... the proposed action will not create impairment to other water rights per the provisions
14 and conditions established under a superseding certificate and the conditions provided
15 within this ROE/ROD; impairment is not an issue for the specific action related to this water
right change.” (*Id.* at 10.)

16 Two of the plaintiffs, Scott Collins, and the Center for Environmental Law and Policy (CELP),
17 appeared before the Board as “protestors” and objected to use of exempt water for stock-watering
18 purposes, and argued that impairment of other water rights could occur. (*Id.* at 4.) Sheila Poe, now
19 president of the plaintiff Five Corners, and John Osborn, of CELP, also testified before the Board.
20 (*Id.* at 6.)

21 The Board rejected their arguments, noting that “[t]he bulk of the stock watering water will be
22 provided by the new water right change/transfer, not an exempt well”. (*Id.* at 5.) As to impairment,
23 the Board specifically concluded:

24 “The protester has provided no technical/factual data to support this item. The FCWCB
25 staff have discussed explicitly the Pepiot water right with WADOE ERO staff, and no issue
26 related to the above has been highlighted by the WADOE staff. The water change/transfer
has been reviewed for impairment impacts using standard hydrologic analyses, conducted by
a certified engineer with over thirty years of experience working for the WA State DNR.

1 These analyses were reviewed by Franklin Conservation District and WADOE staff, as well.
2 The impairment analysis revealed no issues relative to impairment; the WADOE staff
3 indicated concurrence with the no-impairment observation. The FCWCB notes, as well, and
4 the subject water withdrawals are of a low volume relative to many other irrigation
5 withdrawals.” (*Id.* at 5.)

6 Thereafter, Ecology reviewed the Board’s decision and affirmed it as modified in a letter
7 dated June 11, 2009. (11/11/09 Brimmer Decl. Ex. B, at 1.) By this time, the entity called Five
8 Corners Family Farmers (identified as FCFF in the letter), was also participating in the
9 administrative process, and plaintiffs FCFF and CELP even met with Ecology. (*Id.* at 2.) Ecology
10 specifically affirmed the Board’s impairment findings, after noting that “CELP and FCFF assert that
11 pumping water from the proposed ground water well at the Easterday site may result in impairment
12 of existing water rights”:

13 “Ecology’s Response: Ecology staff reviewed the impairment analysis conducted by the
14 applicant’s consultant. Ecology staff also conducted an independent impairment analysis in
15 relation to the potential impacts to existing water rights as a result of the proposed
16 change/transfer of the Pepiot water right for the Easterday project. Ecology concurs with the
17 Board’s decision that approval of the change/transfer will not cause impairment of any
18 existing water rights.” (*Id.* at 4.)

19 After noting the concerns of CELP and FCFF that “basalt aquifers throughout the area near the
20 proposed feedlot are in a state of decline,” Ecology further concluded:

21 “Ecology’s Response: The quantity of water pumped from the new Easterday well will be
22 the same quantity of water historically pumped from the Pepiot well. Therefore, transfer of
23 the water right will not increase aggregate pumping from the Columbia River Basalt Group
24 in the area and will not violate the safe sustaining yield or reasonable and feasible pump lift
25 requirements in the water code. (*Id.* at 5.)

26 None of the plaintiffs appealed from Ecology’s determination, and the deadline for appeals has now
27 passed. As set forth below, plaintiffs are bound by these findings of fact.

28 CSRIA understands that Ecology now takes the position in this litigation that Ecology’s
““non-impairment’ discussion did not relate to Easterday’s proposed use of permit-exempt stock
water”. (State Dfts. Response to Easterday Ranches’ Motion to Dismiss, at 16 n.9.) Whatever
Ecology’s present motive in making such a statement (perhaps a desire to reach the merits of
plaintiffs’ claims), Ecology did not modify the impairment analysis adopted by the Board, which

1 necessarily included the effects on nearby wells of *all* anticipated usage from the new Easterday
2 well. It was at all relevant times understood by the Board that if there were any finding of
3 impairment arising from the new well, whether from pumping of the transferred water or the
4 exempt water, the transfer could not go forward, and that the Board could not lawfully adopt some
5 sort of impairment analysis that arbitrarily excluded a portion of the water to be pumped. (Olsen
6 Decl. ¶ 4.) The very official who issued the June 11, 2009 decision letter specifically represented to
7 the Board that Ecology concurred with the Board’s conclusion that there would be no impairment
8 from all water usage from the new well. (*Id.* ¶ 5.)

9 **B. Stringent Standing Requirements Apply Where Parties Seek to Raise General
10 Challenges to Statutes Through Declaratory Judgment Actions.**

11 The parties’ preliminary skirmish over standing through Easterday’s motion to dismiss has
12 established general agreement that plaintiffs must demonstrate (1) that they are within the zone of
13 interests “to be protected or regulated by the statute”; and (2) that they have proved “an ‘injury in
14 fact,’ *i.e.*, that [they] will be ‘specifically and perceptibly harmed’ by the proposed action”.

15 *Trepanier v. City of Everett*, 64 Wash. App. 380, 382 (1992) (citations omitted).

16 **1. Plaintiffs are within the “zone of interests” only insofar as their rights to avoid
impairment of their own groundwater rights are concerned.**

17 Plaintiffs (other than Sierra Club) are farmers with nearby wells assertedly concerned about
18 groundwater impacts, and associations representing them. They are surely within the “zone of
19 interests” protected by the groundwater code, but their legally protectable interest is their interest in
20 their water rights. Specifically, the water code protects other water rights holders from
21 “impairment”. Ecology has explained that a ground water right is “impaired” whenever:

22 “(1) There is an interruption or an interference in the availability of water to said facilities,
23 or a contamination of such water, caused by the withdrawal of ground water by a junior
water right holder or holders; and

24 “(2) Significant modification is required to be made to said facilities in order to allow the
25 senior ground water right to be exercised.”

26 WAC 173-150-060.

1 It should be noted that Ecology has also provided an administrative remedy for any senior
2 rights holders who believe that their rights have been impaired (*see* WAC 173-15-070), and has
3 afforded itself a wide range of regulatory powers to limit Easterday’s use of even exempt water.
4 *See generally* WAC 173-150-080. Lacking any evidence of impairment, plaintiffs have not
5 pursued that remedy.² Indeed, plaintiffs have gone so far as to say that “[t]his litigation is not a
6 water right dispute (there is no assertion of senior rights or conflict of rights that must be
7 adjudicated by the court)”. (Pltfs. Mem. in Opposition to Motion to Intervene of Columbia Snake
8 River Irrigators Association, Aug. 11, 2009, at 5.) This admission of no conflict with their own
9 water rights is both true, and fatal to their standing.

10 RCW Chapter 90.44, as interpreted by Ecology, does not afford plaintiffs a highly general
11 interest in any and all issues concerning water; it affords them protection against practical and
12 appreciable adverse impacts upon their own water rights. There are numerous other statutes
13 vindicating more general environmental interests in the management of water, but plaintiffs are not
14 bringing an action for violation of those statutes, and their more general purposes, and far broader
15 zones of interest, are not pertinent.

16 **2. The Uniform Declaratory Judgment Act imposes additional injury**
17 **requirements.**

18 Insofar as there is no direct or immediate injury to plaintiffs’ rights by reason of any conduct
19 by Easterday, plaintiffs will presumably argue that even the threat of future injury might suffice to
20 demonstrate standing. Plaintiffs are wrong.

21 This case arises under the Uniform Declaratory Judgment Act (UDJA), under which a
22 person “whose rights, status or other legal relations *are affected* by a statute . . . may have
23 determined any question of the construction . . . arising under the . . . statute”. RCW 7.24.020

24
25
26 ² As set forth *infra* Point III(B), Ecology has a vast range of other powers to limit exempt water
usage when necessary to protect the public interest.

1 (emphasis added).³ The statute manifestly cannot be applied where, as here, plaintiffs rights *are not*
2 *affected*. Indeed, the UDJA, has special, heightened standing requirements pursuant to which
3 plaintiffs must demonstrate:

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

9 *Branson v. Port of Seattle*, 152 Wash.2d 862, 877 (2004). We will distinguish such standing cases
10 as plaintiffs may choose to cite in our reply, but most of the cases they previously cited before this
11 Court involved federal statutes where Congress expressly empowers “any person” to sue as a
12 “private attorney general” to vindicate environmental values. These cases have no application
13 where, as here, plaintiffs failed to appeal the direct proceedings in which they did have standing,
14 and instead mount a collateral attack by means of the general declaratory judgment statute.

15 Plaintiffs would have an “actual, present and existing dispute” if anything that Easterday or
16 Ecology were doing had a measurable impact upon them. If, for example, Easterday’s pumping
17 began to cause any of plaintiffs’ water rights to be impaired, plaintiffs could invoke their senior
18 water rights to enjoin Easterday’s withdrawals. The courts of Washington have long provided a
19 remedy in such circumstances, and there the specific administrative remedy discussed above
20 available to plaintiffs as well. But plaintiffs’ unsupported fears of some future impact amount to a
21 “possible, dormant, hypothetical, speculative” disagreement, *Branson*, 152 Wash.2d at 877, as to
22 which judicial involvement by means of a declaratory judgment is simply premature.

23 **C. All Plaintiffs Are Collaterally Estopped from Claiming Impairment.**

24 The Supreme Court has recently reaffirmed the appropriateness of applying collateral
25 estoppel arising out of administrative proceedings. *Christensen v. Grant County Hospital District*

26 ³ Plaintiffs also invoke the Superior Court’s general authority to issue injunctions (Cmplt. ¶ 11
27 (citing RCW 2.08.010 and 7.40.010)), but correctly describe this case as a “declaratory judgment
28 act case” (Pltfs. Response in Opposition to Motion to Dismiss, at 1; *see also id.* at 7).

1 *No. 1*, 152 Wash.2d 299 (2004). As the Court explained, the doctrine “promotes judicial economy
2 and serves to prevent inconvenience or harassment of parties,” *id.* at 306, as in this case, where
3 plaintiffs had a full and fair opportunity to object to Easterday feedlot as threatening their wells,
4 lost, and now harass Easterday again.

5 The elements of collateral estoppel are as follows:

6 “(1) the issue decided in the earlier proceeding was identical to the issue presented in the
7 later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party
8 against whom collateral estoppel is asserted was a party to, or in privity with a party to, the
earlier proceeding, and (4) application of collateral estoppel does not work an injustice
against the party to whom it is applied.” *Id.* at 307.

9 Each of those elements is met here.

10 The pertinent and identical issue in this case, discussed in greater detail *infra* Point I(C), is
11 the absence of any legally-cognizable injury to plaintiffs, which they must demonstrate in order to
12 secure standing to obtain a declaratory judgment against Easterday. There can be no dispute that
13 Ecology’s determination amounts to a final judgment.

14 Each and every plaintiff except Sierra Club participated directly in the proceedings.
15 Collateral estoppel, however, may be used against a non-party to the former adjudication if there is
16 a substantial identity of interests. *Garcia v. Wilson*, 63 Wash. App. 516, 520 (1991). As set forth
17 *infra* Point I(D), Sierra Club has not offered any evidence of injury sufficient to confer standing
18 beyond the other plaintiffs.

19 Finally, there can be no claim of injustice, as plaintiffs manifestly got a full and fair hearing
20 first before the Board, and then on appeal to Ecology. Plaintiffs could have continued to litigate all
21 the issues they pressed before the Board—even including Easterday’s use of the exemption—
22 through an appeal of Ecology’s decision; having elected not to pursue judicial review of Ecology’s
23 determination, they cannot complain about the administrative processes.

1 **D. Even if Plaintiffs Were Not Collaterally Estopped from Proving Injury, They Fail To**
2 **Do So.**

3 To the extent not barred by collateral estoppel, the affidavits submitted by plaintiffs must
4 “collectively demonstrate sufficient evidentiary facts to indicate that [they will] suffer an ‘injury in
5 fact’.” *Id.* at 383 (citing *Concerned Olympia Residents for Environment v. City of Olympia*, 33
6 Wash. App. 677, 683 (1983)). In particular, mere “bald assertion of injury” from such things as
7 alleged impairment of “hydrologic functioning” are not sufficient to demonstrate standing. *See*
8 *Olympia*, 33 Wash. App. at 683-84.

9 In denying the motion to strike filed by Easterday in connection with its motion to dismiss,
10 this Court held that it might “keep in mind the appropriate weight to be accorded those declarations
11 as this case proceeds”. (Order, Dec. 3, 2009.) However, the case has now progressed to the point
12 where, at the summary judgment stage, it becomes plaintiff’s burden to submit “evidentiary facts,”
13 *Trepanier*, 64 Wash. App. at 382, meaning evidence that may be admitted under the rules of
14 evidence, *see In re Estate of Black*, 153 Wash.2d 152, 166 (2004) (“affidavits submitted during
15 summary judgment proceedings must be based on the affiant’s personal knowledge”). “A court
16 cannot consider inadmissible evidence when ruling on a motion for summary judgment.” *Dunlap v.*
17 *Wayne*, 105 Wash.2d 529, 535 (1986).⁴

18 While plaintiffs would unquestionably have had participational standing to pursue appeals of
19 the permits granted to Easterday, here they assert the right to challenge Easterday’s use of
20 groundwater on the ground that Easterday should be required to apply for a permit. As plaintiffs
21 explained in responding to the motion to dismiss, “the stockwater exemption is an exemption from
22

23 ⁴ Plaintiffs have argued, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1993), that
24 allegations of specific facts supporting standing “for purposes of the summary judgment motion
25 will be taken as true”. *Id.* at 561. All that means is that the *admissible* proof of particular facts
26 will be sufficient to go forward unless, as is the case here, such facts are controverted. CSRIA
believes that the summary judgment record will be sufficient to demonstrate that plaintiffs’
declarations are so overwhelmingly controverted as to demonstrate that they lack standing as a
matter of law, but at the least, there is a material issue of fact concerning standing that bars
summary resolution of the case.

1 permitting requirements and attendant processes” (Pltfs. Response to Motion to Dismiss at 16);
2 there are simply no participational interests in any process upon which plaintiffs can rely for
3 standing purposes. This is not a case for judicial review of agency action, and standing cases in that
4 context are also inapposite. *Cf.* RCW 34.04.530 (noting APA standing requirements).

5 None of the testimony proffered by plaintiffs meets the rights “*are affected*” requirements of
6 the UDJA. The pertinent admissible portion of the testimony of Scott Collin amounts to the fact
7 that he owns a well 736 feet deep (Collin Decl. ¶ 11 (first sentence)), and that he has made some
8 sort of application for a new groundwater permit, which Ecology has not acted upon (*id.* ¶ 15 (to
9 page 5, line 6). But balance of ¶ 11 is hearsay (assertedly from Ecology), and is inadmissible; so
10 too is the balance of ¶ 15 (reporting the uselessly general proposition that “availability of water in
11 Washington is a serious problem”).⁵

12 The pertinent admissible testimony of Randolph Allan Jones is that his well is 570 feet deep
13 (Jones Decl. ¶ 9 (first sentence)); the balance of ¶ 9 is rank hearsay and incompetent, such as the
14 “opinion of many locals” that groundwater pumping elsewhere has dried up certain surface water
15 (*id.*).⁶ The same is true of Sheila Poe; we know that her well is 840 feet deep (Poe Decl. ¶ 7), and
16 the balance is sheer speculation and hearsay. Neither plaintiff offers any evidence whatsoever of
17 any immediate threat to their water supplies, such as well levels that have dropped on account of
18 Easterday’s pumping.

19 By all appearances, plaintiffs are unhappy because Easterday’s use of water is exempt from
20 permitting, and Easterday may proceed while plaintiffs are wrapped around the axle of an agency
21 that refuses to discharge its permitting obligations. *See generally Hillis v. Department of Ecology*,
22 131 Wn.2d 373 (1997) (5-4 decision upholds Ecology’s ongoing refusal to issue permits for decades
23
24

25 ⁵ CSRIA regards the primary problem as generated by astounding malfeasance of Ecology in
discharging its permitting responsibilities.

26 ⁶ The last sentence of ¶ 7 also constitutes inadmissible hearsay.

1 based on claims of inadequate funding to process the applications). But base envy is not grounds
2 for standing; plaintiffs must suffer legally-cognizable injury.

3 The organizational plaintiffs also offer no admissible testimony demonstrating any effect
4 from anything Easterday does on their interests. Lay testimony that “groundwater is connected to
5 and often a source of supply for surface waters” (Sumption Decl. ¶ 12) does not begin to show that
6 any pumping by Easterday will have any effect whatsoever on river flows Sierra Club seeks to
7 protect. Neither does general testimony about *other areas* where groundwater is somehow
8 connected to surface water demonstrate any impairment of any interests CELP seeks to protect.
9 (*See generally* Osborn Decl.)

10 Dr. Osborn’s presentation of articles on groundwater in the general area (his Exhibits A &
11 B) constitute inadmissible hearsay and do not constitute a competent substitute for expert testimony.
12 The only competent and admissible evidence before the Court concerning the actual impact of
13 Easterday’s pumping are the expert opinions brought to bear before the Board and Ecology. (Olsen
14 Decl. Exs. 2-4.)

15 **E. This Is Not a Case of Great Public Importance As To Which Standing Requirements**
16 **Should Be Relaxed.**

17 Plaintiffs have previously suggested that standing requirements should be liberalized
18 because this case concerns “an issue ‘of substantial public importance, [that] immediately affects
19 significant segments of the population, and has a direct bearing on commerce, finance, labor,
20 industry, or agriculture’”. (Pltfs. Response to Motion to Dismiss at 22 (quoting *Grant County Fire*
21 *Protection District No. 5 v. City of Moses Lake*, 150 Wash.2d 791, 803 (2004).) It cannot be said
22 that the scope of stock-watering generally, much less by Easterday, has any appreciable impact on
23 “significant segments of the population”. Moreover, the *Grant County* case did not in fact utilize
24 any expanded conception of standing based on public importance, *id.* at 804, and the doctrine has
25 typically been applied only in cases raising fundamental *constitutional* questions of broad interest.
26

1 Again, the plaintiffs appeared before the Board to defend their own interests. As witness
2 Sheila Poe explained, she “is afraid the project will affect her domestic well”. (Olsen Decl. Ex. 1, at
3 6.) This is and was fundamentally a dispute between nearby landowners which was properly
4 addressed and resolved by the administrative system established by the Legislature to do so, and in the
5 event of any error by that system, full future remedies are available. This Court should resist efforts to
6 spin this narrow dispute into a matter of statewide importance for standing purposes, leaving the
7 statewide issues to be addressed by the governmental body appropriate in these circumstances: the
8 Legislature.

9 To the extent the Court is inclined to hold that a “public interest” entity’s mere public
10 agitation on an issue (*e.g.*, Osborn Decl. ¶¶ 15-17) somehow confers standing to sue Ecology under
11 the UDJA—and it should not—the Court should dismiss out Easterday Ranches and all plaintiffs
12 who fully and fairly litigated issues concerning Easterday Ranches, and render the general advisory
13 opinion sought as between Sierra Club and Ecology without threatening the operations of Easterday
14 Ranches.

15 **II. THE PLAIN LANGUAGE OF RCW 90.44.050 UNAMBIGUOUSLY ESCHEWS ANY**
16 **5,000 GALLON/DAY LIMITATION ON EXEMPT STOCKWATERING.**

17 To the extent the Court reaches the merits of plaintiffs’ claims—and it should not—plaintiffs
18 are wrong again. The plain language of RCW 90.44.050 unmistakably and deliberately avoids any
19 quantity limitation with respect to the Legislatively-favored use of stock-watering.

20 It has long been the law that “[i]f a statute is clear on its face, its meaning is to be derived
21 from the language of the statute alone”. *Cerrillo v. Esparza*, 158 Wash.3d 194, 202 (2006) (quoting
22 *Kilian v. Atkinson*, 147 Wash.2d 16, 20 (2002)); *see also North Coast Air Services, Ltd. v.*
23 *Grumman Corp.*, 111 Wash.2d 315, 321 (1988) (legislative “[i]ntent, if ascertainable, may be of
24 assistance, but cannot override an otherwise discernible, plain meaning”).

1 **A. Plaintiffs' Claims of Ambiguity or Grammatical Error Are Frivolous.**

2 RCW 90.44.050 is clear on its face. It requires a permit for any withdrawals of groundwater
3 in the State of Washington except for five Legislatively-favored classes of withdrawals:

4 “... [1] any withdrawal of public groundwaters for stock-watering purposes, or [2] for the
5 watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or [3]
6 for single or group domestic uses in an amount not exceeding five thousand gallons a day, or
7 [4] as provided in RCW 90.44.052, or [5] for an industrial purpose in an amount not
8 exceeding five thousand gallons a day, is and shall be exempt from the provisions of this
9 section, but, to the extent that it is regularly used beneficially, shall be entitled to a right
10 equal to that established by a permit issued under the provisions of this chapter”⁷

11 At least one case construing the first exemption has read it, in accordance with its plain meaning, to
12 cover “any amount of water for livestock”. *Kim v. Pollution Control Hearing Board*, 115 Wash.
13 App. 157, 160 (2003).⁸ The Supreme Court has also recently affirmed that “the plain meaning of
14 the domestic uses exemption is apparent from the language in RCW 90.44.050 and related statutes”.
15 *State v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 12 (2002).⁹

16 Nevertheless, the position of the plaintiffs is that the Legislature, having included the 5,000
17 gallon/day limitation in only two of the five favored classes, somehow actually meant to include it

18 ⁷ As originally enacted, the statute contained four exemptions from the permitting requirement, and
19 even more clearly expressed the 5,000 gallon/day limitation with respect to only two of them:

20 “. . . any withdrawal of the public ground waters for stock-watering purposes, or for the
21 watering of a lawn or of a non-commercial garden not exceeding one-half acre in area, or for
22 single or group domestic uses in an amount not exceeding five thousand (5,000) gallons a
23 day, or for an industrial purpose in an amount not exceeding five thousand (5,000) gallons a
24 day, is and shall be exempt . . .” (Brimmer Decl. Ex. B).

25 ⁸ In two other cases, courts have, in *dictum*, carelessly lumped all the exemptions together as
26 involving use of 5,000 gallons/day. *Postema v. PCHB*, 142 Wash.2d 68, 89 (2000); *Hillis v.*
27 *Department of Ecology*, 131 Wash.2d 373, 378-79 (1997).

28 ⁹ In that case, a developer sought to develop a group of homes utilizing in excess of 5,000
gallons/day through the device of multiple exemptions; “the developer of a subdivision is,
necessarily, planning for adequate water for group uses, rather than a single use, and accordingly is
entitled to only one 5,000 gpd exemption for the project”. *Id.* Plaintiffs cite a footnote in the case,
responding to a dissenter’s argument, which makes reference to the Court’s role as “to preserve the
general requirement of permitting, as the Legislature obviously intended,” *id.* at 17 n.7, but the
Court found the intent in the plain language of the statute. Here, there is plainly no intent to
require anyone drilling a single well to water stock to engage in permitting.

1 in all of them. Even a misplaced comma could not possibly produce such a result; there is simply
2 no case to be made that the express listing of the 5,000 gallon/day limitation in two of the
3 categories, and its express omission from the other three, was somehow inadvertent. Plaintiffs
4 attempt to parse the exemptions into “three distinct parts” so as to make the meaning hang on a
5 single comma (Plfts. Mem. 12), but this arbitrary construction finds no support in the plain language
6 of the statute.

7 Indeed, two of the three categories for which the 5,000 gallon/day limitation were omitted
8 have express quantity terms utterly inconsistent with the any 5,000 gallon/day limitation. The
9 “lawn and garden” limitation has its quantity limited by the amount of ground that can be
10 irrigated,¹⁰ and the RCW 90.44.052 exemption has a specific quantity there set by RCW 90.44.052
11 in excess of 5,000 gallons/day.¹¹ Any theory that the Legislature somehow omitted a 5,000
12 gallon/day limitation from all the exemptions runs afoul of the plain language of both these other
13 two exemptions.

14 It is true that the stock-watering exemption is not expressly limited by quantity in any way.
15 But it is precisely because the Legislature did not include the limitation that this Court may not add
16 it. *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682 (2003) (“a court must
17 not add words where the legislature has chosen not to include them). “Under *expressio unius est*
18 *exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the
19 exclusion of the other. Omissions are deemed to be exclusions.” *In re Detention of Williams*, 147
20 Wash.2d 476, 491 (2002) (citations omitted).

21 Ultimately, of course, “the principal aim of statutory construction is to give effect to the
22 legislature’s intent”. *In re Estate of Black*, 153 Wash.2d 152, 176 (2004). That intent was
23 manifestly to excuse an entire class of those appropriating the groundwater of the State of

24 _____
25 ¹⁰ As the Attorney General has recently explained, the absence of a specific quantity limitation
26 “does not mean that the exemption for watering lawns and noncommercial gardens is unlimited”.
AG Op. 2009-6 (noting that statute “does limit the acreage to which the water can be applied”).

¹¹ 1,200 gallons/day per residence with a minimum of six residences.

1 Washington from any permitting requirement: those raising cattle, and requiring water to tend the
2 cattle.

3 **B. The Statutory Language after the Exemptions Does Not Change Their Meaning.**

4 The plaintiffs also urge the court to reinterpret the statutory list of exclusions from the
5 permitting requirement given additional language statutory language appearing in provisos after the
6 list of exemptions. The first language cited by plaintiff was part of the 1945 bill and merely
7 provides that “the department from time to time may require the person or agency making any such
8 small withdrawal to furnish information as to the means for and the quantity of that withdrawal”.
9 RCW 90.44.050. The obvious intent of the Legislature is merely to empower Ecology to demand
10 information, which Ecology might or might not use for further administrative action in the public
11 interest. *See infra* Point III(B) (noting other Ecology tools to control even exempt uses). This
12 language manifests no intent whatsoever to tinker with the carefully-crafted quantity specifications
13 set forth in the five statutory exemptions.

14 The only judicial case construing the “small withdrawal” language following the exemptions
15 flatly declared that:

16 “The 1945 legislature defined a “small withdrawal” as (1) *any amount of water for livestock*;
17 (2) any amount of water for a lawn or for a noncommercial garden of a half acre or less; (3)
18 not more than five thousand gallons per day for domestic use; and (4) not more than five
thousand gallons per day for ‘an industrial purpose’.” *Kim*, 115 Wash. App. at 160
(emphasis added).

19 The *Kim* court did not imagine that the term “small” could somehow be given a construction to limit
20 the scope of the specific exemptions. This is consistent with the axiom of statutory construction
21 that “precise terms modify, influence or restrict the interpretation or application of the general terms
22 where both are used in sequence or collocation in legislative enactments”. *Simpson Inv. Co. v.*
23 *Department of Revenue*, 141 Wash.2d 139, 156 (2000) (quoting *State v. Thompson*, 38 Wash.3d
24 774, 777 (1951)).

25 The Legislature imposed its own views of what was small and what was not small when it
26 crafted each of the five exemptions, and, it is easy to understand that, from an agricultural

1 perspective, even an unbounded stock-watering exemption is “small”. Indeed, the Board expressly
2 found that the Easterday well would withdraw “a low volume relative to many other irrigation
3 withdrawals.” (ROE at 5.) The amount of water to be used by Easterday is less than the amount of
4 water used by a single crop circle irrigation system of the type commonly used in Washington.
5 (Olsen Decl. ¶ 7.) This case involves a single facility, and no attempt to aggregate or otherwise
6 abuse the scope of the exemption.

7 Plaintiffs also rely upon a 1947 amendment, but it provides no basis imposing any quantity
8 limitation on the stock-watering exemption either. The amendment provides that

9 “at the option of the party making withdrawals of groundwaters of the state not exceeding
10 five thousand gallons per day, applications under this section or declarations under RCW
11 90.44.090 may be filed and permits and certificates obtained in the same manner and under
the same requirements as is in this chapter provided in the case of withdrawals in excess of
five thousand gallons a day.”

12 Again, the manifest Legislative intent is to permit exempt parties (or at least certain exempt parties)
13 to apply for permits or obtain certification of their vested rights (*see* RCW 90.44.090). Again there
14 was plainly no intent to tinker with the specific quantities of each exemption. Perhaps the best
15 evidence that this language could not possibly be construed as imposing a 5,000 gallon/day
16 limitation on stockwatering is that the Legislation added the fourth exemption in 2003 (“as provided
17 in RCW 90.44.052”) after 1947, an exemption which, as discussed above, manifestly exceeds 5,000
18 gallons/day.

19 While the plaintiffs repeatedly characterize the scope of the exemption as relating only to
20 small farms or homesteads, the legislature plainly intended no limitation whatsoever on commercial
21 uses of the stock-watering exemption. Where the legislature intended to limit the exemptions to
22 non-commercial use, it said so. RCW 90.44.050 (exempting “a noncommercial garden not
23 exceeding one-half acre in area”).

24 The business of raising cattle may not be held in as high esteem as it once was, but that
25 cannot change the plain meaning of RCW 90.44.050. As the Court of Appeals has explained in
26 overturning prior attempts to rewrite RCW 90.44.050, “[w]hen a statute is rendered obsolete by

1 changing conditions, the remedy is for the legislature to amend it; neither an administrative agency
2 nor the courts may read it in a way that the enacting legislature never intended”. *Kim*, 115 Wash.
3 App. at 163 (rejecting Ecology’s attempt to limit the industrial use exemption).¹² CSRIA does not
4 regard the statute as obsolete, but Ecology and the plaintiffs do, and their remedy is legislative
5 action, not judicial relief to shut down the Easterday operation. Indeed, both Ecology and the
6 plaintiffs are actively seeking such legislation and this action is best understood as an effort by
7 plaintiffs to secure an improper advisory opinion from this Court to give them a “leg up” in the
8 legislative arena, rather than any proper exercise of the judicial power.

9 **III. NO ABSURDITY OR INJUSTICE ARISES FROM GIVING EFFECT TO THE**
10 **PLAIN AND UNLIMITED SCOPE OF THE STOCKWATERING EXEMPTION.**

11 There are no compelling reasons, of history, public policy or otherwise, for this Court to
12 impose any limitation of the quantity of water that may be withdrawn for stock-watering purposes
13 under RCW 90.44.050, and certainly none sufficient to depart from the plain language of the statute.

14 **A. There Is No History of Interpreting the Exemption at 5,000 gallons/day.**

15 A central theme of plaintiffs’ memorandum is that until the recent Attorney General’s
16 opinion, everyone had always understood, contrary to the plain language of the statute, that the
17 stock-watering exemption was limited to 5,000 gallons/day. Plaintiffs rely upon newspaper
18 accounts to establish the meaning of the statute, but newspaper accounts are not legislative history.
19 Plaintiffs also rely upon bureaucratic reports of early conservationists, but those too are not
20 legislative history. There is not a shred of evidence that the Washington legislature ever considered

21 _____
22 ¹² The *Kim* case, overturning a PCHB ruling limiting the scope of RCW 90.44.050, “reject[ed] . . .
23 the PCHB’s apparent view that an administrative agency can alter the plain meaning of a statute
24 to meet changing societal conditions”. *Kim*, 115 Wash. App. at 163. Indeed, the Legislature has
25 expressly directed Ecology “to submit statutory modifications” in lieu of such an approach.
26 RCW 90.54.040(3). For this reason, the Court should reject any reliance upon the PCHB’s
27 limitation of the stock-watering exemption in *DeVries v. Department of Ecology*, PCHB No. 01-
28 073, Summary Judgment Order (2001), error that was prompted by Ecology’s transient advocacy
of a stock-watering quantity limitation in violation of its RCW 90.54.040(3) duty to seek
legislation where it wishes changes in law.

1 any of the materials now proffered by plaintiffs, and most of them concern “domestic uses” of
2 water, not uses related to livestock. Nor are records of the Association of Cities, as proponents of
3 the legislation, pertinent. *King County v. Taxpayers of King County*, 104 Wash.2d 1, 5 (1985)
4 (“The intent of the legislative body was not some vocal proponents of the program but the language
5 of the legislation itself”).

6 Contrary to the statements of the uninformed or those with an ax to grind, the parties who
7 worked daily with the groundwater statute, and sought guidance from Ecology concerning its
8 meaning, have always understood that there was no quantity limitation imposed on exempt stock-
9 watering use. Indeed, the State Department of Health, in its 1993 Issue Paper on Exempt Wells,
10 warned that that although RCW 90.44.050 was “commonly referred to as the ‘5,000 gallon
11 exemption,’ the term is a misnomer. The 5,000 gallon per day limitation applies to only two of the
12 four exempted uses specified in the statute.” (Quoted in 1/21/10 Brimmer Decl. Ex. K, at 2.)

13 CSRIA will rely upon the other intervenors to bring before the Court the further facts
14 concerning longstanding interpretation of the stock-watering exemption, but understands they will
15 prove that the State is filled with dairy and livestock operations relying upon the unlimited scope of
16 the exemption, often, indeed, relying upon Ecology’s own construction of the statute, with no
17 history of any attempts by Ecology to limit their usage. *Cf. Kim*, 115 Wash. App. at 157 (Ecology
18 “ordered the Kims to stop using well water for their commercial nursery unless they applied for a
19 permit”). The actual implementation of the statute over decades is far better evidence of the long-
20 held understanding of the statute than any paraphrasing offered for collateral purposes.

21 **B. There Is No Policy Reason to Limit the Scope of the Exemption, Because Ecology Has**
22 **At All Relevant Times Ample Regulatory Authority To Protect the Public Interest**
23 **Even with Respect to Unpermitted Groundwater Withdrawals.**

24 As the Attorney General explained in rejecting plaintiffs’ position,

25 “where Ecology has closed water bodies and ground water in hydraulic continuity with such
26 bodies to new withdrawals, it may prohibit new withdrawals that ‘will have any effect on the
27 flow or level of the surface water.’ Such a new withdrawal might be a new withdrawal for
28 stock-watering As a second example, consistent with principles of prior appropriation,
Ecology has authority under RCW 90.44.130 ‘to limit withdrawals by appropriators of

1 ground water so as to enforce the maintenance of a safe sustaining yield from the ground
2 water body.’ See also RCW 18.104.040(4)(g), authorizing Ecology to limit well
3 construction in areas ‘requiring intensive control of withdrawals in the interests of sound
4 management of the ground water resource.’ Depending upon the specific facts and
5 circumstances, then, these statutes could affect withdrawals for stock-watering purposes . . .”
6 AG Op. 2005-17 (2nd Brimmer Decl. Ex. A.)

7 Indeed, Ecology can even act, pursuant to RCW 90.54.050(2) to halt any and all appropriations of
8 groundwater in a particular area, including exempt uses, unless it acquires sufficient information
9 about the area in question. See AG Op. 2009-6. However, Ecology has not acted to create any
10 special management areas in this vicinity. (See Olsen Decl. Ex. 4, at 2.)

11 In *these* specific facts and circumstances, however, Ecology did not exercise any such
12 authority, despite the opportunity to do so, *because there was no factual case whatsoever to do so.*
13 There is no impairment or even threatened impairment to any of the plaintiffs’ wells or any surface
14 resource because of Easterday’s pumping. Notwithstanding plaintiffs’ highly-general complaints
15 about the importance of water management, there is simply no cause for Ecology to act *in the*
16 *circumstances of this case.*

17 For this reason, plaintiffs’ references to other portions of the groundwater code as
18 supporting a limited interpretation of the stock-water exemption (Pltfs. Mem. 18) are meritless.
19 Thus it is true that under RCW 90.44.030, groundwater appropriations are not to interfere with
20 senior surface rights, but no such interference is shown, and Ecology has not acted to halt
21 groundwater withdrawals in the area to protect any surface rights because it does not need to. The
22 administrative proceedings in which plaintiffs lost adequately vindicated whatever public policies
23 are embedded in the RCW 90.44.060 and 90.44.070, and certainly citation to permitting statutes
24 cannot, without more, eliminate the exemptions to the permitting requirement. The administrative
25 proceedings also addressed concerns about the sustained yield from the aquifer under RCW
26

1 90.44.130, and, again, Ecology has not needed to exercise its independent authority to act.¹³

2 **Conclusion**

3 For the foregoing reasons, and the reasons stated in the briefs of the other intervenors,
4 plaintiffs' motion for summary judgment should be denied, and the cross-motion of Easterday
5 Ranches for summary judgment dismissing plaintiff's complaint for lack of standing (and its
6 associated renewed motion to strike) should be granted.

7 Dated: February 18, 2010.

8 MURPHY & BUCHAL LLP

9
10 By: 

11 James L. Buchal, WSB #31369

12 Attorney for Columbia Snake River Irrigators
13 Association

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25 ¹³ RCW 90.44.105, permitting consolidation of exempt and nonexempt rights, manifestly has no
26 bearing on the scope of exempt rights except in the course of consolidation proceedings not
pursued here; as noted above, the primary concern of nonimpairment was fully vindicated in the
Easterday proceedings.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 18th day of February, 2010, I caused the foregoing Intervenor
3 The Columbia Snake Irrigators Association's Memorandum in Opposition to Plaintiffs' Motion for
4 Summary Judgment and in Support of Defendants' Motion to Dismiss and Renewed Motion to
Strike to be served upon the following parties in the following manner:

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