

**McELROY LAW FIRM, PLLC**

ENERGY  
ENVIRONMENTAL LAW  
HAZARDOUS WASTE  
INSURANCE  
LAND USE & ZONING  
LITIGATION  
NATURAL RESOURCES  
PERMITS  
WATER RIGHTS

1808 N. 42<sup>ND</sup> STREET  
SEATTLE, WASHINGTON 98103

TELEPHONE (206) 654-4160  
FACSIMILE (206) 654-4161  
www.mcelroylaw.com

CHRISTINE McELROY  
cmcelroy@mcelroylaw.com

February 18, 2010

**VIA OVERNIGHT COURIER**

Clerk of Court  
Franklin County Superior Court  
1016 N. 4<sup>th</sup> Ave.  
3<sup>rd</sup> Floor, Room 306  
Pasco, WA 99301

**Re: *Five Corners Family Farmers, et al. v. State of Washington Department of Ecology, et al.***  
**Franklin County Cause No. 09-2-51185-6**

Dear Clerk:

Enclosed for filing in the above captioned matter are the following original documents:


1. Intervenor Washington Cattlemen's Association Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment;
2. Declaration of John William Field in Opposition to Plaintiffs' Motion for Summary Judgment; and
3. Certificate of Service.

A working copy of the above listed documents has been provided to the Court Administrator for delivery to the Judge, once one has been assigned.

Please conform and return the enclosed copy and return in the envelope provided. Thank you for your help in this matter.

Very truly yours,

McELROY LAW FIRM, PLLC



Christine McElroy  
Legal Assistant

cc: Parties

**MCELROY LAW FIRM, PLLC**

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February 18, 2010

**VIA OVERNIGHT COURIER**

Patricia J. Austin  
Court Administrator  
7122 W. Okanogan Place, Bldg. A  
Kennewick, WA 99336-2359

**Re: *Five Corners Family Farmers, et al. v. State of Washington Department of Ecology, et al.***  
**Franklin County Cause No. 09-2-51185-6**

Dear Ms. Austin:

A hearing has been noted on the Court's motion docket for Friday, April 2, 2010 at 1:30 p.m., regarding a motion for summary judgment in the above-referenced matter. Enclosed is a working copy labeled "JUDGE'S COPY" of the following documents:

1. Intervenor Washington Cattlemen's Association Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment;
2. Declaration of John William Field in Opposition to Plaintiffs' Motion for Summary Judgment; and
3. Certificate of Service.

The above listed documents have also been filed with the Clerk. Thank you for your consideration in this matter.

Very truly yours,

MCELROY LAW FIRM, PLLC



Christine McElroy  
Legal Assistant

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

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

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

Plaintiffs,

v.

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

Defendants,

WASHINGTON CATTLEMEN'S  
ASSOCIATION, COLUMBIA SNAKE  
RIVER IRRIGATORS ASSOCIATION,  
WASHINGTON CATTLE FEEDERS  
ASSOCIATION, CATTLE PRODUCERS  
OF WASHINGTON, WASHINGTON  
STATE SHEEP PRODUCERS AND  
WASHINGTON FARM BUREAU,

Intervenor-Defendants.

Case No. 09-2-51185-6

INTERVENOR WASHINGTON  
CATTLEMEN'S ASSOCIATION

MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT

1 **ISSUE**

2 The overly broad relief proposed by Plaintiffs would eliminate the 1945 stockwater  
3 exemption employed by hundreds of historical cow-calf operators in forage-based operations  
4 throughout Washington who are members of the Washington Cattlemen's Association. The  
5 Plaintiffs' request for the court to re-write RCW 90.44.050 should be rejected.  
6

7 **FACTS**

8 The Washington Cattlemen's Association (WCA) is the oldest and largest  
9 organization representing cow-calf producers in Washington State. As of June 2009, the  
10 WCA represented 1,816 members state-wide in 29 counties, including Benton and Franklin  
11 Counties. WCA members account for 92,000 mother cows or an average of 50 head per  
12 member. A substantial portion of these members rely on multiple, exempt livestock wells in  
13 one form or another. Exhibit 1, Declaration of John William Field in Opposition to Plaintiffs'  
14 Motion for Summary Judgment, dated February 18, 2010, pp 2-3, ¶¶ 5 and 6.  
15

16 A cow-calf operation is based on pasture and grazing, following longstanding  
17 livestock practices dating to pre-statehood. Decl. of Field, p. 3, ¶ 7. In evaluating stockwater  
18 use, the Court needs to carefully consider at trial (if a trial is required) the full range of  
19 stockwater uses and to distinguish traditional ranching and grazing operations as they have  
20 existed in Washington since territorial days from the more intense water requirements of  
21 modern Concentrated Animal Feeding Operations (known as CAFO's), like the Easterday  
22 feedlot, which is at issue here.

23 No party can argue successfully on summary judgment that all CAFO's were outside  
24 the contemplation of the Legislature in 1945 when the "unlimited" stockwater exemption was  
25 written.<sup>1</sup> Arguably, even if the Plaintiffs could raise an inference on summary judgment that

1 the number of CAFO's has decreased since 1945 because the intensity of individual CAFO's  
2 have increased, they should address their concern to the Legislature, not the Courts, since  
3 their goal is to regulate that segment of the livestock industry. This goal cannot be  
4 accomplished by alleged legislative history or strained statutory construction.

5 Irrespective of the outcome of the Easterday case, any decision on the outer limit of  
6 the stock water exemption as applied to large CAFO's cannot be allowed to gut the historical  
7 stockwater exemption as it applies to forage-based livestock operations. The Plaintiffs try to  
8 create a false choice for the Court between limiting the stock water exemption to  
9 "subsistence farming" as it existed in 1945 in order to avoid allowing CAFO's (like the  
10 Easterday feedlot) to fall within the plain language of the exemption. In pressing the Court  
11 to make this false choice, the Plaintiffs would force the Court to eliminate all consideration  
12 and allowance for the third alternative, which is the common, historical use of stockwater on  
13 grazing lands, which was one of the original purposes for the stock water exemption in 1945.  
14 Stockwater use on grazing lands is neither a "subsistence farm," nor a CAFO. In the relief  
15 requested by the Plaintiffs, these forage-based operations are in danger of being swept away  
16 by accident, inattention, or clever argument.<sup>2</sup>

17 The application of the "unlimited" stockwater exemption to grazing lands is the  
18 inconvenient truth that the Plaintiffs hope this Court will ignore.

19  
20 <sup>1</sup> Just because feedlots and dairies were not called CAFO's in 1945 does not mean they did  
21 not exist as a class of more intense livestock operations that would have been known to  
22 the Legislature and could have been excluded from the statute if that was the  
Legislature's intent.

23 <sup>2</sup> See, "Plaintiffs' [Proposed] Order for Summary Judgment," page 5, line 10, which asks  
24 the Court to declare that "The stock-water portion of the RCW 90.44.050 exemption from  
25 groundwater permitting is limited to 5,000 gpd, combined total with all other listed  
domestic uses listed in the statute." This would eliminate the broad exemption for  
traditional ranching and grazing operations, which are not barnyard subsistence farms,  
not CAFO's, and not domestic uses.

1 Cow-calf, grazing, and other forage-based operations—in 1855, in 1945, and in  
2 2010—cannot operate if they are limited to a single well or an arbitrary, daily limit of 5,000  
3 gallons. No arbitrary limitation was sensible or required because of the great diversity in  
4 operations and the automatic and natural limiting factors that *all* forage-based operations  
5 must confront. These natural limitations include the number of acres, the limited number of  
6 cattle per acre, the seasonal variability and scarcity of surface water, and the practical  
7 constraints, like the climate, terrain, and amount of forage. A larger ranch might support  
8 more cattle, and might use more water and need more wells, but unlike a CAFO, ranch size  
9 does not increase intensity of use because of the other limiting factors that provide a natural  
10 barrier to the overuse of groundwater. Similarly, ranch size may increase the need for  
11 additional exempt wells in remote locations, but larger ranches only exist in less populated  
12 areas. Decl. of Field, pp. 3-4, ¶¶ 9 through 12.

13 The WCA asks the Court to carefully evaluate and reject the overly broad remedy  
14 proposed by the Plaintiffs.

15 The Plaintiffs' real argument is that today's modern, large CAFO's may not have been  
16 within the contemplation of the legislature when it wrote the "unlimited" stock water  
17 exemption in 1945. If so, the Plaintiffs' real concern is a public policy argument that should  
18 be directed to the Legislature to re-write the exemption to address CAFO's *if the Legislature*  
19 *determines that the law should be changed*. The Plaintiffs cannot properly request the Court  
20 to re-write the laws or gut the exemption for *all* historical livestock practices and uses for  
21 forage-based operations simply to address a perceived problem with CAFO's. The Plaintiffs'  
22 argument that CAFO's stretch the exemption is not an argument that the exemption should be  
23 judicially repealed, especially to the detriment of other segments of the livestock industry  
24 where water use is limited by natural constraints that are variable and seasonal and more  
25 subject to reasonable, annual averages instead of arbitrary daily limits.

1 Contrary to the Plaintiffs' argument, there would be no need for any stockwater  
2 language in RCW 90.44.050 if stockwater was just a subset of other domestic use, derived  
3 from the same well, and limited to the immediate barnyard at the house.

4 **LEGAL ANALYSIS**

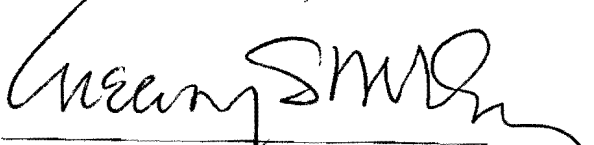
5 The Washington Cattlemen's Association relies on the legal argument and briefing of  
6 Easterday Ranches, Inc. and the other intervening parties. In particular, the WCA adopts the  
7 arguments that: (1) the records produced by Plaintiffs are largely inadmissible and do not  
8 properly reflect historical fact or legislative history; (2) declaratory judgment on statutory  
9 construction is not appropriate in this case, which is largely a private dispute; and (3) the  
10 rules of statutory construction require a reading of RCW 90.44.050 that the groundwater  
11 exemption for livestock is self-limiting and not subject to the separate domestic use ceiling of  
12 5,000 gallons per day.

13 **RELIEF REQUESTED**

14 Plaintiffs' motion for summary judgment should be denied.

15  
16 RESPECTFULLY submitted February 18, 2010.

17 McELROY LAW FIRM, PLLC

18  
19 

20 Gregory S. McElroy, WSBA No.15494  
21 Attorney for Intervenor, Washington  
22 Cattlemen's Association

1 [ ] EXPEDITE (if filing within 5 court days of hearing)  
2 [X] Hearing is set  
3 Date: Friday, April 2, 2010  
4 Time: 1:30 p.m.  
5 Judge: TBD  
6  
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9 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
10 COUNTY OF FRANKLIN

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

15 Plaintiffs,

16 v.

17 STATE OF WASHINGTON,  
18 DEPARTMENT OF ECOLOGY, and  
19 EASTERDAY RANCHES, INC.,

20 Defendants,

21 WASHINGTON CATTLEMEN'S  
22 ASSOCIATION, COLUMBIA SNAKE  
23 RIVER IRRIGATORS ASSOCIATION,  
24 WASHINGTON CATTLE FEEDERS  
25 ASSOCIATION, CATTLE PRODUCERS  
OF WASHINGTON, WASHINGTON  
STATE SHEEP PRODUCERS AND  
WASHINGTON FARM BUREAU,

Intervenor-Defendants.

Case No. 09-2-51185-6

DECLARATION OF JOHN WILLIAM  
FIELD IN OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT

DECLARATION OF JOHN WILLIAM FIELD IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT-1

**McELROY LAW FIRM, PLLC**

1808 NORTH 42<sup>ND</sup> STREET  
SEATTLE, WASHINGTON 98103  
TELEPHONE (206) 654-4160  
FACSIMILE (206) 654-4161  
[www.mcelroylaw.com](http://www.mcelroylaw.com)

EXHIBIT 1

1 I, John William Field, being of legal age and otherwise competent to testify herein,  
2 make this declaration from first hand knowledge of facts that I would be competent to testify  
3 at trial.  
4

5 1. I am the Executive Vice President of the Washington Cattlemen's Association  
6 (WCA) located in Ellensburg, Washington. The WCA is the oldest and largest organization  
7 representing cow-calf producers in Washington State.  
8

9 2. The WCA was organized in the spring of 1926 and has represented the  
10 cattle industry in Washington State for over 83 years.

11 3. I have been Executive Vice President of the WCA since August, 2004.

12 4. I grew up on a cow-calf operation in Central Oregon. I am familiar with cattle  
13 ranching throughout Washington State and have been involved with all segments of the  
14 livestock industry regarding grazing, water rights, food safety, international trade, and  
15 government regulations that affect our members and the industry.  
16

17 5. As of June 2009, the WCA represented 1,816 members state-wide with  
18 members in all of the following counties: Whatcom, Skagit, Snohomish, King, Thurston,  
19 Clark, Kittitas, Douglas, Chelan, Okanogan, Ferry, Stevens, Pend Oreille, Spokane,  
20 Whitnman, Lincoln, Garfield, Asotin, Columbia, Walla Walla, Franklin, Benton, Grant,  
21 Adams, Yakima, Thurston, Klickitat, Grays Harbor, and Clallam.  
22

23 6. The WCA members directly account for 92,000 mother cows. A  
24 substantial portion of these operations rely on exempt livestock wells in one form or  
25 another. Some historical operations have multiple wells in remote locations. Many rely

1 on seasonal use of wells that, unlike domestic wells, may be used for days or weeks at a  
2 time for greater than 5,000 gallons per day even when the annual average use is less than  
3 an average of 5,000 gallons per day.  
4

5 7. As the senior staff member of the WCA, I am the custodian of the WCA's  
6 books and records. As a state-wide organization, the WCA has been actively involved in  
7 stock watering for forage-based operators throughout the 83-year history. The WCA  
8 membership operates cow-calf operation that are centered on pasture and grazing, following  
9 longstanding livestock practices dating to pre-statehood. Stockwater uses by our members in  
10 traditional ranching and grazing operations have existed in Washington since territorial days  
11 and must be distinguished from the more intense water requirements used by Concentrated  
12 Animal Feeding Operations (known as CAFO's).  
13

14 8. Grazing and other forage-based operations represented the greatest number of  
15 cattle operations in 1945 when the stockwater exemption was written by the Legislature. In  
16 1945, the WCA was already 20 years old and actively involved in preserving ranching as a  
17 way of life. Some livestock may have been kept as barnyard animals, but the majority of  
18 beef cattle were maintained on range land and not part of a domestic household and not  
19 capable of being watered and fed as part of a 1945 "subsistence" farming operation, to use  
20 the phrase coined by the Plaintiffs.

21 9. The widespread, historical use of stockwater on grazing lands was one of the  
22 original purposes for the stock water exemption in 1945. Forage-based operations depend on  
23 groundwater to meet their stockwater requirements. Cow-calf operators for forage-based  
24 grazing operations—in 1855, in 1945, and in 2010—could not operate if they were limited to  
25 a single well or an arbitrary, daily limit of 5,000 gallons.



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

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

Case No. 09-2-51185-6

Plaintiffs,

CERTIFICATE OF SERVICE

v.

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

Defendants,

WASHINGTON CATTLEMEN'S ASSOCIATION,  
COLUMBIA SNAKE RIVER IRRIGATORS  
ASSOCIATION, WASHINGTON CATTLE  
FEEDERS ASSOCIATION, CATTLE PRODUCERS  
OF WASHINGTON, WASHINGTON STATE  
SHEEP PRODUCERS AND WASHINGTON FARM  
BUREAU,

Intervenor-Defendants.

On this date I caused a copy of the following documents:

1. Intervenor Washington Cattlemen's Association Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment; and
2. Declaration of John William Field in Opposition to Plaintiffs' Motion for Summary Judgment; and Certificate of Service

to be served by e-service as follows:

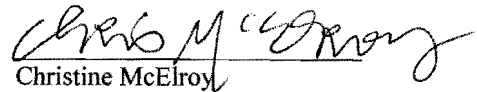
- Plaintiffs:
  - Janette Brimmer ..... jbrimmer@earthjustice.org
  - Kristen Boyles ..... kboyles@earthjustice.org
  - Cheryl McEvoy ..... cmcevoy@earthjustice.org

- 1 • Defendants State of Washington, Washington Department  
of Ecology:
  - 2 ○ Maia Bellon ..... maiab@atg.wa.gov
  - 3 ○ Janet Day ..... janetd@atg.wa.gov
  - 4 ○ AGO Ecy. Div. .... ecyolyef@atg.wa.gov
  
- 5 • Defendant Easterday Ranches, Inc.
  - 6 ○ Crane Bergdahl ..... cranelaw@msn.com
  - 7 ○ William Cameron..... wlc@leesmart.com
  
- 8 • Agricultural Association Intervenors
  - 9 ○ Jeff Slothower ..... jslothower@lwhsd.com
  - 10 ○ Heather Hazlett ..... hhazlett@lwhsd.com
  
- 11 • Intervenor Columbia Snake River Irrigators Association
  - 12 ○ James Buchal ..... jbuchal@mbllp.com
  - 13 ○ Carole Caldwell ..... ccaldwell@mbllp.com

14 with the original filed with the Franklin County Superior Court Clerk via overnight courier to 1016 N. 4<sup>th</sup> Ave.,  
15 3<sup>rd</sup> Floor, Room 306, Pasco, WA 99301.

16 I make this declaration under penalty of perjury under the law of the State of Washington.

17 DATED this 18<sup>th</sup> day of February, 2010, at Seattle, Washington.

18   
19 Christine McElroy  
20 Legal Assistant