

1 EXPEDITE (if filing within 5 court days of hearing)

2 Hearing is set:

3 Date: Friday, April 2, 2010

4 Time: 1:30 p.m.

5 Judge: to be determined

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

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

11 Plaintiffs,)

12 vs.)

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

16 Defendants,)

17 and)

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

26 Intervenor-Defendants.)

NO. 09-2-51185-6

SECOND DECLARATION OF
JANETTE K. BRIMMER

I, JANETTE K. BRIMMER state as follows:

1. My name is Janette K. Brimmer and I reside in King County, Washington.

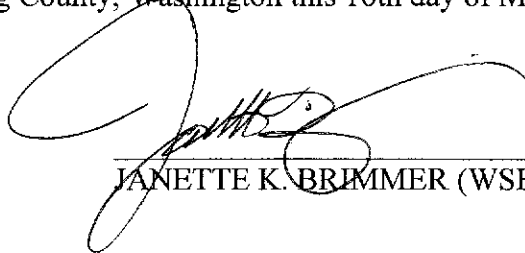
1 2. I am over 21 years of age and have personal knowledge of the statements
2 contained herein.

3 3. This Second Declaration is submitted to supplement my declaration dated January
4 21, 2010. Therefore, the exhibit is lettered consecutively to those in my January 21, 2010
5 declaration.

6 4. Attached as Exhibit M, is a true and correct copy of a printout from the
7 Department of Ecology's website on March 9, 2010. Exhibit M is Publication Number 96-1804-
8 S&WR of the Department of Ecology. It is dated April 2008 and it is titled: "Frequently Asked
9 Questions: Water Rights in Washington."

10 I certify under penalty of perjury in accordance with the laws of the State of Washington,
11 that the foregoing is true and correct.

12 EXECUTED at Seattle, King County, Washington this 16th day of March, 2010.

13
14 

15 JANETTE K. BRIMMER (WSB #41271)

EXHIBIT M

Frequently Asked Questions

Water Resources Program

April 2008

Water Rights in Washington

The Department of Ecology manages the state's water resources, working to meet all the varied demands on Washington's public waters. Water rights play a crucial role in managing and allocating this finite resource.

Under state law, the waters of Washington collectively belong to the public and cannot be owned by any one individual or group. Instead, Ecology may grant individuals or groups the right to use them.

Q: What is a water right?

A: A water right is a legal authorization to use a certain amount of public water for a designated purpose. The water must be put to "beneficial use," which refers to a reasonable quantity of water applied to a non-wasteful use, such as irrigation, domestic water supply, industry and power generation, to name a few.

There are three main types of water right documents: claims, permits and certificates. This document focuses on permits and certificates. (For more detail on claims, refer to Ecology publication #97-2022-S&WR, "Q&A on Water Right Claims.")

- A **claim** is simply that, a *claim* to a water right, for a water use that predates the state's water permitting system (for surface water, 1917/1932, for ground water, 1945). The validity of a claim can only be confirmed through judicial processes.
- A **permit** is permission by the state to *develop* a water right; it is not a final water right. A permit allows you to proceed with construction of the water system and start putting the water to beneficial use, in accordance with the terms of your permit.
- Ecology issues a **certificate** once the department confirms that all the conditions of the permit have been met. A Certificate of Water Right is the legal record of your water right, and is recorded at your county auditor's office. Once Ecology issues a certificate, the water right is considered appurtenant (attached) to the land on which the water is used.

For more information:

Contact the Ecology regional office nearest you

Northwest Regional Office

3190 - 160th Avenue SE
Bellevue, WA 98008-5462
(425) 649-7000

Central Regional Office

15 W Yakima Ave, Suite 200
Yakima, WA 98902-3452
(509) 575-2490

Eastern Regional Office

N 4601 Monroe
Spokane, WA 99205-1295
(509) 329-3400

Southwest Regional Office

P.O. Box 47775
Olympia, WA 98504-7775
(360) 407-6300

Department of Ecology Headquarters

300 Desmond Drive
Olympia, WA 98504-7600
(360) 407-6000

Special accommodations:

If you need this publication in an alternative format, call the Water Resources Program at 360-407-6872. Persons with hearing loss, call 711 for Washington Relay Service. Persons with a speech disability, call 877-833-6341.

Q: Who needs a water right?

A: A water right is necessary if you plan to divert or withdraw any amount of water for any use from:

- Surface waters (water located above ground) such as lakes, rivers, streams and springs.
- Ground waters (water located under ground), if you plan to:
 - Withdraw more than 5,000 gallons per day.
 - Irrigate more than a half acre of lawn or noncommercial garden.

Washington water law requires users of public water to receive approval from the state prior to the actual use of water.

Approval is granted in the form of a water right permit or certificate. In addition to water rights authorized by the state under the permit system, Washington recognizes claims to water rights established prior to the time the permit system originated, and federal reserved water rights.

It should be noted that if you are paying a water distribution entity (such as an irrigation district or a municipal water supplier) for water, you personally do not need a water right. However, the entity from which you purchase water must hold a valid water right or claim.

Q: Are there any exceptions to the water right requirement?

A: You do not need to apply for a water right if you use a total of 5,000 gallons or less of ground water from a well each day for any of the following combinations of uses:

- Single or group domestic purposes
- Industrial purposes

- Watering a lawn or noncommercial garden that is a half acre or less in size

Although you are exempt from the water right permit process in these cases, all other water laws and regulations still apply. If you wish to develop land and supply the development with domestic water from several wells, all the wells together must pump less than 5,000 gallons a day to be covered under this exemption. If the cumulative total is greater than 5,000 gallons per day, you need a water right.

Q: How do I apply for a new water right?

Note: Changes to existing water rights are covered in a separate Ecology publication. Refer to publication #98-1802-WR, "Changing or Transferring an Existing Water Right."

A: Water rights are issued by Ecology's regional offices in Lacey, Bellevue, Yakima, and Spokane. Contact the nearest Ecology office for a water right application, or download the application from Ecology's Internet site. (Office and Web addresses are included later in this document.) The general process is as follows:

1. Fill out an "Application for a Water Right;" instructions are included. The minimum fee required to file an application is \$50, but additional fees may be required.
2. Return the completed application, along with the application fee in the form of a check or money order, to:

Department of Ecology
Cashiering Unit
PO Box 47611
Lacey WA 98504-7611

Note: Applications are stamped on the day they are received. This date will normally become the "priority date," if the application is accepted and has the correct filing fee. (A priority date establishes the seniority of a water right application.) Therefore, it is to your advantage to be sure the application is complete and the necessary filing fee is attached before mailing.

3. Ecology reviews your application for completeness. If additional fees are required, you will be notified at this time.
4. Once an application is complete and accepted, Ecology will send you a legal notice of the application to publish in an approved newspaper with general circulation in the county (or counties) where water is or will be withdrawn, stored, and used. The notice, published once a week for two consecutive weeks, includes:
 - The basic facts of your request.
 - Information regarding the 30-day protest period for any member of the public who feels that your proposed water use would impair other uses of the resource. This 30-day period begins to run on the last day that your legal notice is published.
5. After final publication of the notice, send Ecology an original, notarized Affidavit of Publication that you get from the publishing newspaper. Ecology cannot take action on your water right request until the Affidavit is submitted.
6. Ecology then conducts an investigation of the application (which may include a field examination of your proposal) to validate the information on the application and apply the four-part test mentioned above. The results of the investigation are summarized in a Report of Examination (ROE). The report contains Ecology's staff-level decision on your water right request. Ecology can recommend a denial, an approval, or an approval with conditions. Once approved by an Ecology decision-maker, Ecology issues either a final ROE or an Order approving the ROE. If approved, your permit may contain specific conditions.
7. Ecology sends you, anyone who filed a protest, and identified interested parties a copy of the final decision. You (and others) have 30 days to appeal Ecology's decision if you do not agree with the decision. The state Pollution Control Hearings Board (PCHB) handles appeals.
8. If Ecology recommends that your application be approved and there are no appeals to Ecology's final decision, you are issued a Permit to Appropriate Public Waters of the State of Washington. The permit allows you to construct your water system and put the water to use, by dates specified in the permit (your development schedule).

If Ecology's final decision is appealed, the appealing party may seek a stay of Ecology's decision with the PCHB. (A "stay" is a suspension or postponement of the effectiveness of Ecology's decision.) If a stay is issued,

you may not begin action on your permit until the case is resolved or the stay is lifted. If a stay is not issued, any actions you take are at your own risk, because the final PCHB decision may affirm, deny or modify Ecology's decision, and you will be required to comply with any changes.

9. Your permit will include a *development schedule*, which specifies the dates (on or before) by which you must begin construction of your water system, complete construction of your water system, and put the water to full use. As you complete each phase, you must submit a progress report to Ecology on the appropriate form. When the water is put to full beneficial use, you must complete and submit a notarized Proof of Appropriation of Water affidavit form. This form includes:
 - Exactly what facilities or equipment you are operating.
 - How much water you are using.
 - The purpose for the water use.
 - Where the water is being used.
 - A statement that all conditions of the permit have been met.
10. Ecology may choose to inspect your completed project based on the information you provided in Step 8. After the inspection is completed, or if Ecology determines an inspection is not necessary, Ecology will request certificate filing and recording fees from you.
11. Once the appropriate fees are received, Ecology issues a Certificate of Water Right, based on the information you submitted and the field inspection (if one is conducted). The certificate cannot

exceed the amount of water that has actually been put to use, up to the limits set in the permit. The certificate is recorded at the auditor's office in the county where the project is located, and at Ecology. The county auditor will forward your certificate to you. It becomes part of the legal record of your water right.

Q: How long will it take to receive a decision on my water right application?

A: Depending on the complexities of water availability, the number of applications filed before yours, and water use within your watershed, a decision on your water right application may take anywhere from months to years.

Q: Since it may take a long time to get a decision on a new water right request, are there any alternative processes for securing water available to me?

A: Since much of the water in Washington has already been allocated or claimed, new water rights are increasingly difficult to obtain. As a result, more and more people are choosing to make changes to existing water rights rather than apply for a new one. Generally Ecology will consider changes to the following elements of an existing water right claim, permit, or certificate:

- Place of use
- Point of diversion or withdrawal
- Additional point(s) of diversion or withdrawal
- Purpose of use (for surface water rights)

The water right change application process is similar to that of a new water right, as described above. In recent years, two

additional approaches have been added to provide applicants with timelier water right changes than Ecology would otherwise be able to provide, given staffing limitations. These approaches are:

Water Conservancy Boards that can process water right transfer and change applications, including generating the Report of Examination (ROE), at the local level. Board-generated ROEs are submitted to Ecology for final review within an accelerated timeframe. There are currently 21 boards operating throughout the state.

Cost reimbursement contracting which allows you to pay for the cost of processing the application yourself, and any senior applications ahead of yours in the processing line, in order to allow Ecology to get to your application. (This process can also be used for a new water right application.)

Additional information on changing water rights, conservancy boards and cost-reimbursement contracting is available through Ecology's Publications Office.

Q: Once I get my water right certificate, what are my rights to use the water?

A: Your rights to use water are outlined in your water right certificate. However, it is important to be aware that a "water right" is the entire record connected to that right, and includes the application, Report of Examination, permit, Proof of Appropriation form, certificate, and what the applicant/permit-holder actually did are all important. All this information can

impact a judicial or court-supervised evaluation of the water right.

All or part of a water right is subject to relinquishment if it is unused, without sufficient cause, for five or more consecutive years. The law provides for certain exemptions to relinquishment, such as water claimed for municipal water supply purposes, service in the armed forces, or reduced use of irrigation water resulting from crop rotation. **Note:** It is important to follow any conditions of your permit or certificate.

Q: Does my water right protect me during a drought?

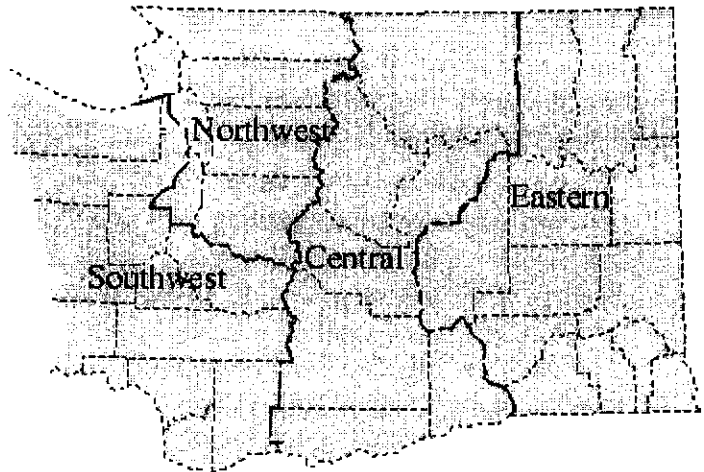
A: Not directly. A water right does not guarantee the availability of water. The degree of reliability depends on your seniority as a water right holder.

Q: Are there other facts I should know concerning water rights?

A: Yes, please read the following carefully.

- ✓ The state water codes are based on a "first in time, first in right" premise. This means that any new water right is subject to existing rights. Therefore your application may be denied, or your water use may be regulated or modified, if it adversely affects existing rights. This will also protect your water right against any impairment (harmful effects) by future applicants.
- ✓ Water rights carry no right-of-way privileges. If the water source you wish to use is not on your property, you must make right-of-way arrangements with the appropriate property owner(s).

- ✓ A water right document (claim, permit or certificate) may be diminished or have little or no value due to unauthorized changes, non-use of water, or never having put the full amount of water to beneficial use in agreement with the terms of the permit. (Refer to the Ecology publication # 97-1804-WR, "Assessing Your Water Right," for more information.)
- ✓ Water right certificates remain attached to the land described on the water right, unless specifically withheld from the deed at the time of sale. To determine whether a water right is included in a property purchase, you should contact the appropriate county assessor's office. This is a real estate transaction and not recorded at the Department of Ecology.
- ✓ In contrast to water right certificates, water right applications and permits are personal property. They are not attached to the land and must be assigned to the new water user. Check with Ecology if you have questions about the status of water rights for property you have acquired or are thinking about purchasing.
- ✓ Disagreements regarding private water use are a civil matter. For example, if you believe your neighbor's water use is interfering with yours, the matter may need to be settled in a civil court. Ecology does not have the legal authority to resolve such disagreements. If you suspect an unauthorized or illegal water use, please contact Ecology immediately.



- ✓ If you are required to have a water right, no construction or water use should begin before a water right permit is obtained from Ecology.

Visit Ecology's Water Resources website at http://www.ecy.wa.gov/programs/wr/wr_home.html

This publication, and others about water rights, is available to view, download and/or order on-line at: <http://www.ecy.wa.gov/biblio/wr.html>

On-line "Application for a Water Right" form: <http://www.ecy.wa.gov/biblio/ecy040114a.html>