



CLEAN, FLOWING WATERS FOR THE WEST

The Center for
Environmental Law & Policy

**PETITION FOR DECLARATORY ORDER
RE "STOCKWATER PURPOSES" EXEMPTION IN RCW 90.44.050**

To: Washington Department of Ecology
From: Center for Environmental Law & Policy and Five Corners Family Farmers, Petitioners
Date: December 11, 2008

Relief Requested. A declaratory order finding that:

- (1) The "stock water purposes" proviso of RCW 90.44.050 does not apply to commercial animal feedlots, such as CAFOs and dairies.
- (2) The "stock water purposes" proviso of RCW 90.44.050 does not authorize the use of unlimited quantities of drinking water for livestock in any circumstance.
- (3) The "stock water purposes" provision of RCW 90.44.050 may not be used to supply water in excess of 5,000 gallons per day for industrial livestock operational purposes such as dust control, boiler operations, barn and equipment washing and other uses.
- (4) New permit exempt wells authorized in RCW 90.44.050 may not be utilized in areas where a moratorium (formal or informal) on groundwater development is in place because of water availability concerns.
- (5) SEPA does not allow segmentation of the water supply elements of a proposal to develop an industrial animal feedlot, such as wells, stockponds, dust control (misting) equipment, etc.
- (6) SEPA process may not be used to determine "impairment" as that term is used in the state Water Code, RCW Ch. 90.03.290; impairment determinations may only be made by the Department of Ecology.
- (7) Private entities may not issue "Reports of Examination" or other documents authorizing use of groundwater in Washington State.

This petition is submitted pursuant to RCW 34.05.240(1), based on the following facts and reasons.

(a) Uncertainty exists regarding the validity of the use of a permit-exempt well for an industrial cattle feedlot, and that uncertainty necessitates resolution.

Easterday Ranches, a privately held corporation located in Pasco, Washington proposes to construct a 30,000-head cattle feedlot on a 200-acre parcel of land located near Mesa, Washington. The legal description of the property is "all of Section 24, Township 12 North, Range 31 East, W.M., and the South half of Section 13, Township 12 North, Range 31 East, W.M., Franklin County, Washington." See Exhibit 1 (map). A feedlot of this size requires substantial water resources to supply drinking water to the animals and for other industrial purposes, such as dust control, boiler operations, and barn and equipment cleaning. Also given its size, a stock pond will be needed to serve as a reservoir to supply water to the

facility. It is estimated that Easterday's feedlot will require at least 3 million gallons of water per day to satisfy various water needs.

In 2005, the Washington State Attorney General's Office issued AG Opinion No. 17. See Exhibit 2. That Opinion states that the exemption from water right permitting authorized under RCW 90.44.050 applies to stockwater, and further that the 5,000 gallon per day limitation on such wells does not apply and water from permit-exempt wells may be used in unlimited quantities for "stockwater" purposes. The AGO does not define the term "stockwater."

On July 28, 2008, Easterday Ranches filed an application for a Conditional Use Permit (CUP) from Franklin County to construct the cattle feedlot near Eltopia. In its application and associated SEPA checklist and associated documents, Easterday Ranches stated that, in reliance on AGO 2005 No. 17, it intends to use a permit-exempt well to serve water to the feedlot. See Exhibits 3 and 4.

On August 28, 2008, in support of its CUP application, Easterday Ranches submitted an "Exempt Well Impairment Analysis" prepared by Water Man Consulting. See Exhibit 5. The "Impairment Analysis" suggests that Easterday Ranches could pump as much as 500,000 gallons per day from a well drilled at a depth of 600-700 feet and not adversely affect other water users in the vicinity of the proposed feedlot. The Water Man report did not analyze impacts on nearby wells owned and used by members of Petitioners CELP and FCFF.

On August 29, 2008, Scott Collin and Randy Jones, owners of property near the proposed feedlot, filed comments on the SEPA checklist, and in September, appealed the CUP to the Franklin County Board of County Commissioners. See Exhibit 6. Mr. Collin and others repeatedly expressed concerns about the potential adverse impact of Easterday's proposed water use on their domestic wells.

On September 3, 2008, Franklin County issued a Conditional Use Permit to Easterday Ranches that purports to authorize water use by permit-exempt well. See Exhibit 7.

On September 10, 2008, the Columbia-Snake River Irrigators Association issued a "Water Policy-Information Memorandum" inviting Scott Collin and Randy Jones to attend a review meeting for a "CSRIA Report of Examination for New Easterday Well." See Exhibit 8. Mr. Collin did attend that meeting, as did representatives of the Department of Ecology, other state agencies, and others. During the meeting Easterday Ranches confirmed that it intended to use a permit-exempt well to supply water to the new feedlot.

On October 13, 2008, Cody Easterday, as representative of Easterday Ranches, signed a "Declaration of Appropriation of Groundwater for Beneficial Use and Plan of Development" describing his intent and plan to use a permit-exempt well to supply water to the Eltopia feedlot. On the same date, CSRIA distributed the aforesaid declaration to "Washington State/County Agencies and Interested Parties." See Exhibit 9.

On October 14, 2008, Petitioner Center for Environmental Law & Policy advised Franklin County Planning & Building Department that the proposed use of a permit-exempt well to supply water to the Easterday Ranches feedlot would not comport with state law. See Exhibit 10.

On October 29, 2008, the Department of Ecology Air Quality Program rejected as incomplete the application of Easterday Ranches for an air quality permit. In its letter of

rejection, the air quality engineer estimated that the feedlot would require as much as 3,000,000 gallons of water per day to control fugitive dust. See Exhibit 11.

On November 12, 2008, the Department of Ecology issued two letters regarding the Easterday Ranches feedlot proposal. The first letter, directed to the Franklin County Building & Planning Department, expressed procedural concerns, noting that segmentation of water use components of the feedlot, including the large stockwater pond, was improper under SEPA. See Exhibit 12. The second letter, directed to Easterday Ranches, expressed the state's position that (1) permit exempt wells may be used in unlimited quantities to provide drinking water to livestock, but (2) industrial uses of water for animal feedlots in excess of 5,000 gallons per day requires a water right permit. See Exhibit 13.

On November 17, 2008, the Franklin County Commissioners held a "closed record" hearing of the appeal of the CUP issued to Easterday Ranches as brought by Scott Collin and neighboring landowners. Following the hearing, the Board issued Resolution No. 2008-480 denying the appeal. See Exhibit 14.

On November 17, 2008, attorney James Buchal submitted a letter to Columbia Snake Irrigators Association offering an interpretation of RCW 90.44.050 in opposition to that contained in the November 12, 2008 letter from Ecology to Easterday Ranches. See Exhibit 15.

On November 25, 2008, Center for Environmental Law & Policy and Five Corners Family Farmers submitted a letter to Governor Gregoire discussing the history of the Easterday Ranches dispute and offering an interpretation different from that contained in Mr. Buchal's letter of Nov. 17, 2008, and as argued for in this petition. See Exhibit 16.

On December 4, 2008, Jay Manning, Director of the Washington Department of Ecology, issued a letter to Senator Lisa Brown and other parties regarding "Reliance on the groundwater exemption for large stock operations," discussing the Easterday Ranches' proposal, offering the agency's interpretation of the permit exemption for stockwatering purposes, and inviting the legislature to take action to amend the statute. See Exhibit 17.

Additional Background Information

As of October 2008, the Department of Ecology's Water Rights Application Tracking System indicates there are 65 applicants for new water rights in Franklin County. See Exhibit 18 (WRATS list).

Easterday Ranches drilled a well on the feedlot property. The well extends 1700 feet below ground surface into the Grande Ronde Aquifer, a basalt aquifer that is part of the Columbia Plateau Basalt System. See Exhibit 19 (well log).

Groundwater resources in the vicinity of the Easterday feedlot are in decline. WAC Ch. 173-128A and Ch. 173-130A established the boundaries of the Odessa Subarea and a policy that allows mining of the Columbia Plateau Basalt Aquifer system in the subarea at an average rate of 10 feet per year. Odessa Subarea aquifers are experiencing severe, long-term declines. The Odessa Subarea boundary lies north of the Easterday feedlot by a few miles, and the Easterday feedlot well would withdraw water from the same basalt aquifer system. See Exhibit 20. Basalt aquifer groundwater resources are also experiencing long-term decline in the Pullman area, east of the Easterday feedlot. See Exhibit 21. Basalt aquifer groundwater resources are also experiencing long-term decline in the West Plains area,

northeast of the Easterday feedlot. Basalt aquifer groundwater resources are also experiencing long term declines in the Umatilla, Oregon area, south of the Easterday feedlot. See Exhibit 22.

The Columbia Plateau Basalt Aquifer System is hydraulically connected to the Columbia River and its tributaries. Well pumping from the basalts depletes instream flows in the Columbia River that are needed for migrating salmon and other instream purposes. See Exhibit 23.

In May 2008, the University of Washington Law School published a law review article examining the legislative history of the permit exemption contained in RCW 90.44.050. That article concluded that the legislative history of the statute does not support an interpretation that unlimited quantities of water may be used for livestock watering or industrial animal purposes. See Exhibit 24.

On May 30-31, 2008, the Center for Environmental Law & Policy held an "Exempt Well Workshop" to examine various issues relating to the permit exemption set forth in RCW 90.44.050. See Exhibit 25.

On 2008, the Pew Commission on Industrial Farm Animal Production issued its report, "Putting Meat on the Table: Industrial Farm Animal Production in America," discussing public health, environmental, animal welfare, and rural land use and economic impacts associated with industrial animal feedlots. See Exhibit 26.

(b)An actual controversy arises from the uncertainty surrounding the proposed use of a permit-exempt well for the Easterday Ranches feedlot.

Easterday Ranches has received a conditional use permit from Franklin County, has drilled a well, and is preparing to construct an industrial feedlot that will use water at the rate of 3 million gallons per day or more. According to Easterday's documents and the County CUP, Easterday Ranches will not obtain a permit to use water and instead will rely on a permit-exempt well to supply water to the feedlot.

Controversy No. 1:

- (1) Whether the "stock water purposes" proviso of RCW 90.44.050 applies to commercial animal feedlots, such as CAFOs and dairies.
- (2) Whether the "stock water purposes" proviso of RCW 90.44.050 authorizes the use of unlimited quantities of drinking water for livestock in any circumstance.
- (3) Whether the "stock water purposes" proviso of RCW 90.44.050 may be used to supply water in excess of 5,000 gallons per day for industrial livestock operational purposes such as dust control, boiler operations, barn and equipment washing and other uses.

At least four interpretations of the "stockwater purposes" prong of RCW 90.44.050 exist:

- The AG Opinion, AGO 2005 No. 17, which states that permit-exempt wells may be used in unlimited quantities for "stockwater purposes," but which does not define the term.
- A Conditional Use Permit issued by Franklin County, and opinions issued by Easterday Ranches and Columbia Snake River Irrigators Association, which state that

permit-exempt wells may be used in unlimited quantities for all aspects of industrial animal feedlots.

- The opinion of the Department of Ecology, which states that permit-exempt wells may be used in unlimited quantities to supply drinking water to livestock, including in industrial animal feedlots, but may only be used at the rate of 5,000 gallons per day for industrial applications, including dust control, barn cleaning and other uses associated with industrial feedlots
- The opinion of Center for Environmental Law & Policy and Five Corners Family Farmers, which state, and petition herein, that permit-exempt wells may only be used in the amount of 5,000 gallons per day for all uses associated with livestock and industrial animal feedlots.

There are a range of interpretations of the permit-exempt well provision that create actual controversy concerning the validity of Easterday Ranches' proposal to use a permit-exempt well to provide water to an industrial feedlot. Petitioners contend that Easterday Ranches may use, at most, 5,000 gallons per day without a water right permit. The resulting ambiguity about the application of the law requires resolution.

Controversy No. 2:

- (4) Whether new permit exempt wells authorized in RCW 90.44.050 may be utilized in areas where a moratorium (formal or informal) on groundwater development is in place because of water availability concerns.

Easterday Ranches proposes to utilize an exempt well in an area where new water rights cannot be obtained because of an informal moratorium on water use. At least 65 applicants have applied to the Department of Ecology for new water rights in this area. However, Ecology will not process their applications, presumably because of concerns about water availability. These concerns are manifest in the problem of long-term groundwater declines in the basalt aquifers in the Odessa Subarea, West Plains, Palouse Basin and Umatilla areas. In addition, groundwater from the Columbia Plateau Basalt System discharges to the Columbia River, where instream flows are insufficient to support recovery of endangered salmon species. Petitioners contend that water is not available to satisfy new groundwater uses, including permit-exempt wells.

Controversy No. 3:

- (5) Whether SEPA allows segmentation of the water supply elements of a proposal to develop an industrial animal feedlot, such as wells, stockponds, dust control (misting) equipment, etc.
- (6) Whether SEPA may be used to determine "impairment" as that term is used in the state Water Code, RCW Ch. 90.03.290.

The Franklin County process utilized under the State Environmental Policy Act that allows Easterday Ranches appears to allow segmentation of the environmental analysis of various water uses required for the feedlot operation, including use of the permit-exempt well, construction and use of stockpond, and use of a misting system for air quality control purposes. Petitioners contend that the environmental impacts of the proposed feedlot have not and are not being properly reviewed under SEPA and that a declaratory order is needed to establish the scope of the water use proposed for the Easterday feedlot and the process

by which the environmental impacts associated with that water use will be considered in a comprehensive fashion.

Franklin County accepted and relied upon an "impairment" report, submitted by the applicant, that purports to determine whether existing (senior) water users in the vicinity of Easterday Ranches proposal will be impaired by the well. Petitioners contend that it is improper for an agency other than the Department of Ecology Water Resources Program to make a determination of water right impairment, and further that such determination cannot be made in the SEPA process. A declaratory order is needed to establish that Franklin County is not authorized to rely on Easterday Ranches' "exempt well impairment analysis" or to make a determination of no impairment to existing water users in the process of determining that water is adequate or available to supply the feedlot.

Controversy No. 4:

- (7) Whether private entities may issue "Reports of Examination" or other documents authorizing use groundwater in Washington state.

Columbia Snake River Irrigators Association issued a consulting report that purports to be an "Exempt Well Impairment Analysis" and may have issued a "Report of Examination" for the Easterday feedlot well. Petitioners contend that private entities may not make determinations of impairment and issue documents that authorize the use of state groundwater or otherwise purport to function in the place of Washington state water rights.

(c) The uncertainty adversely affects petitioners.

Center for Environmental Law & Policy (CELP) is a membership-based, non-profit corporation that works to promote the public interest in water resources. CELP serves to protect public values in instream flows and drinking water aquifers through a variety of activities, including agency advocacy, public policy reform, grassroots outreach, and litigation. CELP has longstanding interests in the permit exemption contained in RCW 90.44.050, including objections to the interpretation of that statute to allow unlimited use for stockwater or any other purpose. CELP also has longstanding interests in protecting instream flows in the Columbia River, which are affected by groundwater pumping. Finally, CELP has members in the Eltopia area who rely on the basalt aquifers of the Columbia Plateau Basalt Aquifer System and who may be affected by water pumping and use on the Easterday Ranches feedlot.

Five Corners Family Farmers (FCFF) is a membership-based, nonprofit corporation that works to protect water resources for its members in the Franklin County area. FCFF has members in the Eltopia area who rely on the basalt aquifer of the Columbia Plateau Basalt Aquifer System and who may be affected by water pumping and use on the Easterday Ranches feedlot.

(d) The adverse effects of uncertainty on petitioners outweigh adverse effects on others and/or the general public.

By circumventing the water right permitting process, Easterday Ranches' proposal for water use is not subject to the usual tests under the Washington Water Code, RCW 90.03.290 to determine whether water is available or whether the proposed water use would harm existing water users or the public interest. The proposed water use also circumvents an existing list of applicants for new water rights that dates back to 1993. Water code

procedures exist to protect water users and the public interest in water resources and to create an orderly process of priority by which water is allocated. A requirement that Easterday Ranches abide by the same laws and rules that govern other waters users and water right applicants will not create adverse effects on Easterday or the public.

Similarly, a requirement that Easterday Ranches abide by State Environmental Policy Act (SEPA), RCW Ch. 43.21C, laws and rules will not create adverse effects on Easterday or the public.

Finally, a declaratory order establishing that private parties may not authorize use of the waters of Washington State will not create adverse effects on Easterday or the public.

(e) No additional rules or procedures apply.

The Department of Ecology has adopted no additional rules or procedures pursuant to RCW 34.05.240(2).

Exhibits:

1. Map, Eltopia-Mesa vicinity.
2. AGO 2005 No. 17 (Stockwater Opinion).
3. Easterday Ranches, Application for Conditional Use Permit.
4. Easterday Ranches, SEPA Checklist.
5. Bucholtz, Thomas R., PE, Water Man Consulting, Easterday Feedlot Exempt Well Impairment Analysis (8-28-08).
6. Collin, Scott and Randy Jones, letters and appeal documents.
7. Franklin County Planning & Building Department, Franklin County Conditional Use Permit No. 2008-11 (9-3-08).
8. Columbia Snake River Irrigators Association, Water Policy-Information Memorandum (9-10-08).
9. Easterday Ranches, Declaration of Appropriation of Groundwater for Beneficial Use and Plan of Development (10-13-08) and Columbia Snake River Irrigators Association, Memo re Documentation Packet (10-13-08).
10. Center for Environmental Law & Policy, Letter to Jerrod MacPherson, Franklin County Planning & Building Dept. (10-14-08).
11. Washington Dept. of Ecology, Air Quality Program, Letter to Cody Easterday, Easterday Ranches, Inc. (10-29-08).
12. Washington Department of Ecology, Eastern Regional Director, Water Resources Program, Letter to Jerrod MacPherson, Franklin County Planning and Building Department (11-12-08).
13. Washington Department of Ecology, Water Resources Program, Letter to Bill Easterday, Easterday Ranches (11-12-08).
14. Franklin County Commissioners, Resolution No. 2008-480 (11-17-08).
15. Buchal, James, Letter to Darryll Olsen, Columbia Snake River Irrigators Association re interpretation of permit-exemption in RCW 90.44.050 (11-17-08).
16. Center for Environmental Law & Policy, Letter to Gov. Christine Gregoire (11-25-08).
17. Manning, Jay, Director, Washington Department of Ecology, Letter to Senator Lisa Brown, et al., (12-4-08).
18. Washington Department of Ecology, Water Resources Program, Water Rights Application Tracking System list for Franklin County (10-23-08).
19. BJ Exploration & Drilling Co., Water Well Report (11-19-08).

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20. U.S. Bureau of Reclamation, Odessa Subarea Special Study, on-line at http://www.usbr.gov/pn/programs/ucao_misc/odessa/index.html. See also Columbia Institute for Water Policy, Odessa Aquifers: Crisis in Sustainability, on-line at <http://columbia-institute.org/oa/odessa/Home.html>.
 21. Palouse Basin Aquifer Committee, Pumping & Water Levels, WSU Test Well hydrograph (2007). See also, PBAC, Annual Report and other materials, on-line at <http://www.webs.uidaho.edu/pbac/>.
 22. U.S. Geological Survey, Umatilla Basin Ground-Water Study, on-line at http://or.water.usgs.gov/proj/umatilla_gw/index.html. See also Ex. 23, Fig. 2.
 23. U.S. Geological Survey, Ground-Water Availability Assessment for the Columbia Plateau Regional Aquifer System, Washington, Oregon, and Idaho, Fact Sheet 2008-3086 (Sept. 2008). See also Columbia Plateau Ground-Water Availability Study, on-line at <http://wa.water.usgs.gov/projects/cpgw/index.html>. See also Vaccaro, John, USGS, "Potential Impacts of Climate Change on Ground-Water Resources of the Columbia River Basin."
 24. Dunn, Kara, "Got Water? Limiting Washington's Stock Water Exemption to Five Thousand Gallons Per Day," University of Washington Law Review, 83 Wash. L. Rev. 249 (May 2008), on-line at www.celp.org.
 25. Proceedings, Exempt Well Workshop, sponsored by Center for Environmental Law & Policy and Aqua Permanente (May 30-31, 2008), on-line at <http://www.celp.org/kittitas/conference/proceedings.html>.
 26. Pew Commission on Industrial Farm Animal Production, "Putting Meat on the Table: Industrial Farm Animal Production in America," (August 2008), on-line at <http://www.ncifap.org/>.