

NO. 84632-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents,

and

WASHINGTON CATTLEMEN'S ASSOCIATION, COLUMBIA
SNAKE RIVER IRRIGATORS ASSOCIATION, WASHINGTON
STATE DAIRY FEDERATION, NORTHWEST DAIRY
ASSOCIATION, WASHINGTON CATTLE FEEDERS ASSOCIATION,
CATTLE PRODUCERS OF WASHINGTON, WASHINGTON STATE
SHEEP PRODUCERS and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

AGRICULTURAL ASSOCIATIONS' RESPONSE TO APPELLANTS'
STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION

This case is not a “fundamental question of law of first impression.”¹ This case is not about exploitation and consumption of a regulatory scheme. Nor is this case about the misuse of a public resource by the agricultural community as Appellants assert. Instead this is a simple case of statutory interpretation in which the Franklin County Superior Court applied this Court’s ruling in *Ecology v. Campbell & Gwinn, L.L.C.*² and Division II’s ruling in *Kim v. PCHB*³ to conclude RCW 90.44.050 clearly and unambiguously exempts withdrawals of any quantity of water for stock-watering purposes from the Chapter 90.44 and 90.03 et seq. RCW water rights permit process.

Intervenor-Respondents Washington State Dairy Federation, Northwest Dairy Association, Washington Cattle Feeders Association, Cattle Producers of Washington, Washington State Sheep Producers and Washington Farm Bureau (hereinafter referred to collectively as the “Agricultural Associations”) oppose direct review in this matter because the Appellants have failed to demonstrate this case presents an issue of fundamental public importance that requires a prompt and ultimate resolution.

¹ *Appellants’ Statement of Grounds for Direct Review*, p. 1.

² *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d. 4 (2002).

³ *Kim v. PCHB*, 115 Wn. App. 157, 61 P.3d 1211 (2003).

II. NATURE OF CASE AND DECISION

Throughout this case, Appellants have misunderstood RCW 90.44.050's function. Appellants argue RCW 90.44.050 is a water use statute and the use of water for stock-watering purposes should be limited to 5,000 gallons per day ("gpd") or to some other arbitrary and undefined small quantity. RCW 90.44.050 is a permit statute that specifies when a permit for a new groundwater appropriation will be required and, in certain limited situations, when an appropriation of water is exempt from needing a permit. The Franklin County Superior Court, after concluding RCW 90.44.050 is clear and unambiguous correctly determined that Easterday's withdrawals of water for stock-watering purposes were exempt and not limited by quantity.

The Franklin County Superior Court decided this case on cross-motions for summary judgment. Appellants' motion for summary judgment asking the court to declare as a matter of law that permit exempt withdrawals of water for stock-watering purposes under RCW 90.44.050 are limited to 5,000 gpd or some other undefined quantity was denied by the court. Respondent Easterday's motion for summary judgment seeking dismissal because the Appellants lacked standing was denied by the court. The court granted the State defendants⁴ and the Agricultural Associations' motions for summary judgment asserting RCW 90.44.050 is unambiguous and the plain meaning of RCW 90.44.050 is that permit-exempt

⁴ The State Defendants include the State of Washington and the Washington State Department of Ecology (hereinafter "Ecology").

withdrawals of public groundwater for stock-watering purposes are not limited to any quantity. The court also granted the Agricultural Associations' motion, concluding as a matter of law Appellants were not entitled to an injunction requiring Ecology to interpret and apply RCW 90.44.050 as limited to withdrawals of 5,000 gpd for stock-watering purposes.

Appellants' focus in this case has been to argue Respondent Easterday Ranches, Inc.'s⁵ (hereinafter "Easterday") use of water and the uses by other agricultural producers as a result of the RCW 90.44.050 stock-water exemption harm the Appellants and the State's water resources. Appellants have advanced this argument throughout the case without any specific evidence of harm and while ignoring the distinction between how one acquires a water right and how one uses a water right. Appellants have sought judicial legislation of a nonexistent problem. The Franklin County Superior Court correctly chose not to legislate from the bench.

III. ISSUES PRESENTED FOR REVIEW

Appellants, in their Statement of Grounds for Direct Review, expend significant effort discussing their theory of the case and advancing

⁵ Respondent Easterday has filed a *Notice of Cross-Appeal*, asserting (1) the Thurston County Superior Court erred in denying its motion for attorney fees when it granted the change in venue from Thurston County to Franklin County; (2) the Franklin County Superior Court erred when it denied Easterday's motion to dismiss for lack of standing; and (3) the Franklin County Superior Court erred when it denied Easterday's request for attorneys fees under several different theories. Respondent Easterday has not sought direct review of its cross-appeal.

arguments considered and rejected by the Franklin County Superior Court. The recitation by Appellants of the issues presented for review does little to persuade this Court to accept direct review pursuant to RAP 4.2(a)(4). As this Court considers the issues presented in the context of RAP 4.2(a)(4) it is important to consider RCW 90.44.050.

The State of Washington's groundwater code was codified as Chapter 90.44 RCW in 1945.⁶ There is no legislative history relating to RCW 90.44.050 and the groundwater code. RCW 90.44.050's language creates four classes of water withdrawals which are exempt from needing a permit:

1. any withdrawal for stock-watering purposes,
2. any withdrawal for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area,
3. any withdrawal for single or domestic group uses in an amount not exceeding 5,000 gallons a day or as provided in RCW 90.44.052, or
4. any withdrawal for an industrial purpose in an amount not exceeding 5,000 gallons a day.⁷

⁶ See generally, *State of Washington, Dept. of Ecology, Stockwater Working Group Report* (2009), http://www.ecy.wa.gov/programs/WR/hq/pdf/swtr/011010_stockwater_workinggroup_finalreport.pdf.

⁷ RCW 90.44.050 (emphasis added); see also, *Kim v. PCHB*, 115 Wn. App. 157, 61 P.3d 1211 (2003).

Once the water is withdrawn and put to beneficial use, a water right is created.⁸ Under RCW 90.44.050, the exemption for stock-water is specifically not limited to withdrawals of less than 5,000 gallons a day. The Washington State Attorney General adopted this analysis of RCW 90.44.050 when he issued AGO 2005 No. 17.

In 1945 when the legislature made policy decisions in adopting the groundwater code it made a reasoned choice to exempt the four types of withdrawals, including water withdrawn for stock-watering purposes, from the permit system. The legislature's choice to exempt certain types of withdrawals from the permit system makes sense because the types of withdrawals, including livestock water was (and are) small when compared to other uses of water. When the amount of water used for stock-watering purposes is compared to other high uses of water, including municipal uses and irrigation uses, it is clear the amount of water withdrawn for stock-watering purposes in Washington is not a significant amount in a statewide policy context. Appellants presented no evidence or compelling arguments that the withdrawals of water for stock-watering purposes harmed the State's water resources, let alone the Five Corners Family Farmers water rights.

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⁸ RCW 90.44.050; *Campbell & Gwinn*, 146 *Wn.2d* at 9.

IV. APPELLANTS HAVE FAILED TO DEMONSTRATE
THAT THIS CASE SATISFIES THE CRITERIA
FOR DIRECT REVIEW.

Appellants assert that this Court should accept direct review pursuant to RAP 4.2(a)(4).⁹ RAP 4.2(a)(4) allows direct review by this Court of a Superior Court decision in this State only in cases involving a fundamental and urgent issue of broad public import that requires prompt and ultimate determination.

Appellants seem to be arguing that "this is a water rights case" and therefore this Court should grant direct review. Just because this case is a water rights case does not mean the case warrants direct review as a fundamental and urgent issue of broad public import requiring prompt and ultimate determination. In this case, there is no evidence to suggest Easterday's or any other livestock producer's withdrawal of water under the exemption harmed or will harm anyone. In arguing that this is a case of broad public importance, Appellants ignore the fact that water rights created by allowing the withdrawal of groundwater for stock-watering purposes are only exempt from the permit requirements. Water rights created through the permit exemption are otherwise fully regulated just as

⁹ Appellants infer but do not clearly articulate an argument that RAP 4.2(a)(3) is a basis for direct review when they assert "For 60 years, the State of Washington, including members of the judiciary engaged in adjudicating water rights, interpreted the stock-water provision of RCW 90.44.050 as within the 5,000 gallons per day limitation." (Appellants' Statement of Grounds for Direct Review, p. 3). However, Appellants point to no specific judicial decision that the Franklin County Superior Court's decision is in conflict with. Two cases, this Court's decision in *Campbell & Gwinn* and Division II's decision in *Kim*, which are ignored by Appellants, are in accord on the interpretation of RCW 90.44.050.

any other water right in the State is regulated, thus Appellants, if harmed by Easterday's use of water, can rely on the Chapter 90.03 and 90.44 RCW provisions relating to regulation of water rights.

While this case is important to the Agricultural Associations it is not a fundamental and urgent issue requiring prompt and ultimate determination. Appellants assert exempt wells not subject to the permitting process have not been examined for potential impairment of senior water rights, none have been examined for sustainability¹⁰, and none have been examined for whether the type of use is in the public interest."¹¹ Appellants conclude that "therefore, the issue affects Washington citizens and agriculture state-wide." Appellants miss the mark. Regardless of how the water rights are created, whether as a result of Ecology issuing a permit or as a result of a water user withdrawing the water and applying water to beneficial use and thus obtaining a right exempt from the permit requirement pursuant to RCW 90.44.050, the water right, once created, is subject to regulation just as any other water right, and that is the Five Corners Family Farmers' remedy. Appellants' situation is no different than any other water right holder who believes another's use of water does or may impair their use. Water right holders across the State must and do rely on the water code to protect their water rights from impairment by another's use. Appellants allege that

¹⁰ "Sustainability" is Appellants' term and is not a criterion that is reviewed when Ecology analyzes a water right permit application under Chapters 90.44 and 90.03 RCW.

¹¹ *Appellants' Statement of Grounds for Direct Review*, p. 15.

Easterday's withdrawal of water would impair the Appellant water right holders in the Five Corners area of Franklin County. Appellants' assertion is a factual assertion related to a specific geographic area. Appellants introduced evidence of alleged impairment, but the evidence was weak and unpersuasive. Now on appeal, Appellants have not identified the issue of whether Easterday's use of water will impair Appellants' water rights as an issue on appeal? Appellants' alleged but unproven impairment of Appellants' water rights does not create a fundamental and urgent issue of broad public import that requires prompt and ultimate determination. Instead, Appellants' alleged impairment is a local impairment issue that cannot be based on speculation and has no effect on any other water users in this State. Appellants have failed to explain why existing legal remedies would not protect their rights if Appellants' speculative harm were to materialize in the future.

Appellants are correct that RCW 90.44.050 applies statewide but this Court should not allow Appellants to create a fundamental issue of statewide significance through speculation. Appellants have not demonstrated a fundamental and urgent issue of broad public import. Appellants have not demonstrated an issue in the case that requires prompt and ultimate determination.

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V. CONCLUSION

For the reasons set forth above, this Court should not accept direct review of this case and instead allow this case to proceed through Division III.

DATED this 23 day of June, 2010.



Jeff Stollhower, WSBA #14526
Attorney for Washington State Dairy
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Feeders Association, Cattle
Producers of Washington,
Washington State Sheep Producers,
Washington Farm Bureau, together
the "Agricultural Associations"

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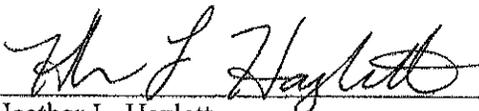
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I certify, or declare, under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Ellensburg, Washington this 23rd day of June, 2010.



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