

SUPREME COURT NO. 84632-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

*Appellants/Cross-Respondents,*

v.

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

*Respondents/Cross-Appellants,*

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.*

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STATE OF WASHINGTON  
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**AMICUS BRIEF OF INTERESTED INDIAN TRIBES**

**OFFICE OF THE RESERVATION ATTORNEY FOR THE LUMMI NATION**

Diana Bob, WSBA #37405  
2616 Kwina Road  
Bellingham, WA 98226  
360-384-7164

*Attorney for the Lummi Nation  
& Coordinating Counsel for Amici Tribes*

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## INTERESTS OF THE *AMICI*

### A. The Amici Tribes Hold Federally Reserved Fishing Rights

The *amici* tribes<sup>1</sup> are federally recognized Indian tribes located throughout the state. They base their participation on the statewide impact on their federally protected rights of the matters being considered in this case. Along with other rights, each Tribe holds fishing rights that were specifically reserved by treaty or that are an integral part of the Reservations that comprise their homelands. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash.), *aff'd*, 520 F.2d 676 (9<sup>th</sup> Cir. 1975), *cert. denied* 423 U.S. 1086 (1976), *aff'd in substantial part*, 443 U.S. 658 (1979); *Sohappy v. Smith*, 302 F. Supp. 899 (D.Or. 1969); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). The importance of fish to the Tribes cannot be overstated. As early as 1905 the Supreme Court characterized these rights as being “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905). For the fish themselves, adequate stream flows literally are the “atmosphere they breathe,” for without sufficient water for

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<sup>1</sup> The amici are the Colville Confederated Tribes, the Jamestown S’Klallam Tribe, the Lummi Nation, the Nisqually Tribe, the Port Gamble S’Klallam Tribe, the Puyallup Tribe, the Quinault Indian Nation, the Suquamish Tribe, the Swinomish Indian Tribal Community and the Yakama Nation.

spawning, rearing and migration, there will be no salmon.

The Treaty Tribes hold the right to fish on all runs that pass through their “usual and accustomed” fishing areas, regardless of where those fish runs originate.<sup>2</sup> The interpretation of the water code provisions at issue in this action will affect streams everywhere in Washington. Thus, the Tribes have a vital interest in assuring that state law provisions that support instream flows are honored and enforced. Because surface waters and ground waters are inherently and inextricably linked through the natural hydrologic cycle, the Tribes’ interest extends to ground water as well as surface water. *See Postema v. PCHB*, 142 Wn.2d 68, 75, 11 P.3d 726 (2000). The interpretation of the statute at issue in this case – an interpretation that would allow unlimited ground water withdrawal without permits for undefined “stock watering” purposes – threatens to significantly undermine state law protections for instream flows by excluding a substantial quantity of water rights from effective state regulation in advance of use. For these reasons, the Tribes seek to make their views known as *amicus curiae*.

**B. Ground Water Withdrawals Reduce Stream Flows And Endanger Fish Runs**

Unlimited and unpermitted groundwater withdrawals in hydraulic

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<sup>2</sup> *See United States v. Washington*, 384 F.Supp. at 344 (treaty fishing rights extend to all fish available for harvest in a tribe’s usual and accustomed fishing grounds).

continuity to surface water will result in reduced instream flows.

*Postema*, 142 Wn.2d at 75. Reduced instream flows will impact fish production and productivity of the watersheds, as the Department of Ecology recognizes:

Low stream flows put fish and other resources at risk. In many watersheds, low flows have contributed to the decline of many threatened fish populations including Chinook, Coho and chum salmon, cutthroat, steelhead and bull trout.<sup>3</sup>

Reduced fish production will detrimentally affect tribal economies, the livelihood of tribal members, and tribal cultures.

Inadequate stream flows are not the sole factor in the decline of fish runs in Washington, but they are an important factor. And ground water plays a crucial role in the life of many fish bearing streams.

[I]n addition to providing a high quality, dependable source of water to wells, ground water also supplies a large percentage of stream flow for most of Washington's rivers and streams. Ground water flow into a stream is especially important during the drier months when there is little or no rainfall.

From July through September, many of the streams in our state are flowing at their lowest levels of the year. It is during this time that stream temperatures are highest, contaminants are more concentrated, and fish survival is at-risk due to low flow conditions. It is also during this time that ***most of the flow in many streams is actually ground water draining out of an aquifer.*** In addition to providing

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<sup>3</sup> Washington Department of Ecology, *Managing Our Water Successfully*, Oct. 2006, pg. 7, at <http://www.ecy.wa.gov/pubs/0611023.pdf>.

the majority of stream flow, [ground water] also provides cooler water that fish need for survival. (*Emphasis added.*)<sup>4</sup>

### **C. Growing Consumptive Uses Reduce Stream Flows**

The demand for consumptive uses of water is growing rapidly. The 2010 Washington Census data shows a 14.1% population growth in the last ten years, necessitating sound water management processes.

Washington State is in the midst of rapid population growth and economic expansion. In 1972 our state's population was 3.4 million. Today it is 6.2 million. The growth rate in Washington State is such that we can expect to add a city the size of Tacoma to our state every two to three years. By 2030, the population is expected to reach between eight to nine million. . . . Proper water management is necessary to provide sufficient and reliable water supplies for our growing population, and to support our competitive position in the global economy.<sup>5</sup>

Many streams and rivers used by salmon in at least 16 watersheds throughout the state (about a quarter of the state's basins) are over-appropriated.<sup>6</sup>

### **D. Livestock Uses Rely On Ground Water**

The livestock industry in Washington depends heavily on ground

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<sup>4</sup> Washington Department of Ecology, *Water Resources Management Program, 2006-2007 Annual Report*, p. 11, at <http://www.ecy.wa.gov/pubs/0711036.pdf>

<sup>5</sup> Washington Department of Ecology, *Managing Our Water Successfully*, Jan. 2007, p. 4, at <http://www.ecy.wa.gov/pubs/0611023.pdf>

<sup>6</sup> Washington Department of Ecology, *State Water use Laws: Compliance and Enforcement*, at [http://www.ecy.wa.gov/programs/wr/comp\\_enforce/comp\\_enfor.html](http://www.ecy.wa.gov/programs/wr/comp_enforce/comp_enfor.html).

water. The Intervenor Livestock Interests have averred that “[a]pproximately 70% of the members of the Washington Cattle Feeders Association rely on water withdrawn from wells that are exempt from permitting under RCW 90.44.050.”<sup>7</sup> These numbers will only increase if the Court concludes that there is no limit on permit-exempt stock watering withdrawals. The cumulative effect of unlimited withdrawals will result in harm to instream flow rights that are protected by statute and case law. These withdrawals are especially damaging when they occur in small tributary streams that are both vital to salmon spawning, rearing and migration, and susceptible to depletion at crucial times of the year.

A recent comprehensive report by the United States Geological Survey on water use in Washington estimates livestock consumed 30.7 million gallons per day in 2005, of which 68 percent (20.9 million gpd) came from ground water.<sup>8</sup> To put this in context, the same report

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<sup>7</sup> See Declaration of Ed Field in Support of Motion for Intervention, *CP 391*. It is unclear whether Mr. Field’s declaration alleges that 70% of the industry’s ground water use is unpermitted, or whether he means that 70% of the total use is attributable to ground water, which he contends does not require a permit. Ground water rights that were perfected prior to 1945 when the Ground Water Code was enacted do not require permits. If, as the Livestock Interests contend, many of the stock watering uses date back several generations, the number of current operations that are potentially affected by the statute is greatly reduced.

<sup>8</sup> Lane, R.C., *Estimated Water Use in Washington, 2005*, U.S. Geological Survey Scientific Investigations Report 2009–5128, p.19 (2009) at <http://pubs.usgs.gov/sir/2009/5128/>.

estimates domestic water consumption at 103 gpd per person statewide.<sup>9</sup> Thus, the quantity of ground water consumed daily by livestock in Washington would meet the domestic needs of 200,970 Washington residents, or about the population of the city of Tacoma, Washington's third largest city.

Likewise, the 446,075 gpd that Easterday Ranches intends to use without a state water permit, *CP571*, would meet the average daily domestic needs of 4,330 Washingtonians. Allowing Easterday Ranches to take this water without a permit is equivalent to authorizing a 1700 unit subdivision without a permit, advance analysis or effective regulation.<sup>10</sup>

If Ecology and Easterday are correct in their interpretation of RCW 90.44.050, this huge quantity of water is entirely exempt from the state's otherwise comprehensive water permitting system. Indeed, even substantially larger quantities of water would be permit exempt for livestock use. Ecology reports that as of 2006 there were 707 medium to large Concentrated Animal Feeding Operations (CAFO) in Washington,

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<sup>9</sup> *Id.* at 11.

<sup>10</sup> This assumes an average of 2.5 persons per unit. *Cf. Dept. of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002) (permit exemption for domestic use limited to one 5,000 gallon per day exemption in a residential development project, regardless of the number of wells constructed.)

of which 583 housed dairy cows and other cattle.<sup>11</sup> Each of these CAFOs, as well as a multitude of smaller farming operations, would be eligible to take unlimited quantities of ground water outside the permitting system if the lower court decision in this case is upheld.

**E. Washington's Comprehensive System of Water Regulation Recognizes Stream Flows As Water Rights**

A primary feature of Washington's water codes is a comprehensive permitting system that requires advance review and approval of all substantial water appropriations. This system recognizes instream flows as protected water rights that must be accommodated in water permit decisions.

The statutes plainly provide that *minimum flows*, once established by rule, are *appropriations* which cannot be impaired by subsequent withdrawals of groundwater in hydraulic continuity with the surface waters subject to the minimum flows. *RCW 90.03.345; RCW 90.44.030*. A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and RCW 90.03.290 mandates denial of an application where existing rights would be impaired.

*Postema*, 142 Wn.2d at 82 (emphasis in original).

The treatment of instream flows as water rights within the water

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<sup>11</sup> Washington Department of Ecology, *Concentrated Animal Feeding Operation Amended Fact Sheet*, NPDES and State Waste Discharge Permit, June 21, 2006, p.6, at [http://www.ecy.wa.gov/programs/wq/permits/cafo/cafo\\_final.fs.pdf](http://www.ecy.wa.gov/programs/wq/permits/cafo/cafo_final.fs.pdf). A "medium" CAFO contains between 200 and 699 mature dairy cows, or 300 to 999 other cattle. A "large" CAFO contains quantities of animals greater than a "medium" one. *Fact Sheet* at 32. Ecology counted 124 "large" CAFOs for cattle and 459 "medium" ones. *Id.* at 6.

codes' provides some protection for the Tribes' interest in healthy fisheries.<sup>12</sup> But unlimited ground water withdrawals for stock watering purposes have the potential to dramatically impair instream flows necessary for healthy fish runs, especially in small tributary streams where salmon spawning, rearing and migration take place. Allowing unlimited ground water rights to be developed without permit will make it more difficult to regulate the system in favor of senior rights. Senior water rights will be continually undercut by unregulated withdrawals that may not have been allowed had the water user gone through the permit process that applies to all other similarly sized uses. Indeed, the experience related by appellant Scott Collin illustrates the likelihood that over-appropriation of water will occur. Mr. Collin, whose farm is located near Easterday Ranches, duly applied for a ground water right for agricultural purposes other than stock watering and was informed by the Department of Ecology that his application could not even be processed. *CP 295*. Meanwhile, Easterday Ranches is allowed to take several hundred thousand gallons of ground water daily without the slightest review by Ecology.

This inconsistency in treatment and the related important impacts

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<sup>12</sup> As in *Postema*, the Tribes' arguments in this brief rest solely on state law. The Tribes make no arguments based on their federally reserved rights or any other rights under federal law, and instead reserve the right to make all such arguments elsewhere.

on the Tribes' reserved fishing rights prompt the Tribes to submit this *amicus curiae* brief.

## ARGUMENT

### A. Washington's Permit System Applies To All Water Rights With Only Minor Exceptions.

“Subject to existing rights all waters within the state belong to the public . . .” *RCW 90.03.010*. Individuals may obtain the right to *use* this public resource upon compliance with the state water code, *id.*, and permitted uses are protected against impairment by future users. *Id.* (“[a]s between appropriations, the first in time shall be the first in right.”) There are no exemptions from the permit requirement for surface water diversions, regardless of size. *RCW 90.03.250*; *Postema, supra*; *Neubert v. Yakima-Tieton Irr. Dist.*, 117 Wash.2d 232, 814 P.2d 199 (1991). The Groundwater Code starts from a similar premise, *Hillis v. Dep't of Ecology*, 131 Wash.2d 373, 383, 932 P.2d 139 (1997), and Ecology must apply the same “four part test” in *RCW 90.03.290* for evaluation of whether to grant a surface water permit when it evaluates whether to grant a groundwater permit. *RCW 90.44.060*.

The Groundwater Code was enacted in 1945 at the request of Washington municipalities as an integral part of the state water code.<sup>13</sup>

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<sup>13</sup> See Wash. Dept. of Conservation and Development, *Thirteenth Biennial Report of the Department of Conservation and Development*, p. 44 (1946).

The motivation for the Groundwater Bill was to manage and regulate groundwater use in the state on a basis comparable to surface water regulation. *RCW 90.44.020*. The Groundwater Code has two main concerns: (1) ensuring that there is regulatory management over the quantity of water that is both physically and legally available for use; and (2) ensuring that a new use will not impair or adversely impact an existing use. The Groundwater Code is based on a simple regulatory premise: there shall be no withdrawal of ground water, nor development of any well for a ground water withdrawal without an application to ***and permit to proceed*** from Ecology. *RCW 90.44.050*.

This Court recently summarized this permitting system as a multi-step process involving public notice and participation together with Ecology's application of the statutory "four part test" in *RCW 90.03.290*. See *Lummi Indian Nation v. State*, 170 Wn.2d 247, 253, 241 P.3d 1220 (2010).

Permit exempt uses for small ground water uses bypass this entire regulatory system. The Legislature provided limited exceptions to the permitting regulatory regime for several categories of "***small***" groundwater withdrawals. Those limited exceptions are listed serially in *RCW 90.44.050*, which may be diagramed as follows:

[A]ny withdrawal of public groundwaters for

stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses

in an amount not exceeding five thousand gallons a day . . .

is and shall be exempt from the [permit requirement] . . .

Ecology and Easterday urge, and the Superior Court held, that the limiter “in an amount not exceeding five thousand gallons per day” applies only to the last of the three categories of exempt uses set out in this portion of the statute. However, the statute itself immediately negates this interpretation by providing that “the department [of Ecology] from time to time may require the person or agency making any **such small withdrawal** to furnish information as to the means for and the quantity of that withdrawal.” *Id. (emphasis added)*. Another provision allows any “party making withdrawals of groundwaters of the state **not exceeding five thousand gallons per day**” to apply for and obtain a permit and certificate for such withdrawal if it chooses to do so. *Id. (emphasis added)*.

Withdrawals cumulatively sufficient to supply the daily demand of the entire population of Tacoma, or, as in Easterday’s case, individually sufficient to supply a 1,700 unit residential subdivision, can hardly be characterized as “small”. Indeed, Easterday Ranches’ intended use of 446,075 gpd is approximately 90 times larger than the 5,000 gpd limit

specified in the statute.

Consistent with the express characterization of these exemptions as involving “small withdrawal[s],” for 60 years Ecology uniformly interpreted each of the exemptions, including the stock water provision, as having a 5,000 gpd limit. In *DeVries v. Dep’t of Ecology*, No. 01-073 (PCHB 2001), the State, through Ecology, successfully argued that the legislative history and plain reading of RCW 90.44.050 limits the stock water exemption to 5,000 gpd. *DeVries* is the only prior case to interpret this statutory provision.

The State now offers a contradictory position and argues that the 5,000 gpd limit applies only to the last of the categories of exempt uses that precede it. It further argues that the meaning of the statute is plain on its face, and that this Court need not consider statutory context, legislative intent, or applicable rules of statutory construction. *State Brf. at 10*. However, Ecology’s current claim is negated by its prior contradictory position in *DeVries*.

**B. The Court Must Consider The Entire Statute To Properly Interpret the Permit Exemption Provision**

“Plain meaning is . . . discerned from all the Legislature has said *in the statute and related statutes* which disclose legislative intent about the provision in question.” *Campbell & Gwinn*, 146 Wn.2d at 11 (emphasis

added). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. *Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd. for King County*, 127 Wash.2d 759, 771, 903 Wn.2d 953 (1995). Here, at least three reasonable interpretations of the statute are possible: (1) the 5,000 gpd limit applies to each of the three categories of exempt uses separately; (2) the limit applies to the three enumerated uses as a group; or (3) the limit applies only to the third such use.

In its briefing, the State ignores the first alternative reading and addresses only its claim that Five Corners Farms has argued for two variations on one interpretation: that the three enumerated uses *as a group* are limited to 5,000 gpd for any given user, or that the stock water exemption applies only to “small rural homesteads” that have only a few head of livestock: *State Brf. at 7*. The State’s argument fails to demonstrate that any other reading of the statute other than its new, preferred interpretation is “unreasonable”.

The State ignores its own longstanding, consistent interpretation of the statute, which came to an abrupt end in 2005 when the Attorney General issued an opinion stating that no quantity limit applied to the unpermitted use of groundwater for watering livestock. Following this opinion, Ecology abandoned its prior interpretation, upheld in *DeVries*,

and began allowing unlimited groundwater use for watering livestock without requiring a permit.<sup>14</sup>

The Attorney General's 2005 opinion runs counter to applicable standards of statutory interpretation, and it is inconsistent with the Attorney General's prior opinions relating to the same statute. In contrast to the 2005 opinion, the Attorney General issued an opinion on October 10, 1997, which concluded that:

[i]f the [ground water permit] exemption is read broadly, a significant amount of water might be withdrawn "outside" the regulated water system, undercutting the central purpose for enacting the water code. Accordingly, we conclude that where water is withdrawn by a property owner for a single housing development, within a reasonably short period of time, a single "withdrawal" occurs for purposes of applying RCW 90.44.050 and determining whether the withdrawal requires a water rights permit, no matter how many individual wells or other withdrawal mechanisms are employed.

*AGO No. 6 (1997)*. The Attorney General's reasoning and opinion was subsequently validated by this Court in *Campbell & Gwinn, LLC.*, 146 Wn.2d 1. A similar approach and conclusion is required here.

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<sup>14</sup> As the Court recently concluded, "where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or revision of the statute, rather than a new agency interpretation." *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). The recent about-face by the Attorney General is based on tenuous legal reasoning and undercuts 60 years of consistent interpretation by Ecology, which has specialized knowledge of managing water rights and resources.

**C. The “Last Antecedent Rule” Does Not Trump Legislative Intent**

Did the Legislature intend to exempt a large, concentrated segment of agricultural water use from requirements that apply to all other agricultural uses, not to mention all domestic, commercial, municipal and industrial uses of comparable size?

Instead of addressing this question, Ecology and Easterday take refuge behind one comma – or rather the absence of a comma. Their entire “plain meaning” argument comes down to application of “the last antecedent rule” of grammar. *See, e.g., State Brf at 24.* Simply stated, if the 5,000 gpd limit were set off by a comma separating that phrase from the last enumerated use, the limitation would clearly apply to all the enumerated uses. *See In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 781, 903 P.2d 443 (1995)* (comma introducing “but only if” qualifying clause supported argument that qualifier applied to all of the nouns listed before the clause.) The argument regarding the significance of the absence of a comma is premised on the assertion that only the immediately preceding use – the “last antecedent” – is modified by the limitation that follows it.

This argument, however, fails to recognize that the “rule” is only a guideline applied to aid interpretation *in the absence* of other evidence of

legislative intent. The “rule” cannot be applied to **override** or avoid examination of legislative intent. See N. Singer, *Sutherland on Statutory Construction* § 47.33, p. 369 (6th rev.ed. 2000)(“Referential and qualifying words and phrases, *where no contrary intention appears*, refer solely to the last antecedent”(emphasis added)); *cf. Whatcom Co. v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (“The purpose of an enactment should prevail over express but inept wording”).

As stated by the United States Supreme Court, “this rule is not an absolute and can assuredly be overcome by other indicia of meaning. . . .” *Barnhardt v. Thomas*, 540 U.S. 20, 26 (2003). A problem that arises from “less-than-meticulous” legislative drafting, *United States v Hayes*, 555 U.S. 415 (2009), should not be resolved by reference to a grammatical ideal that fails to accurately account for legislative intention. In *Barnhardt*, the Court applied the rule to support its conclusion, but in *Hayes* the Court rejected application of the rule for the same reason. In each case, the Court adopted a construction of the statute in question that it felt was a “sensible” reading of legislative intent. See, e.g., *Hayes*, 555 U.S. at 1087.

**D. A Sensible Reading of RCW 90.44.050 Applies the 5,000 Gallon Limitation To Stock Water Uses**

The Groundwater Code includes “substantive provisions of water

law but also contains the administrative controls associated with having a permit system.” *DeVries*, PCHB 01-073, at 3. The permitting system is essential to accomplish the Groundwater Code’s purpose, which is to regulate the *quantity* of groundwater use and *protect* senior water users from having their rights impaired by junior water users. As the Board reasoned, “[t]o read [the stock watering exemption] otherwise would result in an unlimited, and uncontrollable, potential withdrawal of groundwater.” *Id.* at 8.

Statutory exceptions are construed narrowly in order to give maximum effect to the legislative and policy objectives of the general rule from which the exemption is made. *See id.* at 12; *Yakima v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass’n*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991). This Court has expressly applied this requirement to the Water Code. *R.D. Merrill Co. v. PCHB*, 137 Wn. 2d 118, 140,969 P.2d 458 (1999)(citing numerous cases).

*Yakima Fire Fighters Assn.* is instructive in this situation for several reasons. First, that case interpreted a proviso within a statute, as is the case here. Second, the issue was presented to the Court after several administrative interpretations of the same proviso. Finally, the issue affected statewide interests that were based on competing views of the underlying policy. In conducting its analysis the Court examined the

entire statutory structure, the policies that the Legislature sought to promote, and the rules of statutory construction in order to determine the legislative intent.<sup>15</sup> Once the Court identified the purpose of the statute, it “look[ed] to administrative and judicial constructions of the proviso as well as to other aids in construing this exception . . .” *Yakima Fire Fighters Assn.*, 117 Wn.2d at 670. A similar analysis of RCW 90.44.050 is required.

**E. The Lower Court Decision Creates A New Class Of Rights With Ineffective Protection For Existing Rights**

Washington’s water codes place the burden of avoiding harm to existing vested rights on new users. Exempting any user from permit requirements effectively reverses this, greatly increasing the burden on existing, lawful users of water and on the public. “After-the-fact remedies will not serve legislative purposes as effectively as review before appropriation can occur.” *Campbell & Gwinn*, 146 Wn.2d at 17-18. To **obtain** a new water right, an applicant must demonstrate to Ecology’s satisfaction that the new use will not impair existing senior rights and will not be detrimental to the public interest. *RCW 90.03.290*. Affected parties dissatisfied with the outcome may appeal to the PCHB, a specialized administrative adjudicative entity accustomed to water rights issues. On

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<sup>15</sup> The Court did not attach any significance to whether or not the two terms were separated by a comma.

the other hand, to **enjoin** an existing junior use, a senior right holder must typically hire expert hydrogeologists, conduct extensive and expensive studies and modeling, and prove impairment by a preponderance of the evidence to a judge who may never have heard a water rights case. The disparity in burden of proof is daunting, to say the least. An exemption from the permitting system clearly favors users who, although they may not be entitled to a water right, can obtain the use of substantial amounts of water without demonstrating compliance with statutory requirements.

The only other avenue for relief for an injured senior right holder, and the public whose water may be taken for private gain without compliance with the “four part test” for water rights, is a “general adjudication” of all water rights in a given basin. *RCW 90.03.110*. Only Ecology may initiate an adjudication, *RCW 90.44.220*, and its use is rare. According to Ecology, “[82] drainage systems . . . in the state have been adjudicated since 1918 . . . [80] petitions are currently on file requesting general adjudications. More than 165,000 Statements of Water Right Claims were filed . . . during the four claims registry periods. Only a small portion of these have been adjudicated. There is no current time frame for adjudicating the remaining claims.”<sup>16</sup> The only active adjudication in the state was commenced in 1977, has resulted in at least

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<sup>16</sup> See Washington Department of Ecology, *Water Right General Adjudications*, at <http://www.ecy.wa.gov/programs/wr/rights/adjhome.htm>.

three appeals to the state Supreme Court, and is still not complete. *See, e.g. Dept. of Ecology v. Acquavella*, 131 Wn.2d 746, 935 P.2d 595 (1997).

In light of these facts, it is unrealistic and impractical to expect that a party whose senior rights have been impaired by permit exempt uses will have any effective remedy after the fact. On the other hand, if, as Easterday and others assert, their proposed new stockwater uses will not impair senior water rights, they have nothing to fear from going through the same permitting process that applies to all other water uses of comparable size in the state.

### CONCLUSION

The issue before the Court is not whether large scale livestock operations are entitled to water rights. The issue is whether the Legislature intended to exempt those operations from the same process that all others must go through to obtain the right to use an increasingly scarce **public** resource. Nothing in the context or the history of Washington's water codes indicates such an intention. The inadvertent presence or absence of a comma is insufficient to override the legislature's intent to limit the permit exemption to "small withdrawals". The entire structure and history of the water code, together with principles of equal treatment and fundamental fairness to all water users and to the public, require that the Court reverse the decision of the Superior Court.

Respectfully submitted on May 9, 2011

Diana Bob.

Diana Bob, WSBA #37405  
*Attorney for the Lummi Nation*

s/ signature authorized by phone  
Brian Gruber, WSBA # 32210  
*Attorney for the Colville Confederated Tribes*

s/ signature authorized by phone  
Lauren Rassmussen, WSBA #33256  
*Attorney for the Jamestown S'Klallam Tribe  
and the Port Gamble S'Klallam Tribe*

s/ signature authorized by phone  
Bill Tobin, WSBA #4397  
*Attorney for the Nisqually Tribe*

s/ signature authorized by phone  
Samuel J. Stiltner, WSBA #7765  
*Attorney for the Puyallup Tribe of Indians*

s/ signature authorized by phone  
Lisa A. Brautigam, WSBA #27877  
*Attorney for the Puyallup Tribe of Indians*

s/ signature authorized by phone  
Karen Allston, WSBA #25336  
*Attorney for the Quinault Indian Nation*

s/ signature authorized by phone  
Melody Allen, WSBA #35084  
*Attorney for the Suquamish Tribe*

s/ signature authorized by phone  
Emily Hutchinson, WSBA #38284  
*Attorney for the Swinomish Indian Tribal Community*

s/ signature authorized by phone  
Jeffrey S. Schuster, WSBA #7398  
*Attorney for the Yakama Nation*