

NO. 84632-4

SUPREME COURT OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE
CENTER FOR ENVIRONMENTAL LAW & 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.

OPENING BRIEF OF APPELLANTS

JANETTE K. BRIMMER
KRISTEN L. BOYLES
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104
(206) 343-7340
(206) 343-1526 [FAX]
Attorneys for Appellants

10 NOV -9 AM 9:58
BY RONALD A. FORTNER
RECEIVED
STATE OF WASHINGTON
COURT OF APPEALS
10

TABLE OF CONTENTS

INTRODUCTION1

ASSIGNMENTS OF ERROR.....2

ISSUES RELATING TO ASSIGNMENTS OF ERROR2

STATEMENT OF THE CASE.....2

 I. STATEMENT OF FACTS2

 A. The 1945 Groundwater Code And Its Limited
 Permitting Exemption.3

 B. Ecology’s Application Of The Exemption To
 Easterday Ranches’ Industrial Feedlot5

 C. The Unpermitted Use of Groundwater
 Unlimited By Any Quantity Threatens The
 Family Farmers’ Homes and Livelihoods And
 The Organizations’ Missions.7

 II. PROCEEDINGS BELOW11

ARGUMENT.....13

 I. STANDARD OF REVIEW13

 II. CONTRARY TO THE PLAIN LANGUAGE OF
 RCW 90.44.050 AND THE SUPREME COURT’S
 PRIOR RULINGS, THE LOWER COURT ERRED
 IN HOLDING THAT THE LIVESTOCK
 WATERING EXEMPTION IS UNLIMITED.13

 A. In A Statutory Interpretation Case The
 Fundamental Objective Of The Court Is To
 Determine And Give Effect To The Intent Of
 The Legislature.14

B.	When Read As A Whole And Within The Context Of The Groundwater Code And Washington Water Law, The Stockwater Exemption From Permitting Must Be Limited To “Small Quantities” Of 5,000 Gallons Per Day Or Less.	16
1.	The overall purpose and scheme of RCW 90.44.050 dictates a stockwater exemption that is limited in quantity.	16
2.	The provisos that further modify the permitting exemptions demonstrate the legislature’s intent that stockwater be subject to the 5,000 gpd limitation.	20
3.	The State’s only affirmative evidence for its case rests solely on the absence of a comma.	22

III.	LEGISLATIVE HISTORY, INCLUDING THE HISTORICAL CONTEXT FOR RCW 90.44.050, DEMONSTRATES THE LEGISLATURE’S INTENT AND UNDERSTANDING THAT THE EXEMPTIONS FROM PERMITTING, INCLUDING THE STOCKWATER EXEMPTION, ARE LIMITED IN QUANTITY.	24
------	---	----

A.	The State’s Changed Interpretation After 60 Years and the Attorney General’s Arguments Regarding Commas Demonstrate The Ambiguity Of RCW 90.44.050.....	24
----	---	----

B.	The History Of RCW 90.44.050 Demonstrates That The Legislature Intended To Protect Groundwater Resources Through Permitting.	27
----	---	----

C.	The Historical Context, Background Facts, And Agency’s Contemporaneous Interpretation Demonstrate The Intent To Limit The Stockwater Exemption To Small Amounts	
----	---	--

Necessary To Sustain A Small Rural Homestead.	29
1. Government reports published in the early 1940s provide support for livestock water use as part of the domestic water use of a rural homestead.	29
2. Contemporaneous accounts of the 1945 Groundwater Code and exemptions from permitting support an interpretation that limits all exempt withdrawals, including stockwater, to 5,000 gpd.	32
D. For Years, The State And Adjudicators Consistently Interpreted And Applied The Stockwater Exemption From Permitting As A Part Of Aggregate Household Uses Limited To 5,000 Gallons Per Day.	34
E. The Last Antecedent Doctrine Is Inappropriate Here.	40
IV. THE STOCKWATER EXEMPTION WAS INTENDED FOR RURAL HOMESTEAD LEVELS OF USE AND NOT FOR INDUSTRIAL OPERATIONS SUCH AS EASTERDAY RANCHES.	42
CONCLUSION.	45

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Commissioner of Internal Revenue v. Clark</i> , 489 U.S. 726, 109 S.Ct. 1455 (1989).....	19
<i>John Hancock Mutual Life Insurance Co. v. Harris Trust & Sav. Bank</i> , 510 U.S. 86, 114 S.Ct. 517 (1993).....	15
<i>Nobelman v. American Sav. Bank</i> , 508 U.S. 324, 113 S.Ct. 2106 (1993).....	40
<i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337, 117 S. Ct. 843 (1997).....	15
<i>Smith v. U.S.</i> , 508 U.S. 223, 113 S.Ct. 2050 (1993).....	15
<i>United States v. Treadwell</i> , 593 F.3d 990 (9th Cir. 2010)	15

STATE CASES

<i>Barr v. Day</i> , 124 Wn.2d 318, 879 P.2d 912 (1994).....	13
<i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 173 P.3d 228 (2007).....	14
<i>City of Tacoma v. William Rogers, Co.</i> , 148 Wn.2d 169, 60 P.3d 79 (2002).....	13
<i>City of Union Gap v. Department of Ecology</i> , 148 Wn. App. 519, 195 P.3d 580 (2008).....	18
<i>Clark County Public Utility District Number 1 v. Washington Department of Revenue</i> , 153 Wn. App. 737, 222 P.3d 1232 (Wn. App. Div. 2, 2009)	40

<i>Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.,</i> 159 Wn.2d 292, 149 P.3d 666 (2006).....	13
<i>Department of Ecology v. Campbell & Gwinn, L.L.C.,</i> 146 Wn.2d 1, 43 P.3d 4 (2002)..	3, 14, 15, 16, 17, 19, 24, 30, 43
<i>Dot Foods, Inc. v. Washington Department of Revenue,</i> 166 Wn.2d 912, 215 P.3d 185 (2009).....	34
<i>Green River Community College v. Higher Education Personnel Board,</i> 95 Wn.2d 108, 622 P.2d 826 (1980).....	34
<i>Kim v. Pollution Control Hearing Board,</i> 115 Wn. App. 157, 61 P.3d 1211 (Wn. App. Div. 2, 2003)	43, 44
<i>Melhaff v. Tacoma School District Number 10,</i> 92 Wn. App. 982, 966 P.2d 419 (1998).....	34
<i>Pasco v. Public Employment Relations Commission,</i> 119 Wn.2d 504, 833 P.2d 381 (1992).....	13
<i>Post v. City of Tacoma,</i> 167 Wn.2d 300, 217 P.3d 1179 (2009).....	13
<i>Postema v. Pollution Control Hearings Board,</i> 142 Wn.2d 68, 11 P.3d 726 (2000).....	7, 8, 10, 18
<i>R.D. Merrill Co. v. Pollution Control Hearings Board,</i> 137 Wn.2d 118, 969 P.2d 458 (1999).....	18
<i>Restaurant Development, Inc. v. Cannanwill,</i> 150 Wn.2d 674, 80 P.3d 598 (2003).....	16, 24
<i>In re Sehome Park Care Center, Inc.,</i> 127 Wn.2d 774, 903 P.2d 443 (1995).....	35

<i>In re Smith</i> , 139 Wn.2d 199, 986 P.2d 131 (1999).....	40, 41
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	16
<i>Washington State Nurses Association v. Board of Medical Exam'rs</i> , 93 Wn.2d 117, 605 P.2d 1265 (1980).....	25

STATE STATUTES

RCW 90.03	4, 17
RCW 90.03.290	4
RCW 90.14.051	21
RCW 90.22.040	44
RCW 90.44.020	17
RCW 90.44.050	<i>passim</i>
RCW 90.44.052	4, 18

REGULATIONS

WAC 173-510-040.....	3
WAC 173-522-050.....	3
WAC 173-532-040.....	3
WAC 173-549-025.....	3

MISCELLANEOUS

2A Norman J. Singer, <i>Statutes and Statutory Construction</i> § 48A:16 at 809-10 (6th ed. 2000).....	15, 30, 31, 33
---	----------------

Philip A. Talmadge, *A New Approach to Statutory
Interpretation in Washington*, 2516, 24

INTRODUCTION

This is a case brought by long-time family farmers and state and regional water protection groups¹ (the “Family Farmers”) concerning water as a public resource. It is about the extent to which a statutory exception in a larger regulatory scheme can be exploited such that the exception consumes the larger regulatory requirements. This case presents a question of law of first impression.

The Family Farmers seek a declaratory judgment that the stockwater exemption from groundwater permitting requirements in RCW 90.44.050 is not unlimited in quantity, for the 1945 Washington Legislature intended permit-exempt use of groundwater for livestock to be limited by the 5,000 gallons per day amount available for household or domestic use. Alternatively, the Family Farmers seek a declaratory judgment that the stockwater exemption was not intended to be available to large, industrial feedlot operations such as that proposed by defendant/respondent Easterday Ranches, Inc. (“Easterday Ranches”).

The Franklin County Superior Court incorrectly held that the stockwater exemption from groundwater permitting is not limited to any quantity. CP 22-23 (Summary Judgment Order ¶ 3).

¹ The plaintiffs/appellants are Scott Collin, Five Corners Family Farmers, the Center for Environmental Law & Policy, and Sierra Club.

The Family Farmers ask this Court to reverse the Superior Court's ruling and to find that the stockwater exemption of RCW 90.44.050 is limited to 5,000 gallons per day, or less, as one of a bundle of domestic or household uses or that the exemption is not available to large industrial feedlots such as Easterday Ranches.

ASSIGNMENTS OF ERROR

The Superior Court erred in holding that the stockwater exemption from groundwater permitting in RCW 90.44.050 is not limited to any quantity. CP 22-23 (Summary Judgment Order ¶ 3).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is the stockwater exemption from groundwater permitting in RCW 90.44.050 limited to 5,000 gallons per day, as part of a bundle of household or domestic uses?
2. Alternatively, is the stockwater exemption from groundwater permitting in RCW 90.44.050 not available to a large, industrial feedlot operation such as Easterday Ranches?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Residents of Washington rely on streams, rivers, and aquifers to provide water for our homes and industries, to support irrigated agriculture, and to sustain wild salmon runs and recreation. Today, due to

increased population, changes in precipitation caused by a warming climate, and changing patterns of personal and commercial use, many watersheds in Washington are over-appropriated, and the Department of Ecology (“Ecology”) has by regulation limited or closed streams and basins across the State to new water rights. *See e.g.* WAC 173-522-050, 173-510-040, 173-532-040, 173-549-025.² As the Washington Supreme Court has recognized, “[i]t is no secret that water availability is a crucial issue in this state, and will become even more so as time passes.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 18, P.3d 4 (2002). In particular, aquifers in the Columbia Basin are reported to be in decline. *See e.g., generally*, CP 885-921. Unfortunately, vast gaps exist in the State’s regulation of the use of groundwater that threaten Washington’s water resources.

A. The 1945 Groundwater Code And Its Limited Permitting Exemption.

As early as 1917, the Washington Legislature regulated surface water in recognition of the need to ensure an adequate water supply, fairly

² While Ecology has not yet ordered closure in Franklin County, Ecology has not issued new water rights on applications pending in Franklin County for twenty years. *See* CP 925-26. *See also* Department of Ecology Water Rights Application List for Franklin County, <http://www.ecy.wa.gov/cron/wrats/franklin.pdf> (last viewed July 22, 2010).

distributed and efficiently-used, for a growing population. RCW 90.03 *et seq.* In 1945, at the urging of Washington municipalities,³ the legislature enacted the Groundwater Code to similarly manage and regulate groundwater use in the state. CP 765-74. The Groundwater Code provides that there shall be no withdrawal of groundwater, nor any well or other works for such withdrawal constructed, absent an application to and permit from Ecology. RCW 90.44.050. Before a groundwater permit may be issued, Ecology must investigate and find that (1) water is available, (2) for a beneficial use, and (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare. RCW 90.03.290.

The Groundwater Code exempts certain limited uses, including limited stockwatering, from the permitting requirements. Specifically, RCW 90.44.050 provides:

any withdrawal of public ground waters 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, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section....

RCW 90.44.050 further provides that Ecology may require the person or agency making any "such small withdrawal" to furnish information

³ The Association of Washington Cities sponsored the bill which became the Groundwater Code. *See* CP 551 and 559.

regarding the withdrawal and that a party making a withdrawal not exceeding five thousand gallons per day may apply for a permit under the same process followed for withdrawals in excess of 5,000 gpd.

For 60 years, the State, including members of the judiciary engaged in adjudications of water rights, interpreted the stockwater provision of RCW 90.44.050 as limited. *See, e.g.*, the State's position set forth in *DeVries v. Dep't of Ecology*, PCHB 01-073 (2001), CP 629 *et seq.* In *DeVries*, using historical documents, declarations of employees of Ecology, and evidence of water rights adjudications, the State vigorously argued that the exemption language in RCW 90.44.050 relating to watering of livestock was limited by the 5,000 gallons per day amount and that Ecology had a long history of applying the limitation to stockwater. CP 629 *et seq.* and 654 *et seq.* In 2005, Ecology abruptly changed course.

In 2005, the Attorney General, in response to a request from four legislators, issued an opinion that the permit-exempt use of groundwater for watering livestock was unlimited in quantity. AGO 2005 No. 17; CP 536. After issuance of the opinion, Ecology began allowing unlimited groundwater use for watering livestock without requiring a permit.

B. Ecology's Application Of The Exemption To Easterday Ranches' Industrial Feedlot

Easterday Ranches has proposed and is building a large industrial

cattle feeding operation in the Five Corners area of Franklin County.⁴ The Easterday Ranches operation will finish approximately 30,000 head of cattle at any given time. Estimates of the amount of water necessary just for the drinking needs of the operation range from 450,000 to 600,000 gallons per day.⁵ Easterday Ranches claimed, and Ecology agreed, that Easterday Ranches' use of drinking water for its industrial livestock operation was exempt from the Groundwater Code's permit requirements.⁶ See CP 1085 and 1094. Easterday Ranches' industrial cattle operation will use up to 600,000 gallons per day of groundwater without a permit. As a result, Ecology has conducted no analysis of whether 600,000 gallons per day is available from area aquifers, whether it will be put to beneficial use,

⁴ As amply demonstrated by the intervenors, the exempt well-livestock water issue is not isolated to either Easterday Ranches or to Franklin County. Large animal operations around the state are apparently making use of unlimited amounts of groundwater without permits from Ecology.

⁵ Estimates of water needs for cattle vary within an established range. Easterday Ranches' materials estimate 17 gallons per day per beef cow or steer. In its 1942 Report for the Columbia Basin Joint Investigations, the Washington State Planning Council estimates 20-25 gallons per day per head of cattle. CP 571.

⁶ The 450,000-600,000 gallons per day is the amount of water necessary for cattle drinking water at the Easterday Ranches operation, and it is that amount of water use that is claimed exempt from permitting. Easterday Ranches has also purchased and transferred a separate water right, commonly known as the Pepiot Transfer, for non-drinking water needs associated with the operation such as dust suppression and misting. The Pepiot Transfer is not at issue in this litigation.

whether it will impair existing rights, or whether it will be detrimental to the public welfare.

C. The Unpermitted Use of Groundwater Unlimited By Any Quantity Threatens The Family Farmers' Homes and Livelihoods And The Organizations' Missions.

Appellants Scott Collin and the Five Corners Family Farmers are family farmers living and working in or near the Five Corners area of Franklin County, Washington, some on property immediately adjacent to the Easterday Ranches operation. Scott Collin is a fourth generation dryland wheat farmer. CP 923. In 1930, Mr. Collin's grandmother, Josephine Coordes, bought the property where his family now farms and resides. His home is a little more than a mile from the Easterday Ranches industrial feedlot, and his farm property abuts the Easterday property. CP 922-23. Ecology has stated that it treats the aquifers in this part of the state as connected. CP 924.⁷ The characteristics of Mr. Collin's well (depth and temperature of the water) indicate that he is likely withdrawing water from the same aquifer (the Grand Ronde) as Easterday Ranches. *Id.*

Mr. Collin relies on a well for domestic water. He does not irrigate his commercial crops. CP 923-25. Without the domestic well on his property, Mr. Collin's property would be uninhabitable, and his business

⁷ This Court also has ruled in *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 80, 11 P.3d 726 (2000), that the State must manage all ground and surface waters as an integrated resource. *See also* CP 887.

would not be viable. CP 925. In 2008, Mr. Collin applied for a new ground water right in order to diversify his farming operation. CP 925. His application is pending, but he has been informed by Ecology that new ground water rights are not currently available in the Five Corners area and that much of the groundwater is “already appropriated.” *Id.* Mr. Collin submitted his application and received this news before Easterday Ranches began its operation. *Id.*

Sheila Poe, the President of the Family Farmers, is a third-generation farmer in the area, owning the property immediately across the road from the Easterday Ranches feedlot. CP 850. Ms. Poe’s farm and its well have been in her family for generations, and her family has been careful about water use from the well. CP 850-52. Ms. Poe’s family has, from time to time, raised livestock on the property, but always within the exempt well limit of 5,000 gallons per day (“gpd”) or less. CP 851-52. Without the well, Ms. Poe’s property would be uninhabitable, and she will be unable to raise stock there. CP 852. Similarly, Randy Jones, Treasurer and member of the Five Corners Family Farmers, lives on and works a family dryland farm near the Easterday Ranches operation. CP 845-46. Mr. Jones’ home and farm operations are also entirely dependent upon his well which has been in use since the early 1900s. CP 846-47.

In short, many of the Family Farmers have been living and farming in the area for generations. Each relies on a groundwater well for basic domestic drinking, lawn, and garden uses. Some of the Family Farmers also make limited use of their wells for watering livestock. Each of their wells is the sole source of water for their homes and families. If their wells go dry, they have no reasonable means to obtain water for their properties. Mr. Collin is probably drawing water from the same aquifer as Easterday Ranches. Ecology treats all aquifers as connected both legally and hydraulically, and it did so in approving the Pepiot Transfer for Easterday Ranches. CP 870-71.

The Family Farmers are concerned that, due to the lack of regulation of large uses of groundwater for watering livestock, their wells and homes may be in jeopardy now and in the future. Mr. Collin has already been affected in that his business plans to diversify his operation with a new groundwater right and his senior application for that right have been put on indefinite hold and impliedly denied for lack of water in Franklin County. At the same time, Easterday Ranches proceeds to make use of 450,000-600,000 gallons of water a day⁸ without a permit.

⁸ Under the State's and the Superior Court's interpretation of RCW 90.44.050, Easterday Ranches is not even limited to the 600,000 gpd figure. Should Easterday Ranches choose to expand its industrial feedlot, the amount of unpermitted water use would increase.

The organizational plaintiffs, the Center for Environmental Law and Policy (“CELP”) and Sierra Club, are engaged on water issues throughout the state. *See* CP 885 *et seq.* and 856 *et seq.* CELP represents its members’ and the public’s interests in decisions that affect water resources through research, education, litigation, and the oversight of government activities. CP 886-87. For example, CELP’s appeal of withdrawals from a basalt aquifer in the Walla Walla basin was based on the hydraulic connectivity of the basalt aquifers with the Walla Walla and Columbia Rivers, and the potential adverse affects of groundwater pumping on surface water flows and related instream values. CP 887. CELP’s appeal in the Walla Walla led to CELP’s participation in numerous consolidated groundwater appeals in eastern and western Washington, which in turn resulted in this Court’s decision in *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000). *Id.* In *Postema*, this Court held that the State of Washington must manage ground and surface waters as an integrated resource. *Id.* at 80. The *Postema* ruling confirmed that the Department of Ecology must consider the hydraulic connectivity of aquifers and surface waters in Eastern Washington as part of its water right permitting process. CP 887-88. CELP has also, throughout the entirety of its existence, worked on issues relating to the depletion of aquifers and instream flows in the Columbia

River and its tributaries. Ecology's new interpretation and application of the stockwater exemption (and the general proliferation of exempt wells) threatens CELP's work on the sustainability of Washington's aquifers, especially in Eastern Washington where aquifers are already in decline. CP 888; 890-92.

The Sierra Club's conservation work includes the promotion of sustainable water policy at both the national and state level. CP 857-58.

Sierra Club's water resource policy provides:

Minimum instream flows for the benefit of recreation, water quality, fish and wildlife, and scenic values should be protected by law. A moratorium on additional withdrawals and diversions must be immediately imposed where ecosystems are presently in jeopardy. Comprehensive programs to ensure protection of instream flows should be enacted in states and provinces where they do not now exist, and should be implemented in all states and provinces.

<http://www.sierraclub.org/policy/conservation/water>. In Washington, the Club works to protect aquifers, instream flows, and habitat necessary for salmon. CP 858.

II. PROCEEDINGS BELOW

On June 29, 2009, the Family Farmers commenced this action against Ecology and Easterday Ranches seeking a declaratory judgment that the stockwater exemption from groundwater permitting requirements of RCW 90.44.050 is not unlimited in quantity, but rather is part of the

bundle of domestic or household uses that are limited to 5,000 gallons per day or less, or, alternatively, that the stockwater exemption is not available to a large industrial feedlot operation such as Easterday Ranches. CP 1098 *et seq.* Columbia Snake Rivers Irrigators Association (“CSRIA”), the Washington Cattlemen’s Association, and a group of six agricultural associations intervened in the case by stipulation.⁹ In January and February of 2010, the parties filed various cross-motions for summary judgment with the Franklin County Superior Court.¹⁰ The Superior Court heard argument on the motions on April 2, 2010.

On May 5, 2010, the Superior Court issued a final order fully disposing of the case on the cross motions for summary judgment. The court denied the Family Farmers’ motion for summary judgment in its entirety; granted the State’s and Agricultural Associations’ motions for summary judgment in their entirety and Easterday Ranches’ and CSRIA’s motions for summary judgment in part; and denied Easterday Ranches’ and CSRIA’s motions in part. CP 22-23. The Superior Court specifically

⁹ The Washington Cattlemen’s Association together with the six agricultural associations will be collectively referred to as the “Agricultural Intervenors.”

¹⁰ Also in February, nine federally-recognized Indian Tribes sought participation before the Superior Court as *amicus curiae*, arguing in support of the Family Farmers’ position. CP 184 *et seq.* and 208 *et seq.*

held that the stockwater exemption of RCW 90.44.050 “was not limited to any quantity.” CP 23.

The Family Farmers appealed the Superior Court’s decision by Notice of Appeal filed May 28, 2010. CP 9. Easterday Ranches and CSRIA filed a cross-appeal on June 6, 2010. The Family Farmers seek direct review in this Court. Respondents all oppose direct review.

ARGUMENT

I. STANDARD OF REVIEW

This case concerns the interpretation of RCW 90.44.050. Construction of a statute is a question of law. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009); *Pasco v. Pub. Employment Relations Comm’n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). Questions of law are reviewed de novo by this Court. *Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006); *City of Tacoma v. William Rogers, Co.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002); *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994).

II. CONTRARY TO THE PLAIN LANGUAGE OF RCW 90.44.050 AND THE SUPREME COURT’S PRIOR RULINGS, THE LOWER COURT ERRED IN HOLDING THAT THE LIVESTOCK WATERING EXEMPTION IS UNLIMITED.

The issue in this case is narrowly-focused: is the stockwater exemption for groundwater permitting in RCW 90.44.050 unlimited in quantity or is it subject to, and part of, the 5,000 gpd requirement for

exemptions set forth in that section? This is a pure legal question of statutory interpretation. In passing the Groundwater Code, the Washington Legislature intended to manage and regulate the use of groundwater through permitting in order to conserve this precious and finite resource. It did not intend to allow unlimited use, exempt from such regulation, for the industrial watering of livestock. Rather, as is plain from the text of the statute and Code as a whole, the stockwater exemption from permitting is limited.

A. In A Statutory Interpretation Case The Fundamental Objective Of The Court Is To Determine And Give Effect To The Intent Of The Legislature.

When a court is called upon to interpret a statute, the court's primary objective is to carry out the intent of the legislature. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the statute's meaning is plain on its face, the court's inquiry ends there. *Id.* Under Washington law, in discerning a statute's plain meaning, a court looks to the language of the specific section or sentence in question, to the purpose of the act, and to all related statutes or other provisions of the same act in which the provision is found. "[M]eaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11-12. *See also Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d

228 (2007) (“Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” (citations omitted)).

The plain meaning rule also provides that “background facts of which judicial notice can be taken are properly considered as part of the statute’s context because presumably the legislature also was familiar with them when it passed the statute.” *Campbell & Gwinn*, 146 Wn.2d at 11 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16 at 809-10 (6th ed. 2000)). In cases of statutory interpretation, a court does not read and interpret any provision in isolation.

Washington’s approach comports with that of the U.S. Supreme Court. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 846 (1997) (the Court must consider “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole”); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95, 114 S.Ct. 517, 523 (1993) (each statutory provision should be read by reference to the whole act and to its object and policy); *Smith v. U.S.*, 508 U.S. 223, 233, 113 S.Ct. 2050, 2057 (1993) (statutory interpretation is a “holistic” endeavor (citation and quotation omitted)). *See also United States v. Treadwell*, 593 F.3d 990, 1006-07 (9th

Cir. 2010) (“[W]hen we look to the plain language of a statute to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole.” (citation and quotation omitted)).

If, ultimately, a statute is subject to more than one reasonable interpretation, a court may look to the legislative history to glean legislative intent, *Campbell & Gwinn*, 146 Wn.2d at 12, including the circumstances leading up to and surrounding the statute’s enactment. *Restaurant Dev., Inc. v. Cannanwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (citing Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev. 179, 203 (2001)); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

B. When Read As A Whole And Within The Context Of The Groundwater Code And Washington Water Law, The Stockwater Exemption From Permitting Must Be Limited To “Small Quantities” Of 5,000 Gallons Per Day Or Less.

1. *The overall purpose and scheme of RCW 90.44.050 dictates a stockwater exemption that is limited in quantity.*

The plain language of RCW 90.44.050, including the overall purpose and scheme of the Groundwater Code, shows that the exemption from permitting for watering livestock is not, and was never intended by the legislature to be, unlimited in amount. The Washington Legislature

passed the Regulation of Public Groundwaters, RCW 90.44, in 1945 as a supplement to the surface water code, RCW 90.03, for the “purpose of extending the application of such surface water statutes to the appropriation and beneficial use of groundwaters within the state.” RCW 90.44.020. To that end, the legislature strictly regulated the appropriation and use of groundwater, requiring that absolutely no withdrawal of groundwater could begin, nor well or other water works be constructed, without the user first applying for and being granted a permit from the State. RCW 90.44.050.¹¹ As found by this Court, the overall goal of the Groundwater Code is “to assure protection of existing rights and the public interest,” *Campbell & Gwinn*, 146 Wn.2d at 17, and the role of the court is to “preserve the general requirement of permitting” in the face of an expanded exemption claim, “as the Legislature obviously intended.”

Id.

To this blanket permit requirement, the legislature applied a handful of limited exemptions. The plain language of the exemptions to groundwater permitting in RCW 90.44.050 divides the exemptions into three distinct parts:

¹¹ For ease of reference, the Family Farmers have included a full copy of RCW 90.44.050 in the appendix to this brief with some of the key provisions highlighted.

- (1) any withdrawal of public ground waters 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,
- (2) or as provided in RCW 90.44.052,¹²
- (3) or for an industrial purpose in an amount not exceeding five thousand gallons a day....

Each of the statute's exempt categories, including the most recent addition in 2003, specify a particular, limited amount of water per day that is exempt from groundwater permitting. The original provisions (part 1 and 3 above) clearly break the exemptions down into domestic and industrial uses of groundwater, each with a 5,000 gpd limit on quantity. Consistent with the makeup of the state in 1945, stockwater is one of the uses in the domestic use category. This is also consistent with this Court's characterization in *Postema*: "RCW 90.44.050 allows domestic and stock watering uses of up to 5,000 gallons without a permit..." *Postema v. PCHB*, 142 Wn.2d 68, 89, 11 P.3d 726 (2000).

A statute's remedial provisions shall be liberally construed and its exceptions narrowly confined. *City of Union Gap v. Dep't of Ecology*, 148 Wn. App. 519, 527, 195 P.3d 580 (2008) and *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458

¹² Added in 2003.

(1999). This concept is also echoed in the federal case law.

Commissioner of Internal Revenue v. Clark, 489 U.S. 726, 739, 109 S. Ct. 1455 (1989) (Provisos and statutory exemptions should be read narrowly.)

It simply makes no sense for these categories to exist along with an *unlimited* stockwater exemption that could essentially swallow all other requirements whole.

Indeed, the Supreme Court recognized as much in the *Campbell & Gwinn* decision when it found that the legislature clearly did not intend unlimited exempt uses, wholly unregulated, when the overall goal of the Groundwater Code was to assure protection of existing rights, the public interest, and the resource as a whole. *Campbell & Gwinn*, 146 Wn.2d at 16. “The role of this court is to preserve the general requirement of permitting, as the Legislature obviously intended.” *Id.* at 17. This Court found, with respect to the domestic well exemption, that the legislature struck a balance in RCW 90.44.050 allowing for small exempt withdrawals and that it did not contemplate the use of the exemption as a device to circumvent statutory review of permit applications generally. *Id.*

Similarly, here, the interpretation adopted by the Superior Court and urged by the State would “decimate the general rule” of the Groundwater Code (perhaps even more so than the interpretation argued in *Campbell & Gwinn*) to regulate and control the use of groundwater. The

stockwater exemption must not be allowed to devour the whole statutory scheme for regulating groundwater, based solely upon the placement of commas in RCW 90.44.050. Rather, the plain language of the statute as whole must be interpreted to limit the stockwater exemption to part of the 5,000 gpd allowed for domestic uses.

2. *The provisos that further modify the permitting exemptions demonstrate the legislature's intent that stockwater be subject to the 5,000 gpd limitation.*

The legislature appended two provisos to the exemptions in RCW 90.44.050.¹³ The language of those provisos makes no sense if the exemptions are “unlimited by any quantity.” Immediately following the list of exemptions, separated by a colon, RCW 90.44.050 states:

PROVIDED, HOWEVER, That the department from time to time may require the person or agency making *any such small withdrawal* to furnish information...and PROVIDED FURTHER, That at the option of the party making withdrawals of groundwaters of the state *not exceeding 5,000 gallons per day*, applications under this section...may be filed and permits and certificates obtained in the same manner and under the same requirements as in this chapter provided in the case of withdrawals *in excess of 5,000 gallons per day*.

Reading the statute as whole, “*such small withdrawal*” plainly refers to the permit-exempt uses described above. Unlimited withdrawals cannot be

¹³ See Appendix, red highlights.

considered a “small withdrawal” either under a plain language analysis or in light of the legislative intent to regulate and control groundwater use.¹⁴

Reading further, the second proviso states that a party “making withdrawals of less than 5,000 gallons per day” may apply for and receive permits in the same manner and subject to the same requirements as provided in chapter 90.44 for “withdrawals in excess of 5,000 gallons per day.” *Id.*¹⁵ The intent and understanding of the legislature is clear: non-exempt uses—those requiring a permit under the Groundwater Code—are “withdrawals in excess of 5,000 gallons per day.” For “small” withdrawals less than 5,000 gpd (that the legislature anticipates will not be required to get a permit, i.e. those that are exempt), the user may choose to apply for and receive a permit in the same manner as the non-exempt withdrawals that are more than 5,000 gpd. The language used in this provision makes plain that the legislature regarded permitted withdrawals as more than 5,000 gpd and quantities below that limitation as exempt.

¹⁴ This characterization is echoed by the legislature in RCW 90.14.051 when it refers to exempt uses as “minimal.”

¹⁵ The second proviso was added in 1947, two years after passage of the original provision. Importantly, the Department of Conservation had interpreted RCW 90.44.050 in the interim, stating that the entirety of the domestic/household exemption, including watering of livestock, was limited to 5,000 gallons per day. CP 625-26. One year later, the legislature added the second proviso clearly linking the “small withdrawals” allowed under the exemption to the overall limit of 5,000 gallons per day.

The only way to make sense of the permit requirements, the exemptions, and the provisos as a whole, consistent with the legislative intent to regulate groundwater for the good of the public, is to limit the stockwater exemption to “small withdrawals” of no more than 5,000 gallons per day.

3. *The State’s only affirmative evidence for its case rests solely on the absence of a comma.*

The State, applying and defending the 2005 Attorney General opinion, would have this Court believe that the legislature intended to allow a single use exception to devour the whole of the statutory scheme for regulating groundwater, based solely upon the placement of commas in internal prepositional clauses in RCW 90.44.050. CP 539. The State and intervenors claim that the absence of a particular comma is *the* evidence of legislative intent that livestock watering is permit-exempt regardless of the size of the operation and the quantity of water used. Accepting this reasoning would require this court to elevate a newly-discovered punctuation issue over years of statutory interpretation case law that instructs the court to avoid absurd results and to give effect to all provisions of the statute.

To put this much weight on the absence of a comma requires the court to ignore the plainly stated intent of the legislature to regulate and

control groundwater but for some limited uses, requires contorted readings of the word “small” in the provisos following the exemptions, and requires a contorted reading (or leaves the reader wondering what is meant) of the second proviso’s binary reference to uses less than or greater than 5,000 gpd. If this proviso does not refer to exempt versus nonexempt uses, there is no reasonable explanation offered by the State to what it does refer.

But for want of a comma, the State will allow a hole the size of a 30,000 head industrial feedlot to be blown in the side of the Groundwater Code—rendering meaningless the references to small withdrawals and the distinction between more or less than 5,000 gallons per day. The Attorney General opinion and Superior Court decision simply fail to adhere to the basics of statutory construction and are contrary to the legislative intent to limit unpermitted uses of groundwater, including for watering livestock. At most, the comma issue renders the statute ambiguous, at which point the focus of the court expands to include legislative history and historical context all of which supports limiting the stockwater exemption to 5,000 gpd. *See* Section III *infra*.

Reading the permit-exemption provision within the context of the Ground and Surface Water Codes as a whole, the consistent legislative intent is abundantly apparent: to carefully regulate and control use of all water resources and to preserve those resources for all users. Further,

consistent with this intent, the legislature provided that any exemption from that overall regulatory purpose and structure would be narrow and limited to “minimal” or “small” uses. It is entirely inconsistent with the legislature’s intent for the management of Washington’s water resources to allow for unlimited, unpermitted groundwater use for any purpose.

III. LEGISLATIVE HISTORY, INCLUDING THE HISTORICAL CONTEXT FOR RCW 90.44.050, DEMONSTRATES THE LEGISLATURE’S INTENT AND UNDERSTANDING THAT THE EXEMPTIONS FROM PERMITTING, INCLUDING THE STOCKWATER EXEMPTION, ARE LIMITED IN QUANTITY.

A. The State’s Changed Interpretation After 60 Years and the Attorney General’s Arguments Regarding Commas Demonstrate The Ambiguity Of RCW 90.44.050.

Ecology’s recent struggle to adhere to a consistent interpretation of RCW 90.44.050, as well as its heavy reliance on a comma as a primary indication of legislative intent, makes it reasonable for this Court to find the statutory language ambiguous. Even in the case of an ambiguous statute, a court’s primary objective is to discern the legislature’s intent. *Campbell & Gwinn*, 146 Wn.2d at 12. If a statute is subject to more than one reasonable interpretation, a court may look to the legislative history to glean legislative intent, *Campbell & Gwinn*, 146 Wn.2d at 12, which includes the circumstances leading up to and surrounding the statute’s enactment. *Restaurant Dev.*, 150 Wn.2d at 682 (citing Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25

Seattle U. L. Rev. 179, 203 (2001)). The historical context within which the statute was passed may also be examined to identify the problem the legislature intended the statute to solve. *Washington State Nurses Ass'n v. Board of Medical Exam'rs*, 93 Wn.2d 117, 121 605 P.2d 1265 (1980).

As discussed below, for 60 years, the State—first the Department of Conservation and then the Department of Ecology—interpreted and applied the stockwater exemption as part of the domestic uses limited to 5,000 gpd. *See* Section III.D. *infra*. As recently as 2000, the State argued in support of this interpretation. Judges making decisions in water rights adjudications and the Pollution Control Hearings Board in its decision in the *DeVries* litigation found the stockwater exemption to be limited in quantity. This interpretation is certainly reasonable and consistent with RCW 90.44.050's plain purpose to carefully regulate the use of groundwater.

But, in late 2005, the Attorney General's opinion reversed that interpretation after which the State, under the same statutory language as had been in existence since 1945, interpreted the stockwater exemption from permitting as unlimited in quantity.

From a purely grammatical position, the construction of the exemption provisions is inherently ambiguous. The exemption provisions within RCW 90.44.050 are known as “prepositional phrase attachments,”

and they are notoriously structurally ambiguous. The timeworn example (and one that is simpler than the language in RCW 90.44.050) is ‘I saw the man with the telescope.’ By its very nature, it is unclear whether the man has a telescope or whether that is the method by which the speaker sees the man. Or, in a more complex example, ‘I eat apples, bananas, and pears that aren’t rotten.’ While a comma after the words “pears” may assist the reader in determining that the final phrase modifies the whole, it also makes no sense that the speaker eats apples and bananas that are rotten. Hence the statement is inherently ambiguous.

Writing on the subject recognizes the inherent ambiguity in complex sentences and placement of commas and that comma placement does not by itself resolve sentence ambiguity. As one frequent researcher and writer has noted, “it’s clear that no particular significance can be attributed to the comma [placed at the end of several antecedents,]” and that it is “entirely arbitrary” to use the presence of a comma as dispositive of the issue of whether a modifier applies to all or only several preceding clauses. *See* Adams, Kenneth A., University of Pennsylvania Law School, “More Syntactic Ambiguity: The Serial Comma,” July 19, 2010, <http://www.adamsdrafting.com/2010/07/19/more-syntactic-ambiguity-the-serial-comma/> and “Behind the Scenes of the Comma Dispute,” *The Globe and Mail*, August 28, 2007,

<http://www.adamsdrafting.com/2007/08/28/behind-the-scenes-of-the-comma-dispute/>.¹⁶ See also, Cumbow, Robert C., “Not Just for Decoration”, WSBA Bar News, March 2006. (“So what’s the rule[for serial commas]? There is none. It all depends on context.”)

<http://www.wsba.org/media/publications/barnews/mar06-cumbow.htm>;

The State’s about-face coupled with the inherent ambiguity in the structure of RCW 90.44.050, could reasonably lead this Court to find that the language in RCW 90.44.050 is ambiguous, in which case it is appropriate for the court to, as advised by Professor Adams, “roll up its sleeves and get on with the mucky business” of sorting through the legislative history and historical context for RCW 90.44.050 to discern legislative intent.

B. The History Of RCW 90.44.050 Demonstrates That The Legislature Intended To Protect Groundwater Resources Through Permitting.

RCW 90.44.050 started out on February 26, 1945, as House Bill 536, authored by Rep. H.J. Rosellini of Pierce County.¹⁷ The bill as

¹⁶ Copies of Professor Adams’ articles from his website and from the August 28, 2007 Globe and Mail is included in the Appendix.

¹⁷ The Senate companion, S.B. 366, was offered by Sen. A. Rosellini of King County. The Senate bill was identical to the House bill and was tabled early in Senate Committee allowing the House bill to make its way through the process and became the law. H.B. 536 passed quickly through the legislative process, unchanged, and was signed into law by Governor Wallgren on March 19, 1945. CP 765.

proposed contained the same exemption language in section 5 that is today RCW 90.44.050, but for the second proviso modifying the exemption (added during the next legislative session in 1947) and the much later pilot project specific to Whitman County. *See* H.B. 536, sec. 5.¹⁸ CP 767. The bill was sponsored by the Washington Association of Cities (the “Association”). CP 551 and 559. The Association’s bulletin regarding its 1945 legislative agenda described the impetus for the bill:

The underground water supply, a great natural resource of the state, should be given the same protection now given surface waters. In certain areas the waters are now being drawn off so rapidly that the water table is in danger of being permanently lowered and the future supply jeopardized. At the same time, too heavy consumption in one area may definitely affect another area immediately...it is highly important that this natural resource of the state be conserved for the benefit of all the people.

“1945 Legislative Program of the Association of Washington Cities,” Bulletin B-17. CP 551. On March 26, 1945, the Association reported on bills it had sponsored that passed, including H.B. 536, Protection of Underground Water Supply. The Association repeated that the bill’s intent was to give the same protection to the underground water supply as surface waters and that administration of the law would be under the Supervisor of Hydraulics of the Department of Conservation and Development. The Association noted that permits must be obtained from

¹⁸ RCW 90.44.050 was amended in 1947, 1987, and 2003.

the Supervisor of Hydraulics in order to use or appropriate underground waters and that this requirement will allow municipalities to “look with greater assurance toward maintenance of their [water] supply in the future.” CP 559.

The statements of one of the bill’s chief proponents are consistent with the overall purpose, intent, and structure of the Groundwater Code to regulate and control groundwater use through a system of permitting as seen from the language of the original bill. An unlimited exemption to the permitting system is inconsistent with the clear intent of the proponents of the Groundwater Code.

C. The Historical Context, Background Facts, And Agency’s Contemporaneous Interpretation Demonstrate The Intent To Limit The Stockwater Exemption To Small Amounts Necessary To Sustain A Small Rural Homestead.

1. *Government reports published in the early 1940s provide support for livestock water use as part of the domestic water use of a rural homestead.*

In the early 1940s, the U.S. Department of the Interior, Bureau of Reclamation, sponsored a project called the Columbia Basin Joint Investigations. The goal of the project was the successful settlement and development of the Columbia Basin. CP 591; 597. Problem 9 of the Joint Investigations focused on farm improvement with the object of helping the settler obtain the most for their money. *Id.* and CP 603. Problem 9 was broken into sub-problems for more detailed study. Sub-problem 6

concerned “Rural Domestic Water Supply: Means to Minimize the Financial Commitment of Rural Settlers in Obtaining Domestic Water.” CP 564. The Washington State Planning Council led the efforts and prepared the report for sub-problem 6 which was ultimately adopted into the larger report on Problem 9. *Id.* and 601 et seq. These reports were clearly available to the legislature in 1945, having just been completed.¹⁹ They support the conclusion that the legislature intended to limit the stockwater exemption from permitting, along with other household uses, to no more than 5,000 gallons per day, cumulatively.

The State Planning Council’s sub-problem 6 report provides that a rural settler’s domestic water supply should be sufficient to:

- (1) satisfy the personal demands of the settlers including the operation of plumbing facilities;
- (2) to water livestock;
- (3) to occasionally sprinkle lawns and small gardens;
- (4) to process farm products; and
- (5) to provide some fire protection.

CP 569-70. *See also* CP 603. The Planning Council found, immediately following this list, that “[a]lthough the *total* daily requirement of the average farm may be only 200 gallons during the early years, it will

¹⁹ “Background facts of which judicial notice can be taken are properly considered as part of the statute’s context because presumably the legislature also was familiar with them when it passed the statute.” *Campbell & Gwinn*, 146 Wn.2d at 11 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16 at 809-10 (6th ed. 2000)).

expand to probably 1,500 gallons during mature development.” *Id.* (emphasis added). The report included a footnote citation for these numbers which is a summary of groundwater conditions with respect to the development of livestock by George C. Taylor, Jr. According to the report, Mr. Taylor suggested 1,000 gallons per day as the ultimate maximum amount necessary for these combined purposes. *Id.*

This portion of the Planning Council report was further supported by Table I in which the Planning Council set forth the range of water consumption necessary for each category of domestic use. Table I broke domestic use into two categories, human and livestock, with the livestock further broken down into dairy cattle, other cattle, hogs and pigs, horses, sheep, and chickens, and it gave the average number of each type of animal on the average farm. CP 570.²⁰ The entirety of these findings, including Table I, were incorporated into the final report of the Bureau of Reclamation on Problem 9. CP 603.

As can be seen from the text of the 1942 and 1944 Columbia Basin reports, the categories set forth in H.B. 536 track the categories of uses for rural homesteads in the Planning Council and Bureau of Reclamation assessments of water need. Further, the entities that were assessing rural homestead water needs at the time included livestock watering as a

²⁰ The apparent standard number of cattle, both dairy and beef, is 57. *Id.*

common household use in an amount necessary for a basic level of agriculture prevalent at the time. It is clear that the legislature did not think it was allowing large, much less, unlimited, unpermitted water use for 30,000 animals in an industrial feedlot operation. Such a large exemption would have been directly contrary to the very purpose and intent of controlling and regulating groundwater use in the state.

2. *Contemporaneous accounts of the 1945 Groundwater Code and exemptions from permitting support an interpretation that limits all exempt withdrawals, including stockwater, to 5,000 gpd.*

During the 1945 legislative session, various newspapers carried short summaries of activity on bills during the previous day's legislative session. A contemporaneous journalistic account of legislation at the time of its passage would tend to be a more accurate reflection of what the legislation meant at the time than most efforts to reconstruct the meaning 60 years later. The February 27, 1945 edition of the Seattle Post-Intelligencer reported that H.B. 536 passed the Senate the previous day and summarizes the legislation as "provides for the granting of permits by the hydraulics department for the withdrawal of ground water, *except wherein the volume is less than 5,000 gallons per day*, provides procedure and appropriates \$30,000." CP 776.

Similarly, shortly after the end of the 1945 legislative session and a few days before the law was to take effect, the Spokane Spokesman-Review, June 5, 1945, carried a story headlined “Hidden Water Under Control.” CP 174-178. The newspaper reported that “State control of water under the ground as well as flowing across it starts Thursday...” and that “[f]uture development of the state will depend heavily upon thrifty usage of subsurface water upon which a hundred towns and cities rely for domestic supply.” *Id.* Plainly, the general understanding of the purpose and function of the Groundwater Code was overall control and regulation of groundwater resources. The article continued: “[w]ithout control, the development of this resource could become competitive to the extent of severe loss or damage to those who already make use of the ground water....*The statute exempts from administrative control the withdrawal of water for any purpose where the quantity is less than 5,000 gallons a day. Garton called this sufficient to supply a family, including lawn, livestock and noncommercial garden.*” [quoting Director Garton of the Department of Conservation and Development.] *Id.* (emphasis added.) It is unlikely that Director Garton, on the heels of the legislative session and within days of his agency implementing the law, got it wrong.

The reports available to the legislature in 1945 regarding rural water use, the mirror language between those reports and the permitting

exemption in RCW 90.44.050, and the contemporaneous reporting regarding the meaning and intent of the permitting exemption all demonstrate the legislature's intent that the permitting exemption be limited to 5,000 gallons per day, including for the watering of livestock.

D. For Years, The State And Adjudicators Consistently Interpreted And Applied The Stockwater Exemption From Permitting As A Part Of Aggregate Household Uses Limited To 5,000 Gallons Per Day.

While it is the exclusive purview of the courts to interpret statutes, agency interpretations can be relevant to the court's determination. Where, as here, there are competing official interpretations, agency interpretations contemporaneous with the law's passage can aid a court's assessment of historical context and legislative intent. *Melhaff v. Tacoma School Dist. No. 10*, 92 Wn. App. 982, 987, 966 P.2d 419 (1998) (citing *Green River Cmty. College v. Higher Educ. Personnel Bd.*, 95 Wn.2d 108, 117-18, 622 P.2d 826 (1980)). See also *Dot Foods, Inc. v. Washington Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009) (where the court noted that it would not give deference to a new state interpretation in the face of a long history of the opposite interpretation and that "[o]ne would think that the Department had some involvement or certainly awareness of the legislature's plans to enact this type of statute" and "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.”). This is particularly the case where, as here, the agency adopts its interpretation contemporaneous with the adoption of the statute, the agency’s interpretation is not clearly contrary to the intent of the legislature, and the agency’s interpretation is consistently applied for a long period of time. *See In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995).

As shown by Director Garton’s statements to the Spokane newspaper upon implementation of the new groundwater law, the State immediately adopted an interpretation of RCW 90.44.050 that limited the use of water for livestock to part of the bundle of domestic uses at 5,000 gpd or less. This is consistent with the Department of Conservation’s thirteenth biennial report’s description of the law in 1946. CP 624-25. It is also fully consistent with the next two biennial reports issued by the Department. CP 447-53.

The Department of Conservation, in its biennial report for 1944-1946, reported that the 1945 session of the legislature provided for the administration and control of groundwater by the state as a supplement to the surface water code. CP 624-25. The Department echoed the concerns of the Association of Cities in noting:

The need for such a [groundwater] statute lies in the fact that bodies of water beneath the land surface are a public natural resource of great value.... The future development of the State will depend to a large extent on this source of water supply. With a water code, under which waters can be controlled and regulated, a water user may acquire definite rights to the use of water to protect investments made in wells and other facilities. Whereas, in the absence of such a law, the development of this resource might become competitive to the extent that it could cause severe damage or loss to those who already make use of the ground water and possibly to the existing supply. Such destructive competition has been the experience of certain other states. In some sections of this State, *uncontrolled withdrawal of water* has already caused damage to existing rights and investments.”

Id. (emphasis added.) The report further provided:

the Ground Water code exempts from administrative control the withdrawal of public ground water for *any purpose where the quantity is less than 5,000 gallons per day*. This exemption was provided to relieve the *small water user* of the formalities and costs of obtaining water for his household and domestic needs. Five thousand gallons per day will supply *ample* water for household use for a family, their garden and lawn irrigation, *and stock water*.

Id. (emphasis added.) The Department of Conservation’s statements demonstrate the State’s understanding, contemporaneous with the passage of the Groundwater Code and the exemption language of RCW 90.44.050, that the stockwater portion of the permit exemption was part of a bundle of household uses that were collectively subject to the 5,000 gallons per day limit. This understanding is consistent with the Columbia Basin

reports regarding water use and needs for households, issued just prior to the 1945 legislative session.

In 1948, the Department reported on the early education and implementation efforts associated with the new groundwater law. Under the section titled "Individual Domestic Water Supply Exempt," the Department noted the following:

The original Ground Water Code provided for the exemption of public ground water where the amounts withdrawn were 5,000 gallons per day or less. This exemption was provided to relieve users of small amounts of water of the formalities of obtaining water for their household and domestic needs.

CP 447. There is no mention of specific categories of uses. In particular there is no mention or singling out of livestock drinking water. On the following page, the Department twice repeats that the exemption generally applies only to uses that are 5,000 gallons per day or less. CP 448.

In 1950, the Department repeated its basic understanding that only uses of 5,000 gpd or less were exempt:

[T]he demand for ground water for all purposes is continually increasing. Such new rights in excess of 5,000 gallons per day can only be obtained by permit from the Supervisor of Hydraulics. A permit is acquired by filing an application with the Supervisor on a form provided by him.

The Ground Water Code provides that a water user withdrawing public waters for stock-watering purposes, or for the irrigation of lawn or garden not exceeding one-half acre in area, or for domestic or industrial uses not

exceeding five thousand (5,000) gallons per day, is not required to file an application for such withdrawal, although he may do so at his option.

CP 456-57.

For 60 years, the State, (including courts), interpreted and applied the stockwater exemption consistent with the Department of Conservation's initial interpretation. As recently as 2000, the State vigorously and successfully argued for the 5,000 gpd limitation on the stockwater exemption as set forth in the DeVries litigation. In the DeVries case, the Attorney General, on behalf of Ecology, vigorously defended limiting the stockwater exemption to 5,000 gallons per day, relying on much of the evidence of historic context and legislative intent outlined above. In particular, Ecology strongly argued that to construe the stockwater exemption from permitting as unlimited in quantity was contrary to the entire intent and purpose of the Groundwater Code. CP 636-37. Ecology also argued that the legislative history, including the historic reports cited herein, supported an interpretation that limited the stockwater exemption to 5,000 gallons per day as part of the total allowed for domestic uses, CP 637-38 and 640-41, and that Mr. DeVries' claim of

an unlimited exemption for watering livestock was contrary to years of agency and judicial interpretation. CP 638-39.²¹

The Pollution Control Hearings Board ultimately agreed and found the stockwater exemption limited to 5,000 gallons per day. *DeVries v. Dep't of Ecology*, PCHB 01-073 (2001).

Further, as part of the *DeVries* litigation, long-time Ecology employee Douglas McChesney reviewed years of adjudications of water rights predating the *DeVries* case. Mr. McChesney found that judges adjudicating groundwater rights consistently found the groundwater exemption from permitting as limited to 5,000 gallons per day for all household uses, *including watering of livestock*. CP 656-57; 658 et seq. and 677 et seq.²² For 60 years, until the conclusion of the *DeVries* litigation sparked a backlash by industry and resulting inquiry to the Attorney General, CP 779-81, the limited nature of the stockwater exemption was never in doubt.

²¹ Ecology also argued that use of the exemption for stockwatering is limited to open-range stock as opposed to industrial feedlots. CP 642.

²² Attachments 1 and 2 to Mr. McChesney's declaration are voluminous and are generally applicable here. For a non-exhaustive list of specific examples in attachments 1 and 2 of courts applying a 5,000 gpd limitation in adjudications *see* CP 666; 669; 683-85; 698-99; 701-02; 713; 721-22.

E. The Last Antecedent Doctrine Is Inappropriate Here.

The Attorney General's opinion finds the presence and absence of commas in the exemption language definitive. In support, the state has argued for application of the principle of the last antecedent in order to resolve any ambiguity in the statute. The State's argument, however, fails to recognize courts' refusal to apply the principle when to do so is contrary to the overall intent of the legislature or where it would lead to untenable results. *Clark County Public Utility Dist. No. 1 v. Washington Dep't of Revenue*, 153 Wn. App. 737, 222 P.3d 1232,1239 (Wn. App. Div. 2, 2009) (courts do not apply the last antecedent rule as inflexible or take it as binding and will examine the implications of its application relative to the overall statutory scheme); *In re Smith*, 139 Wn.2d 199, 204-05, 986 P.2d 131 (1999) (court declines to apply last antecedent rule where to do so "makes no sense" or "leads to absurd result.") *See also Nobelman v. American Sav. Bank*, 508 U.S. 324, 330-31, 113 S.Ct. 2106, 2111 (1993) (court declines to apply rule where not practical.)²³

The *Smith* case is particularly instructive in light of the dispute here. In *Smith*, the court was confronted with two phrases in the statute,

²³ Note also comments by Professor Adams that the last antecedent doctrine is a "poor tool" in most instances, that it fails to recognize how things are actually drafted and that it is inconsistent with many style manuals for drafters. "Behind the Scenes of the Comma Dispute," *Globe and Mail*, August 28, 2007. Appendix.

neither of which was separated by a comma. The Court found that interpreting the statute in accordance with the last antecedent rule was problematic. Either the court had to be inconsistent in application of the rule to some, but not all, clauses of the statute for the statute to make any sense, or, if it applied the rule consistently to the entirety of the statute and all the clauses, the resulting interpretation was unreasonable and nonsensical. *Smith*, 139 Wn.2d at 204-05.

Here, rigid application of the rule will lead to the absurd result of an unlimited, unpermitted use of water, exempt from the reach of the statute the purpose of which is to control, regulate, and conserve all but minimal uses of groundwater. Rigid application of the rule is clearly contrary to the historical record and the legislative intent evidenced by it.

Application of the doctrine also renders the State's position internally inconsistent. The State argues that the 5,000 gpd limitation modifies only the domestic uses exemption. However, the State's own FAQ publication regarding water rights plainly states that the 5,000 gpd provision also modifies the lawn and garden exemption. CP 169.

Finally, the exemption provisions, as in *Smith*, actually have two modifiers within the exemption and applying the last antecedent consistently to all parts of the exemption leads to absurd results. If the 5,000 gpd only modifies the domestic exemption, then the half-acre

limitation can only modify the garden exemption, but not the lawn exemption. The State's position with respect to application of the last antecedent rule quickly crumbles into an exercise in nonsense. The only reasonable reading in accordance with all these considerations and the overall purpose and history of the statute, is that the 5,000 gpd modifies *all* the exemption provisions, including stockwater.

IV. THE STOCKWATER EXEMPTION WAS INTENDED FOR RURAL HOMESTEAD LEVELS OF USE AND NOT FOR INDUSTRIAL OPERATIONS SUCH AS EASTERDAY RANCHES.

As set forth above, the stockwater exemption from permitting was intended to be one of a bundle of uses necessary to sustain an average rural household. It was never intended (nor did the legislature ever contemplate) its use for large industrial operations like a 30,000 head cattle feedlot. The Easterday Ranches operation, as an industrial operation, is not entitled to utilize the exemption.

The legislature did not intend to exempt large-scale industrial uses of water from the regulatory requirements of the Groundwater Code. First, as noted previously, all the descriptions of H.B. 536 and all of the historical context supports an interpretation limiting the stockwater exemption to household uses or non-industrial levels of use. The reports

before the legislature at the time provided for approximately 283 total animals on a standard farm. *See* CP 570 and 603.

Washington courts have noted that changing societal conditions should not be an excuse to do damage to the original intent and purpose of the legislature. For example, in *Campbell & Gwinn*, the court found that while large subdivisions may be the current order of the day in terms of building residences, that practice cannot be allowed to run roughshod over the legislature's original intention to limit unpermitted groundwater use for domestic purposes. *Campbell & Gwinn*, 146 Wn.2d at 16-17. The court noted the legislature could not have contemplated such large developments of residences and therefore it could not have intended a large, unpermitted use of groundwater to go with those large developments. *Id.* The court refused to fashion an interpretation of the domestic exemption in RCW 90.44.050 to fit current development practices. The *Campbell & Gwinn* example is exactly like this case.

The Court of Appeals echoed this sentiment in *Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 163, 61 P.3d 1211 (Wn. App. Div. 2, 2003) when it rejected the notion that an administrative agency can alter the plain meaning of a statute to meet changing societal conditions. "When a statute is rendered obsolete by changing conditions, the remedy is for the legislature to amend it; neither an administrative agency nor the

courts may read it in a way that the enacting legislature never intended.” Likewise, the agencies and courts may not read the statute in a way the enacting legislature never anticipated.

Second, the legislature actually set forth a limit on industrial use exemptions as well, allowing no more than 5,000 gallons per day for small industrial uses to be exempt from permitting.²⁴ Whether the Easterday Ranches operation is characterized as simply raising livestock or as an industrial use, its unpermitted groundwater use is limited to 5,000 gallons per day.²⁵

The legislature has expressly disfavored unregulated water use by large feedlots in another water policy statute. RCW 90.22.040 provides that it is the State’s policy to retain sufficient minimum flows or levels in streams, lakes, or other public waters in order to provide adequate waters in such sources to satisfy stockwatering requirements on riparian grazing

²⁴ In *Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 161, 61 P.3d 1211 (Wn. App. Div. 2, 2003), the Court of Appeals also noted Ecology’s consistent interpretation of the stockwater exemption as not available to commercial operations such as feedlots. Rather, feedlots fell under the industrial limitation of 5,000 gallons per day or less.

²⁵ Using Easterday Ranches’ conservative estimate of gallons used per cow, 5,000 gallons per day would allow a farmer to raise 300 cows/steers at his or her operation and still come within the stockwater exemption as it was intended and applied for many years.

lands shall not apply to stockwatering relating to feed lots and other activities which are not related to *normal stockgrazing land uses*.

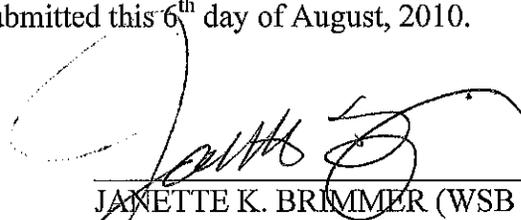
As a commercial/industrial operation, Easterday Ranches' exempt water use is limited to 5,000 gallons per day. The 1945 Legislature did not and could not have anticipated a 30,000 head commercial animal operation when it provided for small withdrawals of groundwater that were exempt from permitting. In providing an exemption for stockwatering, the legislature was providing for small farms or homesteads and not industry. The industrial exemption is 5,000 gallons per day and that is the proper exemption to apply to Easterday Ranches.

CONCLUSION

This appeal presents a familiar question to the Court: how to discern legislative intent and apply it to a modern situation. The Court has done this before in *Campbell & Gwinn*, and that case serves as a valuable foundation. The Family Farmers ask this Court to overturn the decision of the Superior Court and to declare that the stockwater exemption from permitting under the Groundwater Code—RCW 90.44.050—is neither unlimited in amount nor available to an industrial livestock operation, consistent with the plain legislative intent to conserve and regulate Washington's precious groundwater resources and consistent with the

interpretation and application of RCW 90.44.050 for sixty years.

Respectfully submitted this 6th day of August, 2010.



JANETTE K. BRIMMER (WSB #41271)

KRISTEN L. BOYLES (WSB #23806)

Earthjustice

705 Second Avenue, Suite 203

Seattle, WA 98104

(206) 343-7340

(206) 343-1526 [FAX]

Attorneys for Appellants

APPENDIX

RCW 90.44.050

After June 6, 1945, no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided:

EXCEPT, HOWEVER, That any 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, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter:

PROVIDED, HOWEVER, That the department 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:

PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

- AdamsDrafting - <http://www.adamsdrafting.com> -

More Syntactic Ambiguity: The Serial Comma

Posted By [Ken Adams](#) On July 19, 2010 @ 1:46 pm In [Ambiguity](#) | [9 Comments](#)

[This item](#) ^[1] at The Volokh Conspiracy noted that the “serial comma” has been appearing less and less frequently in the New York Times. At [Legal Blog Watch](#) ^[2], Eric Lipman pointed out that a Volokh commenter had suggested that the serial comma is important for clarity in contracts. Here’s the entire [comment](#) ^[3], posted by “Mark”:

I think we should at least all agree that the serial comma is an absolute must in contracts. It doesn’t break up the flow of a series to add the comma—you read it in anyway—but it does provide clarity, which as I understand it is what contracts are all about.

On reading the comment, I realized—shock horror probe!—that I had never explored how the ambiguity that can arise when you drop the serial comma might manifest itself in a contract. It’s another example of syntactic ambiguity, which is caused by uncertainty over which part of a sentence a given word or phrase modifies. (If you want other examples of syntactic ambiguity, search for “syntactic” on this site.)

Background

The serial comma is the comma used immediately before the *and* or *or* preceding the final item in a list of three or more items. You can either include the serial comma (*I like apples, cherries, and grapes*) or omit it (*I like apples, cherries and grapes*). At the moment I don’t have access to my usual authorities on usage, but [this Wikipedia entry](#) ^[4] gives a decent account of the arguments for and against the serial comma and which position the various style guides take.

Using the serial comma can resolve ambiguity. Wikipedia provides the following example, a “possibly apocryphal book dedication”:

To my parents, Ayn Rand and God.

Readers could derive two possible meanings from this. The first is that the book is dedicated three ways. The second that the book is dedicated to the writer’s parents, who happen to be Ayn Rand and God. As Wikipedia notes, “*Ayn Rand and God* can be read as in apposition to *my parents*, leading the reader to believe that the writer’s parents are Ayn Rand and God.” That meaning is obviously ludicrous, but change the components and real confusion could be the result.

Inserting a comma before *and* eliminates the ambiguity:

To my parents, Ayn Rand, and God.

But the serial comma can also create ambiguity. Consider the following adjusted, serial-comma-containing version of the dedication:

To my mother, Ayn Rand, and God.

Readers could derive two possible meanings from this. The first is that the book is dedicated three ways. The second that the book is dedicated to the writer’s mother, who happens to be Ayn Rand, and to God.

Omitting the serial comma eliminates the ambiguity:

To my mother, Ayn Rand and God.

An Example from a Contract

Some rooting around online led me to *Telenor Mobile Communs. v. Storm LLC*, 587 F. Supp. 2d 594, 605–08 (S.D.N.Y. 2008). (Go [here](#) ^[5] for a PDF copy.) At issue was whether someone was an affiliate of a particular entity, and that brought into play the following definition of “control” contained in a shareholders agreement:

[C]ontrol (including, with its correlative meanings, ‘controlled by’ and ‘under common control with’) shall mean, with respect to any Person, the possession, directly or indirectly, of power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise) of a Person.

Here’s what the court had to say about the alternative meanings made possible by the lack of a serial comma before “or otherwise”:

Contrary to the Altimo Entities’ argument, the Agreement’s definition of control contemplates control exercised through means other than ownership interests. The definition of control states that the “power to direct” may arise from “ownership of securities or partnership or other ownership interests, by contract or otherwise.” The phrase could be read, as the Altimo Entities assert, as limited to powers arising out of ownership interests. In this reading, “by contract or otherwise,” specifies the source of the ownership rights, and “otherwise” refers to sources of ownership rights other than contract. However, the phrase could also be read, as Telenor suggests, as a list of the sources of the “power to direct.” That is, the power to direct may arise either through “ownership of securities or partnerships or other ownership interests,” through “contract,” or “otherwise.” In this reading, the “power to direct” is not limited to powers arising out of ownership interests. Instead, such powers may also arise through “contract” or “otherwise.”

Telenor’s interpretation is the more reasonable one. First, the Altimo Entities’ proposed interpretation gives “by contract or otherwise” an awkward and cramped meaning. The specification of the ownership interests as being “ownership of securities or partnerships or other ownership interests” is clear on its own. The addition of the phrase “by contract or otherwise” adds little, if any, clarity to the scope of the ownership interests. It also suggests that ownership interests normally arise out of contract, but in fact they more often arise out of ownership of shares, or out of a partnership, than out of contract. Moreover, aside from property, partnership, and contract, it is not obvious how ownership interests might “otherwise” arise. Read as the Altimo Entities would have it, the phrase is either redundant or obfuscating, adding nothing but confusion to the definition.

Second, Telenor’s interpretation more reasonably defines “control.” Ownership is not the only way in which one person or entity may control another. Contractual arrangements, such as shareholder agreements, employment contracts, or agency or other commercial contracts, can allow one entity to wield significant power over another. It would not be consistent with the purposes of the non-competition provision for the parties to prohibit Alfa Group from directly or indirectly owning shares of a competing telecommunications venture, but to control one through another person or entity that was, for some reason other than ownership, its puppet.

This conclusion is fortified by the fact that the contractual provision appears to be modeled on other legal documents that define “control” broadly, for similar

purposes. Thus, Telenor's interpretation squares with the interpretation of the almost identical definition of "control" used by the SEC in defining the scope of "control person" liability under the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a).

To its discussion of the difference between the shareholders agreement's definition and the SEC's definition, the court added the following footnote:

One other difference, which is perhaps illuminating, is that the Shareholders Agreement drops the comma after "by contract" and before "or otherwise." The use of a comma before a conjunction joining the last two items in a list—the so-called "serial" or "Oxford" comma—is not universal, though it is "strongly recommend[ed]" by at least one authority, "since it prevents ambiguity." The Chicago Manual of Style (University of Chicago Press, 15th ed. 2003). Indeed, the omission of the serial comma in the Shareholders Agreement definition of "control" accounts for much, if not all, of the confusion here. Had the Agreement incorporated the serial comma—i.e., control is power to direct "through ownership of securities or partnership or other ownership interests, by contract, or otherwise"—it would have been substantially clearer that non-ownership types of control are contemplated. The Shareholders Agreement omits the serial comma elsewhere, for example, in the text of the non-competition provision, see Section 6.02. This pattern of omitting the serial comma, together with the overwhelming consistency between the Agreement's definition and the SEC's definition, suggests that the omission of the comma was either inadvertent or a stylistic choice not intended to affect the meaning of "control" under the Agreement.

Recommendation

I think the *Telenor* court's analysis makes sense. But as always, the question for the contract drafter is not how to make sense of a dispute but how to avoid dispute in the first place.

The simplest approach would be always to use the serial comma in a simple list of three or more items. It's very unlikely that you'd find yourself in a situation where a serial comma creates ambiguity rather than resolves it.

And if you're inclined to use what Wikipedia refers to as apposition, you certainly shouldn't rely on omitting or including the serial comma to accomplish that meaning. Instead, restructure the provision. For example, instead of the fourth example above, you could say *To God and to Ayn Rand, who is my mother*. The language at issue in *Telenor* could have been restructured to match the SEC definition, or maybe *including* could have been used instead of *or otherwise*.

But more generally, you might want to limit your use of apposition, which I refer to as "needless elaboration." (See *MSCD* 16.24.) It occurs when a contract provision refers not only to a given set but also to elements that compose all or part of that set, even though there's no question as to the boundaries of the set. Needless elaboration is when you say "fish, whether fresh-water or salt-water," rather than just "fish." Similarly, for purposes of a contract it would be redundant to refer to your parents and then identify them as Ayn Rand and God.

Not all such elaboration is needless. It would, for example, be hard to eliminate it entirely from the language at issue in the *Telenor* case. But if you eliminate needless elaboration and are aware of, and scrutinize the wording of, any remaining instances of apposition, that would help you reduce the odds of confusion down the road.

But I wouldn't want to overstate the significance of this kind of ambiguity. It seems to occur relatively rarely in contracts.

 [6]

Globe and Mail, Aug. 28, 2007

BEHIND THE SCENES OF THE COMMA DISPUTE

Kenneth A. Adams

Last week the Canadian Radio-television and Telecommunications Commission issued its second ruling in the dispute between Bell Aliant and the cable unit of Rogers Communications Inc. Although the dispute may well continue, the first phase—known to the world as “the comma dispute”—is over.

While it was surely a nuisance to the companies involved, I’ll look back on it fondly as a moment when, incongruously enough, contract drafting found itself blinking in the spotlight. And it so happens that I was involved in the drama.

I’m a lawyer who specializes in contract language. Among other things, I maintain a blog on that topic and give contract-drafting workshops in Toronto under the auspices of Osgoode Hall Law School’s professional-development arm.

In August 2006, one of my astute blog readers notified me of the article in this newspaper that alerted the world to the commission’s first ruling in this dispute. That ruling found in favor of Bell Aliant, on the strength of a comma in the contract provision in question. I promptly posted on my blog my off-the-cuff thoughts on the ruling.

Shortly afterwards, I was contacted by Rogers’ outside counsel—would I be interested in acting as an expert for Rogers in this dispute? Of course I would! I set about preparing what was described in one newspaper account as “a 69-page affidavit, mostly about commas.” (To those who questioned my sanity, I’d point out that most of the affidavit consisted of attachments.)

The commission was doubtless relieved that in its second ruling on this dispute, it was able to find in favor of Rogers without having to revisit the question of punctuation. Instead, it decided that the dispute should be governed by the French-language version of the contract, which provided for a markedly different arrangement than did the English-language version. From the commission’s perspective, its chief virtue was that unlike the English-language version, it wasn’t open to conflicting interpretations. [Note that neither party had a hand in crafting either the English-language version or the French-language version, both of which were imposed by Canadian federal authorities.]*

But as a narrative device, this outcome left something to be desired. English-usage buffs the world over have been debating for months the significance of the infamous comma, and by skirting the issue the commission has deprived them of—dare I say it—closure.

And I haven’t seen any account of this dispute that comes remotely close to identifying the issues. For example, Lynne Truss, author of the bestseller *Eats, Shoots, and Leaves: A Zero Tolerance Approach to Punctuation*, unequivocally sided with Bell Aliant but without offering any explanation.

In an attempt to fill this aching void, here's why I think any knowledgeable and even-handed observer would have resolved the comma aspect of the dispute in favor of Rogers.

First, let's revisit the contract language at issue:

Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

The dispute concerned whether the closing modifier—the phrase *unless and until terminated by one year prior notice in writing by either party*—modifies both preceding clauses or just the immediately preceding clause.

Echoing an argument offered by Bell Aliant, the commission noted that based on “the rules of punctuation,” the presence of a comma immediately before the word *unless* meant that the closing modifier modified both preceding clauses. The led the commission to side with Bell Aliant in concluding that under the contract Bell Aliant could terminate on one year's notice during the initial five-year period.

In alluding to “the rules of punctuation,” the commission could only have been referring to the interpretive principle known as the Rule (or Doctrine) of the Last Antecedent.

Although courts had invoked this principle previously, the Rule of the Last Antecedent is associated with one Jabez Sutherland, a U.S. lawyer, who in 1891 said, “Referential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent.”

He went on to propose a specific test: “Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.”

This test has been parroted in at least one Canadian legal text and has been invoked in some Canadian case law. This is presumably how Bell Aliant came to invoke it.

But the Rule of the Last Antecedent is not in fact a “rule of punctuation.” Instead, it's one of the canons of construction used by courts, sporadically and inconsistently, to resolve what would otherwise be ambiguities in statutes and contracts.

Anyone contemplating invoking the Rule of the Last Antecedent should consider that it's inconsistent with how writers use commas and how manuals of style say writers should use commas.

Manuals of style recognize that the comma is used to indicate a slight break in a sentence. But according to the Rule of the Last Antecedent, adding a comma after a series of antecedents not only doesn't sever the modifier from the last noun or phrase in the series,

it in fact operates remotely on all the antecedents, binding them to the modifier. Nothing in the general literature on punctuation suggests such a mechanism.

Instead, it's clear that no particular significance can be attributed to the comma at issue. The language following the comma—*unless and until terminated by one year prior notice in writing by either party*—constitutes a dependent (or subordinate) clause, with *unless and until* acting as the dependent (or subordinating) conjunction. It's a standard recommendation in manuals of style that a dependent clause that follows an independent (or main) clause shouldn't be preceded by a comma if it's essential to the meaning of the independent clause—in other words, if it's restrictive—as is the case here. Such guidance makes no distinction for independent clauses that contain several antecedents.

On the other hand, it's nevertheless commonplace—in this newspaper and elsewhere—for a comma to be used in this context, again regardless of whether the independent clause contains several antecedents.

Given the lack of any indication that writers use or do not use a comma before *unless* to indicate the reach of the dependent clause, it would be entirely arbitrary to use the presence of a comma before *unless* as an indication that the dependent clause modifies all of several preceding antecedents.

Sutherland himself suggested that the Rule of the Last Antecedent shouldn't be relied on as the sole basis for resolving an ambiguity. And the Canadian legal text that mentions the comma test hedges by stating that a comma before the qualifying words “ordinarily” indicates that they are meant to apply to all antecedents.

These caveats simply confirm that the Rule of the Last Antecedent in general, and the comma test in particular, can't be relied on to resolve ambiguity. The only reasonable choice available to any court or other adjudicative body is to roll up its sleeves and get on with the mucky business of trying to figure out what the parties intended. Unless, like the commission in this dispute, it has access to a nifty escape hatch.

* The sentence in brackets was added after publication.

Kenneth A. Adams is a consultant and speaker on contract drafting. He is a lecturer at the University of Pennsylvania Law School and is author of *A Manual of Style for Contract Drafting* (ABA 2004). His website and blog are at www.adamsdrafting.com.