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SUPREME COURT NO. 8460244 RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON *bjh*

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

Appellants/Cross Respondents.

v.

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

Respondents/Cross Appellants.

and

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

Intervenor-Respondents.

RESPONDENT/CROSS APPELLANT EASTERDAY'S OPENING  
BRIEF

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## I. INTRODUCTION

Easterday Ranches is owned by Cody Easterday along with his father, Gale Easterday. Cody Easterday has constructed a 30,000 head feedlot in the Five Corners area of Franklin County.<sup>1</sup> To construct the feedlot, Easterday was obliged to obtain permits from various local and state agencies all of which he has done. He drilled a well to support his cattle. Under the Department of Ecology's interpretation of the law, Easterday was not obliged to obtain a permit for the well to water his stock, but, because the operation requires other water uses, he obtained water rights from Pepiots, Inc., a neighboring farm. Easterday has received approval from Franklin County Water Conservancy Board and the Department of Ecology for the transfer of Pepiots' 316 acre feet of water right.

Five Corners is composed of farmers who operate unpermitted wells 8,000 or more feet from Easterday's operation and two environmental groups. Five Corners originally brought this action in Thurston County. The Thurston County Superior Court transferred the case to Franklin County but refused to grant Easterday his costs. Once the case had been transferred to Franklin County, Easterday moved to dismiss the case for lack of standing, because Five Corners had neither alleged nor

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<sup>1</sup> Feedlots are technically called confined area feeding operations.

shown any injury or potential injury because of Easterday's operation, and they had failed to appeal any of the permits issued to Easterday under the Land Use Petition Act. The court denied that motion.

The trial court granted summary judgment on behalf of Easterday and the Department of Ecology, finding that the State's Groundwater Code permitted Easterday to withdraw unlimited amounts of water without obtaining a permit from the Department of Ecology. The trial court refused to award Easterday his attorneys' fees under the Right to Farm law.

## II. ASSIGNMENTS OF ERROR

### *Assignments of Error*

1. The Thurston County Superior Court erred in failing to grant Easterday Ranches its reasonable attorneys' fees for obtaining a change of venue in accord with RCW 4.26.090.
2. The Franklin County Superior Court erred in failing to dismiss the complaint for lack of standing.
3. The Franklin County Superior Court erred in failing to dismiss the plaintiffs for their failure to appeal decisions under the Land Use Petition Act.

4. The Franklin County Superior Court erred in failing to strike the declarations submitted by Five Corners in support of its standing and summary judgment arguments.

5. The Franklin County Superior Court erred in failing to grant Easterday reasonable attorneys' fees and actual costs and expenses under the right to farm statute, RCW 7.48.300 *et seq.* and parallel Franklin County ordinance.

*Issues pertaining to assignments of error*

1. The plaintiffs filed this case in Thurston County even though all the parties except the Department of Ecology and all the real property in issues were in Franklin County. Did the Thurston County Superior Court err in failing to find that the plaintiffs could have determined the correct venue of this action? [Assignment of Error No. 1]

2. Did the Thurston County Superior Court err in not awarding Easterday Ranches its costs and reasonable attorneys' fees for obtaining a change of venue? [Assignment of Error No. 1]

3. The plaintiffs have not shown injury, the threatened invasion of any right and an actual, present and existing controversy. Did the Franklin County Superior Court err in failing to dismiss the case for lack of standing? [Assignment of Error No. 2]

4. The Franklin County Commissioners and Department of Ecology approved a number of land use permits. Some of these permits were based upon or dependent upon Easterday's use of an exempt stock water well. Did the Franklin County Superior Court err in failing to dismiss the plaintiffs' claims because they did not exhaust their administrative remedies under the Land Use Petition Act? [Assignment of Error No. 3]

5. The plaintiffs filed numerous declarations in support of their standing and summary judgment arguments. These declarations contained inadmissible evidence. Did the Franklin County Superior Court err in not excluding these declarations? [Assignment of Error No. 4]

6. Did the Franklin County Superior Court err in not excluding those portions of Five Corners' declarations that were not admissible? [Assignment of Error No. 4]

7. Easterday applied for its costs and attorneys' fees under the Franklin County Right to Farm Ordinance and RCW 7.48.300 *et seq.* Did the Franklin County Superior Court err in not awarding Easterday his costs and attorneys' fees under these laws? [Assignment of Error No.5]

### III. STATEMENT OF THE CASE

#### A. Easterday Ranches has constructed a feedlot.

Cody Easterday constructed a feedlot for 30,000 head of cattle in the Five Corners area of Franklin County. CP 1585. To water his stock, Easterday drilled a well into the Grand Ronde aquifer. CP 1050-55, 1017. Under existing state law, Easterday does not need a permit to drill such a well and did not seek or obtain one. At the suggestion of the Department of Ecology, however, Easterday purchased certified water rights from Pepiots, Inc., a neighboring farm. CP 965-1034. Easterday received approval from the Franklin County Water Conservancy Board and Ecology approved the transfer for the withdrawal of 316 acre-feet per year on the 11<sup>th</sup> day of June, 2009. *Id.* The entire feedlot operation will use about 505 acre-feet per year for stock watering. CP 989.

#### B. Five Corners is far from Easterday's stock well

Sheila Poe and Scott Collin own properties with domestic wells. These properties are located well over a mile from Easterday's feedlot. The Poe and Collin wells are 840 and 736 feet deep and were dug in 1949 and 1900 respectively. Neither Poe, Collin nor their predecessors in interest obtained permits for these wells. CP 849-55, 922-34. These wells are in the Wanapum Aquifer, CP 851, and Easterday's well will not impair theirs, because it is cased and sealed through the Wanapum Aquifer and

draws from the Grand Ronde Aquifer. CP 1050-51. Easterday's well is some 1655 feet deep. CP 1017.

The nearest well to Easterday's in the Grand Ronde Aquifer is 20,000 feet away. The closest domestic well in the Wanapum Aquifer is 8,000 feet away and owned by Randy Rupp. Collin's well is some 13,000 feet or over two miles away. CP 1050.

**C. The Stock Watering Exemption – the issue in this case.**

Five Corners' claims the Washington Groundwater Code only exempts wells from Department of Ecology regulation if those wells do not draw more than 5,000 gallons per day or about seven gallons per minute. CP 1586-88. Five Corners sought declaratory relief that Ecology was required to issue or deny a permit for Easterday's well. CP 1588. Ecology did not issue or deny such a permit, because the Attorney General has determined the stock watering exemption is not limited to 5,000 gallons per day, and Ecology is not authorized by the legislature to license or regulate Easterday's well insofar as it is used to water stock. AGO 2005 No. 17.

**D. Procedural History**

Five Corners commenced this action in Thurston County against the Department of Ecology and Easterday Ranches. CP 1576-91. Easterday moved for a change of venue to Franklin County. CP 1526-38.

This was granted, but the Thurston County Superior Court would not award Easterday his costs and attorneys' fees. CP 1270-75, 1286.

Once in Franklin County, Easterday moved to dismiss based on Five Corners' lack of standing. CP 1062-79. He moved to strike the responding affidavits because they did not comply with the rules of evidence. CP 833-38. Both these motions were denied. CP 821-22.

All the parties filed cross motions for summary judgment on the proper interpretation of the stock watering exemption. The Franklin County Superior Court ruled in favor of Ecology and Easterday, but did not award Easterday his costs and reasonable attorneys' fees for defending his right to farm. CP 19-25.

#### **IV. ARGUMENT**

##### **A. Standard of review**

We concur with the plaintiffs that the standard of review for statutory construction is a question of law. Because the motions were based solely upon affidavits, the court should decide the issues of changing venue and the trial courts' failure to award reasonable attorneys' fees as matters of law. The consideration of inadmissible evidence on a motion for summary judgment is reviewed on the error of law standard. Standing is reviewed on the error of law standard.

**B. This Court should not consider the plaintiffs' assignments of error, because they are invited error.**

A number of parties prepared proposed orders to memorialize the Franklin County Court's oral decision. The Department of Ecology submitted, then Five Corners concurred, in the present form of the Franklin County Superior Court's judgment that permitted "unlimited" withdrawals. CP 1141-43. Easterday specifically opposed this language, because the amount of water is limited to the amount cattle may reasonably use. CP 1173-76. Easterday agrees that, to the extent that the Franklin County Court's judgment holds Easterday is entitled to "unlimited" withdrawals of water, it is in error, but that error was invited by the plaintiffs and they cannot complain of it.

¶25 In some cases, courts have used the invited error doctrine to analyze the impact a party's tactical choices have on alleged error. The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). Different factors have led courts to conclude that the alleged error merits denial of relief under this doctrine.

¶26 In *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002), we found the invited error doctrine applicable where a defendant proposed a jury instruction based on an ordinance that was later declared unconstitutional. In *Patu*, the defendant proposed an instruction that was missing an essential element of the crime, the court accepted the instruction, and the jury convicted the defendant. On

appeal, the defendant sought reversal of conviction based on the trial court's failure to include an essential element of the offense in the instruction. We affirmed the conviction and held the invited error doctrine applied, reasoning that a party may not request an instruction and later complain on appeal that the requested instruction was given. *See also State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (holding invited error doctrine applicable to defendants who proposed erroneous instruction without attempting to add remedial instruction and reasoning, although error was of constitutional magnitude and presumed prejudicial, defendants invited error and could not complain on appeal). In determining whether the invited error doctrine was applicable, courts have also considered whether a defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *See, e.g., State v. LeFaber*, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J., dissenting) (considering distinction between defendant's failure to object to error and affirmatively assent to error); *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (considering whether defendant materially contributed to error); *People v. Thompson*, 50 Cal. 3d 134, 157, 785 P.2d 857, 266 Cal. Rptr. 309 (1990) (considering whether defendant benefited from closure).

*State v. Momah*, 167 Wn.2d 140, 153-154, 217 P.3d 321 (2009). Ecology for its own aggrandizement and Five Corners for its political ends would have this decision overturned. Five Corners repeats its objection that the stock watering exemption allows for "unlimited" use, but it and Ecology proposed this language and Easterday proposed correct language. CP 1141-43, 1173-76. Five Corners invited error, and this Court need not consider any other issues in this appeal.

**C. The Court should strike the plaintiffs' statement of facts because it is submitted in violation of the RAP 10.3**

Five Corners' Statement of Fact is far from being a "fair statement of the facts ... without argument" as required by RAP 10.3(a)(5) and should be stricken. The Statement is a string of political and legal arguments and statements of contested facts as if they were admitted by all. For example, the opening sentence, "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" is not a fact in issue in this case. It is not untrue, but it has nothing to do with Cody Easterday's well. It has no part is a statement of facts. The next section is an argument for Five Corners' "such small withdrawal" theory of statutory deconstruction and their much contested theory that Ecology has always interpreted the stock water exemption as being limited to 5,000 gallons per day. App. Br. 3-5. It is an argument not facts. Section I.C. is filled with inaccurate claims. *Id.* 7-11. We will address these at greater length *infra* in our discussion of the trial court's error in admitting many of Five Corners' declarations. It is sufficient here to note Five Corners does not claim any injury beyond speculation. This Court should not consider Five Corners' Statement of Facts.

**D. The Attorney General's Opinion is entitled to considerable weight**

The Ground Water Code permits Easterday to drill and operate a stock water well without obtaining a permit from the Department of

Ecology. In 2005, at the request of state legislators, the Attorney General issued an opinion that the ground water code RCW 90.44.050 exempts withdrawals of ground water for stock watering purposes without setting a numeric limit on the quantity of the water withdrawn. We have attached that opinion in the appendix. It is a correct statutory interpretation of the Groundwater Code.

An Attorney General opinion is not controlling, but is entitled to considerable weight. *Bellevue Fire Fighters, Local 1604 v. Bellevue*, 100 Wn.2d 748, 751 n.1, 675 P.2d 592, *cert. denied*, 471 U.S. 1015 (1984). “We review questions of statutory interpretation *de novo*. . . . In reviewing a statute, we give effect to the legislature’s intent, primarily derived from statutory language. Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language. We read an unambiguous statute as a whole and must give effect to all of its language.” *Dot Foods, Inc. v. Dep’t of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). The opinion of the Attorney General correctly applies these principles to the Groundwater Code.

Under applicable rules, if a statute’s meaning is plain from the face of the statute, then effect must be given to its “plain meaning” as expressing the Legislature’s intent. [*Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)]. To determine whether the meaning of a statute is plain, one must consider the statutory scheme as a whole, including related statutes.

Plain meaning is “derived from what the Legislature has said in its enactments, but that meaning 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 10-11. If, after considering “all that the Legislature has said”, the statute is not plain (but rather is ambiguous), then the court applies additional rules of statutory construction to resolve the ambiguity and determine what the statutory language means. Notably, however, a statute is not ambiguous merely because it is subject to more than one conceivable interpretation. Rather, ambiguity depends on the existence of more than one reasonable meaning. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

We conclude that the first proviso to RCW 90.44.050 makes it plain that groundwater withdrawals for stock-watering are exempt from the permit requirement, and that the exemption is not limited to withdrawals of less than 5,000 gallons a day.

2005 AGO No. 17, 7-8. We will discuss the reasonableness of the plain language in light of both past and current agricultural practices.

**E. The meaning of the stock watering exemption is clear, reasonable and not unlimited.**

**1. The statutory interpretation of the stock watering exemption is not limited to specific number of gallons but to the number of cattle.**

Five Corners sustains its analysis of RCW 90.44.050, by never completely citing it, Brief p. 4; and repeating the word “unlimited.” The heart of Five Corners’ argument is that the stock watering exemption will “allow a single use exception to devour the whole of the statutory scheme for regulating groundwater, based solely upon the placement of commas.”

Brief 20 & 22. This is table pounding, not statutory analysis. RCW 90.44.050 provides as follows:

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. [emphasis added]

It is only the italicized portion of this statute that is in issue and its meaning is clear and unambiguous. The Attorney General's thorough and careful analysis leaves little to add. AGO 2005 No. 17. We will address, however, Five Corners attempts to re-write the statute.

RCW 90.44.050 extinguishes Washington citizens' common law rights to appropriate groundwater and substitutes the obligation to obtain a permit. Collin's ancestors exercised their common law right and Poe's

exercised the statutory exemptions. The four exemptions from obtaining a permit are:

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

None of the exemptions are "unlimited." The first is limited to watering stock, the second to noncommercial gardens of less than one-half acre and the last two to domestic and industrial uses not exceeding 5,000 gallons per day. Had Hugh Rosellini, the sponsor of the Groundwater Code, intended to limit the first two exemptions to 5,000 gallons per day he would have written "*EXCEPT, HOWEVER, That any withdrawal of public groundwaters of less than 5,000 gallons per day shall be exempt from the provisions of this section,*" or perhaps "*EXCEPT, HOWEVER, That any withdrawal of public groundwaters for domestic, agricultural or industrial use of less than 5,000 gallons per day shall be exempt from the provisions of this section.*" Instead Rosellini limited the exemptions for stock by number of head and gardens by acreage. Only domestic and industrial uses are limited to 5,000 gallons per day. These are precise, clearly defined distinctions that could not have been the product of careless

drafting or sloppy grammar. The cardinal rule of statutory construction is that a court will not look at a statute to create ambiguity where none exists.

Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. Our starting point must always be “the statute’s plain language and ordinary meaning.” When the plain language is unambiguous--that is, when the statutory language admits of only one meaning--the legislative intent is apparent, and we will not construe the statute otherwise. Just as we “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language, we may not delete language from an unambiguous statute. [citations omitted]

*State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Only by adding the phrase, “not exceeding five thousand gallons a day” behind the first and second exemption do we arrive at Five Corners’ interpretation of the statute. No rationale or tenant of statutory construction exists for adding this language.

**2. The Legislative History of the Ground Water Code does not support Five Corners’ interpretation.**

When Washington adopted the Groundwater Code in 1945, the most current decennial census revealed 1,736,191 humans. By the last census that number had tripled to 5,894,121.<sup>2</sup> This trend is not true for stock animals. In 1945 there were 509,089 dairy cows, 909,855 beef cattle and calves, 178,746 hog and pigs, and 446,749 sheep and lambs. CP 257,

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<sup>2</sup> Population figures may be obtained from <http://www.census.gov/prod/www/abs/decennial/index.htm>. Excerpts appear in the Appendix

259, 262 & 266. Consistent with our current predilection for McDonalds and North Face and our greater aversion to lard, mutton chops and Pendletons, by 2007 those numbers were 243,132, 845,714, 28,545, and 53,220 respectively.<sup>3</sup>

Five Corners attempts to use extrinsic evidence to show that the statute is ambiguous rather than to explain how something in the statute is ambiguous. This is backwards. We need not look at “the historical record” or “historical context” *i.e.* extrinsic evidence, when the language is clear. Br. 23, 25, 27, 34, 38, 41 & 42. The “historical record” does not support Five Corners’ position in the first place. The evidence to which they point overlooks the other three fingers on their hand pointing back at them. Each of Five Corners’ predecessors took full advantage of his right to dig a well without obtaining the permission of the government.

It is a well recognized rule of statutory construction that intrinsic and extrinsic aids may be resorted to only when the meaning of a statute cannot be declared from the statutory language to be construed. It follows, then, that, unless the words tax credit, considered in connection with the context in which they are found, be held ambiguous, intrinsic and extrinsic aids in determining the meaning of the phrase may not be employed. As we stated in the case of *Ernst v. Kootros*, 196 Wash. 138, 82 P.2d 126 [1938],

“When the language of the act is plain, free from ambiguity, and devoid of uncertainty, it is

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<sup>3</sup> See, [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Washington/wav1.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_State_Level/Washington/wav1.pdf). Table 11. The number of beef cattle is obtained by subtracting dairy cows from the total cattle and calf population. This probably produces an inflated number of beef cattle for 2007. Excerpts appear in the Appendix

unanimously held that there is no room for construction.”

*State ex rel. Wash. Mut. Sav. Bank v. Bellingham*, 8 Wn.2d 233, 243, 111 P.2d 781 (1941).

The most telling extrinsic evidence is the reaction from the Legislature when the Pollution Control Hearings Board decided *DeVries v. Dep't of Ecology*, PCHB 01-073 (2001). The letters to the Attorney General in 2005 show that the Legislators who signed it do not consider the plain language of the law ambiguous or out-of-harmony with their understanding. CP 777-81. It is no coincidence that the legislators who wrote this letter represented Eastern Washington districts. While not evidence of intent in 1945, it is certainly evidence that the legislature is satisfied with the plain meaning and in the intervening five years has made no attempt to amend the language. “[T]he Attorney General opinion constitutes notice to the Legislature of the Department’s interpretation of the law, and the Legislature has not acted since 1976 to overturn the Department’s interpretation. Greater weight attaches to an agency interpretation when the Legislature acquiesces in that interpretation.” *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993).

Certainly, there are logical reasons for exempting cattle, but not corn. One irrigation circle uses twice the water as all 30,000 of

Easterday's cattle, but in the end, the legislature made its decision politically. The Groundwater Code took away the freedom of many of Washington's citizens to just dig a well when they needed water and substituted regulation. It is understandable that the legislature in 1945 would chose to not abridge that freedom for as many citizens as possible. We can suppose ranchers and dairy farmers lobbied to retain the freedom to dig wells. If the legislature imposes regulation in place of freedom, that choice will doubtless be a political decision, because the amount of stock using water today is less than it was in 1945. Nothing Five Corners has shown indicates why the Legislature singled stock over other agricultural commodities. It was a conscious choice, however and that is all that matters

**F. The trial court erred in failing to dismiss the plaintiffs for want of standing.**

**1. The Center for Environmental Law and Policy and the Sierra Club admit they lack standing.**

The Center for Environmental Law and Policy and the Sierra Club concede that absent a real controversy, they lack any standing to pursue this case. The court in ordering venue changed to Franklin County found that absent a controversy between the landowners, there was no case or controversy.

After that little political speech, I think the correct way to resolve this is even though there is a declaratory judgment

action on the table here, the essence of this, in order for it to have integrity, it has to be the action between the two landowners. That's why Easterday is made the defendant. That's why the people who are just as concerned about the landowners themselves have the landowners themselves in as a real party at interest. Otherwise, this would be not allowed under declaratory action because nobody would have standing and the court would be giving an advisory opinion.

CP 1281. A controversy between the plaintiffs and Easterday is the *sine qua non* of any action and without that controversy, this action is not possible. As Five Corners concedes:

While the State is the primary defendant here, declaratory judgment actions must involve a "live" controversy in order for a court to avoid issuing advisory opinions. *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990); *Kitsap County v. Smith*, 143 Wash. App. 893, 903, 180 P.3d 834 (Div. 2 2008). Therefore, while the State is the primary defendant and it is the State's action that is truly at issue here, the situation with Easterday is the live controversy that provides the proper context for a court to interpret the stock-water exemption statute.

CP 1462. The environmental plaintiffs lack standing to bring this action.

**2. Five Corners is collaterally estopped from claiming it is injured.**

Five Corners also lacks standing because it will suffer no injury and cannot allege any injury. Ecology has made a final determination and that determination included a finding that the Five Corners plaintiffs will suffer no injury, and none of the parties appealed that decision.

On page 11 of the Report of Examination under the heading **“Review of Potential Impairment”** the first sentence of the first paragraph reads: “Because the proposed action will not increase the existing certificated water use (with change modifications), or increase the water amount put to allowed beneficial use, or likely affect other existing water rights (or applications for new water rights), no impairment is perceptible.” **Ecology modifies this sentence because it is unclear as to what the Board means by “with change modifications.” The Board’s language implies that the existing certificate has previously been modified (through a change process), which Ecology understands is not the case. The sentence shall be amended to read as follows: Because the proposed change/transfer will not increase the existing certificated water use or increase the amount of water put to historic beneficial use, other existing water rights will not be impaired.** [Emphasis in Original]

CP 975. In response to specific allegations by Five Corners, the Franklin County Commissioners made the following finding:

The County required an impairment analysis to be completed and imposed a condition of approval that states the following: “Exempt wells to be located on the farm site shall be drilled to and pull water from the Grande Ronde Aquifer. Wells shall be fully cased the entire depth of the well”. Enactment of these conditions as it relates to the proposed well(s) for stock watering will assist in minimizing potential impacts to surrounding wells and landowners.

CP 1039. Five Corners did not appeal either of these findings and is in no place to complain, because they have suffered no injury.

These decisions preclude a finding of injury now. Administrative determinations have the same binding effect for the purpose of collateral

estoppel or issue preclusion as do decisions of courts. In *McCarthy v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 812, 759 P.2d 351 (1988), McCarthy worked at the Department of Social and Health Services for ten years. During that time, she was required to work in an environment that continuously exposed her to cigarette smoke. Consequently, she developed pulmonary disease, became totally disabled and was forced to terminate her employment. She was denied workers' compensation benefits by the Washington Board of Industrial Insurance Appeals, which determined that her disease was not an occupational disease compensable under the Industrial Insurance Act. McCarthy then sued the State for failure to provide a safe workplace. The State claimed immunity under the Industrial Insurance Act, but our Supreme Court held that McCarthy's disease could not fall under the Act, because the parties had litigated the issue to finality. "The doctrine of collateral estoppel precludes relitigation of issues once litigated and determined between the parties, even though a different claim or cause of action is asserted. . . Here, the parties have litigated, and the Board has made a final determination, as to whether McCarthy's pulmonary disease is an occupational disease within the scope of the Act. Neither McCarthy nor the State appealed the Board's ruling. When the Board's ruling is not appealed, the parties are collaterally

estopped from relitigating the Board's ruling in a subsequent action." *McCarthy*, 110 Wn.2d at 823.

Five Corners allowed the issue of Easterday's stock watering well to become final before the Franklin County Board of Commissioners and the Department of Ecology. Both found that Easterday's well would not injure them. They cannot use a nonexistent claim of injury to create standing before this court.

**3. Five Corners must claim injury or invasion of its rights to have standing to bring this action.**

In order to have standing a party under the declaratory judgment act must allege some "rights, status and other legal relations" that the court may declare. RCW 7.24.010. For example development companies had the requisite standing under the RCW 7.24 to challenge a city's enactment of several moratoria, because the interest to be protected fell within the zone of interests regulated by the moratoria, and the action challenged caused the development companies injury in fact. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 103 P.3d 244 (2004). The plaintiff must, however show some injury to have standing. Thus where a car dealership improperly charged a business and occupation tax to a car buyer, the buyer could seek a declaratory judgment concerning rights under RCW 7.24, because he had standing as he paid the tax for the dealership and the buyer suffered economic injury. The case was a

justiciable controversy. The buyer's restitution claim was a private right of action that allowed him to recover the amount improperly paid as tax. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007).

Similarly, taxpayers have sufficient interest for use of the Declaratory Judgment Act, to test the validity of the expenditure of tax money. *Mitchell v. Consolidated Sch. Dist. No. 201*, 17 Wn.2d 61, 135 P.2d 79 (1943). On the other hand, if the taxpayer will not be injured because he does not pay the tax and will not be adversely affected, he lacks standing. *Heisey v. Port of Tacoma*, 4 Wn.2d 76, 102 P.2d 258 (1940). In the same way, Five Corners must do more than just stand on its pleadings to show it has standing and this it cannot do. The plaintiffs have either admitted they will suffer no injury or have been found to have suffered no injury. They therefore lack standing to bring this action.

**4. The trial court erred in admitting the declarations of the plaintiffs because they contained inadmissible evidence.**

The plaintiffs submitted numerous declarations in support of their standing arguments and in their claims for summary judgment. Most of the material in these declarations is inadmissible. Now that they have filed their appellate brief Five Corners recites many of these facts as if they were the uncontested. Easterday submitted detailed objections to each statement and the reasons for its exclusion. CP 522-29, 833-838. The

court denied this motion reasoning that she could appropriately weigh this material without excluding it. CP 822. It is not the rule that some modicum of weight should be given to inadmissible evidence but rather inadmissible should not be considered at all. Evidence must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture. *State v. Maule*, 35 Wn. App. 287, 667 P.2d 96 (1983) (expert witness).

The evidence to which Easterday objected was the substance of what little Five Corners could produce in the way of evidence. Dr. Osborne, CP 885-921, submitted evidence that was intended to show some basis for C.E.L.P. to be in this litigation, but Osborne had no expertise and his declaration should have been excluded, because its substance was lay opinion, hearsay and just plain irrelevant. CP 524-25. Ralph Jones, Scott Collin, Patricia Sumpton and Sheila Poe CP 845-61, 922-34, all presented evidence that was hearsay, conjecture, lay opinion and irrelevant. CP 523-26. When this inadmissible evidence is withdrawn from consideration, Five Corners has no argument to present to the court.

For example, Scott Collin claims his farm abuts “the Easterday Feedlot.” C.P. 923. This is not true, because their wells are 13,000 feet, over two miles, apart. CP 1051. Collin’s well is only 736 feet deep, CP 924, and draws from the Wanapum Aquifer. CP 1051. Five Corners

makes these critical misstatements to make its standing argument, App Br. 7-9, based on the hearsay in ¶ 11 of Collin's declaration. CP 924. The same inadmissible and incorrect allegation were treated as facts and presented to Franklin County Superior Court. They should never have been admitted. Without these inadmissible and incorrect claims, Five Corners has no standing in this case.

**G. Cody Easterday was entitled to his reasonable attorneys' fees because he was obliged to make a motion for a change of venue.**

As Five Corners was quick to point out, its choice of Thurston County is "only disturbed upon strong showing by the movant." CP 1464 fn8. Their choice was based on their convenience, the convenience of their lawyers, Earthjustice. *Id.* Absolutely no case law supports this sort of venue selection. A plaintiff has a right to select venue initially, but Washington has a history of intolerance to wrong venue choices. RCW 4.28.185(5), the Long-arm Statute, generously awards fees to out-of-state litigants wrongfully hauled into Washington Courts. The Long-arm Statute's fee shifting provision was to compensate an out-of-state defendant for the additional burdens of having to litigate a case in a foreign jurisdiction. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993). The same rules apply to the plaintiff who chooses the wrong venue or jurisdiction.

RCW 4.12.090 provides in relevant part:

(1) . . . . The costs and fees . . . must be paid by the party at whose instance the order [for a change of venue] was made, except [when the county designated in the complaint is not the proper county], in which case the plaintiff shall pay costs of transfer and, in addition thereto, if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence, it shall order the plaintiff to pay the reasonable attorney's fee of the defendant for the changing of venue to the proper county.

Five Corners could have determined it was complaining about injury to its property. Everyone involved lived in Franklin County. The action was intended to enjoin Easterday's farming operation, it would affect the value of his property and it would limit his right to pump water from his well. A reasonable "plaintiff could have determined the county of proper venue with reasonable diligence." Legal arguments are not germane to this determination, only facts. No party to this action has suggested that there is any reason that this case could not have been brought first in Franklin County.

*Keystone Masonry, Inc. v. Garco Const. Inc.*, 135 Wn. App. 927, 147 P.3d 610 (2006); was a breach of contract case in which the plaintiff resolutely refused to accept a venue selection to which it had agreed. Our courts have consistently upheld venue selection clauses in contracts. *State*

*ex rel. Schwabacher Bros. v. Superior Court*, 61 Wash. 681, 112 P. 927 (1911); RCW 4.12.080.<sup>4</sup>

In *Cole v. Sands*, 12 Wn. App. 199, 528 P.2d 998 (1974), a collection case, the defendant petitioned for certiorari when a Stevens County court would not remove venue to Spokane County, the residence of the defendant. The Court of Appeals remanded the case to change venue. “Consequently, the respondent shall pay the cost of transfer. However, the question whether the respondent could have determined the county of proper venue with reasonable diligence must be determined in the present case by the trial court upon remand. If the trial court determines this issue adversely to the respondent, then, in its computation of the attorney’s fees due petitioners, shall take into consideration not only the motion for change of venue argued before it, but also the prosecution and argument of this writ of certiorari.” 12 Wn. App. at 202.

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<sup>4</sup> A contract provision is void as contrary to public policy if it seriously offends law or public policy. *In re Marriage of Hammack*, 114 Wn. App. 805, 810-11, 60 P.3d 663, review denied, 149 Wn.2d 1033 (2003). By enacting RCW 4.12.080, the legislature specifically approved forum selection clauses by mandating that such agreements will determine venue, even if grounds exist to locate the forum elsewhere. RCW 4.12.080; and see RCW 4.12.030. And we have stated, “[p]articularly in the commercial context, the enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability.” *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158 (1997). Our Supreme Court also announced that “the policy of this state is that, if the parties agree to a venue for a suit, the trial court cannot allow the suit to be brought in any county other than the one agreed on by the parties.” *Mangham v. Gold Seal Chinchillas, Inc.*, 69 Wn.2d 37, 45, 416 P.2d 680 (1966). Washington’s public policy strongly favors enforcement of forum selection clauses. Keystone’s argument that the forum selection clause in its contract with Garco violates public policy has no merit.” 135 Wn. App. at 933.

Of particular interest is a case over a \$368.90 violin, *Shelton v. Farkas*, 30 Wn. App. 549, 635 P.2d 1109 (1981), which doubtless cost the plaintiff thousands in terms and attorneys' fees before it was over. Shelton, who had sold a defective violin to Farkas' daughter, refused to take the instrument back when the defect was found, because he had sold it "as is" and lowered the price. Shelton sued on the check after Farkas stopped payment and after she and her attorney had ignored his dunning. Shelton knew that Farkas and her daughter lived in Ellensburg, but nonetheless filed suit in King County.

Like Shelton and Keystone, Five Corners claimed it had the best of reasons to stay in Western Washington and it should not have to pay, because its motive is pure and its cause just. "This is not the kind of bad faith or frivolous or unreasonable action that the statute is meant to address and for which courts have awarded fees for a change of venue." CP 1300. Five Corners' motives are not pure and its cause is not just, but that has nothing to do with making the wrong choice for venue. Respondent cannot conceive that a litigant could not figure out that parties, property, water and causes of action all located in Franklin County ought not to be filed in Franklin County. The law dictates that such a choice sifts the cost of moving venue to the proper county onto the plaintiffs.

**H. Costs of this litigation should have been assessed against the plaintiffs under the Right to Farm Laws.**

As have many agriculturally dependant counties, Franklin County has adopted a Right to Farm ordinance. Franklin County Ordinance number 8-2008, entitled, "An ordinance adopting the Franklin County 'right to farm' policy and repealing ordinance 23-29 adopted on October 17, 1994" was adopted by the Franklin County commissioners on November 3, 2008. The Ordinance defines "Agricultural activity" as "a condition or activity which occurs on a farm in connection with the commercial production of farm products and includes, but is not limited to . . . use of water for agricultural activities; . . . and conversion from one agricultural activity to another . . . The term includes use of new practices and equipment consistent with technological development within the agricultural industry." Ord. 8-2008 §4. Section 5 of the Ordinance provides in relevant part:

(1) A farmer who prevails in any action, claim, or counterclaim alleging that agricultural activity on a farm constitutes a nuisance may recover the full costs and expenses determined by a court to have been reasonably incurred by the farmer as a result of the action, claim, or counterclaim.

(2) A farmer who prevails in any action, claim, or counterclaim (a) based on an allegation that agricultural activity on a farm is in violation of specified laws, rules, or ordinances, (b) where such activity is not found to be in violation of the specified laws, rules, or ordinances, and (c) actual damages are realized by the farm as a result of the

action, claim, or counterclaim, may recover the full costs and expenses determined by a court to have been reasonably incurred by the farmer as a result of the action, claim, or counterclaim.

(3) The costs and expenses that may be recovered according to subsection (1) or (2) of FCC 5.12.060 and as hereinafter amended include actual damages and reasonable attorneys' fees and costs. For the purposes of FCC 5.12.060, "actual damages" include lost revenue and the replacement value of crops or livestock damaged or unable to be harvested or sold as a result of the action, claim, or counterclaim.

An allegation of injury for the withdrawal of ground water is an action for nuisance. *Henderson v. Wade Sand & Gravel Co.*, 388 So. 2d 900 (Ala. 1980); *see, Bradley v. Amer. Smelting & Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985) (merging the law of nuisance and trespass). The ordinance further provides that damages "include actual damages and reasonable attorneys' fees and costs." *Id.* §5. Franklin County's provisions are substantively identical to RCW 7.48.300-.320 which affords Easterday identical remedies. Easterday Ranches was entitled to reasonable attorneys' fees for defending this suit.

**I. Easterday is entitled to reasonable attorneys' fees on this appeal.**

If this Court agrees that Easterday is entitled to recover his attorneys' fees and expenses, then he is entitled to recover those fees in this appeal as the prevailing party under the Right to Farm Ordinance and RCW 7.48.300 *et seq.* *See, Woo v. Firemans Fund Ins. Co.*, 161 Wn.2d

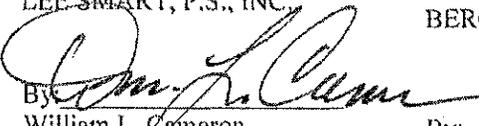
43, 164 P.3d 454 (2007); *Floor Express, Inc. v. Daly*, 138 Wn. App. 750, 158 P.3d 619 (2007). Easterday was entitled to his reasonable attorneys' fees for seeking a change of venue, because as a matter of law Five Corners could have determined that venue was properly in Franklin County. RAP 18.1

#### V. CONCLUSION

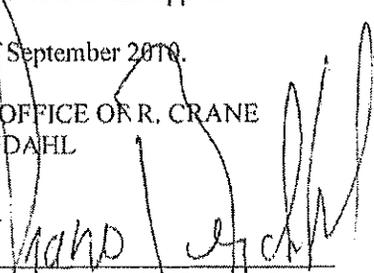
This Court should sustain the trial court in its decision interpreting the stock watering option. Any error in the language of the order was invited by Five Corners and should not now be the basis of any complaint. In the alternative, Five Corners lacks standing for want of a justiciable controversy and their complaint should be dismissed. If at some point they actually suffer injury, they have an appropriate remedy. This Court should remand the case for a determination of Easterday's reasonable fees necessary to obtain the change of venue and to defend his right to farm. Easterday is entitled to his reasonable attorneys' fees on this appeal.

Respectfully submitted this 7<sup>th</sup> day of September 2010.

LEE SMART, P.S., INC.

By:   
William L. Cameron,  
WSBA No. 5108

LAW OFFICE OF R. CRANE  
BERGDAHL

By:   
R. Crane Bergdahl, WSBA No. 741  
Of Attorneys for Defendant  
Easterday Ranches, Inc

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on September 7, 2010, I caused service of *Opening Brief of Respondents* via ABC Messenger Service or First Class

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## APPENDIX

### A. § 90.44.050. Permit to withdraw

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.

**HISTORY:** 2003 c 307 § 1; 1987 c 109 § 108; 1947 c 122 § 1; 1945 c 263 § 5; Rem. Supp. 1947 § 7400-5.

**B. AGO 2005 No. 17**

November 18, 2005

**SYLLABUS:**

WATER -- WATER RIGHTS -- DEPARTMENT OF ECOLOGY -- RULES AND REGULATIONS -- Interpretation of statutory language exempting withdrawals of groundwater for stock-watering from permitting requirements.

1. RCW 90.44.050 exempts withdrawals of groundwater for stock-watering purposes from the permitting requirement, without setting a numeric limit on the quantity of water withdrawn.
2. The Department of Ecology does not have authority to impose a categorical limit on the quantity of groundwater that may be withdrawn for stock-watering without a permit. In certain circumstances, the Department of Ecology's statutory authority to regulate the use of water may affect or limit such withdrawals, just as it may affect or limit withdrawals for other purposes.
3. An agency may not alter its interpretation of a statute in a manner that is inconsistent with statutory language and legislative intent to address changed societal conditions.

**REQUESTBY:**

The Honorable Bob Morton  
State Senator, 7th District  
P. O. Box 40407  
Olympia, WA 98504-0407

The Honorable Janea Holmquist  
State Representative, 13th District  
P. O. Box 40600  
Olympia, WA 98504-0600

**QUESTION:**

By letter previously acknowledged, you have asked for an opinion interpreting RCW 90.44.050. Under this statute, certain withdrawals of groundwater may be made without applying for and receiving a water right permit. You have posed the following questions:

- 1. Does RCW 90.44.050 restrict groundwater withdrawals without a permit, for stock-watering purposes, to 5,000 gallons per day?**
- 2. If RCW 90.44.050 does not limit such groundwater withdrawals for stock-watering to 5,000 gallons per day, may the Department of Ecology implement rules imposing such a limit?**
- 3. May an agency interpret and apply statutory language differently over time due to its perception of changing societal needs or the agency's evolving public policy perspective?**

**BRIEF ANSWERS**

RCW 90.44.050 authorizes groundwater withdrawals for stock-watering purposes without a water right permit and does not limit the amount of such withdrawals to any specific quantity. The Department of Ecology (Ecology) lacks statutory authority to require a permit as a condition to the withdrawal of groundwater for stock-watering purposes, or to categorically limit the amount of water that may be withdrawn for such purposes. In certain circumstances, statutes administered by Ecology would authorize it to affect or limit withdrawals of water for stock-watering purposes, just as they would authorize Ecology to affect or limit other exempt and nonexempt withdrawals. An administrative agency may not interpret a statute in a manner that is inconsistent with its language and legislative intent based on its belief that a different interpretation would better advance sound public policy, but may change its interpretation based on changes in case law, new information about legislative intent in enacting the statute, or where the statute is sufficiently broad to reasonably permit a changed interpretation.

**OPINIONBY:**

ROB MCKENNA, Attorney General; JAMES K. PHARRIS, Deputy  
Solicitor General

**OPINION:**

**ANALYSIS**

Background

Your questions concern a portion of the state's groundwater code, originally enacted in 1945 and codified as RCW 90.44. The key section giving rise to your questions is RCW 90.44.050, which provides as follows:

After June 6, 1945, no withdrawal of public ground waters 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 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, 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 ground waters 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.

RCW 90.44.050 (*italics added*). Structurally, this section states: (1) a general rule requiring a water right permit for any withdrawal of public groundwater; (2) a proviso excepting identified categories of withdrawals from the general rule -- i.e., allowing them without a permit; (3) a second proviso allowing Ecology to require persons making withdrawals excepted from the permit requirement to provide information about the means and amounts of such withdrawals; and (4) a third proviso giving persons, authorized by the statute to withdraw less than 5,000 gallons a day without a permit, the option to obtain a water right through the generally applicable permit process.<sup>1</sup> Under the statute, an authorized use of groundwater without a permit establishes a water right to the same extent as a right established by permit.

With this statutory background, we turn to your questions:

**1. Does RCW 90.44.050 restrict groundwater withdrawals without a permit, for stock-watering purposes, to 5,000 gallons per day?**

Your question is one of statutory construction and, as such, is governed by rules that courts apply in construing statutes. The fundamental object of statutory construction is to ascertain and carry out the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Under applicable rules, if a statute's meaning is plain from the face of the statute, then effect must be given to its "plain meaning" as expressing the Legislature's intent. *Id.* at 9-10. To determine whether the meaning of a statute is plain, one must consider the statutory scheme as a whole, including related statutes. Plain meaning is "derived from what the Legislature has said in its enactments, but that meaning 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 10-11. If, after considering "all that the Legislature has said", the statute is not plain (but rather is ambiguous), then the court applies additional rules of statutory construction to resolve the ambiguity and determine what the statutory language means. Notably, however, a

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<sup>1</sup> Almost all of the language in RCW 90.44.050 dates from the adoption of the original groundwater code. Laws of 1945, ch. 263, § 5. The two parts of the statute that are newer than 1945 are: (1) the third proviso, authorizing the option of securing a permit for certain water uses that otherwise would be exempt, added by Laws of 1947, ch. 122, § 1; and (2) the phrase "or as provided in RCW 90.44.052", in the first proviso. This phrase was added in 2003 when RCW 90.44.052 was enacted to allow a pilot program involving cluster housing in Whitman County relating to the statute's exemption for single or group domestic uses. Laws of 2003, ch. 307, § 2.

statute is not ambiguous merely because it is subject to more than one conceivable interpretation. Rather, ambiguity depends on the existence of more than one reasonable meaning. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

We conclude that the first proviso to RCW 90.44.050 makes it plain that groundwater withdrawals for stock-watering are exempt from the permit requirement, and that the exemption is not limited to withdrawals of less than 5,000 gallons a day. The relevant language exempts:

*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[.]*

RCW 90.44.050 (italics added). Based on its ordinary language and rules of grammar, the first proviso exempts:

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

Of these four categories of withdrawals, the third (single or group domestic use) and the fourth (industrial use) are expressly limited to withdrawals of less than 5,000 gallons a day. The second category (watering a lawn or a noncommercial garden) is not limited to 5,000 gallons a day but contains an acreage limit. By contrast, the first category (stock-watering purposes) contains no language limiting the amount of the withdrawal. Thus, the grammatical structure and plain language of this

proviso indicates that of these four categories, groundwater withdrawals for stock-watering purposes are not limited. Indeed, the language of the exceptions makes it evident that the Legislature was well aware of how to limit exempt withdrawals when it so chose, and it did not do so with respect to stock-watering.<sup>2</sup>

If RCW 90.44.050 ended with its first proviso, this would be the end of the inquiry. However, the inquiry does not end with consideration of only the first part of RCW 90.44.050. In determining the meaning of statutory language, the courts interpret a statute as a whole “in the context of the entire act” in which it appears. *Campbell & Gwinn*, 146 Wn.2d at 10 (quoting *Estate of Lyons v. Sorenson*, 83 Wn.2d 105, 108, 515 P.2d 1293 (1973)). “Plain meaning is still derived from what the Legislature has said in its enactments, but that meaning 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.

Accordingly, it is necessary to consider the rest of the statute and related statutes to determine whether they limit the stock-watering exemption to 5,000 gallons a day, or create an ambiguity with respect to the amount of water that may be withdrawn without a permit for stock-watering purposes. As noted above, the second proviso states that Ecology may require information from any person making “any such small withdrawal” as to the means or amount of the withdrawal. The third proviso gives persons making withdrawals “not exceeding 5,000 gallons a day” without a permit the option of applying for and obtaining one. The question then becomes whether either of these provisos limits the amount of groundwater that may be withdrawn without a permit for stock-watering purposes. Finally, in a related statute, RCW 90.14.051, the Legislature described exempt uses as “minimal uses”.

We do not read either the second or the third proviso as altering the meaning of the first proviso as discussed above. We note first the nature of

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<sup>2</sup> Although it was not considering the scope of the stock-watering exemption, the Court of Appeals, in *Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 160, 61 P.3d 1211 (2003), similarly described RCW 90.44.050:

The overall scheme of this statute is to require a permit except for certain “small withdrawals.” The 1945 legislature defined a “small withdrawal” as (1) any amount of water for livestock; (2) any amount of water for a lawn or for a noncommercial garden of a half acre or less; (3) not more than five thousand gallons per day for domestic use; and (4) not more than five thousand gallons per day “for an industrial purpose.”

provisos generally. Provisos operate as limitations on or exceptions to the terms of the statute to which they are appended and, as such, generally should be strictly construed with any doubt resolved in favor of the general provisions, rather than the proviso. *West Valley Land Co., Inc. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 369, 729 P.2d 42 (1986). When interpreting a statute which contains an exception to the statute's general rule, especially when the general rule is unambiguous, the exception should be strictly construed with any doubts resolved in favor of the general provision, rather than the exception. *Converse v. Lottery Comm'n*, 56 Wn. App. 431, 783 P.2d 1116 (1989). Here, the second and third provisos do not modify the general rule (requiring a permit for groundwater withdrawals) but rather modify the categorical exemptions in the first proviso<sup>3</sup>

Neither the second nor third proviso contains language limiting the amount of water that may be withdrawn without a permit for stock-

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<sup>3</sup> The second and third provisos do not modify, restrict, or create an exception to that part of the statute stating the general rule that a permit is required prior to withdrawing groundwater. Neither proviso would make any sense in that context. For example, if the second proviso modified only the general rule of the statute requiring a permit for groundwater withdrawal, the statute would read as follows:

After June 6, 1945, no withdrawal of public ground waters 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 . . . 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[.]

Similarly, if the third proviso modified that general requirement, it would read:

After June 6, 1945, no withdrawal of public ground waters 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 . . . PROVIDED, FURTHER, That at the option of the party making withdrawals of ground waters 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.

The provisos only make sense as modifications of all of the language that precedes them, including the categorical exceptions to the general requirement for a permit.

watering purposes. The second proviso plainly is intended to modify the categorical exemptions by allowing Ecology to track the amount and method of withdrawals exempt from the permit requirement. We understand the phrase "any such small withdrawal" or "minimal uses" as the Legislature's short-hand reference to withdrawals falling within any of the four categorical exemptions listed in the first proviso.<sup>4</sup> The second proviso authorizes Ecology to obtain information concerning any of these "small" withdrawals, but contains no language further limiting such withdrawals.

Similarly, the third proviso plainly is intended to modify the statutory exemptions from the permitting process to give a person the option to obtain a permit for certain categories of withdrawals that would otherwise be exempt from the permit requirement. The reference to "5,000 gallons a day" defines the category of water user that is authorized by the third proviso to apply for an (optional) permit. Again, we do not believe that this language can be read to impose a quantitative limitation on exempt stock-water withdrawals. The obvious purpose of the third proviso is to permit certain otherwise exempt water users to apply for a permit if they so choose, not to re-define the categorical exemptions in the first proviso. Thus, we conclude that neither the second nor third provisos imposes a quantitative limit on the amount of groundwater that may be withdrawn without a permit for stock-watering purposes.

It has been suggested that the second and third provisos nonetheless create an ambiguity with respect to the scope of the stock-watering exception, an ambiguity that should be resolved by construing the statute to impose a 5,000-gallon-a-day limit on withdrawals for stock-watering purposes. Under this view, the descriptive phrase "small withdrawal" in the second proviso suggests that all withdrawals exempt from permitting by the first proviso must be "small"; the reference to 5,000 gallons a day in the third proviso quantifies the term "small withdrawal" at 5,000 gallons a day; and taken together, these provisos suggest that all of the exceptions to the permit requirement under RCW 90.44.050 are limited to 5,000 gallons a day. This approach depends on reading language into the second and third provisos that they do not contain, and reading language

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<sup>4</sup> The Legislature may have thought of stock-watering withdrawals as "small" in the sense that, at the time the exemption was enacted in 1945, most farms withdrew relatively small amounts of water for this purpose. This does not mean that the reference to "small" was intended to quantify the maximum quantity of water which could be withdrawn for stock-watering without a permit. If the Legislature had intended this result, surely it would have adopted far more direct and specific wording.

out of the first proviso that it does contain, i.e., “any withdrawal” for stock-watering purposes. All language in a statute is to be given meaning; a court may not add language to a statute that it does not contain. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). As previously noted, a statute is not ambiguous merely because it is subject to more than one conceivable interpretation. Rather, ambiguity depends on the existence of more than one reasonable meaning. *Keller*, 143 Wn.2d at 276. In addition, this approach discounts that the 1945 Legislature very well could have considered withdrawal of water for stock-watering purposes as small in relation to many other types of groundwater withdrawal, or small in relation to all groundwater withdrawal as a whole. As noted earlier, it would seem unlikely that having been precise in limiting the amount of other categories of withdrawals exempt from permitting, the Legislature would have intended to change this language through oblique references in the later provisos. See *De Grief v. City of Seattle*, 50 Wn.2d 1, 11, 297 P.2d 940 (1956) (when similar words are used in different parts of a statute, the meaning is presumed to be the same throughout). The conclusion we reach gives full meaning to each phrase contained in RCW 90.44.050, while still giving a sensible construction to the section taken as a whole.

Finally, it could be suggested that an “open-ended” exemption for stock-watering is inherently inconsistent with the general policy of requiring permits for groundwater withdrawals in order to provide for an orderly and consistent administration of an important and limited public resource, the state’s water supply. The answer to this, first, is that broad policies must still be considered in light of the specific language the Legislature used in enacting the groundwater code. Here, the Legislature appears to have chosen its words carefully in defining which withdrawals should be exempt from permitting. As noted earlier, the Legislature may have concluded that the total amount of water used for this purpose was sufficiently small to justify the categorical exemption.

Second, the Legislature gave Ecology an important tool in the second proviso to RCW 90.44.050: Ecology may require information on the use of groundwater for stock-watering (and other exempt withdrawals) and can use the information for its administrative and enforcement decisions. This information would assist in assuring that exempt withdrawals do not impair more senior water rights, as well as providing a clearer picture concerning the uses of water in a given area. If the information shows that exempt withdrawals are jeopardizing the quantity or quality of water available, these facts can be drawn to the attention of the Legislature,

which is the proper body to consider changes in the state's water resource policies.

**2. If RCW 90.44.050 does not limit such groundwater withdrawals for stock-watering to 5,000 gallons per day, may the Department of Ecology implement rules imposing such a limit?**

Administrative rules may not contradict legislative enactments. *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 99 P.3d 386 (2004), *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998). *Accord* AGO 1989 No. 7. As noted above, RCW 90.44.050 authorizes groundwater withdrawals for stock-watering purposes without requiring a permit, and without any numeric limitation on the maximum quantity of water withdrawn. The statute does not authorize Ecology to modify the categorical exemptions, nor could we locate any other statute that would authorize Ecology to promulgate an administrative rule categorically limiting the amount of unpermitted groundwater withdrawals. It follows, then, that such a rule would be inconsistent with RCW 90.44.050 and, accordingly, Ecology would lack authority to adopt it.<sup>5</sup>

Although Ecology lacks authority to categorically limit the amount of water that may be withdrawn for stock-watering purposes without a permit, other statutes that authorize Ecology to regulate the use of water may affect withdrawals for stock-watering, just as they may affect other exempt withdrawals and withdrawals requiring a permit. For example, in *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 94-95, 11 P.3d 726 (2000), the Supreme Court held that where Ecology has closed water bodies and ground water in hydraulic continuity with such bodies to new withdrawals, it may prohibit new withdrawals that "will have any effect on the flow or level of the surface water." Such a new withdrawal might be a new withdrawal for stock-watering or it might be a new withdrawal for some other purpose. As a second example, consistent with principles of prior appropriation, Ecology has authority under RCW 90.44.130 "to limit withdrawals by appropriators of ground water so as to enforce the maintenance of a safe sustaining yield from the ground water body." *See also* RCW 18.104.040(4)(g), authorizing Ecology to limit well

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<sup>5</sup> In answering this question, we do not intend to imply that Ecology has adopted rules limiting unpermitted groundwater withdrawals, or is considering the adoption of such rules.

construction in areas "requiring intensive control of withdrawals in the interests of sound management of the ground water resource." Depending on the specific facts and circumstances, then, these statutes could affect withdrawals for stock-watering purposes, just as they could affect withdrawals for other purposes.

**3. May an agency interpret and apply statutory language differently over time due to its perception of changing societal needs or the agency's evolving public policy perspective?**

Your opinion request reflects your belief that, over time, Ecology has changed its interpretation of RCW 90.44.050. You suggest that Ecology originally read RCW 90.44.050 to exempt all withdrawals of groundwater for stock-watering purposes from permitting, and only recently began interpreting the statute to limit the stock-watering exemption to 5,000 gallons a day. We understand that Ecology disputes this view, and asserts that it has consistently interpreted the statute for many years, and perhaps since 1945. A legal opinion is not well-suited to resolving factual disputes, and it is not necessary to determine whether such a change occurred in order to answer your question. Consequently, the assertion is not addressed, and this opinion responds to your question as if it were hypothetical in nature.

Like a court, an administrative agency is to interpret and apply statutes to carry out the Legislature's intent, consistent, of course, with binding case law interpreting the statute. On occasion, this responsibility may require an administrative agency to change its interpretation or application of the law. For example, a controlling court decision may conclude that the agency's interpretation is erroneous. New circumstances may arise which make it apparent that the agency's prior interpretation did not comport with legislative intent; or an agency's reassessment of its prior approach may lead it to conclude that its interpretation is inconsistent with the language of the statute and should be modified. In other cases, governing statutes may be sufficiently broad that a changed interpretation would be consistent with statutory language and legislative intent. Where that is the case, an administrative agency would have the discretion to choose the interpretation that it believes best implements the law. Provided that its interpretation is constitutionally permissible and is reasonably consistent with the statute being implemented, the agency would not be precluded from changing its interpretation based on its determination that a different approach would better serve legislative

intent. *In re Myers*, 105 Wn.2d 257, 264, 714 P.2d 303 (1986) (administrative rules are presumed valid and will be upheld if reasonably consistent with the statute they implement); *Lockheed Shipbldg. Co. v. Dep't of Labor & Indust.*, 56 Wn. App. 421, 430, 783 P.2d 1119 (1989) (administrative agency not disqualified from changing its interpretation of statute).

However, none of these circumstances suggest that, based simply on its own policy preferences and without regard to statutory language and legislative intent, an agency is authorized to decide how to interpret a statute, or to change its interpretation. An agency may not alter its interpretation of a statute in a manner that is inconsistent with governing statutes simply because its own policy preferences have changed. *See Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 163, 61 P.3d 1211 (2003) (administrative agency may not alter the plain meaning of a statute to meet changing societal conditions).

We trust the foregoing will prove useful to you.

### C. Excerpt of 1940 Census for Washington State

#### WASHINGTON

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**Table 1.—POPULATION OF THE STATE, URBAN AND RURAL: 1920 TO 1940**  
[A minus sign (—) denotes decrease]

CLASS	1940 (April 1)	1930 (April 1)	1920 (January 1)	INCREASE, 1920 TO 1940	
				Number	Percent
Total	1,786,181	1,868,856	1,856,801	125,795	11.1
Urban	721,950	694,629	740,601	37,430	4.8
Urban-farm	6,936	4,364	6,590	256	9.0
Rural	814,222	876,607	619,620	125,655	19.9
Rural-nonfarm	478,772	376,714	335,799	100,059	26.4
Rural-farm	285,450	280,142	283,622	32,307	11.5
Percent	100.0	100.0	100.0	-	-
Urban	52.1	50.5	54.0	-	-
Rural	46.9	48.4	46.0	-	-
Rural-nonfarm	27.4	24.2	24.6	-	-
Rural-farm	19.3	19.2	21.4	-	-

<sup>1</sup> Partly estimated.

**Table 2.—POPULATION IN GROUPS OF PLACES CLASSIFIED ACCORDING TO SIZE, AND IN RURAL TERRITORY, FOR THE STATE: 1920 TO 1940**

CLASS	1940 (April 1)	1930 (April 1)	1920 (January 1)
<b>Urban territory:</b>			
Places of 100,000 or more.....	Number of places..... 3	3	3
	Population..... 569,711	607,014	419,749
Places of 25,000 to 100,000.....	Number of places..... 3	3	3
	Population..... 66,769	61,970	150,194
Places of 10,000 to 25,000.....	Number of places..... 8	10	5
	Population..... 130,921	148,708	78,074
Places of 5,000 to 10,000.....	Number of places..... 5	6	7
	Population..... 42,890	37,976	47,544
Places of 2,500 to 5,000.....	Number of places..... 29	19	16
	Population..... 78,246	44,557	52,240
<b>Rural territory:</b>			
Incorporated places of 1,000 to 2,500.....	Number of places..... 45	42	47
	Population..... 70,474	63,010	70,224
Incorporated places under 1,000.....	Number of places..... 347	311	350
	Population..... 66,923	64,312	63,555
Unincorporated territory.....	Population..... 676,617	621,532	478,976

## D. Excerpt of 2000 Census

Table 1. Age and Sex: 2000

For information on report design, see backmatter, and instructions, see 101.

State County County Subdivision Place	Age										
	Total Population	Under 5 years	5 to 17 years	18 to 24 years	25 to 34 years	35 to 44 years	45 to 54 years	55 to 64 years	65 to 74 years	75 to 84 years	85 and over
<b>Totals</b>	<b>8,884,424</b>	<b>554,236</b>	<b>1,148,937</b>	<b>232,209</b>	<b>307,020</b>	<b>441,100</b>	<b>591,067</b>	<b>765,072</b>	<b>1,008,605</b>	<b>1,211,025</b>	
Alabama County	19,429	25,053	1,181	4,061	762	654	1,157	2,151	1,819	789	
Chilton County	1,866	2,012	100	448	51	65	106	207	368	116	
Clay County	102	12,195	7	25	6	6	6	11	14	4	
Coahatchee County	1,000	2,000	27	128	17	17	51	52	19	20	
Etowah County	41,100	41,100	6	6	6	6	6	6	6	6	
Franklin County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Greene County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Madison County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Montgomery County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
St. Clair County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Tallapoosa County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Washington County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Wilcox County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Arizona County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Cochise County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Cochitilla County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Concho County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
DeWitt County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Donley County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Elbert County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Garfield County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Grant County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Greene County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Haskell County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Jefferson County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Lincoln County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Logan County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
McCurtain County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Nowata County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Osage County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Pottawatomie County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Pushmataha County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Rockwall County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Sevier County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Stephens County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Texas County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Wagon Wheel County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Washington County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Woods County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	
Yuma County	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	1,100	

2 Washington

Summary Population and Housing Characteristics

U.S. Census Bureau, Census 2000

## E. Excerpt 1940 Census of Farms - Table 2

STATE TABLE 3.—SPECIFIED CLASSES OF LIVESTOCK ON FARMS, 1910 TO 1940; AND LIVESTOCK PRODUCTS, 1909 TO 1939  
 [For comparability of data, items not included, and definitions, see text.]

ITEM	1940 (April 1)	1935 (January 1)	1930 (April 1)	1925 (January 1)	1920 (January 1)	1910 (April 15)
Horses and/or mules.....	29,622	42,819	46,700	49,029	(1)	(1)
Horses and colts.....	25,859	41,124	(1)	(1)	52,338	45,524
farms reporting.....	129,070	170,156	181,237	219,099	289,361	308,501
number.....	19,460	18,124	12,124	16,226	41,359	(1)
Colts.....	1,001	9,634	(1)	(1)	6,677	2,447
Males and male colts.....	5,352	20,917	22,689	26,417	28,031	11,032
farms reporting.....	266	1,067	1,833	3,269	8,913	(1)
number.....	60,021	63,109	50,106	(1)	54,013	42,685
Cattle and calves.....	698,498	740,602	634,428	561,714	572,614	364,932
farms reporting.....	317,645	411,020	267,719	397,700	379,491	(1)
number.....	87,540	(1)	47,015	50,657	49,359	22,056
Kept for milk production.....	306,175	(1)	241,622	265,216	236,270	163,238
farms reporting.....	8,492	(1)	2,635	(1)	5,177	(1)
number.....	67,422	(1)	40,470	71,597	61,134	(1)
Hogs and pigs.....	24,260	24,690	16,262	20,418	20,716	20,403
farms reporting.....	175,870	167,852	163,490	137,976	164,747	137,966
number.....	12,209	9,684	7,120	(1)	1,523	(1)
Boars and gilts to farrow.....	90,563	23,432	19,620	20,630	42,610	(1)
farms reporting.....	3,166	4,919	4,433	2,768	4,144	9,155
number.....	487,234	747,061	673,976	515,705	635,778	205,264
Dogs.....	454,612	740,602	673,976	(1)	6,464	1,486
farms reporting.....	36,423	69,231	61,625	67,871	56,734	44,622
number.....	4,828,513	6,881,553	6,370,527	5,363,202	3,917,691	2,801,114
Turkeys.....	2,711	3,328	(1)	(1)	3,006	2,087
farms reporting.....	79,408	53,648	(1)	(1)	20,621	16,919
number.....	2,283	(1)	(1)	(1)	2,564	2,356
Ducks.....	19,171	(1)	(1)	(1)	15,245	15,179
farms reporting.....	1,124	(1)	(1)	(1)	2,025	2,023
number.....	6,076	(1)	(1)	(1)	13,220	14,156
Bees.....	3,226	(1)	5,051	(1)	5,066	6,596
farms reporting.....	22,696	(1)	34,669	(1)	60,400	33,284
number.....						
	1933	1934	1935	1936	1937	1938
Cows and heifers milked.....	67,583	69,551	40,019	64,876	(1)	(1)
farms reporting.....	396,294	311,000	357,673	376,016	(1)	(1)
number.....	206,402,156	185,876,754	180,156,632	169,546,621	140,554,519	121,255,835
Milk produced.....	81,420	86,238	22,639	(1)	31,763	24,074
farms reporting.....	4,174,566	5,669,618	5,156,420	5,088,638	5,089,678	4,791,676
pounds.....	36,080	(1)	17,050	(1)	15,241	6,029
Whole milk sold.....	110,191,328	(1)	61,790,000	62,519,306	70,675,224	29,684,269
farms reporting.....	2,208	(1)	9,171	(1)	12,344	11,774
gallons.....	484,354	(1)	480,980	(1)	3,012,660	3,113,020
Butter sold.....	2,338	2,401	3,164	(1)	2,698	1,290
farms reporting.....	809,387	685,343	64,126	429,050	506,217	322,444
pounds.....	4,054,228	6,594,547	5,364,511	4,263,669	6,008,616	4,105,348
Wool shorn.....	54,155	53,224	(1)	(1)	69,787	56,567
farms reporting.....	66,917,870	50,003,609	71,469,019	40,000,261	21,395,674	16,373,740
chickens.....	37,031	(1)	23,801	(1)	20,493	(1)
farms reporting.....	3,634,307	(1)	6,500,322	(1)	1,462,105	(1)
number.....	42,841	47,100	83,156	(1)	39,719	36,551
Chickens raised.....	7,876,773	7,761,282	11,051,695	7,069,190	4,640,217	3,660,889
farms reporting.....	2,671	(1)	6,347	(1)	(1)	(1)
number.....	601,857	(1)	264,713	(1)	(1)	(1)
Turkeys raised.....	1,811	(1)	3,072	(1)	4,093	8,140
farms reporting.....	1,046,911	(1)	1,343,668	(1)	1,586,206	603,590
pounds.....						

<sup>1</sup>Not available.

**F. Excerpt WASHINGTON 2007 CENSUS OF AGRICULTURE - STATE DATA**

[For meaning of abbreviations and symbols, see introductory text]

2002 data are based on a sample of farms.

Table 11. Selected Characteristics of Irrigated and Nonirrigated Farms: 2007 and 2002 Characteristics	All farms		Irrigated farms				Nonirrigated farms		All harvested cropland irrigated
			Any land irrigated						
	2007	2002	2007	2002	2007	2002	2007	2002	
Farms.....number	39,284	35,939	15,492	15,534	9,900	10,176	23,792	20,405	
Livestock Inventory: Cattle and calves.....farms	12,731	12,215	4,411	4,092	1,835	1,641	8,320	8,123	
.....number	1,088,846	1,100,181	713,788	668,212	384,066	308,878	375,058	433,969	
Milk cows.....farms	817	1,208	451	552	195	241	366	656	
.....number	243,132	246,753	191,938	161,024	122,231	101,335	51,194	85,729	
Hogs and pigs.....farms	1,463	961	488	303	193	121	975	658	
.....number	28,545	30,289	8,288	8,810	3,630	6,095	20,257	21,479	
Sheep and lambs.....farms	2,366	1,709	739	639	277	201	1,627	1,070	
.....number	53,220	58,470	25,451	29,646	12,412	16,710	27,769	28,824	

2002 data do not include farms with land in Farmable Wetlands or Conservation Reserve Enhancement Programs.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
FIVE CORNERS FAMILY FARMERS, ET AL.,  
Plaintiff/Petitioner

vs  
STATE OF WASHINGTON, ET AL.,

No. 84632-4

DECLARATION OF  
EMAILED DOCUMENT  
(DCLR)

Defendant/Respondent

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I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 120 Pear St NE, Olympia, WA 98506.
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 55 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 9/7/10 at Olympia, Washington.

Signature: \_\_\_\_\_

Print Name: Ingrid Y. Elsinga

