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SUPREME COURT
STATE OF WASHINGTON

NO. 84632-4

2011 JUN -1 P 2:52 IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

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

Appellants.

v.

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

Respondents.

and

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

Intervenors-Respondents.

RESPONDENT/CROSS APPELLANT EASTERDAY'S RESPONSE TO
AMICUS BRIEF OF INTERESTED INDIAN TRIBES

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I. INTRODUCTION

The Interested Indian Tribes' brief is essentially a recitation of legal positions and arguments that have been advanced by Five Corners. This Court should disregard those parts of the Tribes' brief that merely repeats Five Corners' arguments. RAP 10.3(e). However, the Tribes raise a different perspective that tends to highlight the impropriety of using this case as a vehicle to address a minor exemption to the Ground Water Code, essentially the standing of the parties. The Tribes' strained statutory construction is not helpful to the resolution of this case.

II. ASSIGNMENTS OF ERROR

Issues Pertaining to Assignments of Error Addressed in this Response

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? [Easterday's Assignment of Error No. 2]

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? [Five Corner's Assignment of Error]

III. ARGUMENT

A. **The Interested Tribes are Unaffected by Easterday's Stock Well.**

In exactly the same way Five Corners has not shown injury – the threatened invasion of any right or an actual, present and existing controversy – the Tribes have failed to demonstrate Easterday's use of water from the Grande Ronde aquifer will infringe on their treaty fishing rights. They cannot show that Easterday's not having obtained a permit from the Department of Ecology for stock watering in excess of 5,000 gallons per day will cause anyone any harm. Easterday's use of ground water is unrelated to any issue of fishing rights. Careful studies show that Easterday's withdrawal of ground water will not harm his neighbors. He is drawing water from far below sea level, and his well is cased and sealed through the Wanapum Aquifer used by his neighbors. CP 1050-51. Easterday's well is some 1655 feet deep. CP 1017. This is not water that is connected with fish. Nothing Easterday does with his well can have any effect on any tribal interests. If anything, the fact that Easterday was required to conduct studies and obtain permits to commence his operation only highlights the relative insignificance of the absence of a preapproved permit to withdraw ground water. CP 334-62, 869-84, 1036-48.

The Ground Water Code is not the only regulation at work, and the absence of an obligation to obtain a permit for stock watering does not

leave some gaping hole in the State's ground water management. Easterday and the Department of Ecology have agreed upon the amount of water he can use to water his stock. *See*, CP 989. The vast majority of his water is permitted and was obtained as the result of a transfer of rights from the Pepiot well permit. *Id.*

The Tribes' apocalyptic arguments are unsupported:

An interpretation that would allow unlimited ground water withdrawal without permits for undefined "stock watering" purposes – threatens to significantly undermine state law protections for instream flows by excluding a substantial quantity of water rights from effective state regulation in advance of use.

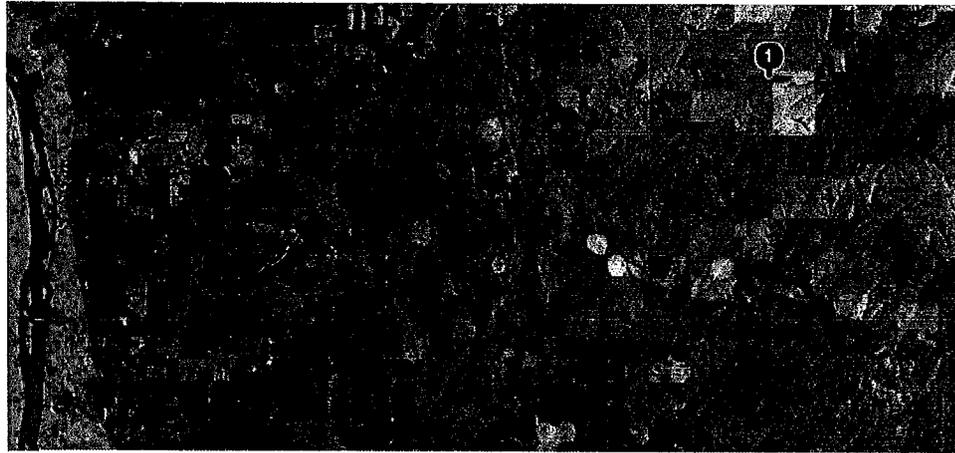
Tribes' Brief, Pg. 2

[T]his huge quantity of water [the water used by cattle] is entirely exempt from the state's otherwise comprehensible water permitting system.

Tribes' Brief, Pg. 6

Aside from the water involved having no connection whatsoever to any river system in the state, "huge quantity" is anything but. Consider the satellite photograph of Central Franklin County below showing a number of circles.¹ These are irrigation circles of which there are hundreds in Franklin County. Each of these circles uses more water than Easterday's entire operation. CP 331. For the most part, these circles

obtain their water from the Columbia Basin Project, but in the scope of agricultural activity in Franklin County, the tiny amount of water Easterday draws from his stock well is insignificant. On the other hand, the water used by the irrigation circles comes directly from the Columbia



Central Franklin County. Easterday Ranch is at 1
River and there is no question that one of the side effects of the Columbia Basin Project and the construction of the Grand Coulee Dam has been a reduction of anadromous fish in the river. McKay & Renk “*An Administrative History of Lake Roosevelt National Recreation Area, Washington*” Nat’l Park Service January 2002 p. 6.² Easterday’s operation is of no consequence to Treaty Fishing Rights.

¹ A small scale version of this map appears at CP 1055

² This document is available at <http://www.eric.ed.gov/PDFS/ED476001.pdf>. It is 590 pages long.

B. Statutory Construction

The Tribes' claim, "Ecology and Easterday take refuge behind one comma – or rather the absence of a comma." Tribes' Brief, Pg. 15. The Tribes then go on to spend a great deal of time casting aspersion on the last antecedent rule. Easterday did not make any reference to the last antecedent rule, and the rule has little application to an understanding of the proper statutory construction of RCW 90.44.050. The Tribes are really asking this court to rewrite the law according to their view of the equities of the situation. "It is a primary rule of statutory construction that courts cannot overcome statutes not unlawful in themselves or violative of some provision of the Constitution to meet the equities of any particular case; the presumption being that the Legislature has passed the act advisedly and with reference to every possible condition that might arise under it." *Murray v. MacDougall & Southwick Co.*, 88 Wash. 358, 359, 153 Pac. 317, 318 (1915).

Let us take the example Five Corners used, a contract dispute over whether a five year contract was really a ten year contract.

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.

Kenneth A. Adams, “Behind the scenes of the comma dispute” *Globe and Mail*, Aug. 28, 2007 Plt. Brief p.26, App. In this example, the Canadian-Radio and Television Communications Commission found an easy way to make an interpretation of this contract language, and Adams poked fun at them. The Commission correctly resolved the issue, however, because the interpretation of the contract that would violate the rule would lead us to the conclusion that there was a ten-year contract; a five-year contract plus a mandatory five-year extension that could not be terminated until the end of the extension. One must have a fairly skewed sense of the English language and contract law to conclude that someone would draft a contract in that fashion unless they were trying to be deceitful. Even if the comma between “terms” and “unless” were missing it is still hard to imagine coming to any other conclusion.

The absence of commas or their presence does not help the Tribes in their statutory analysis, because it is not the absence of a comma but the presence of two 5,000 gallon limitations that causes their statutory construction to fail. The language can be interpreted using the last antecedent rule, but the Tribes are arguing with themselves over a

“penultimate antecedent rule,” because the 5,000 gallon limit appears twice – once after “single or group domestic uses” and then after “industrial purpose.” If we were to excise from this language the first 5,000 gallon limitation and then put a comma after “industrial purpose” the last antecedent rule could be interpreted as applying to all four proceedings exemptions. It does not. There is no comma and there is an unexplained, penultimate 5,000 gallon per day limitation. This court should do what the Canadian-Radio and Television Communications Commission should have done, take a rational look at the language used and draw the rational conclusion that a careful writer such as Hugh Rosellini would not have written a list of four things and only qualified two of them with a 5,000 gallon per day limitation while intending to qualify all four. When the Ground Water Code was adopted in 1945, this Court had used the last antecedent rule at least twice. *State v. Bailey* 167 Wash. 336, 121 Pac. 821 (1912); *Smith v. Dept. Lab. & Inds.*, 8 Wn.2d 587, 113 P.2d 57 (1941). Presumably Rosellini was aware of this rule, because, “Both the Legislature and this court are presumed to know the rules of statutory construction.” *State v. Blilie*, 132 Wn. 2d 484, 492, 939 P.2d 691 (1997); *Commercial State Bank v. Palmerton-Moore Grain Co.*, 152 Wash. 89, 95, 277 Pac. 389, 391 (1929).

The Tribes fume over statutory construction rules that are of no help to them or this Court. Courts employ all manner of statutory construction principles to aid in the interpretation of lists. For example, the principle of *noscitur a sociis* provides that a single word in a statute should not be read in isolation, and that “the meaning of words may be indicated or controlled by those with which they are associated.” *Ball v. Stokely Foods, Inc.*, 37 Wn.2d 79, 87-88, 221 P.2d 832 (1950). The principle of *ejusdem generis* provides that where general words follow an enumeration the general words are to be limited by the specific words in the enumeration. *State ex rel. Gilrony v. Super. Ct.*, 37 Wn.2d 926, 226 P.2d 858 (1951). Nonetheless, the statutory scheme must always be read as a whole and after discussing all these rules and more, this Court returned to the plain meaning rule, giving effect to all the words in a statute.

Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (“[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended.”); *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (it is “well established that when ‘different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.’ ” (quoting *State ex rel. Pub. Disclosure Comm’n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976))). Here, the legislature chose to use the term “in a reckless manner” in the vehicular homicide and

vehicular assault statutes and to use the term “reckless driving” in another. Because the legislature chose different terms, we must recognize that a different meaning was intended by each term. [Footnotes omitted]

State v. Roggenkamp, 153 Wn. 2d 614, 625-26, 106 P.3d 196 (2005). In the Ground Water Code the legislature carefully singled out four exemptions from the prior permit requirement of the statute and bounded those four exemptions with three different limitations. The statute was drafted with a clear and unambiguous meaning that made sense in 1945 and makes just as much sense today.

What other language would the legislature have used had it intended the meaning ascribed to the statute in AGO 2005 No. 17? In Easterday’s opening brief he suggested two alternative choices of language that would have produced the Tribes’ interpretation. Easterday Brief p. 14, but the Tribes do not suggest how the legislature might have drafted these exemptions otherwise had it intended the interpretation given by the Attorney General. The Tribes’ interpretation comes from intentionally not quoting the language of the statute but citing discrete parts of it, in effect, writing a new statute. Brief pp.10-12. The Tribes never recite any relevant portion of RCW 90.44.050 in its entirety and excises the last antecedent from the part they do quote, *Id p. 11*, to fabricate their last antecedent argument, but they never suggest how the statute should have been written had it been the intention of the drafters to

write something other than what Easterday and the Department of Ecology claim is perfectly clear. The reason is that it is not possible to rationally or conveniently write the statute in any way other than it was written.

C. The Ground Water Code recognizes the difficulty of dealing with and obtaining any permit and rationally put regulation after the appropriation.

The Tribes point to Scott Collin's unsuccessful attempt to obtain a permit as evidence of over appropriated water. Brief p. 8. What this really demonstrates is that the unresponsiveness of bureaucracies has not changed much over the last sixty-five years. Doubtless the legislature was well aware that at some point obtaining a permit might become impossible. If it was for no other purpose than to keep ranchers from having to deal with the bureaucrats who would administer this program, an impediment Collin's situation illustrates, the statute makes perfect sense. Cattle, sheep, horses and all stock need to drink every day, and the inertia of government to do nothing when not compelled or when the political winds blow over the bow is nothing new. *State v. Superior Court of Franklin County*, 49 Wash. 268, 94 Pac. 1086 (1908) (no liquor license because of ad hoc zoning); *Neighbors & Friends of Viretta Park v. Miller*, 87 Wash. App. 361, 940 P.2d 286 (1997)(figurative foot-dragging); *King County v. Washington State Boundary Review Bd. for King County*, 122

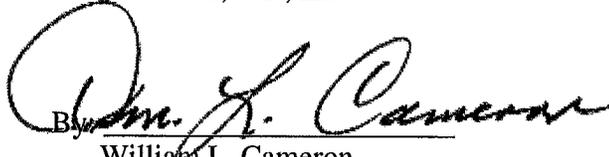
Wash. 2d 648, 860 P.2d 1024 (1993) (virtually unstoppable administrative inertia).

IV. CONCLUSION

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

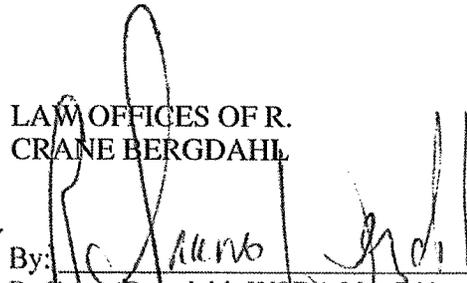
Respectfully submitted this 31st day of May 2011.

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on May 31, 2011, I caused service of *Respondent/Cross Appellant Easterday's Response to Amicus Brief of Interested Indian Tribes* via ABC Legal Messenger, Overnight Mail and Email to:

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