

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 84632-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS; SCOTT COLLIN; THE
CENTER FOR ENVIRONMENTAL LAW AND POLICY; and 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 AQUA PERMANENTE

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I. INTRODUCTION

Aqua Permanente claims to represent small farmers in upper Kittitas County.¹ It has successfully lobbied the Department of Ecology to close this area to further new well withdrawals both exempt and non-exempt except in limited circumstances. If anything, Aqua Permanente's situation demonstrates the efficacy of the Groundwater Code and the lack of any need to tamper with effective, existing regulations.

II. ASSIGNMENTS OF ERROR

Issues Pertaining to Assignments of Error Addressed in this Response

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 Corners' Assignment of Error]

III. ARGUMENT

A. Aqua Permanente and its members are asking this Court to legislate for their economic benefit.

Aqua Permanente does not claim that Easterday's Ranch will in some way affect its members. Aqua Permanente's argument can be summed up in its own words:

Establishing cause and effect relationships would likely require expensive studies, the use of expert witnesses, and lengthy litigation-an expense that the state might be able to bear, but an expense that individual small farmers likely could not. At the same time, the State's ability to take enforcement action as between different users would be

¹ Aqua Permanente was incorporated in 1997.

hampered by this Court's previous decisions that effectively require adjudications where one party has no state-issued or no already-quantified rights, even if an aggrieved party appears to be the holder of a senior water right issued by the state.

Brief 18-19.

Aqua Permanente's real goal is to add the impediment of the Department of Ecology to anything other than its members' own operations irrespective of the cost to others. Its goal is to shift the financial burden of protecting its member's water rights to the taxpayer. This is a function for the legislature, not the courts.

There are two well-established rules by which we must be governed in construing a statute. On the one hand, we must give effect to each and every part of it; on the other, we are not permitted to read into a statute anything which we may conceive the Legislature may have unintentionally left out. Rather than violate the latter rule, the court will leave ambiguous phrases of statutes ineffective and refer their correction to the Legislature. And that is what must be done with respect to the phrase we are considering. To render the phrase effective would require much supplementation by the court. No tribunal is even designated in which such application must be filed. The character of the application is not prescribed. No process is provided to bring it up for hearing. To supply these deficiencies in the act in order to give effect to the ambiguous phrase would amount to judicial legislation. From the phrase itself, we think it would be a violent assumption to say that the Legislature intended in any manner to change or modify our long-established practice and procedure with respect to the appointment of trustees for insolvent corporations. That such an assumption would be repugnant to the legislative intent is apparent from the title of the act, which is comprehensive of its content: 'An Act relating to insolvent

corporations, defining preferences, providing for offsets, and limiting the time in which actions for preferences may be commenced.’

Seattle Ass'n of Credit Men v. Gen. Motors Acceptance Corp., 188 Wash. 635, 639-40, 63 P.2d 359 (1936). The legislature has specifically left out a 5000 gallon limitation on stock wells. To add this limitation is judicial legislation and legislation that would be ill advised. Example, when confronted with a statute giving the power to government agencies, but not vendees, to enforce the state platting laws this Court noted, “While specifically allowing the appropriate public authority to recover a civil fine for the sale of unplatted land or, optionally, to seek an injunction against such sale, this pre-1969 chapter did not provide a remedy of rescission to the vendee of unplatted land. Such a remedy is, therefore, excluded by implication.” *Gilmore v. Hershaw*, 83 Wash. 2d 701, 704, 521 P.2d 934 (1974).

Nonetheless, Aqua Permanente has managed to close upper Kittitas County to new groundwater withdrawals and finds the time and money to participate with plaintiff Center for Environmental Law and Policy in achieving its political goals. Brief pp. 8-9. Aqua Permanente and its members are anything but helpless in advancing their political agenda and protecting their water rights. Their political arguments should be rejected. As we will discuss *infra*, the problem is really with the 5000

gallon exemption, not the stock water exemption, and Aqua Permanente's arguments are appropriately made to the legislature, not this Court.

B. Aqua Permanente's situation demonstrates that the Groundwater Code works.

If anything, Aqua Permanente's situation demonstrates that the Department of Ecology has ample tools to deal with the State's groundwater without further legislation or modification of existing law. WAC 173-539A-040, cited by Aqua Permanente, effectively cuts off further appropriation of water in upper Kittitas County. The regulation provides in relevant part:

WAC 173-539A-040 Withdrawal of unappropriated water in upper Kittitas County. (1) Beginning on the effective date of this rule, all public groundwaters within the upper Kittitas County are withdrawn from appropriation. No new appropriation or withdrawal of groundwater may occur, including those exempt from permitting, except:

(a) Uses of groundwater for a structure for which a building permit is granted and the building permit application vested prior to July 16, 2009; and

(b) Uses determined to be water budget neutral under WAC 173-539A-050.

Under the forgoing regulation, no one could possibly commence a cattle feeding operation using groundwater in upper Kittitas County without purchasing existing water rights. Under no circumstances can Aqua Permanente or its members be injured by the stock watering exemption.

Aqua Permanente makes a strained attempt to distinguish its members from Easterday by claiming he runs “an industry, while stockwatering is an activity associated with a family farm.” Brief p. 13. The proof for this is Easterday has a Standard Industrial Classification of 0211. *Id* fn. 9. Aqua Permanente’s members all have Standard Industrial Classifications; *e.g.* 0212 Beef Cattle, 0241 Dairy Farms, 0213 Hog farming. Scott Collin and the Five Corners plaintiffs, dry land wheat farmers, are classified as 0111 and Aqua Permanente is classified as 8651. Every occupation has an industrial classification.

Aqua Permanente also forgets that an operation the size of Easterday’s is not a common occurrence. If there are 845,714 beef cattle in the state,² there could only be 28 feed lots in the entire state with 30,000 head of cattle; less than one per county. As we have seen, Easterday spent years obtaining the permits he needed to start his operation in Franklin County, and it has not been an easy process. Again, however, Aqua Permanente generalizes to make any case at all by claiming, “The unlimited exemption for industrial cattle feedlots is not appropriate, and” Ecology needs to be in charge “to protect senior rights.” That is not what the Groundwater Code provides, however:

² See Agricultural Associates Brief p. 11

Subject to existing rights, all natural groundwaters of the state as defined in RCW 90.44.035, also all artificial groundwaters that have been abandoned or forfeited, are hereby declared to be public groundwaters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise.

RCW 90.44.040. Groundwater in Washington is publicly owned. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). Subject to senior rights, groundwaters belong to the public and are “subject to appropriation for beneficial use.” RCW 90.44.0040. That is just what Easterday is doing with his groundwater – putting it to beneficial use.

C. Aqua Permanente’s real complaint is it wants government to pay the cost of excluding anyone else from entering Kittitas County.

Aqua Permanente tries to put Easterday’s operation in Kittitas County to make its point. “Presumably, if this Court sustains the decision of the Superior Court, all existing stockwatering operations in the Upper Kittitas will be able to continue withdrawing unlimited amounts of water and would be able to increase those withdrawals-since they would not be ‘new’ uses.” Brief p. 20. The only exempt stock wells that Aqua Permanente mentions are those of its members. Brief pp.13-14. There are apparently no feed lots in Kittitas County. Brief p. 14 FN 10. What Aqua Permanente is really complaining about is the difficulty Ecology and its members have in dealing with residential withdrawals. Ecology has had no difficulty regulating Easterday’s well and his stock watering

withdrawal is limited to 505 acre feet per year. CP 974. This is not “unfettered, unregulated, unmetered, and unlimited use of groundwater for a multiplicity of activities associated with industrial cattle operations.” Brief p. 14. It is small operations, those of Aqua Permanente’s members, that are difficult to regulate and quantify, not large operations. Aqua Permanente’s I’ve-got-my-place-in-the-country environmentalism is the reason Aqua Permanente imagines a problem in Kittitas County, not Easterday’s carefully planned and operated feed lot.

This Court has noted enforcement of the Ground Water Code has been limited by Ecology’s lack of funding. *Hillis v. Dept. of Ecology, supra; State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 43 P.3d 4 (2002). The legislature has not funded the enforcement programs it has already laid at Ecology’s door, and now Aqua Permanente wants more enforcement. Its remedy for Kittitas County was about as cost effective as killing flies with a shotgun, because it overlooks the cost to anyone trying to establish or expand a business or farm and does not take into account the economic welfare of the County. These are costs and losses that cannot be quantified in the context of this case, which involves people and property a hundred miles away. Aqua Permanente’s resolutions are not worthy of approbation and should not be a model for resolving this case.

IV. CONCLUSION

This Court should sustain the trial court's decision interpreting the stock watering exemption in its entirety.

Respectfully submitted this 2nd day of June 2011.

LEE SMART, P.S., INC.

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IV. CONCLUSION

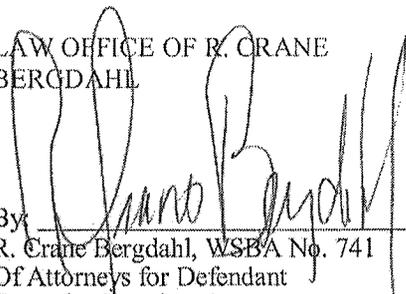
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Respectfully submitted this 2nd day of June 2011.

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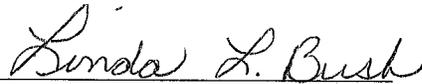


CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on June 2, 2011, I caused service of *Respondent/Cross Appellant Easterday's Response to Amicus Brief of Interested Indian Tribes* via ABC First Class Mail and Email to:

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