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STATE OF WASHINGTON

NO. 84632-4

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**SUPREME COURT OF THE STATE OF WASHINGTON** W. R. CARPENTER  
CLERK

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 ASSOCIATION, WASHINGTON CATTLE FEEDERS  
ASSOCIATION, CATTLE PRODUCERS OF WASHINGTON,  
WASHINGTON STATE SHEEP PRODUCERS and  
WASHINGTON FARM BUREAU,

Intervenor-

Respondents.

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**BRIEF OF *AMICUS CURIAE* AQUA PERMANENTE**

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## I. INTRODUCTION

Aqua Permanente offers this brief as friend of the Court. The issue before the Court is whether the exemption from the water rights permitting process for groundwater used for “stockwatering” purposes under RCW 90.44.050, which by practice of the Department of Ecology has been limited to a maximum of 5000 gallons per day, should instead be available in unlimited quantities—without a water right permit—to large industrial cattle feedlot operations. Aqua Permanente and its members are family farmers in the Upper Kittitas Valley who are familiar with both stockwatering and exempt wells, and who do not support the unlimited use of the groundwater exemption for large industrial feedlots. Aqua Permanente supports the position taken, and relief requested, by the Appellants.

## II. IDENTITY AND INTERESTS OF AMICUS CURIAE

Amicus curiae Aqua Permanente (“AP”) wishes to highlight the potential implications, both statewide in general, and particularly in Kittitas County, of the Franklin County Superior Court’s upholding of the Attorney-General’s opinion (AGO 2005,

No. 17, November 18, 2005) that would allow the use of unlimited water for stockwatering under the groundwater permit exemption in RCW 90.44.050. In particular, Aqua Permanente would like to address the potential impacts that such an interpretation would create upon senior water rights holders in the Upper Kittitas, including Aqua Permanente members who hold water rights for both agricultural and domestic uses.<sup>1</sup> Aqua Permanente would also like to point out the potential conflicts created between this Attorney General Opinion and the recently-adopted rule for the Upper Kittitas Valley (WAC Ch. 173-539A) that governs the use of new permit-exempt wells in that basin. Those water rights, and the management scheme under the new rule, would be significantly and detrimentally affected if the strained and unprecedented interpretation by the Attorney-General of this statutory exemption were to allow industrial cattle feedlots to locate in Kittitas County—historically a rural, farming area of the state that has supported a number of agricultural and livestock industries. To do

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<sup>1</sup> Note that other issues related to the sufficiency of water supplies from exempt wells for residential development in Kittitas County, and the respective roles of state and local governments in assuring adequate and reliable supplies for that development, are currently at issue before this court in *Kittitas County v. Eastern Wash. Growth Mgt. Hrgs. Board*, Supreme Court Docket No. 84187-0.

so would undermine the Legislature's stated preference to support watershed-based solutions to water resource management issues.

Aqua Permanente (AP) is a non-profit organization dedicated to protecting senior water rights in Kittitas County, including family farmers. Stirred by a series of forced curtailments in Kittitas County, local residents with post-1905 water rights formed Aqua Permanente to protect those rights. AP's core concern is and has been the proliferation of new groundwater withdrawals from permit-exempt wells. AP believes that it is unjust that their members have been forced to curtail water use in times of shortage while more junior permit-exempt wells are allowed to pump water unabated.

Ecology has had an administrative moratorium on issuance of new groundwater rights in the Yakima Basin (including Kittitas County) since 1999. WAC 173-539A-020. Because the Yakima Basin is already over-appropriated, permit-exempt well proliferation—as has occurred for residential development, and as would be allowed for industrial cattle operations claiming coverage under the Attorney General's interpretation of the "stockwatering" exception in RCW 90.44.050-- would allow junior water rights

holders, *i.e.* permit-exempt well owners, to take water that legally belongs to more senior water rights holders, *i.e.* post-1905 water rights holders, including AP members. At the same time, it would stress instream flows, endangered species habitat, and water quality.

This concern for protecting senior water rights led AP to petition Ecology in September 2007 to close the Upper Kittitas Valley to new groundwater withdrawals pending completion of hydrogeologic studies assessing the impacts that future permit-exempt wells would have on the Basin. In October, 2007, the Center for Environmental Law and Policy (“CELP”)—a party to this case--formally joined in the AP petition, which was further supported in a joint letter by the Washington Environmental Council (“WEC”), American Rivers (“AR”), and Futurewise. Largely in response to the AP petition, and supported by other parties<sup>2</sup> the Department of Ecology (“Ecology”) entered into a Memorandum of Agreement (“MOA”) with Kittitas County (“County”) to develop a rule for

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<sup>2</sup> At the time, other comments that did not expressly support the petition, but did express concerns regarding the effects of continued unregulated groundwater extraction and effects on their water rights, were sent to Ecology by the Deputy Director of the Yakama Nation’s Department of Natural Resources, the Bureau of Reclamation, and the Roza Irrigation District.

better management of water resources, including exempt wells. Ecology then issued a series of emergency rules that effectively halted the drilling of new exempt wells. Ultimately, on December 22, 2010, Ecology promulgated a final rule (WAC Ch. 173-539A), that created groundwater management measures to allow the use of new exempt wells in Upper Kittitas County only if the new withdrawals were fully mitigated under a “water budget neutral” approach.<sup>3</sup>

The Yakima Basin, in which Kittitas County is located, is an area of the state where the amount of water permitted for use is greater than the amount of water available. In times of shortage, this over-appropriation of the Basin routinely leads to curtailment of junior water rights (those whose water rights date from May 10, 1905) in order to protect more senior water rights.<sup>4</sup> Simply put, water supply is not adequate to satisfy current water users, much less new or future water users. This is not atypical of

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<sup>3</sup> A detailed chronology, and supporting documentation, for Ecology’s Upper Kittitas rulemaking process, is contained in Ecology’s website at <http://www.ecy.wa.gov/laws-rules/activity/wac173539A.html>.

<sup>4</sup> Such curtailments have occurred three times since the year 2000. AP members who are Kittitas Reclamation District (KRD) members have been subject to such curtailments, as have the City of Roslyn and more than 500 cabin and nonprofit camp owners in the Upper Kittitas. See *Ecology v Acquavella*, Yakima Cty. Sup. Ct. No. 77-2-01484-5, Order Limiting Post-1905 diversions during Periods of Water Shortage (June 10, 2004), and Ecology’s “2006 Report to the Legislature: Potential Solutions for Domestic Surface Water Users—Yakima Basin Camps and Cabin Owners” at <http://www.ecy.wa.gov/biblio/0611044.html>

many basins in Washington, where exempt wells have become virtually the only new source of water supply. This situation is particularly worrisome in Kittitas County in light of two additional facts: 1) Kittitas County is a rapidly growing county with substantial increasing demand for water for domestic and residential supplies, and 2) the impacts of climate change in the Basin will decrease the supply of water now available for appropriation. Almost all of the Basin's cities and towns rely solely on groundwater for their public water supplies.<sup>5</sup> Because Ecology has not issued any new ground water rights since the mid-1970s, and has had an administrative moratorium on issuing such rights since 1999, the water deficit is being filled by permit-exempt wells, which have been proliferating at an alarming rate. This is troubling for two reasons. First, most ground and surface waters in the Basin are hydraulically continuous. Thus, most exempt wells tap into the same limited water supply that supports more senior water rights, instream flows, salmon habitat, and water quality. Second, Ecology has historically failed to subject permit-exempt wells to curtailment orders, even though exempt wells are exempt only from the

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<sup>5</sup> Yakima Basin Watershed Plan, Management of Groundwater Resources, Ch. 4, at 4-1 (adopted 2005).

permitting process and not from other tenets of the water code establishing priority dates based on date of first use. These two factors create an untenable situation: in times of shortage, users of new exempt wells take water that legally belongs to more senior use.

AP's focus has been on the unsustainable use of exempt wells for domestic purposes. That threat is substantial, even though there has not been—at least so far—any contention that the permit exemption in RCW 90.44.050 for domestic purposes allows any more than the maximum amount of use established in that section—5000 gallons per day—for any use.<sup>6</sup> There is little doubt that in many, if not most, areas of this state, water resources are subject to increasing demand, water supplies are increasingly over-appropriated, and they will continue to be subject to increasing competition and other constraints—such as meeting Endangered Species Act (ESA) needs, and adapting to changes in water regimes resulting from climate change.<sup>7</sup> Only careful management

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<sup>6</sup> At least for domestic purposes, this Court has stated that a single project—even if multiple wells are used—is subject to the 5000 gpd limit. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn. 2d 1, 43 P. 3d 4 (2002). But see fn 11 for discussion of possible future litigation on interpretation of RCW 90.44.050.

<sup>7</sup> For a more complete description of the water resource management challenges facing the state, and possible approaches, see the September 2010 report by Ecology to the Legislature <http://www.ecy.wa.gov/pubs/1011022.pdf> (entitled

and wise decisions regarding water resources will ensure that growth and economic development can occur while also protecting senior water rights. Allowing the unconditional use of the exemption in RCW 90.54.050 for stockwatering purposes will undermine those management efforts, and create localized areas of major conflict—such as in Upper Kittitas—that the state for a variety of reasons appears to be increasingly unable to address rationally. This Court should not invite an exacerbation of that situation by sustaining the Attorney-General’s interpretation of this statutory provision.

#### STATEMENT OF THE CASE

Aqua Permanente adopts and incorporates by reference the Statement of the Case set forth in Petitioner/Appellant’s Opening Brief of Appellants on pp. 2-13.

#### ARGUMENT

The statements and authorities set forth in the Opening Brief of the Appellants (at pp. 13-45), and the Amicus Brief of

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“2010 Report to the Legislature and Governor: Water Resources Program Functions and Funding Structure.”)

Interested Indian Tribes at pp. 9-20)<sup>8</sup>, provide persuasive and compelling arguments for this Court to reverse the decision of the Superior Court, and find that the Attorney-General's opinion on the application of the stockwatering exemption contained in RCW 90.44.050 is an incorrect interpretation of the law.

To equate large cattle feeding businesses with family farms, and industrial feedlot operations with stockwatering, while at the same time ignoring original legislative intent and 60 years of statutory interpretation by the agency responsible for managing the state's water resources, simply strains credulity. Cattle feedlots are an industry, while stockwatering is an activity associated with a family farm.<sup>9</sup> RCW 90.44.050 allows for groundwater permitting exemptions for industrial use, but only up to 5000 gallons per day.

To these arguments, amicus Aqua Permanente would like to add in this brief the observations and concerns of small farmers in an area—the Upper Kittitas Valley—that is still attempting to

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<sup>8</sup> At the time of filing of AP's motion, the Court had yet to rule on whether to accept the Tribal brief.

<sup>9</sup> Under classifications adopted by the federal Occupational Safety and Health Administration, the standard industrial classification (SIC) code for cattle feedlot operations is 0211, defined as establishments primarily engaged in the fattening of beef cattle in a confined area for a period of at least 30 days, on their own account or on a contract or fee basis. Feedlot operations that are an integral part of the breeding, raising, or grazing of beef cattle are classified in Industry 0212. The term "stockwatering" does not have an SIC code.  
[http://www.osha.gov/pls/imis/sic\\_manual.display?id=330&tab=description](http://www.osha.gov/pls/imis/sic_manual.display?id=330&tab=description)

address legal and actual water rights impairment issues caused by the cumulative effects of exempt wells—issues that could be exacerbated should this Court find that the stockwatering exemption in RCW 90.44.050 allows unfettered, unregulated, unmetered, and unlimited use of groundwater for a multiplicity of activities associated with industrial cattle operations.<sup>10</sup> The members of Aqua Permanente understand what stockwatering is, and why an exemption from water rights permitting for it is and has been appropriate since the enactment of the Groundwater Code. The unlimited exemption for industrial cattle feedlots is not appropriate, and such operations that require water should be subject to the same water rights permitting requirements as any other large water users in order to protect senior rights and the public interest.

- I. The Attorney-General's interpretation of RCW 90.44.050 would undermine the statutory scheme of prior appropriation that protects senior water rights and the legal uses under them, and would place an undue burden on small farmers in exercising their rights.

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<sup>10</sup> Given its history as a rural and agricultural area, including a history where cattle have historically been raised and marketed, it is plausible that it could in the future be the site of an industrial feedlot operation.

In creating a statewide water rights permitting system and process for surface water sources in 1917 (Ch. 90.03 RCW), the Legislature intended to “create a mechanism for avoiding the private disputes that were occurring over the use of water.” James K. Pharris and P. Thomas McDonald, An Introduction to Washington Water Law, (Office of Attorney General, January 2000), IV:3. Washington Courts have consistently interpreted the creation of this permitting approach as “a comprehensive system that provides both the substantive and procedural authority for the creation of new water rights.” *Id.*, at IV:4. In multiple decisions, this Court has recognized this legislative purpose of creating a state-managed system for managing and authorizing uses of water, and for reinforcing the state’s choice in 1891 to establish the “first in time” principle governing competing uses from the same source of supply. *Ibid.*, at IV:2-3; see *West Side Irrig. Co. v Chase*, 115 Wn. 146, 196 P. 666 (1921); *Washington v Lawrence*, 165 Wn 508, 6 P 2d 363 (1931). Inherently underlying this statutory scheme is the purposeful interjection of the state into management decisions, rather than relying on the essentially private mechanisms for notice and dispute resolution under both common law and previous code enactments.

In 1945, the Legislature enacted the Groundwater Code, expressly extending the prior appropriation doctrine expressed in the surface water code to the appropriation and beneficial use of groundwater within the state. RCW 90.44.040. Thus those with “first in time” uses have priority under state law over later uses from the same sources of water.

The small uses of groundwater that are exempt from the state permitting process under RCW 90.44.050 are not exempt from state water law generally, or the state’s authority to regulate such uses under other provisions of the law protecting water rights. As has been stated by the Attorney General, specifically with regard to legal questions posed by the exempt well proliferation in Kittitas County:

This is not to say that exempt withdrawals are exempt from regulation. As discussed more fully in the context of your third question, RCW 90.44.050 merely exempts certain uses of groundwater from the *permitting* requirement. RCW 90.44.050 (merely exempting such uses from “this section”). Exempt withdrawals are not exempt from other regulatory authority found elsewhere in the water code. This principle, however, should not obscure the distinction between withdrawing water from new appropriations, on the one hand, and regulating the allocation of water among users, on the other. A water right obtained through a permitting process or by way of exempt use are equivalent. RCW 90.44.050 (right obtained through exempt use is “a right equal to that established by a permit”).

Attorney General Opinion 2009 No. 6 (September 21, 2009).<sup>11</sup>

However, as has been shown in times of drought in the Yakima Basin, and the *pro rata* reductions in water use there under Ecology orders, Ecology has not been willing to take enforcement action against the “junior” water rights held by exempt well users, even though other senior water rights holders and users—including Aqua Permanente members—have been ordered by Ecology to reduce or cease their withdrawals. Coupling this administrative and compliance approach with the Attorney-General’s view in 2005 AGO No. 17 that stockwatering use is unlimited under RCW 90.44.050, would exacerbate the water management situation in the Upper Kittitas and other water-short areas of the state. It would also undermine the Legislative purpose in 1917 of protecting senior “prior appropriation” rights through an exclusive state permitting system where there would be a chance that new uses could impair existing, senior rights (made applicable to groundwater uses in 1945). In short, it would invite regression to pre-1917 conditions, and invite an escalation of private disputes for resolving water issues, either judicially or extra-judicially. That is

<sup>11</sup> It might be noted that this Opinion also stated that other parts of the exemption in RCW 90.44.050 (related to outdoor irrigation) were not limited by the 5000 gpd overall limitation in the statute. There has yet to be a judicial review of this interpretation.

inconsistent with the general statutory scheme in the Water Code, and with the Attorney-General's own views as to the availability of the remedy of state regulation for exempt wells expressed in his 2009 Opinion.

Moreover, it would place an unfair and considerable burden on existing senior water rights holders, such as the small farmers of the Upper Kittitas Valley. In some circumstances, it may be possible to point to one particular use of an exempt well—e.g., an Easterday type of operation, with major groundwater withdrawals—as affecting and impairing an existing senior right. In other circumstances, the potential impairment is likely to be a cumulative and aggregate effect from groundwater withdrawals by multiple exempt wells. 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 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. See *Rettkowski v Dept. of Ecology*, 122 Wn. 2d 219, 858 P. 2d 232 (1993).

As the Tribal brief puts it (at pp. 18-19), the Superior Court decision and the Attorney-General's stockwatering opinion would create a new class of rights with ineffective protection for existing water rights. That is an outcome that would be inconsistent with the state statutory scheme, and would put an undue burden on smaller water rights holders whose rights may be impaired by uses that would not otherwise meet state code for issuance of new water rights.

II. Allowing exempt wells for unlimited industrial stockwatering rights would interfere with, and undermine, the watershed-based management plan adopted by the Department of Ecology in WAC ch. 173-539A.

As noted above, as recently as December, 2010, the Department of Ecology adopted a final rule that addresses previously-unregulated groundwater withdrawals by exempt wells in the Upper Kittitas Valley. WAC Ch. 173-539A (effective January 22, 2010). Its principal provision is the withdrawal of all groundwater within the Upper Kittitas Valley to further appropriation, pending further study. WAC 173-539A-010. Any

proposed new use of groundwater, either under the exemption contained in RCW 90.44.050, or under a water right permit, would only be allowed if a request is made to Ecology, and if the proposed new withdrawals would be “water-budget neutral.” WAC 173-539A-040. For exempt uses, the proposed user would have to request a “determination” from Ecology, even if not requesting issuance of a water right. “Water budget neutral” projects are those where an appropriation or use of groundwater would be exchanged for placement in the state Trust Water Rights program an amount at least equal to the consumptive amount of groundwater withdrawn. WAC 173-539A-030. “Consumptive use” is the total depletion that any withdrawal has on any affected surface water bodies. Id.

The rule operates prospectively. Thus, any exempt well uses in place as of January 22, 2011, would not be required to submit a request to Ecology, nor required to be “water budget neutral.” 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.

As noted above, the entire Yakima basin has been closed to new appropriations since the 1970's, and Ecology has had an administrative moratorium on the issuance of new groundwater rights there for over 10 years. The promulgation of a final rule for the Upper Kittitas finally puts a halt to any new, unmitigated uses of exempt wells, including for any building permits that were issued after July 16, 2009 that assumed domestic water supply from new exempt wells, pending completion of a comprehensive groundwater study. WAC 173-539A-027. Adoption of the rule will allow time for thorough and science-based discussions of the impacts of expanded exempt well use, and development of appropriate management strategies that preserve and protect all water uses. However, if this Court sustains the lower court decision regarding the stockwatering exemption, it would likely interfere and undermine efforts to move down this more rational, planned path if unlimited uses for stockwatering are allowed to continue.<sup>12</sup> Such a result would be counter to the direction provided by the Legislature in chapter 90.54 RCW that directs the state to pursue

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<sup>12</sup> Another possibility is that existing exempt well uses for other purposes authorized under RCW 90.44.050 could be converted to stockwatering in order to take advantage of the unlimited amounts that the Attorney-General has said are available. The new rule uses interchangeably the terms new "withdrawals," "appropriations," and "uses," potentially opening the door to expanded uses under an existing withdrawal.

this watershed-based planning and rulemaking pathway to make better decisions on water management.<sup>13</sup>

III. Allowing unlimited industrial feedlot water use without water rights permits is inconsistent with the public welfare and the fundamentals of Washington water law.

In 1971, the Legislature established the fundamental principles to guide future water rights management and water allocation decisions, placing them in chapter 90.54 RCW. Among those principles is that the basic objective of water allocation decisions is to achieve the maximum net benefits for the people of the state. RCW 90.54.020(2) Expressions of the public interest are to be sought at all stages of water planning and allocation decisions. RCW 90.54.020 (9)

The groundwater exemptions contained in RCW 90.44.050 allow a potential user of groundwater to avoid the permitting process established by the Legislature in 1945 for new uses of groundwater. That permitting process includes an evaluation by Ecology of the four tests for a new water right—whether the

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<sup>13</sup> See RCW 90.54.005 (enacted in 2002): “The legislature recognizes the critical importance of providing and securing sufficient water to meet the needs of people, farms, and fish. The legislature finds that an effective way to meet the water needs of people, farms, and fish is through strategies developed and implemented at the local watershed level.”

beneficial use is authorized, whether water is available, whether the use would impair existing rights, and whether the proposed use is consistent with the public interest or welfare—as well as a notice and hearing that allows third parties to express any concerns, personal or otherwise, with regard to the requested water right. See RCW 90.44.020; 90.03.290.

The Attorney-General's opinion, sustained by the Superior Court, turns these principles on their head when applied to stockwatering uses under RCW 90.44.050. Not only would there be no decision by Ecology on potential impairment of existing rights by potentially enormous water uses by industrial feedlots, but there would be no opportunity for the public interest to be expressed in the allocation decision (or lack of decision).

As the appellants have pointed out, water resources in this state are generally over-appropriated. They certainly are in the Upper Kittitas Valley. There are new stresses daily due to economic growth, and impending stresses due to climate change. To allow one set of users to evade processes put in place by the Legislature to ensure that the state makes wise water management decisions is detrimental to the public

welfare, and undermines public confidence in the state's authorities and institutions. That is not an outcome that this Court should invite or encourage.

#### CONCLUSION

The parties to this case have provided extensive, thorough briefing to this Court on the history of the groundwater exemption established by the Legislature for stockwatering in RCW 90.44.050, the possible interpretations of the language of that statutory section, and the public policy reasons for this Court to consider. Aqua Permanente would ask this Court to consider to consider the appropriate use of the exemption within the context of the state's water rights permitting and water management system, and the inequitable result to family farmers with senior water rights should the Court sustain the Superior Court decision. In AP's view, the far better interpretation of the statute is the one advocated by the appellants, and AP respectfully requests that the Court grant the relief requested by the appellants.

DATED this 18<sup>th</sup> day of May, 2011.

Respectfully submitted,



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