WASHINGTON SUPREME COURT AFFIRMS GROUNDWATER PERMIT EXEMPTION FOR STOCK-WATERING – NOT LIMITED TO 5,000 GALLONS PER DAY

By Sarah E. Mack
mack@tmw-law.com

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***Five Corners Family Farmers, et al. v. State of Washington, et al.*, Washington Supreme Court No. 84632-4, 2011 WL 6425114, ___ P.3d ___ (December 22, 2011)**

In 6-3 decision, the Washington Supreme Court concluded a lengthy dispute over Washington's groundwater permit exemption statute, holding that groundwater withdrawn under the permit exemption for stock-watering is not limited to 5,000 gallons per day. Applying principles of statutory construction as well as basic rules of English usage, the Court concluded that the 1945 statute unambiguously allows stock-watering from permit-exempt wells without being limited to a specific quantity.

Background: 1945 - 2005

Washington's groundwater code, enacted in 1945 to extend the surface water statutes to the appropriation and use of groundwater, requires a permit for any withdrawal of groundwater – except certain withdrawals specifically listed in RCW 90.44.050:

> 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)

In a 2002 decision addressing the scope of the permit exemption for domestic uses, the Supreme Court explained that "[w]hile the exemption in RCW 90.44.050 allows appropriation of groundwater and acquisition of a groundwater right without going through the permit or certification procedures of chapter 90.44.RCW, once the appropriator perfects the right by actual application of the water to beneficial use, *the right is otherwise treated in the same way as other perfected water rights*." *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (emphasis added). Thus, particularly in areas of the state where new water right permits cannot be obtained, significant advantages attach to a groundwater use that can qualify for the permit exemption.

Between 1945 – when this provision was originally enacted – and 2005, the Department of Ecology and its predecessor agencies assumed that the permit exemption for stock-watering was limited to 5,000 gallons per day. The Pollution Control Hearings Board endorsed this limitation, ruling in *DeVries v. Dep't of Ecology*, PCHB No. 01-073 (2001), that groundwater withdrawals of 5,000 gallons per day or less for stock-watering are exempt from the permit requirement. The PCHB ruled that permit-exempt "stock-watering purposes" under the statute embrace water consumption by cows in a large commercial dairy operation, and not just stock-watering on a "family farm" or an open range.

Significantly, the PCHB also ruled in *DeVries* that permit-exempt "stock-watering purposes" include uses of water by a dairy for washing machinery, cleaning, dust suppression, and other dairy-related uses that do not involve the consumption of water by stock. The PCHB reasoned that the statute's use of the plural term "stock-watering purposes" implies "all reasonable uses of water normally associated with the sound husbandry of livestock."

Attorney General Opinion 2005 No. 17

In 2005, the Washington Attorney General issued a formal opinion interpreting the stock-watering exemption (AGO 2005 No. 17). The Attorney General disagreed with the PCHB's

5,000 gallons-per-day limit in the *DeVries* case, and interpreted RCW 90.44.050 as imposing no quantity limit for stock-watering purposes, in contrast to the explicit 5,000 gallon-per-day limit on domestic uses and industrial purposes.

The Attorney General's 2005 Opinion that an exempt well used for "stock-watering" is not limited to 5,000 gallons per day, coupled with the PCHB's 2001 ruling that "stock-watering purposes" covers a large commercial dairy operation and includes all reasonable uses of water normally associated with such an operation, set the stage for the Easterday Ranches controversy.

The *Five Corners Family Farmers* Litigation

Relying on the Attorney General's 2005 Opinion, Easterday Ranches, Inc. proposed a new 30,000-head beef cattle feedlot in Franklin County, to be supplied by a well drilled into the Grande Ronde aquifer. Easterday acquired and transferred water rights from a neighboring farm that provided approximately 280,000 gallons per day for various feedlot purposes (such as washing, cooling, and dust suppression) and stock drinking water. Estimated stock drinking water requirements range from 450,000 to 600,000 gallons per day. Ecology agreed, based on the Attorney General's 2005 Opinion, that Easterday's withdrawal of additional groundwater for stock drinking water is exempt from the groundwater permit requirement.

An organization of local farmers, one of its members, and two environmental groups filed a declaratory judgment action against the State, Ecology, and Easterday Ranches, seeking a declaration that the stock-watering permit exemption in RCW 90.44.050 is limited to uses of less than 5,000 gallons per day. The case attracted immediate attention, and numerous agricultural organizations intervened as defendants. The Franklin County Superior Court granted summary judgment to the defendants, ruling that RCW 90.44.050 unambiguously provides an exemption from the permit requirement for withdrawal of any amount of groundwater for stock-watering purposes. The Supreme Court accepted direct review of the plaintiffs' appeal.

Dueling Interpretations of the Permit Exemption

The language and structure of RCW 90.44.050 are at the heart of the *Five Corners* case. In effect the statute prohibits withdrawal of public groundwaters until Ecology grants a permit to do so, and then sets forth a number of exceptions to this general rule. The Court referred to the sentence defining the exceptions as the "exemption clause." The statute also includes two provisos relating to the exemption clause. The first proviso authorizes Ecology to require information from persons or entities making permit-exempt withdrawals of groundwater. The second proviso (added to the statute in 1947) allows

persons or entities withdrawing 5,000 or fewer gallons of groundwater per day under a permit exemption to apply for a permit.

The parties argued for two competing constructions of the exemption clause. Easterday and its supporters argued that the exemption clause should be divided into four distinct categories, as follows:

> Any withdrawal of public groundwaters (1) for stock-watering purposes, or (2) for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or (3) 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 (4) for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the [permit requirement].

The appellants contended that the exemption clause breaks down into two categories, a first category consisting of a "bundle" of uses, and a second category consisting of industrial use:

> Any withdrawal of public groundwaters (1) 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 (2) for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the [permit requirement].

The appellants argued that a 5,000 gallon-per-day limitation applies to all three uses "bundled" in their first category: stock-watering purposes, lawn and noncommercial garden watering, and domestic uses.

The Court's Interpretation

The Court began its analysis by setting forth familiar rules of statutory construction. First, the fundamental objective when interpreting a statute is to discern and implement the intent of the legislature. The "surest indication" of the legislature's intent is the plain meaning of the statute, which is gleaned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Second, if a statute is susceptible of two or more *reasonable* interpretations, it is ambiguous. However, the fact that two or more interpretations are *conceivable* does not render a statute ambiguous. If – and only if – a statute is ambiguous, the courts may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent.

The Court held that Easterday's interpretation of the exemption clause is reasonable, and the appellants' interpretation is not reasonable. "The interpretation dividing the clause into four distinct exemptions accounts for each word used by the legislature. The categories are logically divided by the legislature's consistent use of the term 'or for,' which appears three times . . . naturally suggesting four categories."

The Court rejected the appellants' two-category interpretation:

> To be reasonable, an interpretation must, at a minimum, account for all the words in a statute. Appellants fail to account for the first 'or' in the exemption clause and, as a consequence, fail to give effect to the parallel structure created by the legislature. Simplified, the exemption clause allows withdrawals 'for [Purpose A], or for [Purpose B], or for [Purpose C], or for [Purpose D].'. . . If the legislature had intended to bundle Purposes A through C, we would expect it to read 'for [Purpose A], [Purpose B], or [Purpose C], or for [Purpose D]' or 'for [Purpose A], for [Purpose B], or for [Purpose C], or for [Purpose D].' Either way, we would not expect a conjunction between the first and second items in a category listing three items. While perhaps conceivable, the 'bundle' interpretation is not reasonable. There is simply no basis in the text of the statute to assume that the first three purposes were intended to be considered a single bundle of uses.

The appellants argued that division of the exemption clause into four independent exemptions is unreasonable in light of related statutory provisions. Noting that "consideration of related provisions and statutes is undeniably appropriate," the Court disagreed. Considering a reference to "small withdrawal" in the first proviso in RCW 90.44.050 and a reference to "minimal uses" in RCW 90.14.051, the Court explained: "The term 'small withdrawal[s]' is simply a shorthand reference to the four exemptions; it does not independently suggest that permit-exempt stock-watering withdrawals are limited to a given quantity. As such, neither this phrase nor the term 'minimal uses' in RCW 90.14.051 renders Respondents' proposed interpretation unreasonable."

The appellants also relied upon the last proviso in RCW 90.44.050, which allows parties "making withdrawals of groundwaters of the state not exceeding five thousand gallons per day" to apply for a permit. The Court held that this proviso "is clear and unambiguous, granting a certain class of permit-exempt groundwater users the opportunity to apply for a permit. This proviso in no way limits the amount of water that may be withdrawn by permit-exempt users."

The appellants argued that the last proviso indicates "a legislative intent to divide water uses into two categories: (1) uses of 5,000 gallons per day or less, which are exempt from permits, and (2) uses of more than 5,000 gallons of water per day, which are not exempt

from permits." The Court rejected that argument for two reasons. First, not all uses of 5,000 gallons of water per day or less are exempt from permit requirements; only the enumerated uses in RCW 90.44.050 (stock-watering, lawn or noncommercial garden watering, domestic, and industrial) are exempt.

> Second, the language plainly does something very different. It identifies only certain uses that are exempt from the permit requirement, places additional limitations on some of those uses, and further allows only some of those certain limited permit-exempt uses to apply for an optional permit. The legislature enacted a sophisticated statute. The legislature's decision to limit those permit-exempt uses that may apply for an optional permit does not render Respondents' interpretation unreasonable.

The Court also addressed appellants' argument that it would be an "absurd result" to allow "unlimited" groundwater withdrawals for stock-watering without a permit. The Court questioned the accuracy of appellants' use of the word "unlimited" by noting that while RCW 90.44.050 does not limit use of groundwater for stock-watering purposes, there are other limits to such use, including Ecology's authority to close groundwater bodies to new appropriations, restrictions on impairment of senior water rights, and the possibility of civil litigation to enforce water rights.

Acknowledging that it "will avoid [a] literal reading of a statute which would result in unlikely, absurd, or strained consequences," the Court pointed out that "this canon of construction must be applied sparingly. . . . Application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature."

The Court explained that if a result is conceivable, the result is not absurd, and that it is conceivable that the legislature intended to allow permit-exempt withdrawals of groundwater for stock-watering purposes without a specified quantity: "It may be that, at the time of enactment of RCW 90.44.050, the legislature believed that stock-watering was sufficiently important, and its impact sufficiently slight, that a balancing of interests categorically justified groundwater withdrawals without consideration of other factors." The Court noted that "[t]o the extent this reasoning no longer holds true, it is for the legislature, not this court, to amend the statute."

This last point appears to be a direct response to the dissenting opinion, in which three justices found the statute ambiguous and concluded that it is "highly unlikely that the legislature contemplated in 1945 that the stock-watering exemption would apply to an industrial feedlot using between 450,000 and 600,000 gallons of water per day." (Wiggins, J., dissenting.)

Conclusion and Implications

The Court's opinion incorporated much of the reasoning in the Attorney General's 2005 Opinion, including the interpretation of RCW 90.44.050 to create four independent categories of permit-exempt withdrawals. *Five Corners Family Farmers* finally lays to rest – at least until the Legislature amends the statute – the question whether all permit-exempt uses are limited to 5,000 gallons per day. It also lays to rest some of the more outlandish criticisms of the Attorney General's Opinion, by underscoring the importance (for litigators and legislators alike) of careful attention to sentence structure, grammar, and punctuation.

The 2012 legislative session is not expected to produce an amendment of the groundwater permit exemption statute. It is more likely that a "stock water working group" created in 2009 will reconvene now that *Five Corners Family Farmers* has been decided, to grapple anew with the issue of what uses should be exempt from water right permit requirements.

Sarah Mack, an editorial board member of Western Water Law & Policy Reporter, is an attorney with Tupper Mack Wells PLLC in Seattle and a lifelong believer in the importance of punctuation. She encourages anyone who does not understand AGO 2005 No. 17 or the Court's majority opinion in *Five Corners Family Farmers v. State* to read the book Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation by Lynne Truss (Gotham Books 2004).

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