

## **The Unsustainable Stockwater Exemption**

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***"I have one well that my great grandfather dug in 1900.***

***If I lose it, I'm done."***

- Scott Collin, Five Corners Family Farmers Board Member  
"Industrial Wells Could Leave Eastern Washington with Dry Wells"  
April 9, 2009, *New York Times*

### **A. The AG Opinion**

In 2001, conflict over water supply for a Moxee Valley dairy boiled over into litigation. Ultimately, the Department of Ecology won a ruling that the 5,000 gallon per day limit on permit-exempt wells applies to large dairies. *Dennis and DeVries v. Department of Ecology*, PCHB No. 01-073, Summary Judgment Order (9/21/01). The *DeVries* ruling was significant in two respects. First, it defined the term "stockwater" to include industrial, non-potable uses of water within a dairy. Second, the decision limited such uses to 5,000 gallons per day (gpd). Per *DeVries*, if a dairy needs more than 5,000 gpd for any use or combination of uses, that water must be obtained via water right. Ecology's prevailing arguments in *DeVries* were consistent with several decades of policy and guidance statements on the subject.

The *DeVries* ruling raised alarms about the extent to which livestock operations throughout the state were already withdrawing large quantities of water without permits. The dairy industry estimates that 70% of the approximately 450 dairies in the state are using groundwater without a water right.<sup>1</sup> In addition, cattle feedlots and other types of industrial livestock facilities may be using water without permits.

In 2005, Attorney General Rob McKenna was asked to interpret the stockwater language set forth in the groundwater permit-exemption contained in Washington's groundwater code, RCW 90.44.050. In the resulting Attorney General Opinion (AGO), the AG's office and Ecology changed course. The AGO tersely construed the language of the statute, finding that the placement of commas indicates that the 5,000 gpd limit does not apply to stockwater, and concluding that stockwater use is

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<sup>1</sup> Estimates of unpermitted water usage were provided by Chris Cheney and John Stuhlmiller at the September 4, 2009 meeting of the Washington Legislative Stock Water Work Group, described in more detail below.

therefore unlimited. AGO 2005 No. 17 (11/18/05). The AGO contains no reference to other parts of the statute, including the use of the term "small withdrawals" in the proviso following the permit exemption, nor to the legislative history of the Groundwater Code, Chapter 90.44 RCW, enacted in 1945.

The history of the permit-exemption is sparse but interesting. Reports issued around the time of enactment of Chapter 90.44 RCW indicate that water needs for rural farmsteads (for both humans and livestock), ranged around 1,500 gallons per day.<sup>2</sup>

The 2005 AGO opened an unexpected and substantial loophole in the hornbook rule that all water use in Washington requires a permit. RCW 90.03.010, 90.44.050. Although livestock water use is encompassed within the permit-exemption, an interpretation allowing *unlimited* usage contradicts the rule that exceptions to statutes (including the water code's general requirements) must be narrowly construed.

It is difficult to obtain a new water permit in Washington, in large part because water resources are over-allocated in most basins, particularly when environmental needs such as instream flows for aquatic habitat and water quality are taken into account, as they must be. It comes as no surprise then that, shortly after the AGO was issued, large livestock operations announced intent to use the unlimited exemption for water supply.

In 2006 and again in 2007, two dairies in eastern Washington indicated in county land use applications that they would use the stockwater exemption to supply water for several thousand head of dairy cows, pumping between 150,000 and 500,000 gallons per day. Ecology's SEPA comment letter for one of the operations suggested that, because the agency itself could not do so, the dairy should analyze the potential for impairing the rights of other water users and whether pumping might jeopardize the maintenance of "safe sustaining yields" of groundwater as required by RCW 90.44.130. Ecology also noted the existence of hydraulic continuity between the target aquifers and the Columbia and Snake Rivers, citing the need to avoid depletion of surface water flows that support endangered salmon populations.<sup>3</sup> Thus, from the outset, it was clear that the basis for the permitting process, i.e., protection of senior water rights and the public interest, was not served by the 2005 AG Opinion.

## **B. Enter Easterday**

In 2008, Easterday Ranches, Inc., proposed the third (known) explicit use of the unlimited exemption: a 30,000-head cattle finishing feedlot near Eltopia, Washington that would rely entirely on permit-exempt wells for water supply. A group of local dryland wheat farmers, collectively known as Five Corners Family Farmers, began

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<sup>2</sup> See Dunn, Kara, "Got Water? Limiting Washington's Stockwater Exemption to Five Thousand Gallons Per Day," 83 Wash. L. Rev. 249, 257-261 (2008) and documents cited therein.

<sup>3</sup> *Washington Department of Ecology to Benton County Planning Dept. re Watts Bros. Dairy, LLC* (1-26-06). Notably, however, Ecology missed the water supply issue in its comments on the SEPA checklist for Mesa Dairy. *Washington Department of Ecology to Franklin County Planning & Building Dept. re Mesa Dairy* (3-28-09). Copies on file with author.

raising questions. The Family Farmers' members rely on their own permit-exempt wells to provide basic household water supply.

The proposed feedlot is located a few miles from and would withdraw water from the same aquifers as serve the Odessa Subarea, a groundwater subbasin where water levels are declining at an average rate of 10 feet per year. See WAC 173-130A-060. Groundwater decline in the Odessa Subarea is causing irrigators to chase water to depths of 1-2 thousand feet below ground surface, and creating a regional crisis mentality. Federal and state agencies are responding with multi-million dollar studies for replacement supply that would pump more water from the Columbia River.<sup>4</sup>

Five Corners Family Farmers are concerned about the potential impacts of increased groundwater pumping on their own domestic water supply. Unlike farms to the north and west, these dryland wheat farmers utilize groundwater solely for household usage. Loss of water supply would preclude their ability to continue to live on their farms.

The Easterday Ranches proposal led Ecology to re-examine the scope of the permit exemption established by the 2005 AGO. In November 2008, Ecology announced that the groundwater exemption could be used for drinking water for livestock, but could not be used for industrial purposes associated with the feedlot (e.g., dust control, boiler use).<sup>5</sup>

Ecology urged Easterday Ranches to purchase and transfer an existing water right to serve water for its industrial uses, which it promptly did. In a water supply analysis submitted as part of the water right transfer, Easterday Ranches indicated that the feedlot would require approximately 250 acre-feet per year for industrial uses and 500 acre-feet per year for drinking water.<sup>6</sup> This latter water use will be supplied without a water right. The same well will provide water pursuant to the transferred water right, and Easterday is required to measure water use for both uses (250 acre-feet of industrial, plus unlimited potable).

In June 2009, Five Corners Family Farmers, along with the Center for Environmental Law & Policy and Sierra Club, filed a declaratory judgment action seeking judicial interpretation of the quantity of water available under the stockwater prong of the permit exemption.<sup>7</sup> A case schedule is not yet established.

### **C. Legislative Working Group**

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<sup>4</sup> U.S. Bureau of Reclamation, Odessa Subarea Special Study, Appraisal-Level Investigation Summary of Findings (4/1/08), see [http://www.usbr.gov/pn/programs/ucao\\_misc/odessa/index.html](http://www.usbr.gov/pn/programs/ucao_misc/odessa/index.html).

<sup>5</sup> The Easterday Ranches correspondence can be found on Ecology's website at <http://www.ecy.wa.gov/programs/wr/rights/easterday.html>, and on CELP's website at [www.celp.org](http://www.celp.org). Copies also on file with the author.

<sup>6</sup> Franklin County Water Conservancy Board, In re Easterday Ranches, Inc., Report of Examination, Groundwater Certificate No. G3-00101C (4/10/09). Copy on file with author.

<sup>7</sup> *Five Corners Family Farmers, et al. v. State of Washington, et al.*, Thurston County Superior Court Cause No. 09-2-01622-1. The case has been transferred to Franklin County. CELP, the author's employer, is a party to this lawsuit.

In late 2008, as the state was trying to determine its position on unlimited stockwater, Ecology Director Jay Manning urged legislators to address the issue. Several bills were filed during the 2009 session, two of which received a hearing. HB 1091 would clarify that all listed uses of permit-exempt wells are subject to the 5,000 gpd limitation, and also grandfather existing stockwater use. HB 1489 would allow up to 350 acre-feet per year in permit-exempt withdrawals for stockwater purposes. Neither bill advanced to the floor.

With a live controversy and no fix in sight, the legislature decided to study the matter over the interim. The budget passed with an unfunded proviso directing Ecology to convene a working group, composed of agricultural, environmental, tribal, agency and legislative representatives, who are directed to "review issues surrounding the use of permit-exempt wells for stock-watering purposes and . . . develop recommendations for legislative action."<sup>8</sup> The working group met on August 4 and September 3, and is expected to hold 2 more meetings this year.<sup>9</sup> The second meeting focused on the status of water resources affected by stock watering and the extent to which the livestock industry relies on the unlimited exemption for water supply.

Meanwhile, the Attorney General's office recently issued another opinion regarding exempt wells (discussed elsewhere in this newsletter). The opinion follows the same logic as the stockwater opinion in finding that the use of water for irrigating a half-acre lawn or garden is unlimited in quantity. The opinion also finds that Ecology lacks authority to limit the quantity of permit-exempt use of water on eligible parcels, as recently proposed in a rule for managing water in Kittitas County (WRIA 39).<sup>10</sup> This raises the intriguing question why the Attorney General's office is advocating and advising agency action to control exempt wells (e.g., the *DeVries* case, the draft Kittitas rule) while simultaneously issuing opinions that such agency actions are in violation of the law.

Litigation over the unlimited stockwater exemption raises larger questions about the sustainability of water resources in Washington. Despite clear lessons from the Odessa Subarea aquifer, to date no branch of government has taken action to prevent and reverse groundwater mining and attendant surface water depletions. The outcome of the Five Corners Family Farmers litigation may be a partial remedy for the problem of unsustainable groundwater use, but policy changes at the agency and legislative level are clearly needed.

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<sup>8</sup> ESHB 1244, p. 107. No tribes are participating.

<sup>9</sup> The Legislature has created a website for the Stockwater Working Group, found at <http://www.ecy.wa.gov/programs/wr/hq/swwg.html>.

<sup>10</sup> Ecology may, however, simply close a basin to new appropriations, whether permitted or permit-exempt.