



CLEAN, FLOWING WATERS FOR THE WEST

The Center for  
**Environmental Law & Policy**

April 2, 2009

Franklin County Water Conservancy Board  
1620 Road 44 N.  
Pasco, WA 99301

Re: Easterday-Pepiot Transfer, Water Right G3-00101C

Dear Franklin County WCB Members:

This letter is provided as a supplement to the 2/6/09 protest letter filed by the Center for Environmental Law and Policy (CELP) regarding the above-referenced transfer. CELP is a membership based non-profit organization dedicated to protecting and preserving the freshwater resources of Washington and the Columbia River Watershed. Thank you for the opportunity to comment.

The general public, and especially the families that live in the vicinity of the proposed transfer, have good reason to be seriously concerned about the water use this transfer represents. Because the Pepiot farm has not pumped this water for many years, the revival of the water right effectively represents a "new hit" on the groundwater system. This transfer, combined with proposed use of the domestic well exemption to access 500 acre-feet of water that has never been used before, will most certainly contribute to continued mining of the deep basalt aquifer system.

As the January 2009 Columbia Groundwater Management Area study indicates, these aquifers have no virtually no recharge and are in dramatic decline, creating what the Department of Ecology has identified as the worst water crisis in the state. Ecology and the Bureau of Reclamation are currently spending millions of dollars on studies to determine whether it is feasible to import Columbia River surface water to the nearby Odessa Subarea. Given the cost and the energy subsidies involved, that project is unlikely to be built, and water scarcity problems will continue to worsen. Climate change could make matters worse. The management and use of these aquifers to date is a sad commentary on western water law and the capability of Washington's water resources agency, which to date is still unable to prevent impairment, correct serious water well construction problems, and prevent or slow the decline of water levels.

Under these circumstances, it is not in the public interest to authorize a transfer that will contribute to the continued mining of the Columbia Plateau basalt aquifer system. We urge the Water Conservancy Board to deny the transfer.

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## **1. The SEPA documents are inadequate.**

The Franklin County Mitigated Determination of Non-Significance (MDNS) issued on August 4, 2008 is insufficient to serve as a basis for meeting State Environmental Policy Act (SEPA) requirements for the proposed Pepiot water right transfer, for several reasons.

First, the water supply proposal for the feedlot has changed and the MDNS does not adequately identify and mitigate for the impacts of the new proposal, including the Pepiot transfer.

Second, the MDNS fails to discuss the condition of aquifers in the vicinity of the feedlot.

Third, and related, new information is available about the condition of those aquifers, in the form of a basalt stratigraphy study issued by the Columbia GWMA in January 2009. That study provides information about the basalt aquifers at issue in this transfer, and concludes that the regional aquifers underlying the feedlot site are in decline. See the Franklin County Conservation District and GWMA websites (<http://www.franklincd.org/gwma> and <http://www.gwma.org/>) for more information. The study concludes that "existing groundwater supplies in the deep basalt are not reliable or sustainable in the long term." The Franklin County MDNS pre-dates and contains no discussion of this critical issue.

Finally, Ecology has acknowledged in letters and e-mails that the SEPA work done by Franklin County is inadequate to support the water supply determinations associated with this matter.

## **2. The feedlot water budget underestimates water use.**

Easterday does not have adequate water to serve the feedlot. It is apparent that Easterday's consultants have low-balled their theoretical estimates of feedlot water supply needs. The proposed water budget fits within the quantity limits of the Pepiot water right, but does not comport with industry standards and agency estimates of feedlot water needs.

The Department of Ecology has estimated that Easterday will require between 1.35 and 2.5 million gallons per day (mgd) or 745 to 1,381 acre-feet per year for dust control purposes. Department Director Jay Manning has stated that the feedlot may need as much as 3-5 million gallons per day during the dry season.

Easterday's consultants have projected a water budget significantly lower than Ecology's own low-end estimates. Even so, the Pepiot instantaneous and annual quantities, if fully transferable (which they are not), are insufficient to meet the daily and annual water requirements projected by their own consultants.<sup>1</sup> The Pepiot Qi and Qa are far short of the water supply requirements projected by the Department of Ecology. Easterday's withdrawal of its proposal to build a 33 million gallon freshwater pond makes the need for adequate Qi

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<sup>1</sup> The Easterday air quality application indicates that, when water is scarce, it will cross-fence the facility to reduce the amount of space available for each animal (from 167 to 75 square feet). This raises serious questions about sustainable and humane practices. A recent report of the Pew Commission on Industrial Farm Animal Production, "Putting Meat on the Table: Industrial Farm Animal Production in America," notes that significant human health, environmental and animal welfare problems are associated with intensive animal confinement practices.

even more acute, given that there will be minimal storage available. The appropriate  $Q_i$  is not present in the Peplot water right.

Industry standards indicate that feedlot drinking water supply requires 15-20 gallons per day (gpd) per head of cattle. Easterday's consultants have proposed 14 gpd/head, a low-end estimate that makes no sense in the context of the extremely hot, arid and windy climate found in the Five Corners area. Obviously Easterday will pump what it needs to provide water to its cattle to prevent heat stress. Easterday should be required to provide a credible and accurate budget for the actual water needs of the proposed feedlot.

Finally, the Easterday's feedlot plans call for creation of an irrigated windbreak, installation of a boiler system, and construction of a small uncovered stockpond (where water will evaporate). The water budget contains no discussion of the water needs associated with these uses, which will increase water demand at the feedlot.

**3. The domestic well exemption may not be used to supply 500 acre-feet per day to the feedlot.**

Easterday may not rely on an exempt well to meet all the water needs of the proposed feedlot. Despite the Department of Ecology's position that the stockwater exemption in RCW 90.44.050 may be used as a legal basis to provide drinking water for feedlot cattle, this interpretation is not supported by legislative history (and reflects a political accommodation to avoid conflict with the 2005 Attorney General Opinion on stockwater use). Exempt well use may not exceed 5,000 gallons per day for all uses. RCW 90.44.050. Additionally, the amount of water proposed for transfer under this application is insufficient to meet the total water needs of the feedlot and illegal water use will occur as a result of approval of the transfer.

The legislative history of the groundwater exemption is discussed in a recent article titled "Got Water? Limiting Washington's Stockwatering Exemption to Five Thousand Gallons Per Day."

Historical circumstances surrounding the stock-watering exemption's enactment reveal that an average family farm required 1500 gpd or less in 1945. At the time the Legislature enacted the statute, Washington and the United States Bureau of Reclamation were attempting to populate the Columbia Basin region with family farms. The Columbia Basin Project was located below the newly constructed Grand Coulee Dam, in the dry eastern region of the state. It was the Bureau of Reclamation's largest project, part of its plan to "develop the West through the creation of permanent family farms on Federal Reclamation projects." The Bureau of Reclamation expected the Columbia Basin Project to strengthen the agricultural economy of the Pacific Northwest once post-World War II settlers developed the project area with irrigation water provided by the Grand Coulee Dam.

For settlement to succeed, every rural settler needed a domestic supply of water at a minimum cost. A 1945 Bureau of Reclamation report on farm improvement recommended that the supply of domestic water "should be sufficient (1) to satisfy the personal demands of the settlers, including the operation of plumbing facilities; (2) to water livestock; (3) to sprinkle lawns and small gardens occasionally; (4) to process farm products; and (5) to provide some fire protection." These recommended categories parallel the

categories codified in Washington's groundwater exemption statute in the same year that the Bureau of Reclamation published its report. The report also noted that because climate and topography in the Columbia Basin limited the use of ditches, canals, rivers, and creeks as water sources, groundwater was the most promising source for rural development. The farm improvement report also advised that "total daily requirements of the average farm may be only 200 gallons during the early years" and "will expand to perhaps 1,500 gallons during the mature development." This estimation is consistent with the 1940 Washington Census of Agriculture statistics, which reveal that Washington farms at this time were typically small farms of 100 acres or less.

One year after the Legislature enacted the groundwater code, the Department of Conservation published an overview of the groundwater code, which described the groundwater exemption statute as:

INDIVIDUAL DOMESTIC SUPPLY EXEMPT. The Ground Water Code exempts from administrative control the withdrawal of public ground water for any purpose where the quantity is less than 5,000 gallons per day. This exemption was provided to relieve the small water user of the formalities and costs of obtaining water for his household and domestic needs. Five thousand gallons per day will supply ample water for household use for a family, their garden and lawn irrigation, and stock water. The Department of Conservation interpreted the statute as limiting all exempt uses, including stock-watering, to 5000 gpd.

The agency believed the statute's purpose was to supply "small water users" with water, and the agency considered 5000 gpd an "ample" amount for such users. The Department of Conservation's interpretation limiting all exempt uses to 5000 gpd was consistent with the Bureau of Reclamation's estimation that maximum water use for small family farms would not exceed 1500 gpd.

83 Washington Law Review 249, at pp. 258-61 (May 2009) (footnotes omitted), citing U.S. Bureau of Reclamation, Columbia Basin Joint Investigations: Farm Improvement 54 (1945) and Washington Department of Conservation and Development, Thirteenth Biennial Report of the Department of Conservation and Development 44 (1946).

The above information may not matter in this proceeding, however, since it is doubtful that the Board has jurisdiction to consider the legitimacy of Easterday's proposed use of an exempt well to supply 500 acre-feet or more per day to the proposed feedlot. The Board should simply state that Easterday lacks documented water rights to serve the full water budget of the feedlot.

#### **4. The Pepiot water right may have relinquished in full or part.**

There is evidence that the Pepiot water right has not been continuously utilized in the full quantities indicated on the face of the certificate; approval of the transfer may result in an enlargement of the right. Anecdotal reports indicate that Pepiot was unable to withdraw the full quantity of water from his well and did not fully utilize his water right for a number of years in the 1980s and 1990s, prior to putting the property into the Conservation Reserve Program. Relinquishment may have occurred.

Easterday and Pepiot, as applicants, carry the burden of showing that there was continuous use of all of the water on the Pepiot property. The Board must examine objective and credible forms of evidence, such as water and/or electrical meter records, aerial photos, crop sales records, Farm Service Agency records, Department of Natural Resource records, and/or Internal Revenue Service income statements, that objectively indicate whether the Pepiot water right was continuously used.

**5. Approval of the transfer would violate "safe sustaining yield" laws.**

Exercise of the Pepiot water right will violate safe-sustaining yield requirements found in the Water Code. RCW 90.44.130. As noted above, and recently documented by the Columbia GWMA's stratigraphy study, regional basalt aquifers are in decline. An increase in pumping will draw down the aquifers even further. A water right decision that effectively approves mining of the basalt aquifers is in violation of Washington state law.

The Department of Ecology maintains that the safe, sustaining yield requirement applies only at the time a new water right is issued. This position makes no sense, because the impacts of pumping on aquifer yield are often not known until AFTER water rights are issued and pumping occurs. That is certainly what has occurred with respect to the basalt aquifers in this locale.

**6. The Easterday well does not tap the same body of groundwater.**

As described in the Easterday "impairment analysis," the Pepiot well taps into and, when it was operating, withdrew water from two aquifers: the Wanapum and the Grande Ronde. The right to water pumped from the Wanapum Aquifer is not transferable to the Easterday well, which is cased into and will withdraw only from the Grande Ronde Aquifer. The Grande Ronde is not the same body of groundwater as the Wanapum. The Board must determine the quantity of water Pepiot withdrew from each aquifer and reduce the transferable quantity accordingly to prevent enlargement of the water right. RCW 90.44.100(2)(a).

**7. Consumptive use will increase at the feedlot.**

Water use to control fugitive dust at the Easterday feedlot does not result in return flow, and will increase the consumptive use of water over what was utilized for Pepiot irrigation. The transferable quantity of the Pepiot right must be scaled back accordingly to prevent enlargement of the water right.

**8. The transfer risks impairment of nearby water users.**

Approval of the transfer of the Pepiot seasonal right to year-round use may harm other water users. Easterday's impairment analysis is inadequate and the transfer may impair existing water rights in violation of RCW 90.44.100. Easterday's "impairment analysis" fails to identify all of the wells within the vicinity of the proposed feedlot, fails to identify the depths and aquifers utilized by these wells, and fails to discuss the condition of the aquifers in the area. See Landau & Associates Report submitted by Five Corners Family Farmers.

Evidence of declining groundwater levels in the vicinity of the proposed feedlot, along with stresses on well levels when heavy pumping occurs, and dry lakes, indicate potential significant water scarcity problems in the feedlot area. The Columbia GWMA has determined that recharge to the Grande Ronde Aquifer is virtually non-existent. It is

incumbent on the Board to investigate and determine whether the Pepiot right can be utilized without detrimental impact to other water users.

Exercise of the Pepiot right may violate the requirement to maintain reasonable and feasible pump lift for neighboring wells, as set forth at RCW 90.44.070. The appropriate test to determine impacts on other wells is a pump test. Over the years, basalt aquifer pump tests have yielded surprising results, including in the Sinking Creek and Moxee areas. Reliance on models and equations is insufficient, particularly because the use of the Pepiot right will essentially revive a water right that has not been used in a long time in an area of declining groundwater.

**9. Water is not available.**

Ecology's conclusion at the time that the Pepiot water right was issued, that water is available from the deep basalt aquifers without violating safe sustaining yield requirements, was in error. The basalt aquifers serving the Pepiot right are in decline and water is not sufficient to serve all users. Water is not legally or physically available to serve the Easterday water right, and the application must be denied. RCW 90.03.290 and RCW 90.44.020.

**10. The transfer is not in the public interest.**

The Easterday feedlot raises questions concerning environmental protection, proper management of scarce and declining water resources, protection of senior water rights, and animal welfare. As discussed in the introduction to this letter, the transfer will be detrimental to the public interest and therefore must be denied. RCW 90.44.100.

**11. Easterday must be required to meter and report water use and monitor affected wells.**

Should the Board determine that some fraction of the Pepiot right is in fact transferable, it is critical, particularly under the physical conditions of the aquifer from which Easterday proposes to withdraw water, that strict metering and data reporting requirements be imposed on the water use. In addition, Easterday should be required to monitor well levels not only in his own well, but to pay for monitoring in nearby wells to determine the extent to which impairment may or may not occur.

Thank you for your consideration of these concerns. We request that you deny the proposed Pepiot-Easterday transfer.

Sincerely,



Rachael Paschal Osborn  
Executive Director

cc: Department of Ecology Water Resources Program