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THE THIRSTY CATTLE EXCEPTION: HOW AN ANTIQUATED LAW COULD DRY UP EASTERN WASHINGTON

SEAN HICKEY*

Abstract: Groundwater is a scarce resource in the arid plains of the northwestern United States. Accordingly, its high demand by farmers and cattle ranchers has led to a series of laws restricting and governing its use. The Supreme Court of Washington recently ruled in Five Corners Family Farmers v. State that one of these statutes, drafted decades ago, allows for unlimited water to be used for the purposes of watering cattle. This Comment reviews the competing arguments of this case, and focuses on the method the court used in making its determination. This Comment addresses the plain meaning of the statute in question, and suggests that while the court made the correct decision, it may have catastrophic effects on the land and people affected by it.

INTRODUCTION

Washington State is well known for Seattle and its notoriously rainy climate.1 The showery west side of Washington averages about forty-eight inches of rain per year, and is frequently the subject of many jokes.2 But just over the Cascade Mountains to the east, a far different climate is present: average precipitation plummets to just eight inches per year and farmers scramble to find enough water to sustain their crops.3 While western citizens frequently travel with umbrellas, to the east, farmers struggle to irrigate their soil to maintain their crops in the


dry climate. But because rainfall is so scarce, many of these farmers depend on extracting groundwater via wells to maintain a healthy field of crops. Family farms have survived this way for generations, and a rich sense of tradition vests in these farms.

In an attempt to attract new settlers to this dry land, the federal Bureau of Reclamation provided the area with irrigation water from a nearby dam beginning in the 1940s. In addition, the Washington state legislature passed a 1945 statute that made it easier for the new family farms to use the water, by allowing them to forego a permit requirement for water use to support their cattle farms. The plans worked, as Washington farmers developed almost 2.5 million more acres into usable farmland by 1954.

In Washington, groundwater is considered a public resource, and the state requires citizens to apply for and obtain a permit before extraction and utilization may begin. One exception to the rule, as created by the 1945 Washington state law, is using the extracted groundwater for stock-watering purposes. Stock-watering is the reasonable use of water associated with the normal farming of livestock, including drinking water, feeding, cleaning stalls, washing of cattle and related equipment, cooling cattle, and even controlling dust. The amount of water needed for these activities depends on how many cattle a rancher owns. The average beef cattle needs between 3.5 and 23 gallons of water a day, depending on size and seasonal temperature.

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6 See Dunn, supra note 7.


8 §§ 90.44.040, .050.

9 §§ 90.44.040, .050.


12 See id.
there were 1,088,846 individual cattle on 12,731 cattle farms in Washington.\(^\text{15}\) Of those farms, almost 50% had only one to nine cattle, and nearly 83% had less than one hundred.\(^\text{16}\)

Despite these developments, traditional family farms are potentially at risk due to a broader new interpretation of the 1945 state statute, an interpretation that could significantly “harm the public welfare.”\(^\text{17}\) For sixty years, the statute was interpreted as creating a five thousand gallon per day (“GPD”) restriction on water to be used for stock-watering, considered sufficient for the average family farm in 1945.\(^\text{18}\) In 2005, however, the Washington Attorney General was asked to interpret the complex statute, and in an official release stated that he believed that the five thousand GPD restriction did not apply to stock-watering.\(^\text{19}\) The Washington Department of Ecology adopted this view, significantly altering traditional stock-watering practices.\(^\text{20}\) Instead of having to acquire a permit from the state, commercial cattle ranchers would be able to withdraw all the water they pleased to water their cattle and promote their own business, regardless of its effect on nearby family farms.\(^\text{21}\) One commercial cattle rancher advanced with plans to build large cattle feedlots in the area and began digging wells into the water supply.\(^\text{22}\)

In *Five Corners Family Farmers v. State*, a group of family farmers—concerned about the potential devastating effects this could have on the limited water supply—brought suit against the State of Washington.\(^\text{23}\) These farmers responded to the commercial cattle ranchers actions by seeking an official declaration on the exact limits under the statute in question.\(^\text{24}\) This Comment argues that although the court correctly interpreted the statute, the environmental policy effects on Washington agriculture and the water supply are potentially “devastating.”
ing,” which demands that the state legislature change this law, as it no longer serves its purpose.25

I. FACTS AND PROCEDURAL HISTORY

Since the early twentieth century, Scott Collin and his family depended on a well that draws from the Grande Ronde Aquifer to water their small family farm in Washington State.26 The Grande Ronde Aquifer is part of a larger aquifer system but is individually isolated, and shows significant levels of decline due to over withdrawal—as much as three feet per year.27 Water levels in the aquifer have steadily declined since the 1930’s, making citizen groups in the area concerned about future water use.28 Collin and family farmers in the area rely on this water to keep their farms operational, and thus value it very highly.29

Following the Attorney General’s new interpretation of the permit exemption statute, a private cattle feedlot company called Easterday Ranches began construction for a large cattle feedlot near Collin.30 At the Washington Department of Ecology’s suggestion, Easterday negotiated with a local third-party farmer for right to use his water—referred to as the “Pepiot Transfer”.31 The two parties reached an agreement wherein Easterday could take approximately 282,106 gallons of water each day; the Franklin County Water Conservancy Board and the Department of Ecology approved this agreement in 2009.32 The water was to be used for both stock drinking water and for other feedlot purposes, and the agreement stipulated that only 58,921 gallons were to be allowed for stock drinking water purposes.33

25 Devries, 2001 WA ENV LEXIS 46, at *17; see infra notes 74–104 and accompanying text.
29 See Who We Are, supra note 26.
30 Att’y Gen. Op., supra note 17; Respondent/Cross Appellant Easterday’s Opening Brief at 1, 5, Five Corners Family Farmers, 268 P.3d 892 (No. 84632-4).
31 Five Corners Family Farmers, 268 P.3d at 895.
32 Id.; Respondent/Cross Appellant Easterday’s Opening Brief, supra note 30, at 5.
33 Five Corners Family Farmers, 268 P.3d at 895.
The estimated stock drinking water Easterday would actually need to operate its business and to provide enough water for the planned 30,000 cattle on the feedlot was assessed to be between 450,000 and 600,000 gallons.34 Easterday planned on withdrawing this water from the Grande Ronde Aquifer without a stock-watering permit.35 Easterday argued, with support from the Department of Ecology, that the withdrawal of this additional groundwater was exempt from the statutory permit requirements, as it was explicitly for stock-watering purposes, as exempted by the 2005 guidance of the Attorney General.36

As a small farmer who felt threatened by the new interpretation of the law and the possibility that the lack of water would seriously impair his family farm, Collin decided to take legal action.37 Together with Five Corners Family Farmers,38 the Center for Environmental Law and Policy,39 and the Sierra Club, he filed suit against Easterday, the Department of Ecology, and the State of Washington in Superior Court.40 The Plaintiffs asked for declaratory relief from the court to limit the stock watering exemption from the permit requirement in the Washington statute to usages of less than five thousand GPD.41 Furthermore, the plaintiffs sought a court-ordered injunction to require Easterday to stop its current groundwater use without a permit from the state.42 The Plaintiffs suggested that the four statutory permit exceptions—the first of which is stock watering—be bundled into two categories.43 By bundling the first three exemptions as one domestic category and the last industrial exemption by itself, the five thousand GPD limit would apply to both domestic and industrial uses.44

The state Superior Court allowed the intervention of many agricultural organizations with an interest in the case as additional defen-
dants. Led by Easterday, the Defendants filed a motion for summary judgment based on the unambiguousness of the plain wording of the statute. The Superior Court found merit in Defendants’ summary judgment claim, and granted the motion. The court agreed that the statute provided an unambiguous exemption from the permit requirement for the withdrawal of all quantities of groundwater for explicit stock-watering purposes, and thus those withdrawals were not subject to the five thousand GPD restriction.

The Plaintiffs then filed a notice of appeal, asking for direct review by the Supreme Court of Washington. The Washington Supreme Court retained the case for decision, and on appeal, addressed the issue of the potential ambiguity of the statute.

II. LEGAL BACKGROUND

In Washington State, groundwater is considered a public resource, and according to state law, a permit must be acquired before water can be removed and used. There are, however, exceptions, which are governed by section 90.44.050 of the Revised Code of Washington. According to the statute:

[A]ny withdrawal of public groundwaters 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 . . . .

Lawmakers enacted the statute in 1945 with the intention of allowing family farms to use water without needing a permit, not likely contem-
platting use by commercial feedlots. As a result, the statute has long been interpreted to mean that up to five thousand gallons of water a day can be withdrawn for stock-watering purposes without a permit. For example, in a Washington Pollution Control Hearings Board case, Dennis v. Department of Ecology, the board found that the five thousand GPD limit applied to stock-watering, because the statute was ambiguous; to interpret it otherwise would “result in an unlimited, and uncontrollable, potential for withdrawal of groundwater.” Additionally, both in 1997 and 2000, the Supreme Court of Washington upheld the five thousand GPD limit for stock watering in dicta. Although the statute in question was interpreted one way for many years, its precise meaning remained uncertain.

Washington courts offer guidance for interpreting ambiguous statutes. The “primary duty in interpreting any statute is to discern and implement the intent of the legislature.” The most definite way to discern intent is to look at “the plain meaning of the statute,” where meaning is discerned “from all that the Legislature has said in the statute and related statutes which disclose legislative intent.” Ultimately, a “statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.”

In 2005, two state representatives asked the Attorney General for clarity on the statute. The Attorney General responded with an official opinion arguing that the plain wording of the statute did not support a five thousand GPD limit on stock-watering. Instead, he sug-

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56 Devries, 2001 WA ENV LEXIS 46 at *17.
57 See Postema, 11 P.3d at 739 (stating that “RCW 90.44.050 allows domestic and stockwatering uses of up to 5,000 gallons without a permit”); Hillis, 932 P.2d at 142 (stating that “water right permit is not required for withdrawal of public water in an amount not exceeding 5,000 gallons per day for single or group domestic uses or other specific purposes”).
58 Five Corners Family Farmers, 268 P.3d at 901; see infra notes 63–68 and accompanying text.
60 J.P., 69 P.3d at 320.
61 Five Corners Family Farmers, 268 P.3d at 897 (quoting Campbell & Gwinn, L.L.C., 43 P.3d at 10).
62 Burton, 103 P.3d at 1234.
64 Id.
gested that each enumerated limit applied only to that use that immediately preceded the limitation in the text.\textsuperscript{65} He reasoned that although the last three uses all have express limits directly attached to them in the plain wording of the statute, “the first category (stock-watering purposes) contains no language limiting the amount of the withdrawal” directly proceeding it.\textsuperscript{66} Therefore, “the grammatical structure and plain language of [the] proviso indicates that of these four categories, groundwater withdrawals for stock-watering purposes are not limited.”\textsuperscript{67} The Washington State Department of Ecology found the argument persuasive and stopped requiring permits for stock-watering groundwater withdrawals shortly thereafter.\textsuperscript{68}

Previous Washington statutes and case law provide some general guidance for when an Attorney General’s opinion should be given full credence.\textsuperscript{69} In general, “opinions of the Attorney General in construing statutes are entitled to great weight,”\textsuperscript{70} as he or she is “the legal adviser of the state officers.”\textsuperscript{71} An Attorney General’s opinion “constitutes notice to the Legislature of the Department’s interpretation of the law,” and “[g]reater weight attaches to an agency interpretation when the Legislature acquiesces in that interpretation.”\textsuperscript{72} Finally, the length of time between the passage of the statute and the publication of the opinion is a factor in assessing the impact of the opinion.\textsuperscript{73}

\section*{III. Analysis}

In \textit{Five Corners Family Farmers v. State}, on the issue of the proper interpretation of the statute, the Washington Supreme Court held that the plain meaning of the statute in question could only be interpreted in

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} Id.

\textsuperscript{68} Dunn, \textit{supra} note 7, at 250; see Wash. State Dep’t of Ecology, Stock Water Working Group Report 8 (2009), http://www.ecy.wa.gov/programs/wtr/hq/pdf/swtr/011010_stockwater_workinggroup_finalreport.pdf. The legislature established a stock-water working group in 2009 to investigate the ambiguity of the statute, but the group ultimately decided to halt their efforts until after the Washington State courts had issued an opinion in \textit{Five Corners Family Farms}. See id.


\textsuperscript{70} Seattle Bldg. & Const. Trades Council, 920 P.2d at 588.

\textsuperscript{71} Wash. Const. art. III, § 21.

\textsuperscript{72} Bowles, 847 P.2d at 446.

\textsuperscript{73} See Kaiser Aluminum & Chem. Corp., 854 P.2d at 616.
one reasonable way, and thus it was not ambiguous.\textsuperscript{74} The court found that given the plain wording of the statute, each of the four categories was restricted only by the “qualifying phrase” that immediately followed it; because there was no such phrase following the stock-watering exemption in the statute, there the statute established no limit.\textsuperscript{75}

The court dismissed the Plaintiffs’ bundling suggestion, as it failed to account for the word “or” in the statute, which the court deemed unacceptable.\textsuperscript{76} Furthermore, the bundling suggestion destroyed the parallel structure that the legislature created in the bill, which the court found indicated no intent for the five thousand GPD limitation to apply to stock-watering.\textsuperscript{77} The court reasoned that if the legislature wanted to affix a restriction to stock-watering, they would have explicitly done so.\textsuperscript{78} The court found the Plaintiff’s argument to be too inconceivable and therefore determined bundling was an unreasonable interpretation.\textsuperscript{79}

With the Plaintiffs’ suggestion quashed and only one reasonable interpretation of the statute remaining, the court determined the restriction does not apply to stock-watering, and affirmed the ruling of the superior court granting the Defendants’ motion for summary judgment, crushing any hopes for an injunction.\textsuperscript{80} This was the court’s first official opinion on the statute since the Attorney General’s opinion and subsequent adoption by the Department of Ecology, and it was consistent with that interpretation.\textsuperscript{81}

The court split 6–3 in this case, and the dissent expressed serious concern over the environmental consequences of interpreting the “ambiguous” statute.\textsuperscript{82} The dissent agreed with the Plaintiffs’ bundled interpretation of the statute and concurred that since the first three categories were all domestic, and the last category was industrial, that the three-and-one grouping was reasonable.\textsuperscript{83} The dissent contended

\begin{footnotesize}
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\item\textsuperscript{74} 268 P.3d 892, 901 (Wash. 2011).
\item\textsuperscript{75} Id.
\item\textsuperscript{76} The five thousand GPD limit is only mentioned only after: (3) "domestic uses" and (4) "industrial purpose[s]," and thus only applies to those two categories, not (1) “stock-watering” or (2) "watering of a lawn." See WASH. REV. CODE ANN. § 90.44.050 (West 2004); Five Corners Family Farms, 268 P.3d at 901.
\item\textsuperscript{77} Id.
\item\textsuperscript{78} Id.
\item\textsuperscript{79} Id.
\item\textsuperscript{80} See id. at 902.
\item\textsuperscript{81} Id.; Att’y Gen. Op., supra note 17, at 3; see WASH. STATE DEP’T OF ECOLOGY, supra note 68.
\item\textsuperscript{82} See Five Corners Family Farms, 268 P.3d at 902, 907 (Wiggins, J., dissenting).
\item\textsuperscript{83} Id. at 903.
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that because there were two reasonable interpretations, the statute was effectively ambiguous, and thus the true purpose of the statute must be uncovered to determine its meaning.\textsuperscript{84} When the dissent looked back to the circumstances surrounding the enactment of the statute in 1945, it reasoned that the legislature at that time was concerned with encouraging development of the area by providing water for small family farms in the arid climate.\textsuperscript{85} That legislature could never have anticipated the enormous cattle farms that may try to take advantage of this restriction-free withdrawal when drafting the law.\textsuperscript{86} Because it was likely the intention of the legislators to encourage development of dry land by the small family farmers of its era only, and not the megacorporations of today, the dissent contended the five thousand GPD limit must apply.\textsuperscript{87}

An argument based on history is exactly why the dissent lost this decision, however.\textsuperscript{88} The Washington state legislature passed the statute at issue in 1945, and United States’ agricultural development in that era shows that the federal government was pushing to encourage development in the arid climate of the West, including Washington.\textsuperscript{89} The Federal Bureau of Reclamation’s largest project at the time was to manage water in the developing West.\textsuperscript{90} To that end, it worked with Washington State to use the Columbia River basin to make more water available to ease settlement, with the ultimate goal “to develop the West through the creation of permanent family farms.”\textsuperscript{91} To support farmers moving to this harsh area, legislators decided to allow permit-free water use for cattle.\textsuperscript{92} The statute reflects this by neglecting to place any qualifying limit after the word “stock-watering”—something it did with all other

\begin{thebibliography}{99}

\bibitem{84} Id. at 904–05.
\bibitem{85} Id. at 905.
\bibitem{86} Id.
\bibitem{87} Id.
\bibitem{88} See infra notes 89–105 and accompanying text.
\bibitem{90} Dunn, supra note 7, at 258.
\bibitem{91} Id.; Pisani, supra note 89, at 24.
\end{thebibliography}
uses in the statute and an indication that no limit was intended.\textsuperscript{93} It
does not matter that the legislators may not have intended for com-
mercial use, as there is only one reasonable interpretation, and under
that single interpretation, the statute does not limit the use to non-
commercial purposes only.\textsuperscript{94} The plain meaning of the statute is the
“surest indication of the legislature’s intent,” and because the statute is
clear and unambiguous, today’s regulators may not change this mean-
ing simply because circumstances have changed.\textsuperscript{95} Thus, the Supreme
Court of Washington correctly analyzed this case.\textsuperscript{96}

Nevertheless, this law needs to be updated to adjust to changing
farming conditions that the drafters could not foresee.\textsuperscript{97} This case pres-
ts a prime example of an outdated law that must be updated by the
legislature before significant harm is done to the environment.\textsuperscript{98} The
court may be correct in its legal analysis, as the statute is not ambigu-
ous, but as the dissent argues, policy-wise, this result does not make
sense, and will only serve to harm the farmland that the 1945 legisla-
ture worked to develop.\textsuperscript{99} The dissent emphasized that the legislators
intended this exemption only be used by small family farmers who
would only need trivial amounts of water to sustain their farms.\textsuperscript{100} They
could never have foreseen enormous cattle ranches taking over the
land, and if they had, it seems unlikely that they would have wanted a
permit exemption for that kind of use.\textsuperscript{101}

This new interpretation to allow permit-exempt use “potentially
threatens existing water rights and the public welfare” by giving large
industry the ability to remove vast quantities of water from the depleted
Grande Ronde Aquifer, when the legislature intended only to exempt
small withdrawals.\textsuperscript{102} With no law to stop the withdrawals, large cattle
ranches may withdraw as much water as they like “without any consid-
eration whatsoever of whether such withdrawals would harm the public

\textsuperscript{93} § 90.44.050; Five Corners Family Farms, 268 P.3d at 901.
\textsuperscript{94} Five Corners Family Farms, 268 P.3d at 901.
\textsuperscript{95} Id. at 897, 901; see also Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 15
(Wash. 2002) (enforcing the plain meaning of the statute).
\textsuperscript{96} See supra notes 89–96 and accompanying text.
\textsuperscript{97} See Campbell & Gwinn, L.L.C., 43 P.3d at 18 (“[I]t is a matter for the legislature, not
our majority, to enact it”); supra notes 86–87 and accompanying text.
\textsuperscript{98} See Five Corners Family Farms, 268 P.3d at 902 (“The larger the exemption, the greater
the threat.”); Family Farms Threatened, supra note 6.
\textsuperscript{99} Five Corners Family Farms, 268 P.3d at 902–03 (Wiggins, J., dissenting); Dunn, supra
note 7, at 284.
\textsuperscript{100} Five Corners Family Farms, 268 P.3d at 904.
\textsuperscript{101} Id. at 905.
\textsuperscript{102} Id. at 902, 904; see Washington, WSU, & the Grande Ronde Aquifer, supra note 27.
welfare or impair existing water rights.” Given the inability of the 1945 drafters to foresee commercial use, this exception is “illogical”. Because the exemption is so potentially large, any resulting permit-exempt use may curtail the water rights of family farmers— “the larger the exemption, the greater the threat.”

Conclusion

Collin and his supporters make a strong argument that unlimited withdrawals in this era are likely to have calamitous effects on those who use groundwater in eastern Washington. As commercial interests like Easterday begin to move in on these lands, now is the time for the Washington legislature to change the law to more suitably fit the needs of modern citizens. Now that the state highest court has weighed in on the situation, the stock-water working group created by the state legislature needs to reconvene to fix this dangerous exception.

The legislature must modify the statute as it presently exists to seal off this potentially devastating exception. Without it, Easterday and similar commercial farmers will continue to dry up a climate already desperate for water, all under the authority of the law. If action is not taken quickly, historical family farms like Collin’s could be erased from eastern Washington’s countryside forever.

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105 Five Corners Family Farms, 268 P.3d at 906.
104 See id. at 906.
103 See id.
107 See id.
108 See Wash. State Dep’t of Ecology, supra note 81. At the time of publication, a bill has been proposed to reconvene the group, but has yet to pass. See Reconvening a Stock Water Working Group, S.B. 6200, 2012 Leg., Reg. Sess. (Wash. 2012).