Law on the Horizon

Analysis of an emerging issue affecting real property

GROUNDWATER RIGHTS

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Stock-watering exemption to Washington's groundwater permit program not limited to 5,000 gallons per day

by Michael B. Gillett

In *Five Corners Family Farmers v. State of Washington*, No. 84632-4, 2011 WL 6425114 (Wash., Dec. 22, 2011), the Washington Supreme Court settled the long-disputed question of whether an exemption to the statutory groundwater rights permit program for stock-watering purposes is limited to withdrawals not exceeding 5,000 gallons per day. For now, at least, the answer is no, the exemption has no such limitation.

In 1945, the Washington legislature enacted a law, now codified at RCW 90.44.050, providing that "no withdrawal of public groundwaters 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 [of Ecology] and a permit has been granted it as herein provided ….” Certain purposes were exempted from the permit requirement: “[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, 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 ….”

Reading this exemption text literally, the 5,000 gallon per day limitation appears to apply only to domestic uses and industrial purposes. A limitation exists for lawn and garden use of not more than one-half acre. But the text does not appear to apply any limitation on the amount of groundwater that may be withdrawn for stock-watering purposes. Nevertheless, for many years, the Department of Ecology interpreted this language to mean that all exempted purposes, including stock-watering, are subject to the 5,000 gallon per day limitation. In 2001, the Pollution Control Hearings Board, an administrative appeals board, agreed, stating: “All of the objectives of the groundwater code would be undermined if the stockwatering exemption is for an unlimited quantity.” *DeVries v. Department of Ecology*, No. 01-073 (PCHB, Sept. 27, 2001). The Department changed course after the Washington Attorney General issued an opinion in 2005 that “RCW 90.44,050 authorizes groundwater withdrawals for stock-watering purposes without a water rights permit and does not limit

the amount of such withdrawals to any specific quantity." AGO No. 17, 2005 WL 3142148 at *1 (Nov. 18, 2005),.

Since that time, the position of the Department of Ecology has been that the 5,000 gallon per day limitation does not apply to groundwater withdrawals for stock-watering purposes. When Easterday Ranches, a cattle feeder in Eastern Washington, decided to establish a new feedlot in Franklin County for 30,000 head of cattle, the Department of Ecology agreed that no permit was required for the withdrawal of groundwater to provide drinking water for the cattle - which is estimated will require between 450,000 and 600,000 gallons per day. Several individuals and two environmental organizations brought suit, asking the Franklin County Superior Court to declare that RCW 90.44.050 limits non-exempt withdrawals of groundwater for stock-watering purposes to not more than 5,000 gallons per day. On summary judgment, the superior court held that no such limitation applies. The Washington Supreme Court accepted direct review.

The Court holds it is reasonable to interpret the statute as not limiting the quantity of permit-exempt groundwater withdrawn for stock-watering purposes

The Court, by a 6-3 majority, affirmed the superior court. Justice Owens, writing for the majority, closely followed the reasoning of the Attorney General's 2005 opinion, which the Court found to be persuasive. 2011 WL 6425114, at *6. The Court first considered the construction given to RCW 90.44.050 by the Respondents, Easterday Ranches and the Department of Ecology, which the Court described as follows:

> [A]ny withdrawal of public groundwaters

> [(1)] for stock-watering purposes, or
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> [(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 per day,
>
> is and shall be exempt from the provisions of this section.

2011 WL 6425114, at *4. The Court concluded that the Respondents' construction is reasonable. "The categories are logically divided by the legislature's consistent use of the term 'or for,' which appears four times in the proviso, naturally suggesting four categories. In this way, Respondents' interpretation recognizes the parallel structure of the statute." 2011 WL 6425114, at *5. The Appellants argued that the Respondents' construction is unreasonable in light of two provisos in the statute that modify the exemption. The first proviso reads:

> [T]he 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 ...."

The Appellants argued that the term "any such small withdrawal" in the proviso "is evidence that the legislature intended to limit withdrawal to some limited quantity." 2011 WL 6425114, at *6. The Court disagreed, saying that "[t]he legislature may have simply considered stock-watering withdrawals, in the aggregate, small as compared to other agricultural or domestic withdrawals." *Id.*

> The second proviso relied upon by the Appellants reads:
>
> [A]t the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations filed under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as in this chapter provided in the case of withdrawals in excess of withdrawals in excess of five thousand gallons a day.

The Appellants argued that this proviso "is indicative of a legislative intent to divide water uses into two categories: (1) uses of 5,000 gallons of water 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." *Id.* The Court rejected this argument, stating:

> This approach fails for two reasons. First, not all uses of 5,000 gallons of water per day or less are exempt from permit requirements, only those for stock-watering, lawn or noncommercial garden, domestic, or industrial purposes are. RCW 90.44.050. 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.

Id.

Finally, the Appellants argued that "interpreting the exemption clause to allow withdrawal of 'unlimited' groundwater for stock-watering is an 'absurd result.'" 2011 WL 6425114, at *7. Not so, said the Court.

> 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. Because it is conceivable that the legislature intended this result, the result is not absurd and Respondents' proffered plain meaning is not thereby rendered unreasonable.

Id.

The Court holds it is unreasonable to interpret the statute as limiting permit-exempt groundwater withdrawn to 5,000 gallons per day

The Court then turned to the Appellants' interpretation of the statute, for "if another interpretation is also reasonable, the statute is ambiguous and we may resort to legislative history and the circumstances surrounding the enactment of the statute." *Id*. In contrast to the Respondents' four categories, the Appellants divided the exemptions into two:

> [A]ny 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 per day,
>
> is and shall be exempt from the provisions of this section.

2011 WL 6425114, at *5. The Court concluded that it is not reasonable to "bundle" the three purposes of stock-watering, lawn and garden use, and domestic uses into a single category. The Court found that the Appellants' bundling of these three purposes "fail[s] to give effect to the parallel structure created by the legislature. … 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." 2011 WL 6425114, at *7. Declining to accept the bundling of the first three purposes, the Court concluded that the argument to limit permit-exempt stock-watering withdrawals to 5,000 gallons per day also failed.

> Accepting, as the sentence structure makes clear, that the exemption clause contains four distinct categories, it becomes apparent that each category is limited by its own qualifying language and only its own qualifying language. Given that the "five thousand gallons a day" limitation appears twice in the exemption clause, it is evident that the legislature knew how to attach that limitation to multiple categories, and yet it chose only to apply it to two categories. There is simply no textual

> basis for the conclusion that "five thousand gallons a day" modifies "for stock-watering purposes." RCW 90.44.050. Accordingly, Appellants' proposed interpretation is not reasonable.

2011 WL 6425114, at *8.

Therefore, the Court held, "under a plain reading of RCW 90.44.050, groundwater withdrawn without a permit for stock-watering purposes is not limited to 5,000 gallons per day." *Id.*

The dissent finds the statute to be ambiguous, and that the legislature intended to limit permit-exempt groundwater withdrawals to 5,000 gallons per day

The dissent, authored by Justice Wiggins, agreed that the Respondents' construction of the statute is reasonable, but argued that the Appellants' interpretation also is reasonable, thus creating an ambiguity in the statute which the Court must resolve. The dissent did not respond the majority's grammatical parsing of the statutory language, whereby the majority rejected the Appellants' bundling of the first three purposes into one category, and thus did not directly address the majority's express reason for holding that the Appellants' interpretation of the statute is not reasonable. Instead, the dissent concludes that RCW 90.44.050 is ambiguous due to the two provisos discussed above.

According to the dissent, the first provision, which allows the Department of Ecology to request information from a water user making "any such small withdrawal", "creates dissonance" with the Respondents' interpretation of the statute, "which would allow very large permit-exempt withdrawals." 2011 WL 6425114, at *11. In the dissent's view, "it seems highly unlikely that the legislature

would have used the term 'small withdrawal' if it had intended to create a permit exemption that was entirely without limit and could be used to withdraw more than 400,000 gallons of water per day without a permit." *Id.* The dissent took issue with the majority's suggestion that the legislature may have considered stock-watering withdrawals, in the aggregate, small as compared to other agricultural or domestic withdrawals. According to the dissent:

> [T]his does not make sense in light of the fact that all of the other exemptions in the statute are limited in some unambiguous way. … It is elementary to statutory construction that we must construe elements in a list in light of the company they keep. I find it difficult to believe that the legislature would include in the same list of "small withdrawal[s]," three exemptions in the 5,000-gallon-or-below range and one that would allow withdrawal of between 450,000 and 600,000 gallons of water per day.

2011 WL 6425114, at *11, n. 2.

The dissent found the second proviso "even more troubling" for the Respondents' construction of the statute. 2011 WL 6425114, at *11. "It gives the permit-exempt user the option to obtain a permit if desired, and in doing so it appears to assume that all exempt uses are limited to 5,000 gallons per day". *Id.* According to the dissent, the language of the second proviso "suggests that there are two classes of water use: uses under 5,000 gallons per day that fall under an exemption and uses over 5,000 gallons per day, which always require a permit." *Id.* The dissent responded sharply to the majority's view, discussed above,

that the statute allows only some of the permit-exempt users to apply for an optional permit. According to the dissent:

> Frankly, this explanation strains credulity. I can think of no possible reason to allow the option of a permit for exempt users of less than 5,000 gallons per day but not for exempt users of more than 5,000 gallons per day. The more likely explanation is that the legislature assumed that under the statute every exemption was capped at 5,000 gallons per day and sought to give all exempt users the option of obtaining a permit. This directly conflicts with the [Respondents'] unlimited interpretation.

2011 WL 6425114, at *12.

Concluding that the Respondents and the Appellants both offered reasonable interpretations of the statute, the dissent proceeded to apply statutory rules of construction in order to discern the legislature's intent, which the dissent found was to limit permit-exempt stock-watering withdrawals to 5,000 gallons per day. 2011 WL 6425114, at *12-14. The majority, which held that a plain reading of the text led to only one reasonable interpretation, had no need to resort to these rules of construction; therefore, the occasional sparring with the majority found in this portion of the dissent is somewhat stray of the mark.

Conclusion

Although *Five Corners Family Farmers* may be the last word on the meaning of RCW 90.44.050 as its stands today, there is no certainty that the law will remain unchanged. This issue has been hotly debated for several years. Attempts have been made in the

past to amend RCW 90.44.050, and it would be surprising if attempts are not made in the future. Indeed, in 2009, a working group on the issue, established by the Department of Ecology pursuant to the legislature's direction, deferred making a specific legislative proposal due in part to a concern that any such recommendation would be premature while *Five Corners Family Farmers* was pending before the Court.

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