No. 84632-4

WIGGINS, J. (dissenting)—I agree with the majority that appellants Five Corners Family Farmers et al. have standing and that Easterday Ranches Inc. is not entitled to attorney fees. I dissent because I believe the stock-watering permit exemption in RCW 90.44.050 is ambiguous, and the legislature intended to limit the exemption to 5,000 gallons of water per day.

The purpose of requiring a permit for groundwater use is to protect senior water rights and the public welfare. Before a permit is issued, the Department of Ecology must find that (1) water is available, (2) the proposed use is beneficial, and (3) appropriation will not impair existing rights or (4) be detrimental to the public welfare. RCW 90.03.290(3). If a groundwater use is exempt from permitting requirements, the Department of Ecology does not make these findings before use begins. Thus, any permit-exempt use potentially threatens existing water rights and the public welfare; the larger the exemption, the greater the threat.

I conclude that the legislature never intended that RCW 90.44.050 would allow Easterday to use between 450,000 and 600,000 gallons of water per day with no inquiry whatsoever into whether existing rights may be impaired or the public welfare may be harmed. Rather, I believe the legislature enacted an

ambiguous statute that is now being read to produce a result contrary to legislative intent.

I. The stock-watering exemption is ambiguous

We apply ordinary principles of statutory interpretation to determine whether a statute is ambiguous. For a statute to be ambiguous, it must have more than one reasonable interpretation. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). A statute's meaning is derived "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). We must not read any provision in isolation but look at the statute as a whole. *Id.*

There are two reasonable interpretations of the stock-watering exemption: first, an "unlimited" interpretation and second, a "limited" interpretation.

Under the "unlimited" interpretation, the statute creates four categories of exemption, each of which is subject only to its own limitations:[1]

> [A]ny withdrawal of public ground waters
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> [(1)] for stock-watering purposes, or
>
> [(2)] for the watering of a lawn or of a non-commercial garden not exceeding one-half acre in area, or
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> [(3)] for single or group domestic uses in an amount not exceeding five thousand (5,000) gallons a day, or

[1] I use the statute as originally passed in 1945 for this analysis. *See* Laws of 1945, ch. 263, § 5 (codified as amended at RCW 90.44.050).

> [(4)] for an industrial purpose in an amount not exceeding five-thousand (5,000) gallons a day,
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> is and shall be exempt from the provisions of this section . . . .

Laws of 1945, ch. 263, § 5. Under this approach, three of the four delineated categories are expressly limited. The third (single or group domestic use) and the fourth (industrial use) are expressly limited to withdrawals of less than 5,000 gallons per day. The second category (watering a lawn or a noncommercial garden) is limited to one-half acre. By contrast, the first category (stock-watering purposes) contains no language limiting the amount of withdrawal.

Under the second "limited" interpretation, the exemption is divided into two categories, domestic and industrial, and the 5,000 gallon per day limit applies to both:

> [A]ny withdrawal of public ground waters
>
> [(1)] for stock-watering purposes, or for the watering of a lawn or of a non-commercial garden not exceeding one-half acre in area, or for single or group domestic uses *in an amount not exceeding five thousand (5,000) gallons a day*, or
>
> [(2)] for an industrial purpose *in an amount not exceeding five thousand (5,000) gallons a day*,
>
> is and shall be exempt from the provisions of this section . . . .

Id. (emphasis added).

Under this view, the first 5,000 gallon limitation applies to the first three exemptions. The second 5,000 gallon limitation applies to industrial use. In other words, every permit-exempt use is limited to 5,000 gallons per day.

I disagree with the majority's conclusion that this limited interpretation is not reasonable. I find both the limited and unlimited interpretations reasonable, and for that reason I believe the statute is ambiguous.

The statute is ambiguous when it is read as a whole. The ambiguity arises from two provisos found at the end of the statute. The first proviso allows the Department of Ecology to request information from the water user about permit-exempt use. In doing so, it refers to all permit exemptions as "small withdrawal[s]":

> 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 . . . .

RCW 90.44.050. This reference to "small withdrawal" suggests the legislature intended to exempt only small water uses. This creates dissonance with the unlimited interpretation, which would allow very large permit-exempt withdrawals. This in turn suggests that the limited interpretation is more reasonable. In particular, 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.[2]

[2] The majority suggests that "[t]he legislature may have simply considered stock-watering withdrawals, in the aggregate, small as compared to other agricultural or domestic withdrawals." Majority at 13. But this does not make sense in light of the fact that all of the other exemptions in the statute are limited in some unambiguous way. Two of them (single- or group-domestic use and industrial use) are unquestionably limited to 5,000 gallons per day, and the third, lawn-watering, is limited to one-half acre.

The second proviso is even more troubling for the unlimited interpretation. 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:

> PROVIDED, FURTHER, That at 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 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.

Id. The language of this 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. This language appears to assume that *every* permit-exempt withdrawal is limited to 5,000 gallons per day. Indeed, I have a hard time seeing how the second proviso can be read any other way. This second proviso plainly conflicts with the unlimited interpretation, again making the limited interpretation more reasonable in comparison.

I am not convinced by the majority's attempt to explain away this inconsistency. *See* majority at 14. The majority claims the legislature meant to

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It is elementary to statutory construction that we must construe elements in a list in light of the company they keep. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). 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.

give exempt users the option of obtaining a permit if they use less than 5,000 gallons per day but not if they use more than 5,000 gallons per day. 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.[3] This directly conflicts with the unlimited interpretation.

These two provisos lead me to believe that both the limited and the unlimited interpretations are reasonable, and therefore the statute is ambiguous. The unlimited interpretation is in patent disharmony with the second proviso, and arguably with the first proviso as well. In contrast, the limited interpretation makes sense in light of both. We should not pretend a statute has a plain meaning when it does not. Instead, we should recognize that RCW 90.44.050 is ambiguous and attempt to decipher its legislative intent.

II. The legislature intended to limit the stock-watering exemption to 5,000 gallons per day

Our fundamental objective in constructing a statute is to ascertain and

[3] The second proviso was added to the statute in 1947, but that does not mean we cannot rely on it to ascertain legislative intent. "[W]here a former statute is amended, such amendment is strong evidence of legislative intent of the first statute." *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 755-56, 953 P.2d 88 (1998) (citing 2B Norman J. Singer, Sutherland Statutory Construction § 49.11, at 83 (5th ed. 1992); *Cowiche Growers, Inc. v. Bates*, 10 Wn.2d 585, 604, 117 P.2d 624 (1941); *Groves v. Meyers*, 35 Wn.2d 403, 408, 213 P.2d 483 (1950)).

carry out the intent of the legislature. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). Here, many factors lead me to conclude that the legislature's intent was to cap *all* permit exemptions at 5,000 gallons per day, including the stock-watering exemption.

First, an unlimited interpretation conflicts with the purpose of the 1945 groundwater code. The purpose of the 1945 code was to subject the withdrawal of groundwater to the permitting process in order to protect senior water rights and the public welfare. *See* RCW 90.44.020; RCW 90.03.290(3). Indeed, under the majority's unlimited interpretation, stock-watering would be the only exception not subject to any limitation at all. This would put senior water rights and the public welfare at risk and contravene the purpose of the groundwater code. The limited interpretation makes more sense in light of the purpose underlying the code. The limited interpretation is true to the principle that we interpret statutes to implement the general rule and narrowly interpret exceptions to the rule. *W. Valley Land Co. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 369, 729 P.2d 42 (1986). The general rule of RCW 90.44.050 is that a permit is required for any new withdrawal of groundwater, while stock-watering and the other specified uses are all exceptions which should be read narrowly. A limited interpretation complies with this general principle, whereas an unlimited interpretation contravenes the purpose of the 1945 code.

Second, the limited interpretation is consistent with the historical context in

which the exemption was enacted.[4] The stock-watering exemption was enacted in an era when the legislature was concerned with providing permit-free water to small family farms:

> 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 . . . . [as] part of its plan to "develop the West through the creation of permanent family farms on Federal Reclamation projects." . . . .
>
> For settlement to succeed, every rural settler needed a domestic supply of water at a minimum cost.

Kara Dunn, *Got Water? Limiting Washington's Stockwatering Exemption To Five Thousand Gallons Per Day*, 83 Wash. L. Rev. 249, 258 (2008) (footnote omitted) (quoting Donald J. Pisani, *Federal Reclamation and the American West in the Twentieth Century*, 77 Agric. Hist. 391, 401 (2003)). The groundwater code's statutory exemptions may have originated in a report produced by the Bureau of Reclamation on providing water to small family farms:

> 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.

[4] *See Wash. State Nurses Ass'n v. Bd. of Med. Exam'rs*, 93 Wn.2d 117, 121, 605 P.2d 1265 (1980) ("[Legislative purpose] can be found by examining the historical context in which a statute was passed to identify the problem that the statute was intended to solve." (citing *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 872, 602 P.2d 357 (1979))).

Id. at 258-59 (footnote omitted). It was estimated that these farms would use an average of 200 to 1,500 gallons of water per day. *Id.* 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, and we should be wary of any interpretation that allows such a use. In contrast, the limited interpretation is consistent with the concerns of the era in which it was enacted.

Third, the limited interpretation is more consistent with our canons of statutory construction. It is well established that "words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. Impac Ltd, Inc.*, 432 U.S. 312, 322-23, 97 S. Ct. 2307, 53 L. Ed. 2d 368 (1977). In Washington, this is enshrined in the principle of noscitur a sociis, which roughly translates to "words are known by the company they keep." *See State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Here, three of the exemptions in RCW 90.44.050 are indisputably limited in some way: the single- or group-domestic and industrial exemptions are limited to 5,000 gallons a day, and the lawn-watering exemption is limited to one-half acre of lawn. In the context of these "small withdrawal[s]," it would be strange indeed if the fourth exemption in this list allowed water users like Easterday to withdraw limitless amounts of water without a permit or indeed without any consideration whatsoever of whether such withdrawals would harm the public welfare or impair existing water rights.

Fourth, as discussed above, the two provisos in the statute suggest a legislative intent to limit the exemption to 5,000 gallons per day. The reference to "any such small withdrawal" in the first proviso is particularly suggestive of legislative intent in light of the fact that two of the exemptions to which it refers are unquestionably limited to 5,000 gallons per day, and the other to one-half acre of lawn. In this context, it is illogical to consider 450,000 to 600,000 gallons per day to be a "small withdrawal." As for the second proviso, as discussed above, only the limited interpretation is consistent with this proviso, suggesting the legislature intended this interpretation and not an unlimited one. In short, both provisos support the limited interpretation and undermine an unlimited interpretation.

Finally, we should be guided by Department of Ecology's long standing interpretation of the exemption. We accord great weight to the contemporaneous construction placed on a statute by officials charged with its enforcement, especially where the legislature has silently acquiesced in that construction over a long period of time. *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995) (citing *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990)). Until 2005, the agency responsible for enforcement of the groundwater code (initially the Department of Conservation and then the Department of Ecology) followed the limited interpretation. The most recent example of this is the 2001 *DeVries* litigation. *Devries v. Dep't of Ecology*,

PCHB 01-073, 2001 WA ENV LEXIS 46 (Wash. Pollution Control Hr'gs Bd. Sept. 27, 2001), *available at* http://www.eho.wa.gov/searchdocuments/2001%20archive/pchb%2001-073%20summary%20judgment.htm (last visited Dec. 16, 2011) (limiting the stock-watering exemption to 5,000 gallons per day). The Department of Ecology and the Department of Conservation held this position for many years, and the legislature silently acquiesced in that interpretation. The Department of Ecology changed its position only after the attorney general issued 2005 Op. Att'y Gen. No. 17, which, as discussed by the majority, is not entitled to great interpretive weight.[5] *See* majority at 11-13. We should be guided by the Department of Ecology's limited interpretation and the legislature's long standing acquiescence therein.

The legislature may have drafted an ambiguous stock-watering exemption, but its purpose is sufficiently clear. We should hold that the exemption is limited to 5,000 gallons per day.

[5] The legislature has not acquiesced in the unlimited interpretation of 2005 Op. Att'y Gen. No. 17. Instead, the legislature has convened a task force to study how to deal with the stock-watering exception. Engrossed Substitute H.B. 1244, § 302(17)(a)-(c), at 107, 61st Leg., Reg. Sess. (Wash. 2009). At the end of 2009, the task force reported to the legislature that it had studied the issue but had not decided on any recommendation. Dep't of Ecology, *Stock Water Working Group Report*, *available at* http://www.ecy.wa.gov/programs/wr/hq/pdf/swtr/ 011010_stockwater_workingroup_ finalreport.pdf (last visited Dec. 16, 2011). Some members questioned the wisdom of proceeding with any recommendations while this case is pending before us. *Id*. at 6 ("I think it makes much more sense for this work group to meet after the courts have weighed in on this issue.").

I dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Debra L. Stephens