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## GOT WATER? LIMITING WASHINGTON'S STOCKWATERING EXEMPTION TO FIVE THOUSAND GALLONS PER DAY

Kara Dunn

*Abstract:* In Washington, a comprehensive groundwater code governs groundwater withdrawals and use. This regulatory scheme protects water users, minimizes disputes over water rights, and maximizes the beneficial use of public water resources. Despite these protections, groundwater resources are declining in many parts of the state. Washington exempts certain types of small withdrawals from the groundwater code's regulations, including water for livestock. Conflicting interpretations of this stock-watering exemption have created uncertainty over whether exempt stock-watering withdrawals are unlimited, or are limited to 5000 gallons per day. This Comment analyzes the conflicting interpretations of the groundwater exemption statute under Washington's rules of statutory interpretation and argues that the stock-watering exemption is limited to 5000 gallons per day. This conclusion is based on the context of the statute, the historical circumstances surrounding its enactment, and important policy considerations.

### INTRODUCTION

Imagine a dairy farm in the arid eastern region of Washington State.<sup>1</sup> The dairy's herd of 2500 cows consumes approximately 45,000 gallons of water per day (gpd). Water is a public resource in Washington,<sup>2</sup> so prospective water users must apply for a permit from the State before withdrawing water from streams or aquifers.<sup>3</sup> The permitting statute exempts specific types of small withdrawals from these permitting requirements, however, including "any withdrawal of public ground waters for stock-watering purposes . . ."<sup>4</sup> Although other exempt uses are limited to 5000 gpd,<sup>5</sup> the dairy farm believes that this limitation does

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1. Fictional scenario based on the facts in *DeVries v. Dep't of Ecology*, PCHB 01-073, 2001 WA ENV LEXIS 46 (Sept. 27, 2001).

2. See WASH. REV. CODE § 90.44.020 (2006).

3. See *id.* § 90.44.050.

4. *Id.* § 90.44.050. "[S]tockwatering purposes covers all reasonable uses of water normally associated with the sound husbandry of livestock. This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them." *DeVries*, PCHB 01-073, 2001 WA ENV LEXIS at \*23-24.

5. *Id.* (except irrigation of a noncommercial garden, which is limited to one-half acre).

not apply to its withdrawal of 45,000 gpd because the statute exempts “any withdrawal” for stock-watering purposes.<sup>6</sup>

The Washington State Department of Ecology (Ecology), the Pollution Control Hearings Board (PCHB), and the Washington State Attorney General (Attorney General) recently examined this issue and arrived at conflicting conclusions. Ecology initially concluded that stock-watering withdrawals are limited to 5000 gpd by relying on the statutory and historical context of the exemption.<sup>7</sup> In 2001 the PCHB agreed with this interpretation in *DeVries v. Department of Ecology*.<sup>8</sup> A 2005 Attorney General opinion concluded that the plain meaning of the statute allows unlimited stock-watering withdrawals, however, and Ecology has subsequently changed its practices to accord with this opinion.<sup>9</sup>

The distinction between a limited and unlimited exemption is significant because declining groundwater levels and a proliferation of exempt groundwater withdrawals currently impede sustainable management of Washington’s groundwater resources. Increasing reliance on groundwater has overstressed aquifers across the nation.<sup>10</sup> In Washington, rapid population growth has placed significant pressure on groundwater resources.<sup>11</sup> These demands have caused declining groundwater levels across the state, especially in the eastern and southeastern regions,<sup>12</sup> where the majority of the state’s livestock farms

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6. *Id.*

7. See *DeVries*, PCHB 01-073, 2001 WA ENV LEXIS at \*15–21 (granting summary judgment to Ecology on issue of whether WASH. REV. CODE § 90.44.050 limits stock-watering to 5000 gallons per day).

8. *Id.*

9. 2005 Op. Wash. Att’y Gen. No. 17, 2 (2005), available at <http://www.atg.wa.gov/page.aspx?id=1738>; Press Release, Dep’t of Ecology, New Att’y General Opinion Addresses Livestock Watering Issue (Nov. 30, 2005), <http://www.ecy.wa.gov/news/2005news/2005-289.html> [hereinafter Ecology Press Release].

10. See J. R. BARTOLINO & W. L. CUNNINGHAM, U.S. GEOLOGICAL STUDY, GROUNDWATER DEPLETION ACROSS THE NATION 2 (2003), available at [http://pubs.usgs.gov/fs/fs-103-03/JBartolinoFS\(2.13.04\).pdf](http://pubs.usgs.gov/fs/fs-103-03/JBartolinoFS(2.13.04).pdf); JEFFREY S. ASHLEY & ZACHARY A. SMITH, GROUNDWATER MANAGEMENT IN THE WEST 1 (1999).

11. See ASHLEY & SMITH, *supra* note 10, at 75, 77; see also Robert N. Caldwell, *Six-Packs for Subdivisions: The Cumulative Effects of Washington’s Domestic Well Exemption*, 28 ENVTL. L. 1099, 1107–08 (1998) (estimating new wells for withdrawing exempt groundwater were being constructed at a rate of 8500 per year in the 1990s).

12. See ASHLEY & SMITH, *supra* note 10, at 79; Elliot Bruhl & Dale R. Ralston, *Ground Water Management under the Appropriation Doctrine*, in PROCEEDINGS OF THE NWWA FOCUS CONFERENCE ON NORTHWESTERN GROUND WATER ISSUES 11, 13 (1987).

are located.<sup>13</sup> As water availability declines, Ecology is forced to deny an increasing number of water use applications to protect senior water rights.<sup>14</sup> Consequently, new water users are turning to the statutory exemptions from the groundwater permitting requirements.<sup>15</sup> Although the exact quantity of exempt withdrawals is unknown, because such withdrawals are unregulated, it is clear that the total amount of groundwater withdrawn under the exemption is significant.<sup>16</sup> An unlimited exemption for stock-watering could exacerbate current groundwater management issues, because such exempt withdrawals occur outside Ecology's permitting authority.<sup>17</sup>

This Comment analyzes the conflicting interpretations of Washington's stock-watering exemption and argues that the exemption is limited to 5000 gpd. This conclusion is based on Washington's principles of statutory interpretation, the statute's historical background, and public policy considerations.<sup>18</sup> Part I discusses Washington's surface and groundwater codes and examines the structure of the groundwater exemption statute. Part II examines the historical context surrounding the exemption statute's enactment and the subsequent rise of industrialized livestock farms. Part III describes the conflicting interpretations of the stock-watering exemption, and Part IV discusses

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13. See, e.g., Tristan D. Skoldrud, Erik O'Donoghue, C. Richard Shumway, & Almuhanad Melhim, *Farm Growth, Consolidation, and Diversification: Washington Dairy Industry*, CHOICES: THE MAGAZINE OF FOOD, FARM, AND RESOURCE ISSUES, 2nd Quarter 2007, at 125, available at <http://www.choicesmagazine.org/2007-2/grabbag/2007-2-07.pdf>. (observing that Washington's dairy industry is becoming highly concentrated on the eastern side of the state).

14. See ASHLEY & SMITH, *supra* note 10, at 83. Under the prior appropriation doctrine, water rights are based on a hierarchy of priority. In times of drought or shortage, water users with "junior" water rights must defer to "senior" or older water rights. See WASH. REV. CODE § 90.03.010 (2006). The prior appropriation doctrine is discussed in greater detail *infra* at Part I.A

15. See Bill Clarke, *Exempt Wells: The End of the Controversy or Just the Beginning?*, AMERICAN WATER RESOURCES ASSOCIATION WASH. SECTION NEWSLETTER, Jan.–Feb. 2002, at 2, available at <http://earth.golder.com/waawra/PDF/2002-01-waarwranews.pdf>.

16. See Caldwell, *supra* note 11, at 1105.

17. See DeVries v. Dep't of Ecology, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*17 (Sept. 27, 2001) ("[A]n unlimited, and uncontrollable, potential for withdrawal of groundwater . . . could have a potentially devastating effect on the ability of the state to protect the senior water right holders or to grant future water rights.").

18. This Comment addresses the *quantity* of water that may be withdrawn under the stock-watering exemption, and not the *type* of activity that is properly classified as "stock-watering" (e.g. whether withdrawals for concentrated animal feeding operations should be considered "stock-watering" as opposed to a "commercial" use of water and therefore limited by the "industrial purpose" exemption in WASH. REV. CODE § 90.44.050 (2006)).

Washington's principles of statutory interpretation. Finally, Part V argues that the stock-watering exemption is limited to 5000 gpd.

I. WASHINGTON WATER LAW COMPREHENSIVELY REGULATES GROUNDWATER AND EXEMPTS SMALL WITHDRAWALS FROM ITS PERMITTING SYSTEM

Washington groundwater is comprehensively regulated by a groundwater code that exempts small withdrawals from its permitting system.<sup>19</sup> The Legislature enacted the groundwater code to prevent destructive competition for groundwater by providing uniform regulations and a centralized administration for governing water rights.<sup>20</sup> Although specific types of withdrawals are exempt from the groundwater code's permitting requirements, they remain subject to other regulations within the groundwater code.<sup>21</sup>

A. *The Surface and Groundwater Codes Were Enacted to Protect Senior Water Users, Minimize Disputes Over Water Rights, and Protect Public Water Resources*

The prior appropriation doctrine governs water use in Washington, as it does in most western states.<sup>22</sup> Under the riparian doctrine, which traditionally governed water use in the eastern states, only lands adjacent to water are entitled to a water right.<sup>23</sup> In contrast, the prior appropriation doctrine allows water users to acquire water rights by appropriating water and putting it to a beneficial use.<sup>24</sup> Prior appropriation also protects senior water users by providing that between appropriators from the same water source, the first in time has a higher priority water

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19. See WASH. REV. CODE § 90.44.050 (2006).

20. See WASHINGTON DEPARTMENT OF CONSERVATION AND DEVELOPMENT, THIRTEENTH BIENNIAL REPORT OF THE DEPARTMENT OF CONSERVATION AND DEVELOPMENT 44 (1946) [hereinafter WDCD]; 1945 Wash. Sess. Laws 826 (codified as amended at WASH. REV. CODE § 90.44 (2006)); *infra* Part I.A.

21. See WASH. REV. CODE §§ 90.44.050 (2006) (exempting certain types of withdrawals from permitting requirements), 90.44.030 (stating existing rights shall not be affected), 90.44.110 (prohibiting waste of water); *infra* Part I.B.

22. See WASH. REV. CODE § 90.03.010 (2006); DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5.01 (1989).

23. See TARLOCK, *supra* note 22, at §§ 3.02, 3.09(1); Christopher L. Len, *Synthesis: A Brand New Water Law*, 8 U. DENV. WATER L. REV. 55, 59–61 (2004).

24. See TARLOCK, *supra* note 22, at § 5.08(1); see, e.g., WASH. REV. CODE § 90.03.010 (2006) (adopting prior appropriation doctrine).

right.<sup>25</sup> The gold miners and farmers who first settled the western territories developed this system because land that was not adjacent to water in the arid regions of the west was practically worthless under the riparian doctrine.<sup>26</sup> Appropriation based on need, rather than on riparian property rights, facilitated successful settlement.<sup>27</sup>

Between 1889 and 1917, Washington recognized water rights under both the riparian and prior appropriation doctrines. Beginning with *Thorpe v. Tenem Ditch Co.*<sup>28</sup> in 1889, the Washington State Supreme Court considered the question of water rights in several cases and protected both rights by appropriation and rights by riparian ownership.<sup>29</sup> In addition to the case law, Washington had many conflicting statutes regarding the right to use water.<sup>30</sup> This resulted in a chaotic and confused state of the law, which, in turn, led to continuous disputes among water users throughout the state.<sup>31</sup> To create clarity and security for water users,<sup>32</sup> the Washington State Legislature enacted a comprehensive surface water code in 1917.<sup>33</sup> This code adopted the prior appropriation doctrine<sup>34</sup> and created a centralized administration for determining the existence of water rights<sup>35</sup> and establishing new rights,<sup>36</sup> thereby ensuring the most efficient use of water resources.

Several decades later, the 1945 Legislature passed the groundwater code as a supplement to the surface water code, extending the protections and regulations of the surface water code to groundwater.<sup>37</sup> Although the Legislature did not explicitly state its purpose for enacting the groundwater code, the Washington Department of Conservation and

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25. See TARLOCK, *supra* note 22, at § 5.08(1); see, e.g., WASH. REV. CODE § 90.03.010 (2006) (adopting prior appropriation doctrine).

26. See TARLOCK, *supra* note 22, at § 5.02; Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 318–20 (1985).

27. See Charles Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 WASH. L. REV. 197, 200 (1932).

28. 1 Wash. 566, 20 P. 588 (1889).

29. See *id.* at 569, 20 P. at 589; Horowitz, *supra* note 27, at 203–04.

30. WDCD, *supra* note 20, at 24.

31. WDCD, *supra* note 20, at 24.

32. See WDCD, *supra* note 20, at 24; Horowitz, *supra* note 27, at 208.

33. 1917 Wash. Sess. Laws 447 (codified as amended at WASH. REV. CODE § 90.03 (2006))

34. WASH. REV. CODE § 90.03.010 (2006).

35. *Id.* § 90.03.245.

36. *Id.* §§ 90.03.250–340.

37. 1945 Wash. Sess. Laws 826 (codified as amended at WASH. REV. CODE § 90.44 (2006))

Development (Department of Conservation),<sup>38</sup> which was the agency responsible for water resources in 1945, described the reasons for its enactment in a 1946 report. In the report, the Department of Conservation stated that the groundwater bill was prepared and sponsored at the request of an association of Washington cities to protect the 126 cities that depended on groundwater for domestic uses, irrigation, and industrial purposes.<sup>39</sup> The Department of Conservation also noted that “destructive competition has been the experience of certain other states,” and “[i]n some sections of this State, uncontrolled withdrawal of [ground]water has already caused damage to existing rights and investments.”<sup>40</sup> This report indicates that the Legislature enacted the groundwater code to protect existing rights, avoid damaging competition, and provide security for future development.<sup>41</sup>

*B. The Groundwater Code Provides Comprehensive Regulations for Obtaining a Water Right Permit, with an Exemption for Small Withdrawals of Water*

The groundwater code is supplementary to the surface water code.<sup>42</sup> Because the groundwater code extended the provisions of the surface water code to govern groundwater appropriations,<sup>43</sup> it is important to first understand the relevant provisions of the surface water code. The surface water code adopted the prior appropriation doctrine<sup>44</sup> and created a permitting system that allows the state to control the distribution and utilization of surface water resources.<sup>45</sup> Under this permitting system, a prospective water user must obtain a permit from Ecology before appropriating water.<sup>46</sup> Before issuing a permit, Ecology must find “(1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the

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38. The Department of Conservation was responsible for many of the state’s natural resources, including water. See OFFICE OF THE SECRETARY OF STATE, HISTORIES OF WASHINGTON STATE AGENCIES 45 (1996). In the 1960s the department was abolished and replaced with the Department of Natural Resources and the Department of Ecology. See *id.*

39. WDCD, *supra* note 20, at 44.

40. *Id.*

41. *Id.*

42. WASH. REV. CODE § 90.44.020 (2006).

43. *Id.*

44. *Id.* § 90.03.010.

45. *Id.* § 90.03.250.

46. *Id.* § 90.44.050.

public welfare.”<sup>47</sup> The surface water code also mandates that none of its provisions “shall be construed to lessen, enlarge, or modify . . . any existing right acquired by appropriation, or otherwise.”<sup>48</sup>

The groundwater code adopted most of these surface water code provisions. The groundwater code’s purpose is “regulating and controlling the ground waters of the state.”<sup>49</sup> Because groundwater withdrawals can impact surface water resources in areas where surface water and groundwater are connected, the groundwater code protects existing surface water rights by mandating that surface water rights existing when the code was enacted “shall not be affected or impaired by any of the provisions of this supplementary chapter.”<sup>50</sup> The groundwater code also adopts the prior appropriation rules and permitting system established in the surface water code.<sup>51</sup> Unlike the surface water code, however, the groundwater code provides an exception to the permitting system.<sup>52</sup>

The groundwater code’s general permitting requirement provides:

After June 6, 1945, no withdrawal of public ground waters 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 by it as herein provided . . . .<sup>53</sup>

This general rule requires prospective groundwater users to apply to Ecology for a permit before withdrawing public groundwater, and Ecology must make the same findings required in the surface water code before granting the permit application.<sup>54</sup> This general rule is followed by

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47. Dep’t of Ecology v. Campbell & Gwinn, 146 Wash. 2d 1, 8, 43 P.3d 4, 8 (2002) (citing WASH. REV. CODE § 90.03.290(3)).

48. WASH. REV. CODE § 90.03.010 (2006).

49. *Id.* § 90.44.020.

50. *Id.* § 90.44.030; *see also* Rettkowski v. Dep’t of Ecology, 122 Wash. 2d 219, 227 n.1, 858 P.2d 232, 236 n.1 (1993) (“[WASH. REV. CODE § 90.44.030] emphasizes the potential connections between groundwater and surface water and makes evident the Legislature’s intent that groundwater rights be considered in part of the overall water appropriation scheme, subject to the paramount rule of ‘first in time, first in right.’”).

51. *Id.* §§ 90.44.040 (groundwater subject to appropriation); 90.44.060 (“Applications for permits for appropriation of underground water shall be made in the same form and manner provided in RCW 90.03.250 through 90.03.340 [surface water code] . . .”).

52. *Id.* § 90.44.050.

53. *Id.*

54. *Id.* § 90.44.060.



an exception, in the form of an exemption provision, and two modifying provisions. The exemption provision states:

EXCEPT, HOWEVER, That *any withdrawal of public ground waters 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 [applicable only in Whitman County], 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 . . . .<sup>55</sup>

This provision exempts four categories of water use from the general permitting rule: stock-watering, irrigation, domestic uses, and industrial uses.<sup>56</sup> Three of these categories are specifically limited—irrigation of a lawn or garden is restricted to a half acre, and domestic and industrial uses are limited to 5000 gpd—while the stock-watering provision does not contain a specific limitation.<sup>57</sup> Although these categories of withdrawals are exempt from the permitting requirement, all groundwater withdrawals are subject to the mandate that existing surface water appropriations “shall not be affected or impaired by any provisions of [the groundwater code],”<sup>58</sup> and the mandate that senior appropriators are entitled to a “safe sustaining yield” of groundwater.<sup>59</sup>

Two modifying provisions follow the exemption provision:

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: PROVIDED, FURTHER, That at the option of the party making *withdrawals of ground waters 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

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55. *Id.* § 90.44.050 (emphasis added).

56. *Id.*

57. *Id.*

58. *Id.* § 90.44.030.

59. *Id.* § 90.44.130; *see also* Caldwell, *supra* note 11, at 1103–04.

chapter provided in the case of withdrawals in excess of five thousand gallons a day.<sup>60</sup>

The first proviso authorizes Ecology to require exempt users to report the purpose and quantity of their withdrawals, and describes all exempt uses as “small withdrawal[s].”<sup>61</sup> The second proviso, added in 1947,<sup>62</sup> provides that users may voluntarily obtain a permit for their exempt withdrawals, and it describes the exempt withdrawals as “not exceeding five thousand gallons per day.”<sup>63</sup> When reviewing the statute as a whole, it is unclear whether the statute allows unlimited use because it lacks a specific limitation for the stock-watering exemption, or whether the statute limits stock-watering to “small withdrawals” not exceeding 5000 gpd through the modifying provisos.

While the groundwater code’s stock-watering exemption lacks clarity, what is clear is that the circumstances surrounding the surface water and groundwater codes’ enactment strongly indicate that the Legislature created these codes to minimize water disputes and protect the public’s water resources from destructive competition.<sup>64</sup> The groundwater code adopted the surface water code’s protections and regulations for groundwater.<sup>65</sup> Unlike the surface water code, however, the groundwater code contains an exception to the general permitting requirements for specific categories of water use, including withdrawals for stock-watering.<sup>66</sup> This exemption statute fails to clearly convey the limitations that govern the stock-watering exemption.

## II. ALTHOUGH STOCK-WATERING WAS MINIMAL WHEN THE LEGISLATURE ENACTED THE EXEMPTION IN 1945, IT HAS SINCE SUBSTANTIALLY INCREASED

Although the exemption statute does not specifically limit stock-watering, historical context shows that stock-watering did not exceed 1500 gpd on an average farm in Washington when the Legislature

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60. WASH. REV. CODE § 90.44.050 (2006) (emphasis added).

61. *Id.*

62. *See* 1947 Wash. Sess. Laws 655 (codified as amended at WASH. REV. CODE § 90.44.050 (2006)).

63. *See* WASH. REV. CODE § 90.44.050 (2006).

64. *See supra* Part I.A.

65. *See supra* Part I.B.

66. WASH. REV. CODE § 90.44.050 (2006).

enacted the statute in 1945.<sup>67</sup> Since 1945, however, the industrialization of the livestock industry has substantially increased the size of livestock farms and the amount of water a single farm is capable of using.<sup>68</sup> The historical background and subsequent development of stock-watering provides a historical context for understanding the Legislature's intent when it enacted the stock-watering exemption.<sup>69</sup>

A. *Stock-watering Requirements For a Fully Developed Family Farm in 1945 Did Not Exceed 1500 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.<sup>70</sup> The Columbia Basin Project was located below the newly constructed Grand Coulee Dam, in the dry eastern region of the state.<sup>71</sup> 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."<sup>72</sup> 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.<sup>73</sup>

For settlement to succeed, every rural settler needed a domestic supply of water at a minimum cost.<sup>74</sup> A 1945 Bureau of Reclamation report on farm improvement recommended that the supply of domestic

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67. See U.S. BUREAU OF RECLAMATION, COLUMBIA BASIN JOINT INVESTIGATIONS: FARM IMPROVEMENT 54 (1945) [hereinafter FARM IMPROVEMENT]; see also *infra* Part II.A.

68. See *infra* Part II.B.

69. Legislative intent and the stock-watering exemption's historical context are analyzed *infra*, in Part V.

70. See Donald J. Pisani, *Federal Reclamation and the American West in the Twentieth Century*, 77 AGRICULTURAL HISTORY 391, 401 (2003).

71. See U.S. Bureau of Reclamation, Columbia Basin Project (1998), available at <http://www.usbr.gov/dataweb/projects/washington/columbiabasin/history.html> (stating the Grand Coulee Dam was officially completed Jan. 1, 1942); FARM IMPROVEMENT, *supra* note 67, at III (stating the Bureau of Reclamation's goal was to "assure successful settlement and development of more than 1,000,000 project acres [below the Grand Coulee Dam] that will be irrigated as soon as war conditions permit.").

72. Pisani, *supra* note 70, at 401.

73. FARM IMPROVEMENT, *supra* note 67, at III.

74. *Id.* at 53–54.

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.”<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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.”<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup>

The Department of Conservation interpreted the statute as limiting all exempt uses, including stock-watering, to 5000 gpd.<sup>81</sup> The agency believed the statute’s purpose was to supply “small water users” with

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75. *Id.* at 54.

76. *See* WASH. REV. CODE § 90.44.050 (2006).

77. FARM IMPROVEMENT, *supra* note 67, at 54–55.

78. *Id.* at 54. The maximum water consumption of “mature development” was calculated based on four humans, twenty-four dairy cattle, thirty-three other cattle, twenty-six hogs and pigs, five horses, forty-five sheep, and 150 chickens per farm. *Id.*

79. *See infra* Part I.B (comparing 1940 and 2002 Washington Census of Agriculture statistics).

80. WDCD, *supra* note 20, at 46 (emphasis added).

81. *See id.*

water, and the agency considered 5000 gpd an “ample” amount for such users.<sup>82</sup> 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.<sup>83</sup>

*B. The Industrialization of American Agriculture Since 1945 Has Significantly Altered the Structure and Concentration of the Livestock Industry*

Since 1945, the livestock industry has experienced rapid industrialization and concentration. In recent decades, technological advances and horizontal integration have dramatically altered the way farms are operated,<sup>84</sup> replacing the small-scale family farms that historically typified American agriculture with industrialized farming.<sup>85</sup> Technological improvements have steadily increased farming production efficiency since the 1930s,<sup>86</sup> but when the Legislature enacted the groundwater code in 1945, many still did not believe that large-scale farming would ever replace the family farm as a staple of American agriculture.<sup>87</sup> For instance, the Bureau of Reclamation’s mission was to

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82. *Id.*

83. See FARM IMPROVEMENT, *supra* note 67, at 54.

84. See, e.g., ALEXANDER C. MCGREGOR, COUNTING SHEEP: FROM OPEN RANGE TO AGRIBUSINESS ON THE COLUMBIA PLATEAU 322 (1982) (“The livestock business of the Columbia Plateau underwent a period of rapid transformation. The number of cattle in the region increased rapidly after 1950. . . . Postwar [WWII] improvements in technology and equipment offered definite advantages to the large-scale operator.”). See generally Note, *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2645–56 (2004) (discussing horizontal integration, where smaller farms become absorbed into large factory farms, and vertical integration, where meat processors enter into supply contracts and ownership agreements with producers, within the meat industry).

85. See Charles Geisler & Thomas Lyson, *The Cumulative Impact of Dairy Industry Restructuring*, 41 BIOSCIENCE 560, 560 (1991).

86. See BRUCE L. GARDNER, AMERICAN AGRICULTURE IN THE TWENTIETH CENTURY 10–19 (2002).

87. See, e.g., Pisani, *supra* note 70, at 400 (“[T]he dream of the family farm persisted following World War II.”); John M. Brewster, *Technological Advance and the Future of the Family Farm*, 40 JOURNAL OF FARM ECONOMICS 1596, 1608 (1958) (“Many believe [the decline of independent family farms] has happened in the ‘broiler industry,’ and that we are on the threshold of the same thing in cattle, sheep and hogs. Thus a phobia arises that the independent family farm of the corn belt and elsewhere is threatened. . . . [However] it will not be easy for ‘integration’ to pull these enterprises off well operated family farms with complementary enterprises . . . [f]or producing hogs and feeding cattle are much more complicated activities than hatching chicks or raising broilers, which were formerly carried on mainly as sidelines by the housewife for pin-money.”).

“create and sustain family farms in the West” by providing water with reclamation projects,<sup>88</sup> like the Grand Coulee Dam and the Columbia Basin Project. The vision of a rural West populated by small farms persisted from the 1930s into the 1960s, even though this vision competed with emerging agricultural businesses and growing cities that “created new opportunities for those eager to flee the countryside.”<sup>89</sup> Congress did not raise the acreage limitation on reclamation farms until 1982, when it raised the limitation from 160 acres to 960 acres. This action convinced observers that the Bureau of Reclamation had finally abandoned its original family farm mission and endorsed agribusiness.<sup>90</sup>

As technology increasingly advanced, engineered livestock confinement facilities became widespread between the 1960s and 1980s, replacing traditional pasture methods and leading to a concentration of livestock on industrialized farms.<sup>91</sup> From the 1950s to the 1990s, the number of farms in the United States decreased by fifty percent,<sup>92</sup> and concentrated livestock operations more than doubled between 1982 and 1997.<sup>93</sup> As recently as 1987, a typical dairy herd had fewer than seventy-two cows, but now large dairy farms with 500 or more cows are the fastest growing segment of the dairy industry in the western states.<sup>94</sup>

Washington agriculture statistics also reflect this trend of declining farms numbers and increasing farm size.<sup>95</sup> In 1940, Washington State had approximately 81,600 farms, and the majority of those farms were

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88. Pisani, *supra* note 70, at 391.

89. *Id.*

90. *Id.* at 403.

91. See, e.g., LYLE P. SCHERTZ ET AL., U.S. DEP’T OF AGRIC., ANOTHER REVOLUTION IN U.S. FARMING? 85 (1979) (“Cattle feeding has shifted to very large commercial feedlot operations using: (1) highly specialized . . . technology and (2) industrialized approaches to management.”); *id.* at 119 (“[T]he number of commercial dairy farms declined from [1950 to 1979] . . . . Conversely, average herd size on commercial farms more than doubled during the same period.”) *id.* at 190 (“Advances in technology have permitted . . . hogs to be produced successfully without pasture. Hogs are produced year-round in low-labor, capital-intensive systems conducive to large-scale production.”); A.G. Mueller, *Impact of Changing Technology on Livestock Systems*, ILLINOIS AGRICULTURAL ECONOMICS, July 1971, at 1, 5 (“Rapid progress in engineered confinement systems in recent years has been related to the need to make scarce labor resources more productive.”).

92. See Geisler & Lyson, *supra* note 85, at 560.

93. See NOEL GOLLEHON ET AL., U.S. DEP’T OF AGRIC., CONFINED ANIMAL PRODUCTION AND MANURE NUTRIENTS 11 (2001), available at <http://www.ers.usda.gov/publications/aib771/aib771e.pdf>.

94. See Geisler & Lyson, *supra* note 85, at 560–61.

95. See SCHERTZ ET AL., *supra* note 91, at 404.

100 acres or less in size.<sup>96</sup> The total number of livestock was approximately 1,500,000, with cattle representing about half that number and sheep comprising most of the other half.<sup>97</sup> In contrast, by 2002 Washington had approximately 36,000 farms with an average size of 430 acres.<sup>98</sup> Census statistics classified about one third of the farms as livestock industries.<sup>99</sup> Additionally, the total number of livestock in 2002 amounted to approximately 1,300,000, including 1,100,000 cattle.<sup>100</sup> As these statistics reveal, livestock numbers have not significantly decreased since the 1940s, but they have become concentrated on half the number of farms. At the same time, livestock demographics have shifted to predominantly cattle.<sup>101</sup>

This shift in demographics is significant because of the difference in the amount of water consumed by cows and smaller livestock. In a temperate climate, beef cattle consume about twelve gallons of water per day, and dairy cows consume about thirty-five gallons.<sup>102</sup> In contrast, sheep and goats consume one to four gallons per day.<sup>103</sup> An increasing concentration of cows leads to higher daily water consumption. For example, in 2006 Washington State had approximately 490 dairy farms,

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96. See U.S. DEP'T OF AGRIC., CENSUS OF AGRICULTURE: PACIFIC DIVISION 536 (1940), available at [http://www.agcensus.usda.gov/Publications/Historical\\_Publications/1940/Farm%20and%20Farm%20Property%20Mountain%20and%20Pacific/00179375v1p6ch6.pdf](http://www.agcensus.usda.gov/Publications/Historical_Publications/1940/Farm%20and%20Farm%20Property%20Mountain%20and%20Pacific/00179375v1p6ch6.pdf) [hereinafter 1940 CENSUS].

97. *Id.* at 537 (total number cattle and calves was 698,468; sheep and lambs, 487,256; horses and mules, 134,902; and hogs and pigs, 174,570 in 1940; poultry not included in total livestock calculation).

98. U.S. DEP'T OF AGRIC., CENSUS OF AGRICULTURE: WASHINGTON 48 (2002), available at <http://www.nass.usda.gov/census/census02/volume1/wa/WAVolume104.pdf> [hereinafter 2002 CENSUS].

99. *Id.* at 62 (11,105 farms classified as livestock industries in 2002, excluding "animal aquaculture" industry).

100. *Id.* at 62, 64 (total number of cattle and calves was 1,100,181; hogs and pigs, 30,289; sheep and lambs, 58,470; horses and ponies, 75,951; goats, 23,217 in 2002; poultry was not included in total livestock calculation).

101. See *id.* at 62, 64 (total number of cattle and calves was 698,468 in 1940 and 1,100,181 in 2002).

102. U.S. DEP'T OF AGRIC., NATIONAL RANGE AND PASTURE HANDBOOK 6–12 (2003), available at [http://policy.nrcs.usda.gov/media/pdf/H\\_190\\_NRPH\\_6.pdf](http://policy.nrcs.usda.gov/media/pdf/H_190_NRPH_6.pdf) [hereinafter PASTURE HANDBOOK]; Dairy Farmers of Washington, From Grass to Glass, <http://www.havemilk.com/article.asp?id=1480> (last visited Feb. 2, 2008).

103. See PASTURE HANDBOOK, *supra* note 102, at 6–12. See generally C. L. HAMILTON & HANS G. JEPSON, U.S. DEP'T OF AGRIC., STOCK-WATER DEVELOPMENTS: WELLS, SPRINGS, AND PONDS 5–6 (1940) (discussing variations in stock-water requirements by breed, season, etc.).

with an average herd size of 475 cows per farm.<sup>104</sup> If each dairy cow consumed thirty-five gallons of water per day,<sup>105</sup> the total average daily consumption per dairy farm was approximately 16,625 gpd.

In short, when Washington's Legislature enacted the groundwater code in 1945, the state was encouraging family farm development in the Columbia Basin and needed to provide water for settlers at minimum cost.<sup>106</sup> At that time, the average fully developed farm required less than 1500 gallons of water per day.<sup>107</sup> One year after the exemption statute was enacted, the Department of Conservation concluded that it limited all withdrawals to an "ample" amount of 5000 gpd.<sup>108</sup> Since the statute's enactment, however, the industrialization of the livestock industry has decreased the number of farms in Washington and increased farm size, concentrating a greater number of livestock onto fewer farms and thereby increasing the amount of water a single livestock farm is capable of using.<sup>109</sup>

### III. CONFLICTING INTERPRETATIONS OF THE STOCK-WATERING EXEMPTION HAVE CAUSED A DISPUTE OVER WHETHER IT IS LIMITED OR UNLIMITED IN QUANTITY

Ecology, the PCHB, and the Attorney General have interpreted the stock-watering exemption and arrived at conflicting conclusions. The agencies dispute whether the exemption is limited or unlimited.<sup>110</sup> Ecology originally limited the stock-watering exemption to 5000 gpd based on the overall structure of the groundwater code and the statute's

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104. See Dairy Farmers of Washington, Facts About the Washington Dairy Industry, <http://www.havemilk.com/article.asp?id=2142> (last visited Mar. 6, 2008).

105. See Dairy Farmers of Washington, From Grass to Glass, <http://www.havemilk.com/article.asp?id=1480> (last visited Mar. 6, 2008).

106. FARM IMPROVEMENT, *supra* note 67, at III, 53–54.

107. *Id.* at 54.

108. WDCD, *supra* note 20, at 46.

109. See *supra* Part II.B.

110. These three state agencies are related to each other in the following manner. Ecology administers and enforces groundwater permits. See WASH. REV. CODE §§ 90.44.035(1), 90.44.050 (2006). The PCHB reviews Ecology decisions and orders, including decisions about groundwater permits. *Id.* § 43.21B.010. Ecology actions may be appealed to the PCHB, and PCHB final decisions may be appealed to the superior court. *Id.* §§ 43.21B.230 (appeals to PCHB); 43.21B.190 (appeals to superior court). The Attorney General represents Ecology in all court actions and proceedings. *Id.* § 43.10.030(3). The Attorney General also provides written opinions on legal questions to state officers when requested. *Id.* § 43.10.03(5), (7).



historical context.<sup>111</sup> The PCHB upheld this interpretation in a dispute between a dairy farm and Ecology in 2001,<sup>112</sup> but in 2005, the Attorney General issued an opinion concluding that the stock-watering exemption is unlimited.<sup>113</sup> Ecology subsequently changed its practices to conform to the Attorney General's opinion.<sup>114</sup>

A. *The Department of Ecology Originally Interpreted the Stock-watering Exemption as Limited to 5000 Gallons Per Day*

Ecology, the agency responsible for administering the groundwater code, originally interpreted the stock-watering exemption as limited to 5000 gpd.<sup>115</sup> The agency based its interpretation on the language of the two provisos that describe all exempt uses as “small withdrawals”<sup>116</sup> “not exceeding five thousand gallons per day.”<sup>117</sup> Also, the groundwater code specifically states that no existing surface water rights “shall be affected or impaired by any of the provisions of this supplementary chapter.”<sup>118</sup> Ecology reasoned that this indicates the groundwater exemption provision is not unlimited, because unlimited withdrawals could potentially impair senior surface water users.<sup>119</sup> Ecology also relied on the Department of Conservation's 1946 interpretation that stock-water withdrawals were limited to 5000 gpd,<sup>120</sup> and a 1942 report on domestic water supply by the Washington State Planning Council indicating that total farm demand for domestic and stock-water was expected to be 1500 gpd.<sup>121</sup> For these reasons, Ecology concluded that

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111. See Dep't of Ecology's Motion for Summary Judgment, PCHB 01-073 (PCHB Aug. 20, 2001), at 7–14 (on file with author); DeVries v. Dep't of Ecology, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*7 (Sept. 27, 2001).

112. *DeVries*, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*16–19.

113. See 2005 Op. Wash. Att'y Gen. No. 17, 2 (2005), available at <http://www.atg.wa.gov/opinion.aspx?section=archive&id=5872>.

114. See Ecology Press Release, *supra* note 9.

115. See *id.* (quoting Ecology Director Jay Manning, “Ecology had consistently interpreted the livestock watering exemption as limited to 5,000 gallons a day”); Dep't of Ecology's Motion for Summary Judgment, PCHB 01-073 (PCHB Aug. 20, 2001), at 7–14 (on file with author).

116. See *DeVries*, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*7; Dep't of Ecology's Motion for Summary Judgment, PCHB 01-073 (Aug. 20, 2001), at 8–10 (on file with author).

117. See *DeVries*, PCHB 01-073, 2001 WA ENV LEXIS 46 at \*8.

118. WASH. REV. CODE § 90.44.030 (2006) (emphasis added).

119. See Dep't of Ecology's Motion for Summary Judgment, PCHB 01-073 (Aug. 20, 2001), at 10 (on file with author).

120. See *id.* at 12.

121. *Id.* The 1942 Washington State Planning Council report was later incorporated into the 1945

stock-watering withdrawals are limited to 5000 gpd under the exemption statute and large livestock operations, such as cattle feedlots and commercial dairies, may not use the statute to withdraw unlimited groundwater for stock-watering purposes.<sup>122</sup>

*B. The PCHB Also Interpreted the Stock-Watering Exemption as Limited to 5000 Gallons Per Day*

In a 2001 case, the PCHB agreed with Ecology that the stock-watering exemption is limited to 5000 gpd.<sup>123</sup> In *DeVries v. Department of Ecology*, a dairy farm relied on the stock-watering exemption to withdraw between 39,000 to 56,000 gpd for its herd of 2261 dairy cows.<sup>124</sup> The herd was expected to eventually reach 4400 cows, consuming about 110,000 gallons of water per day.<sup>125</sup> When Ecology ordered the dairy to restrict its groundwater use to 5000 gpd until it obtained a permit to withdraw more, DeVries appealed to the PCHB, arguing that the plain language of the exemption allows unlimited withdrawals for stock-watering.<sup>126</sup> The PCHB concluded that the stock-watering exemption is limited to 5000 gpd.<sup>127</sup>

The PCHB reasoned that the first proviso indicates the Legislature intended to limit all exemptions to “small withdrawals,” and the second proviso defines small withdrawals as “not exceeding five thousand gallons per day.”<sup>128</sup> The PCHB also reasoned that canons of statutory construction support this interpretation.<sup>129</sup> The PCHB described the general permitting requirement as “the central purpose of the 1945 groundwater code.”<sup>130</sup> Under the rule of narrowly construing exceptions

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Bureau of Reclamation’s report. See FARM IMPROVEMENT, *supra* note 67, at V.

122. See *Kim v. Pollution Control Hearings Bd.*, 115 Wash. App. 157, 160–61, 61 P.3d 1211, 1212–13 (Wash. Ct. App. 2003) (quoting a 1995 Ecology document explaining Ecology’s interpretation of the exemption statute); Dep’t of Ecology’s Motion for Summary Judgment, PCHB 01-073 (Aug. 20, 2001), at 7–14 (on file with author).

123. See *DeVries v. Dep’t of Ecology*, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*21 (Sept. 27, 2001) (granting summary judgment to Ecology on issue of whether the exemption statute limits stock-watering to 5000 gpd).

124. *Id.* at \*8–9.

125. *Id.*

126. *Id.* at \*1, 7.

127. *Id.* at \*21 (granting summary judgment to Ecology).

128. *Id.* at \*6–7 (quoting WASH. REV. CODE § 90.44.050 (2006)).

129. *Id.* at \*11–12, 14.

130. *Id.* at \*5, 20.

to give full effect to a general provision, the PCHB concluded that it should narrowly construe the stock-watering exemption to give full effect to the general permitting requirement.<sup>131</sup> Furthermore, under the rule of avoiding literal readings if they produce absurd consequences, the PCHB concluded that “[a]ll of the objectives of the groundwater code would be undermined if the stockwatering exemption is for an unlimited quantity,” because “an unlimited, and uncontrollable, potential for withdrawal of groundwater” could potentially have a “devastating effect on the ability of the state to protect the senior water right holders or to grant future water rights.”<sup>132</sup>

*C. The Attorney General Interpreted the Stock-Watering Exemption as Unlimited and Ecology Subsequently Changed its Interpretation*

The Attorney General issued a formal opinion in 2005 interpreting the stock-watering exemption as unlimited.<sup>133</sup> When Washington cattle ranchers reported being turned down for financing because of the 5000 gpd limit Ecology was imposing on exempt stock-watering withdrawals, two legislators from eastern Washington requested an opinion from the Washington State Attorney General.<sup>134</sup> Although Attorney General opinions are advisory in character and do not bind state officers,<sup>135</sup> “officials are entitled to [the Attorney General’s] opinion before they do anything as they are not protected [from civil liability] if acting without the advice of their duly constituted legal adviser.”<sup>136</sup> If an official disregards an Attorney General opinion, “they do so at their own peril.”<sup>137</sup>

Because the stock-watering provision is the only exemption that is not immediately qualified by a limitation,<sup>138</sup> the Attorney General concluded

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131. *Id.* at \*5, 20.

132. *Id.* at \*17–18.

133. See 2005 Op. Wash. Att’y Gen. No. 17, 2 (2005), available at <http://www.atg.wa.gov/opinion.aspx?section=archive&id=5872>.

134. Bob Hoff, *Ecology to Respect Stock Water Opinion*, FARM BUREAU REPORT, Nov. 30, 2005, available at <http://www.aginfo.com/AgInfoReportView.cfm?Story=5714>.

135. See 1923–24 Op. Wash. Att’y Gen. 197, 201 (1924).

136. 1935–36 Op. Wash. Att’y Gen. 86, 87 (1936). See also *State v. Hood*, 93 Wash. 2d 603, 607, 611 P.2d 758, 760 (1980) (“State officials who take official action in accordance with the advice of the Attorney General are protected from liability in connection therewith.”) (quoting *State v. Martin*, 64 Wash. 2d 511, 520, 392 P.2d 435, 441 (1964)).

137. 1935–36 Op. Wash. Att’y Gen. 86, 88 (1936).

138. See WASH. REV. CODE § 90.44.050 (2006).

that the plain language of the statute does not limit stock-watering withdrawals based on ordinary rules of language and grammar.<sup>139</sup> While the Attorney General acknowledged Ecology’s argument that an unlimited exemption is “inherently inconsistent with the general policy of requiring permits for groundwater withdrawals in order to provide for an orderly and consistent administration of an important and limited public resource,” he noted that Ecology could alternatively require information on the use of exempted withdrawals for use in its administrative and enforcement decisions.<sup>140</sup>

Shortly after the Attorney General issued this opinion, Ecology issued a press release stating that even though it “had consistently interpreted the livestock watering exemption as limited to 5,000 gallons a day,” the agency would change its practices to conform to the new legal guidance provided by the Attorney General, and “will not take any action to limit groundwater use under the stock-water exemption to 5,000 gpd.”<sup>141</sup>

#### IV. THE PRIMARY GOAL OF STATUTORY INTERPRETATION IN WASHINGTON IS TO ASCERTAIN AND IMPLEMENT THE LEGISLATURE’S INTENT

The stock-watering exemption must be interpreted in accordance with Washington’s principles of statutory interpretation. A court’s fundamental objective in statutory interpretation is to implement the Legislature’s intent.<sup>142</sup> Courts first analyze the plain meaning of a disputed statutory provision based on its text and the context of related

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139. 2005 Op. Wash. Att’y Gen. No. 17, 3–4 (2005), available at <http://www.atg.wa.gov/opinion.aspx?section=archive&id=5872>. It is interesting to note that this opinion conflicts with a 1997 Attorney General opinion interpreting the exemption statute as allowing “very small withdrawals” that are “unlikely to have a significant impact on the water system.” 1997 Op. Wash. Att’y Gen. No. 6, 6 (1997), available at <http://www.atg.wa.gov/opinion.aspx?section=archive&id=9200>. The 1997 opinion also states that “[i]f the exemption is read broadly, a significant amount of water might be withdrawn by a property ‘outside’ the regulated water system, undercutting the central purpose for enacting the water code.” *Id.* at 7. Although the 1997 opinion was interpreting the domestic use exemption and not the stock-watering exemption, the opinion’s arguments in favor of limiting the groundwater exemptions to very small withdrawals might undermine the amount of deference a court gives to the 2005 opinion’s broad interpretation of the stock-watering exemption.

140. 2005 Op. Wash. Att’y Gen. No. 17, 5 (2005), available at <http://www.atg.wa.gov/opinion.aspx?section=archive&id=5872>. See WASH. REV. CODE § 90.44.050 (2006).

141. Ecology Press Release, *supra* note 9.

142. See *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wash. 2d 1, 9–10, 43 P.3d 4, 9 (2002) (citing *State v. J.M.*, 144 Wash. 2d 472, 480, 28 P.3d 720, 724 (2001)).

statutes.<sup>143</sup> A “plain” meaning based on literal or express wording may be restricted, however, if it does not implement the Legislature’s intent and impairs the spirit or purpose of an enactment.<sup>144</sup> If the statute remains ambiguous after conducting a plain meaning analysis, then courts may resolve the ambiguity by examining a statute’s legislative history and the circumstances surrounding its enactment to determine legislative intent.<sup>145</sup> When a statute is ambiguous, courts may also consider the public policies underlying the statute.<sup>146</sup>

A. *Washington Courts First Analyze the Plain Meaning of a Statute to Ascertain the Legislature’s Intent*

A court’s fundamental objective in statutory interpretation is ascertaining and implementing the Legislature’s intent.<sup>147</sup> The first step in statutory interpretation is to look to the text of the statute, and if the statute’s meaning is plain, then courts must give effect to that plain meaning as an expression of the Legislature’s intent.<sup>148</sup> Although Washington courts previously looked only to the disputed statutory provision when analyzing the plain meaning of a statute, the Washington State Supreme Court recently expanded the analysis in *Department of Ecology v. Campbell & Gwinn*<sup>149</sup> to include “all that the Legislature has said in the statute and related statutes which disclose legislative intent

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143. *Id.* at 11, 43 P.3d at 10 (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48A:16 (6th ed. 2000)).

144. *See* *State v. Robinson*, 67 Wash. 425, 432–33, 121 P. 848, 851 (1912) (citing *Barto v. Stewart*, 21 Wash. 605, 615–16, 59 P. 480, 482 (1899)) (“When the object and general intent of a statute are ascertained, general words may be restrained to it, and those of narrower import may be expanded to effectuate that intent.”); *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 239, 59 P.3d 655, 663 (2002) (citing *State v. Day*, 96 Wash. 2d 646, 648, 638 P.2d 546, 547 (1981)) (“The spirit or purpose of an enactment should prevail over . . . express but inept wording.”); *In re Parentage of J.M.K.*, 155 Wash. 2d 374, 387, 119 P.3d 840, 846 (2005) (“Strained, unlikely or absurd consequences resulting from a literal reading are to be avoided.”).

145. *See* *Rest. Dev. Inc., v. Cananwill, Inc.*, 150 Wash. 2d 674, 682, 80 P.3d 598, 602 (2003) (discussing legislative history and historical circumstances); *State v. Costich*, 152 Wash. 2d 463, 477, 98 P.3d 795, 802 (2004) (discussing historical circumstances).

146. *See In re Estate of Hastings*, 88 Wash. 2d 788, 793, 567 P.2d 200, 202 (1977) (“[I]n passing on the meaning of any legislative enactment, we look to the language of the statute [and] the policy behind it . . .”).

147. *See* *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wash. 2d 1, 9–10, 43 P.3d 4, 9 (2002) (citing *State v. J.M.*, 144 Wash. 2d 472, 480, 28 P.3d 720, 724 (2001)).

148. *Id.*

149. 146 Wash. 2d 1, 43 P.3d 4 (2002).

about the provision in question.”<sup>150</sup> Washington’s expanded plain meaning rule mandates that courts consider every word within the text of the disputed statute, as well as the context of related statutes and the integrity of the overall statutory scheme.<sup>151</sup> For example, where a disputed provision is an exception to a general rule, context suggests that a court should interpret the exception narrowly.<sup>152</sup>

Although courts often do not clearly explain how they have arrived at their conclusion that a statute’s meaning is plain,<sup>153</sup> their rationale becomes clearer when the reader remembers that a court’s primary goal in statutory interpretation is ascertaining and implementing the Legislature’s intent. For this reason, courts avoid literal interpretations if they do not implement the Legislature’s intent. A statute’s plain meaning should not be based on “literal” wording if it produces “[s]trained, unlikely, or absurd consequences.”<sup>154</sup> Rather, “the purpose of an enactment should prevail over express but inept wording.”<sup>155</sup> Once a court has ascertained the Legislature’s intent, “general words [within the statute] may be restrained to [the general intent], and those of narrower import may be expanded to effectuate that intent.”<sup>156</sup>

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150. *Id.* at 11–12, 43 P.3d at 10.

151. *See id.*; *City of Olympia v. Drebeck*, 156 Wash. 2d 289, 295, 126 P.3d 802, 804 (2006).

152. *See State v. Christensen*, 18 Wash. 2d 7, 19, 137 P.2d 512, 518 (1943); *Monroe Calculating Mach. Co. v. Dep’t of Labor & Indus.*, 11 Wash. 2d 636, 644, 120 P.2d 466, 470 (1941); *see also* 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION*, § 47:11 (7th ed. 2007) (“[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.”).

153. *See Philip A. Talmadge, A New Approach to Statutory Interpretation in Washington*, 25 SEATTLE U. L. REV. 179, 191 (2001).

154. *In re Parentage of J.M.K.*, 155 Wash. 2d 374, 387, 119 P.3d 840, 846 (2005). The rule of avoiding absurd consequences has been described as the rule of statutory interpretation that “trumps every other rule.” *Davis v. Dep’t of Licensing*, 137 Wash. 2d 957, 971, 977 P.2d 554, 560 (1999).

155. *Whatcom County v. City of Bellingham*, 128 Wash. 2d 537, 546, 909 P.2d 1303, 1308 (1996).

156. *State v. Robinson*, 67 Wash. 425, 432–33, 121 P. 848, 851 (1912) (citing *Barto v. Stewart*, 21 Wash. 605, 615–16, 59 P. 480, 482 (1899)); *see also* 2A NORMAN J. SINGER, *STATUTES & STATUTORY CONSTRUCTION*, §§ 48A:16, 48A:17 (6th ed. 2000) (stating in certain situations it is proper not to interpret a statute according to its apparent plain meaning, such as when the legislature never contemplated the problem before the court or when extrinsic aids demonstrate another meaning is more consistent with the legislature’s intent). *But see Amalgamated Transit Union Legislative Council of Wash. State v. State*, 145 Wash. 2d 544, 560, 40 P.3d 656, 663 (2002) (quoting *Sundquist Homes Inc. v. Snohomish Pub. Util. Dist. No. 1*, 140 Wash. 2d 403, 416, 997 P.2d 915, 921 (2000) (Sanders, J., dissenting)) (“[I]t is the legislature’s job—not ours—to stem the tide of potential absurd results that might result from impartially applying the plain meaning of statutory language.”).

For example, in *Department of Ecology v. Campbell & Gwinn* the Washington State Supreme Court applied the plain meaning rule to the groundwater exemption statute addressed by this Comment.<sup>157</sup> The statutory provision at issue was the domestic use exemption, which exempts “any withdrawal . . . for single or group domestic uses in an amount not exceeding five thousand gallons a day.”<sup>158</sup> The court was asked to determine whether a residential subdivision developer could use the exemption to drill multiple wells that would individually withdraw less than 5000 gpd but would collectively withdraw more than 5000 gpd.<sup>159</sup> The court considered whether the plain meaning of the words “any withdrawal” in the exemption statute is “every or all removals of water,”<sup>160</sup> and determined that “[n]either term, in and of itself, defines the scope of the right . . . and the words ‘any withdrawal’ do not establish the plain meaning of the exemption.”<sup>161</sup> When the parties disputed the potential impact of interpreting the exemption to apply to each individual well, the court stated that “[t]he question is more basic, i.e., whether the Legislature even contemplated the possibility that developments of the size in this case, or even larger, would be entitled to exempt withdrawals of 5,000 gpd for each of their lots.”<sup>162</sup> The court concluded that “[g]iven the limitation on [domestic] uses, and the overall goal of regulation to assure protection of existing rights and the public interest, it is clear that the Legislature did not intend that possibility when this statute was enacted.”<sup>163</sup> The court went on to hold that the plain meaning of the domestic use exemption, as determined by the context of related statutory provisions, limited the developer to one 5000 gpd withdrawal for the entire project.<sup>164</sup> As *Campbell & Gwinn* demonstrates, the plain meaning analysis requires a court to ascertain and implement the meaning that the Legislature intended when the statute was enacted.<sup>165</sup>

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157. See *Campbell & Gwinn*, 146 Wash. 2d at 4, 43 P.3d at 6; WASH. REV. CODE § 90.44.050 (2006).

158. *Campbell & Gwinn*, 146 Wash. 2d at 4, 43 P.3d at 6 (citing WASH. REV. CODE § 90.44.050 (2006)).

159. *Campbell & Gwinn*, 146 Wash. 2d at 4, 43 P.3d at 6.

160. *Id.* at 14–15, 43 P.3d at 12.

161. *Id.* at 16, 43 P.3d at 12.

162. *Id.* at 16–17, 43 P.3d at 13.

163. *Id.* at 17, 43 P.3d at 13.

164. *Id.* at 21, 43 P.3d at 15.

165. See also *Linn v. Reid*, 114 Wash. 609, 615, 196 P. 13, 15 (1921) (quoting *Bloomer v. Todd*,

*B. Washington Courts May Consider Legislative History, Historical Context, Agency Interpretations, and Policy Considerations if a Statute is Ambiguous*

If a statute remains susceptible to more than one reasonable meaning under the plain meaning analysis, then courts may look to sources outside of the statute's text to ascertain the Legislature's intent.<sup>166</sup> Washington courts have held that ambiguity exists when multiple interpretations are *reasonable*, not merely *conceivable*.<sup>167</sup> In other words, ambiguity exists when a reasonably well-informed person is capable of understanding a statute in two or more different senses.<sup>168</sup>

Where a statute is ambiguous, Washington courts may look to the legislative history of a statute, the circumstances surrounding its enactment, and contemporaneous interpretations of the statute to determine legislative intent.<sup>169</sup> Legislative history includes hearings, committee reports, and floor debates.<sup>170</sup> Historical context includes circumstances leading up to and surrounding a statute's enactment.<sup>171</sup> Courts look to the historical context in which the Legislature enacted a statute to identify the problem the Legislature intended the statute to

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3 Wash. Terr. 599, 615, 19 P. 135, 139 (1888)) ("The ordinary use of words at the time when used[,] and the meaning adopted at that time, is usually the best guide for ascertaining legislative intent, as it is always the intent of any written instrument or law at the time it was made that is to govern in enforcing it.").

166. See *Campbell & Gwinn*, 146 Wash. 2d at 12, 43 P.3d at 10; *Rest. Dev. Inc., v. Cananwill, Inc.*, 150 Wash. 2d 674, 682, 80 P.3d 598, 602 (2003).

167. See, e.g., *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 242, 59 P.3d 655, 664 (2002) ("[A] statute is not necessarily ambiguous simply because of two different interpretations. The question . . . is whether those interpretations are sufficiently reasonable to warrant further inquiry.").

168. See 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION*, § 45.2 (7th ed. 2007).

169. See *Bernard v. Benson*, 58 Wash. 191, 194–95, 108 P. 439, 441 (1910) (discussing contemporaneous construction); *Rest. Dev.*, 150 Wash. 2d at 682, 80 P.3d at 602 (discussing legislative history and historical circumstances); *State v. Costich*, 152 Wash. 2d 463, 477, 98 P.3d 795, 802 (2004) (discussing historical circumstances).

170. See BLACK'S LAW DICTIONARY 911 (7th. ed. 1999). Unfortunately, there is very little record of the legislative history for the groundwater code. The groundwater code was introduced as House Bill 536 into the House and the Senate on February 26, 1945, and was passed by March 8, 1945. See WASHINGTON STATE LEGISLATURE, HOUSE JOURNAL 425, 623, 878 (1945); WASHINGTON STATE LEGISLATURE, SENATE JOURNAL 367, 783, 895 (1945). There are no committee reports or records of floor debates available.

171. See *Linn v. Reid*, 114 Wash. 609, 615, 196 P. 13, 15 (quoting *Bloomer v. Todd*, 3 Wash. Terr. 599, 615, 19 P. 135, 139); *Wash. State Nurses Ass'n v. Bd. of Med. Examiners*, 93 Wash. 2d 117, 121, 605 P.2d 1269, 1271 (1980); *Costich*, 152 Wash. 2d at 477, 98 P.3d at 802.



solve and ascertain the Legislature's purpose for enacting the statute.<sup>172</sup> Even where a statute is not ambiguous, the Washington State Supreme Court has used historical circumstances to support the plain meaning of the statute. For instance, in *Restaurant Development Inc. v. Cananwill Inc.*,<sup>173</sup> the court determined that the plain meaning of the Insurance Premium Finance Company Act instructs insurance companies to calculate service charges by using an "add-on" method, and then discussed circumstances surrounding the enactment of the statute in 1969 to support its plain meaning interpretation.<sup>174</sup>

When a statute is ambiguous, courts may also defer to contemporaneous agency interpretations of the statute. The reason for this is not because the agency interpretation is evidence of legislative intent, but because Washington courts have a policy of deferring to agency interpretations when (1) a statute is ambiguous, (2) the agency is charged with enforcing the statute, and (3) the agency has special expertise in the statute's subject matter.<sup>175</sup> Attorney General interpretations are also accorded "considerable weight" if a statute is ambiguous,<sup>176</sup> although the Washington State Supreme Court recently stated that it "give[s] little deference to [A]ttorney [G]eneral opinions on issues of statutory construction."<sup>177</sup> Washington courts have not indicated which interpretation receives greater deference when the Attorney General and an agency disagree.<sup>178</sup>

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172. *See State Nurses Ass'n*, 93 Wash. 2d at 121, 605 P.2d at 1271.

173. 150 Wash. 2d 674, 80 P.3d 598 (2003).

174. *Id.* at 687, 80 P.3d at 604.

175. *See Bostain v. Food Exp. Inc.*, 159 Wash. 2d 700, 716, 153 P.3d 846, 854 (2007); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash. 2d 568, 593, 90 P.3d 659, 672 (2004). When the PCHB and Ecology disagree on the interpretation of a statute within Ecology's expertise, courts will defer to Ecology. *See Port of Seattle*, 151 Wash. 2d at 594, 90 P.3d at 672. PCHB statutory interpretations are not entitled to deference and are reviewed de novo. *See id.* at 587–88, 90 P.3d at 669–70.

176. *See Davis v. County of King*, 77 Wash. 2d 930, 933, 468 P.2d 679, 681 (1970); *In re Elec. Lightwave Inc.*, 123 Wash. 2d 530, 542, 869 P.2d 1045, 1052 (1994).

177. *Amalgamated Transit Union Legislative Council of Wash. State v. State*, 145 Wash. 2d 544, 554, 40 P.3d 656, 660 (2002); *see also Elec. Lightwave Inc.*, 123 Wash. 2d at 542, 869 P.2d at 1052 ("[Attorney general opinions] are entitled to less deference when statutory interpretation is at issue.").

178. This issue has not been addressed by any Washington cases, which is likely due to the fact that the Attorney General represents state agencies in court. WASH. REV. CODE § 43.10.030(3) (2006). Therefore, the interpretation forwarded in court is always the Attorney General's interpretation, not the agency's.

Finally, where a public interest is affected, an interpretation that favors the public and implements the public policy underlying the statutory provision is preferred.<sup>179</sup> Public policy is found by examining the history, purpose, language, and effect of the statute.<sup>180</sup> Generally courts only use public policy to resolve ambiguous statutes because of the indefinite nature of “public policy.”<sup>181</sup> Washington courts have stated that a “paramount concern” when interpreting a statute is ensuring that “the interpretation is consistent with the underlying policy of the statute.”<sup>182</sup> Courts cannot amend statutes that changing societal conditions have rendered obsolete.<sup>183</sup> Rather, where two reasonable interpretations of a statute exist, a court should adopt the interpretation that better advances the overall legislative purpose and policy behind the statute.<sup>184</sup>

For example, in *In re Hastings*<sup>185</sup> the Washington State Supreme Court said, “[I]n passing on the meaning of any legislative enactment, we look to the language of the statute [and] the policy behind it.”<sup>186</sup> The court then examined the history of Washington’s pretermitted heir statute and interpretations of similar statutes in other jurisdictions to determine the policy underlying the act.<sup>187</sup> Once the *Hastings* court determined that the underlying policy was to protect heirs who are omitted from a will due to the failing mind of an elderly testator, the court held that it must “construe [the statute] in a way that is ‘consonant with the obvious purpose’” and declined to extend the statute to include children who were omitted because they had predeceased the testator.<sup>188</sup>

Overall, a court’s fundamental objective in statutory interpretation is to ascertain and implement the Legislature’s intent.<sup>189</sup> Washington courts

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179. See 2B NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 56.01 (6th ed. 2000).

180. *Id.*

181. *Id.*

182. Dep’t of Natural Res. v. Marr, 54 Wash. App. 589, 593, 774 P.2d 1260, 1262 (1989) (citing Safeco Ins. Cos. v. Meyering, 102 Wash. 2d 385, 392, 687 P.2d 195, 200 (1984)).

183. See Kim v. Pollution Control Hearings Bd., 115 Wash. App. 157, 163, 61 P.3d 1211, 1214 (2003).

184. See Weyerhaeuser Co. v. Dep’t of Ecology, 86 Wash. 2d 310, 321, 545 P.2d 5, 12 (1976).

185. 88 Wash. 2d 788, 567 P.2d 200 (1977).

186. *Id.* at 793, 567 P.2d at 202.

187. *Id.* at 793–96, 567 P.2d at 202–04.

188. *Id.* at 795, 567 P.2d at 204 (quoting Gehlen v. Gehlen, 77 Wash. 17, 24, 137 P. 312, 315 (1913)).

189. See Dep’t of Ecology v. Campbell & Gwinn, 146 Wash. 2d 1, 9–10, 43 P.3d 4, 9 (2002)

first attempt to ascertain this intent by analyzing the plain meaning of a statute.<sup>190</sup> If the statute is ambiguous, Washington courts may examine the legislative history of a statute, historical circumstances surrounding its enactment, and contemporaneous interpretations to determine the Legislature's intent.<sup>191</sup> Courts may also defer to agency interpretations or examine a statute's underlying public policy when interpreting an ambiguous statute.<sup>192</sup>

#### V. WASHINGTON'S STOCK-WATERING EXEMPTION IS LIMITED TO 5000 GALLONS PER DAY BASED ON THE TEXT AND HISTORICAL CONTEXT OF THE STATUTE

The proper interpretation of the stock-watering exemption begins with a plain meaning analysis of the statute, bearing in mind that the ultimate goal is ascertaining and implementing the Legislature's intent.<sup>193</sup> The text of the exemption statute and the context of related statutory provisions within the groundwater code reveal that the enacting Legislature did not intend to create an unlimited stock-watering exemption. Rather, the Legislature instead intended to limit exempt withdrawals of groundwater to 5000 gpd.<sup>194</sup> Even if the text and context of the statute did not clearly support limiting the exemption, the historical circumstances surrounding the statute's enactment and the groundwater code's underlying public policy further support limiting stock-watering withdrawals to 5000 gpd.<sup>195</sup>

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(citing *State v. J.M.*, 144 Wash. 2d 472, 480, 28 P.3d 720, 724 (2001)).

190. *Id.* at 9–10, 43 P.3d at 9.

191. *See State v. Costich*, 152 Wash. 2d 463, 477, 98 P.3d 795, 802 (2004) (discussing historical circumstances); *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash. 2d 674, 682, 80 P.3d 598, 602 (2003) (discussing legislative history and historical circumstances); *Bernard v. Benson*, 58 Wash. 191, 194–95, 108 P. 439, 441 (1910) (discussing contemporaneous construction).

192. *See Bostain v. Food Express, Inc.*, 159 Wash. 2d 700, 716, 153 P.3d 846, 854 (2007) (agency interpretation); *In re Hastings*, 88 Wash. 2d 788, 793, 567 P.2d 200, 202 (1977) (public policy).

193. *See Campbell & Gwinn*, 146 Wash. 2d at 9–10, 43 P.3d at 9.

194. *See infra* Part V.A.

195. *See infra* Part V.B & V.C.

A. *The Text and Context of the Exemption Statute Indicate That the Legislature Intended to Limit the Stock-Watering Exemption to 5000 Gallons Per Day*

The stock-watering exemption is a limited exemption according to the plain meaning of the statute. Although the text of the stock-watering provision indicates the exemption is unlimited when standing alone,<sup>196</sup> the context of related statutes support narrowly construing the exemption.<sup>197</sup> Furthermore, the context of the exemption statute shows that 5000 gpd is the proper quantity for the limitation.<sup>198</sup>

i. *The Text of the Stock-Watering Provision Supports an Unlimited Interpretation When Considered in Isolation*

A plain meaning analysis of the statute begins with the text of the stock-watering exemption, which states that “*any withdrawal* of public ground waters for stock-watering purposes . . . shall be exempt from the provisions of this section.”<sup>199</sup> If the analysis were limited to this provision, it would be easy to conclude that the statute exempts unlimited withdrawals for livestock based on the ordinary meaning of the words “any withdrawal.” However, the Washington State Supreme Court has already considered whether the phrase “any withdrawal” within the exemption statute defines the scope of an exemption, and in *Campbell & Gwinn* the court held that the words did not define the scope of the domestic use exemption.<sup>200</sup> The expanded plain meaning rule that was adopted in *Campbell & Gwinn* allowed the court to look beyond the disputed statutory provision and rely on the context of the entire statute and related statutory provisions to determine the proper scope of the domestic use exemption.<sup>201</sup> Since the *Campbell & Gwinn* court was interpreting the same phrase—“any withdrawal”—within the same statute,<sup>202</sup> courts should apply the same interpretation to the stock-

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196. See *infra* Part V.A.i & V.A.ii.

197. See *infra* Part V.A.iii.

198. See *infra* Part V.A.iv.

199. WASH. REV. CODE § 90.44.050 (2006) (emphasis added); see *supra* Part I.B for full text of the statute.

200. Dep’t of Ecology v. Campbell & Gwinn, 146 Wash. 2d 1, 16, 43 P.3d 4, 12 (2002).

201. See *id.* at 14–16, 43 P.3d at 12–13 (primarily relying on provisions concerning the construction of wells).

202. See *id.*; WASH. REV. CODE § 90.44.050.

watering exemption. Thus, courts must discern the scope of the stock-watering exemption from the text and context of the entire statute, and cannot define the statute's scope solely by the ordinary meaning of the words "any withdrawal."

ii. *The Context of the Exemption Provision Also Supports an Unlimited Interpretation of the Stock-Watering Exemption*

The first level of context for the stock-watering provision is the context of the entire exemption provision. The exemption provision provides that any withdrawal for (1) stock-watering, (2) lawn and noncommercial garden irrigation one half acre or less, (3) single or group domestic uses 5000 gpd or less, or (4) industrial uses 5000 gpd or less, is exempt from the general permitting requirement.<sup>203</sup> Because stock-watering is the only exempt withdrawal that is not immediately qualified by a limitation, it would appear that the Legislature intended stock-watering withdrawals to be unlimited. However, courts should avoid literal readings if they lead to absurd consequences.<sup>204</sup> In a case such as *DeVries v. Department of Ecology*, allowing a dairy farm to withdraw up to 100,000 gpd under the stock-watering exemption is an absurd result based on the dramatic disparity between such a withdrawal and the other exempt withdrawals, which are limited to one half acre of irrigation or 5000 gpd.<sup>205</sup> To resolve the inconsistency between the structure of the exemption provision, which appears to allow unlimited withdrawals for stock-watering, and the absurd results produced by such an interpretation, it is necessary to examine the broader context of the entire exemption statute and other statutes within the groundwater code.

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203. See WASH. REV. CODE § 90.44.050.

204. See *In re Parentage of J.M.K.*, 155 Wash. 2d 374, 387, 119 P.3d 840, 846 (2005) ("Strained, unlikely or absurd consequences resulting from a literal reading are to be avoided."); see also *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash. 2d 224, 239, 59 P.3d 655, 663 (2002) (citing *State v. Day*, 96 Wash. 2d 646, 648, 638 P.2d 546, 547 (1981)) ("The spirit or purpose of an enactment should prevail over the express but inept wording."); *State v. Robinson*, 67 Wash. 425, 432–33, 121 P. 848, 851 (1912) (citing *Barto v. Stewart*, 21 Wash. 605, 615–16, 59 P. 480, 482 (1899)) ("When the object and general intent of a statute are ascertained, general words may be restrained to it, and those of narrower import may be expanded to effectuate that intent.").

205. See *DeVries v. Dep't of Ecology*, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*8–9 (Sept. 27, 2001); WASH. REV. CODE § 90.44.050.

iii. *The Context of the Entire Exemption Statute and the Groundwater Code Support a Limited Interpretation of the Stock-Watering Exemption*

The context of the entire exemption statute and other statutes within the groundwater code indicate that exempt stock-watering withdrawals are not unlimited. The overall structure of the exemption statute reveals that it is primarily a general rule requiring all prospective water users to obtain a permit before withdrawing groundwater.<sup>206</sup> The exemption provision follows this general rule, and two provisos modify the exemption provision.<sup>207</sup> The exemption provision begins with the words “EXCEPT, HOWEVER . . .” indicating that it is an exception to the preceding rule.<sup>208</sup> Accepted principles of statutory interpretation mandate that courts narrowly interpret exceptions to general rules.<sup>209</sup> Furthermore, the two modifying provisos that follow the exemption provision characterize all of the exempt withdrawals as “small withdrawals” that do not exceed 5000 gpd.<sup>210</sup> In this way, the structure and text of the entire statute support the conclusion that the Legislature only intended to exempt small withdrawals from the general permitting requirement, and courts must narrowly construe such exemptions to give maximum effect to the general permitting rule. An unlimited stock-watering exemption would be inconsistent with the Legislature’s intent that water users must obtain a permit before withdrawing groundwater in most circumstances, especially considering the comparatively small quantities of water allowed under the other exempt uses and the Legislature’s description of the exempt uses as “small withdrawal[s]” “not exceeding five thousand gallons a day.”<sup>211</sup>

Related statutes within the groundwater code further reinforce the interpretation that stock-watering is a limited exemption. To begin with, advocates of an unlimited stock-watering exemption argue that an

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206. See WASH. REV. CODE § 90.44.050; see also *supra* Part I.B (discussing structure of exemption statute).

207. See WASH. REV. CODE § 90.44.050.

208. *Id.*

209. See *State v. Christensen*, 18 Wash. 2d 7, 19, 137 P.2d 512, 518 (1943); *Monroe Calculating Mach. Co. v. Dep’t of Labor & Indus.*, 11 Wash. 2d 636, 644, 120 P.2d 466, 470 (1941); see also 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:11 (7th ed. 2007) (“Where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.”).

210. See WASH. REV. CODE § 90.44.050.

211. See *id.*

unlimited exemption is not inconsistent with the overall structure of the groundwater code because there are other enforcement mechanisms within the groundwater code.<sup>212</sup> The exemption statute itself provides that Ecology may require a person making an exempt withdrawal to provide information about the quantity of their withdrawal, and a related statute authorizes Ecology to limit groundwater withdrawals to protect senior appropriators.<sup>213</sup> The Washington State Supreme Court addressed this argument in *Campbell & Gwinn*, however, and the court concluded “after-the-fact remedies will not serve legislative purposes as effectively as review before [groundwater] appropriation occurs,”<sup>214</sup> because “damage will already have been done” by the time the enforcement mechanisms are invoked.<sup>215</sup>

Furthermore, the stated purpose of the groundwater code is “regulating and controlling ground waters of the state.”<sup>216</sup> The groundwater code also mandates that senior surface water rights “shall not be affected or impaired by any of the provisions of this supplementary chapter,”<sup>217</sup> and provides that senior appropriators “shall enjoy the right to have any withdrawals by a subsequent appropriator of ground water limited to an amount that will maintain and provide a safe sustaining yield” of groundwater for prior appropriators.<sup>218</sup> The State cannot properly regulate and control groundwater and protect senior appropriators if unlimited withdrawals of groundwater are made outside the regulatory permitting scheme. An exemption allowing unlimited groundwater pumping could have a detrimental effect on surface water flows that are connected to groundwater sources, and a “devastating effect on the ability of the state to protect the senior water right holders or to grant future water rights.”<sup>219</sup> In *DeVries*, the PCHB concluded that “[a]ll of the objectives of the groundwater code would be undermined if

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212. See Dep’t of Ecology v. *Campbell & Gwinn*, 146 Wash. 2d 1, 17–18, 43 P.3d 4, 13 (2002).

213. See WASH. REV. CODE §§ 90.44.050, 90.44.130.

214. *Campbell & Gwinn*, 146 Wash. 2d at 17–18, 43 P.3d at 13.

215. *Id.*

216. WASH. REV. CODE § 90.44.020.

217. *Id.* § 90.44.030.

218. *Id.* § 90.44.130.

219. *DeVries v. Dep’t of Ecology*, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*17 (Sept. 27, 2001); see also WASH. REV. CODE § 90.44.030; *Rettkowski v. Dep’t of Ecology*, 122 Wash. 2d 219, 227 n.1, 858 P.2d 232, 236 n.1 (1993) (“[WASH. REV. CODE § 90.44.030] merely emphasizes the potential connections between groundwater and surface water, and makes evident the Legislature’s intent that groundwater rights be considered a part of the overall water appropriation scheme, subject to the paramount rule of ‘first in time, first in right.’”).

the stockwatering exemption is for an unlimited quantity.”<sup>220</sup> As these statutes demonstrate, an unlimited exemption is inconsistent with the groundwater code’s overall purpose, which is to protect senior appropriators and regulate withdrawals to maintain a safe and sustaining yield of groundwater.

*iv. The Proper Limitation for the Stock-Watering Exemption is 5000 Gallons Per Day Based on the Context of the Entire Exemption Statute*

As discussed above, the text and context of the statute indicate that the Legislature intended to create a limited stock-watering exemption. The appropriate scope of that limit is 5000 gpd based on the context of the entire exemption statute. Two of the other exempt uses are limited to 5000 gpd,<sup>221</sup> indicating that the Legislature believed this was an appropriate limitation for exempt withdrawals. Furthermore, the first proviso describes the scope of all of the exemptions as “small withdrawal[s]” and the second proviso describes the exemptions as withdrawals that do not exceed 5000 gpd.<sup>222</sup> When read together, these two provisos indicate that the Legislature intended all exempt withdrawals to be small withdrawals that do not exceed 5000 gpd.

The second proviso states that a party withdrawing groundwater “not exceeding five thousand gallons per day” may obtain a permit for their exempt withdrawal in the same manner as a party “withdraw[ing] in excess of five thousand gallons a day” under the general permitting provisions.<sup>223</sup> It could be argued that the second proviso only applies to the exemptions that *specify* a 5000 gpd limitation, rather than describing *all* exempt withdrawals as limited to that amount. However, a permit provides protection for senior appropriators because it documents the date the water user acquired the water right and establishes the right as senior to all later appropriations. Presumably the Legislature would not allow some exempt users to obtain permits, while denying others the privilege simply because they are using their groundwater withdrawals for a different purpose. There is no logical reason for the Legislature to only allow domestic and industrial withdrawals (exemptions that specify a 5000 gpd limitation) to obtain the protections offered by a permit, but

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220. *DeVries*, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*18.

221. *See* WASH. REV. CODE § 90.44.050.

222. *Id.*

223. *Id.*



not stock-watering and irrigation withdrawals.<sup>224</sup> Furthermore, this interpretation ignores the first proviso, which describes all of the withdrawals as “small,” indicating that they are not unlimited.<sup>225</sup>

In short, a plain meaning analysis of the stock-watering exemption supports interpreting the exemption as limited, rather than unlimited, based on the context of the statute and related statutory provisions. The proper scope of the limitation is 5000 gpd, based on the context of the modifying provisos and other exemption provisions within the statute.

*B. Historical Circumstances Support Limiting the Stock-Watering Exemption to 5000 Gallons Per Day*

The historical circumstances surrounding the groundwater code’s enactment also support limiting the stock-watering exemption to 5000 gpd. Even though the exemption is limited to 5000 gpd according to the plain meaning of the statute, considering historical circumstances is still appropriate in this case. While historical context may not be used to *contradict* the plain meaning of an unambiguous statute, the Washington State Supreme Court has used historical context to *confirm* and *support* the plain meaning of an unambiguous statute.<sup>226</sup> Pre-enactment historical circumstances show that stock-watering was minimal and did not exceed 1500 gpd when the statute was enacted in 1945.<sup>227</sup> Post-enactment developments show that in 1946 the statute was interpreted as limiting all exempt withdrawals to 5000 gpd, and in 1947 the Legislature implicitly endorsed this interpretation when it amended the statute.<sup>228</sup>

The correct interpretation of the stock-watering exemption requires an answer to the same fundamental question addressed in *Campbell & Gwinn*: Did the Legislature even contemplate the possibility that future groundwater users would be entitled to exempt withdrawals that exceed 5000 gpd for stock-watering?<sup>229</sup> Because little legislative history for the groundwater code exists,<sup>230</sup> historical circumstances immediately

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224. *See id.*

225. *See id.*

226. *See Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash. 2d 674, 687, 80 P.3d 598, 604 (2003).

227. *See FARM IMPROVEMENT*, *supra* note 67, at 54; *see also supra* Part II.A (discussing the Bureau of Reclamation’s report).

228. *See WDCD*, *supra* note 20, at 46; 1947 Wash. Sess. Laws 655 (codified as amended at WASH. REV. CODE § 90.44.050 (2006)).

229. *See Dep’t of Ecology v. Campbell & Gwinn*, 146 Wash. 2d 1, 16–17, 43 P.3d 4, 13 (2002).

230. *See supra* note 170 and accompanying text.

surrounding the enactment of the groundwater code provide especially valuable insights into the Legislature’s intent.

Pre-enactment historical circumstances reveal that the groundwater exemption was almost certainly enacted to support the development of small family farms that were not expected to require more than 1500 gpd. When the Legislature enacted the exemption in 1945, the state and federal government were in the process of developing the Columbia Basin region into family farms.<sup>231</sup> A report from the Bureau of Reclamation issued in the same year that the statute was enacted advised that the average fully developed farm would require less than 1500 gallons of water per day.<sup>232</sup> The Legislature likely relied on this report when enacting the exemption statute for several reasons. First, the report indicated that securing a domestic supply of water at minimum cost was necessary for successful settlement.<sup>233</sup> The Legislature accomplished this goal by providing an exemption to the general permitting regulations.<sup>234</sup> Second, the report suggested groundwater was the most promising source for rural development,<sup>235</sup> and the Legislature created an exemption within the groundwater code, but not the surface water code.<sup>236</sup> Third, the necessary categories of water discussed in the report<sup>237</sup>—irrigation of lawns and small gardens, domestic uses, water for livestock—parallel the categories that the Legislature exempted in the groundwater code.<sup>238</sup>

Post-enactment historical circumstances further support the conclusion that the Legislature intended stock-watering to be limited to 5000 gpd. In 1946, one year after the groundwater code was enacted, the Department of Conservation interpreted the statute as allowing withdrawals “for any purpose where the quantity is less than 5,000 gallons per day,”<sup>239</sup> and in the agency’s opinion, that “[f]ive thousand

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231. See FARM IMPROVEMENT, *supra* note 67, at III; U.S. BUREAU OF RECLAMATION, COLUMBIA BASIN PROJECT (SECOND DRAFT) (1998), <http://www.usbr.gov/dataweb/projects/washington/columbiabasin/history.html>. See also *supra* Part II.A (discussing the Columbia Basin Project).

232. See FARM IMPROVEMENT, *supra* note 67, at 54; see also *supra* Part II.A (discussing the Bureau of Reclamation’s report).

233. See FARM IMPROVEMENT, *supra* note 67, at 53–54.

234. See WASH. REV. CODE § 90.44.050 (2006).

235. See FARM IMPROVEMENT, *supra* note 67, at 55.

236. Compare WASH. REV. CODE § 90.44 (groundwater code) with § 90.03 (surface water code).

237. See FARM IMPROVEMENT, *supra* note 67, at 54.

238. See WASH. REV. CODE § 90.44.050.

239. WDCD, *supra* note 20, at 46.

gallons per day will supply ample water for household use for a family, their garden and lawn irrigation, and stock water.”<sup>240</sup> In 1947, one year after this interpretation was published in a report to the Legislature, the Legislature added the second proviso describing all exempt uses as “not exceeding five thousand (5,000) gallons a day.”<sup>241</sup> The Legislature was presumably aware of the Department of Conservation’s interpretation when it amended the exemption statute,<sup>242</sup> so the Legislature implicitly affirmed the interpretation that the statute limits all exempt uses to 5000 gpd when it added the second proviso describing the exemptions as “not exceeding five thousand gallons a day.”<sup>243</sup>

Furthermore, there is no indication that the enacting Legislature ever contemplated the possibility of the industrialization of the livestock industry. The Legislature may have anticipated that technology would eventually allow water use to exceed the Bureau of Reclamation’s 1500 gpd estimation,<sup>244</sup> but there is no evidence that the Legislature contemplated the possibility of future commercial livestock operations supporting thousands of cows and requiring as much as 100,000 gallons of water per day.<sup>245</sup> Census statistics reveal that in the 1940s the average Washington farm was much smaller than today,<sup>246</sup> and contemporary reports predicted livestock water requirements would be minimal for fully developed farms.<sup>247</sup> The Bureau of Reclamation’s “vision of a rural West built on small farms” was in the process of being realized through the Columbia Basin Project,<sup>248</sup> and the decline of the family farm and rise of industrialized, concentrated livestock farms did not begin occurring until several decades after the statute’s enactment.<sup>249</sup> The

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240. WDCD, *supra* note 20, at 46.

241. *See* 1947 Wash. Sess. Laws 655 (codified as amended at WASH. REV. CODE § 90.44.050 (2006)).

242. The Department of Conservation’s interpretation was written in its annual report to the Legislature. *See* WDCD, *supra* note 20.

243. *See* 1947 Wash. Sess. Laws 655 (codified as amended at WASH. REV. CODE § 90.44.050 (2006)).

244. FARM IMPROVEMENT, *supra* note 67, at 54.

245. *See, e.g.,* DeVries v. Dep’t of Ecology, PCHB 01-073, 2001 WA ENV LEXIS 46, at \*8–9 (Sept. 27, 2001) (dairy farm was withdrawing between 39,000 to 56,000 gpd, with the potential to eventually withdraw about 110,000 gpd).

246. *Compare* 1940 CENSUS *supra* note 96, at 536–37 (average farm size 100 acres or less) *with* 2002 CENSUS, *supra* note 98, at 48 (average farm size 430 acres).

247. *See* FARM IMPROVEMENT, *supra* note 67, at 54.

248. *See* Pisani, *supra* note 70, at 391.

249. *See* Geisler & Lyson, *supra* note 85, at 1–2; GOLLEHON ET AL., *supra* note 93, at 11; *see*

groundwater code was enacted to protect Washington’s groundwater resources from the “destructive competition” and the “uncontrolled withdrawal of [ground]water” that had already caused damage to existing water rights and investments in the state, indicating that the Legislature’s purpose in enacting the groundwater code was to *prevent*, not *facilitate*, unlimited withdrawals of groundwater.<sup>250</sup> If the Legislature could have envisioned the possibility of concentrated livestock operations, it almost certainly would have specifically limited the stock-watering exemption.

Pre-enactment historical circumstances demonstrate that the 1945 Legislature most likely considered stock-watering to be naturally limited to small withdrawals, making an express limitation within the statute unnecessary. Post-enactment circumstances indicate that the Legislature agreed with the Department of Conservation’s interpretation limiting all exempt withdrawals to 5000 gpd. There is no evidence suggesting the Legislature recognized or considered the possibility of the industrialization of the livestock industry that subsequently increased the amount of stock-water a single farm is capable of utilizing. These historical circumstances support the conclusion that the Legislature intended to limit all exempt uses, including stock-watering, to 5000 gpd.

*C. The Public Policy Underlying the Groundwater Code Supports Limiting the Stock-Watering Exemption to 5000 Gallons Per Day*

Finally, contemporary groundwater management issues and the underlying policy of the groundwater code support a narrow interpretation of the stock-watering exemption. Although Washington courts have stated that it is the Legislature’s duty to amend statutes that changing societal conditions have rendered obsolete,<sup>251</sup> they have also said that where two reasonable interpretations of a statute exist, the interpretation that better advances the overall legislative purpose and underlying public policy should be adopted.<sup>252</sup> In this case, no

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*also supra* Part II.B (discussing industrialization of livestock industry).

250. *See* WDCD, *supra* note 20, at 44; *supra* Part I.A.

251. *Kim v. Pollution Control Hearings Bd.*, 115 Wash. App. 157, 163, 61 P.3d 1211, 1214 (2003).

252. *Weyerhaeuser Co. v. Dep’t of Ecology*, 86 Wash. 2d 310, 321, 545 P.2d 5, 12 (1976); *see also* *Dep’t of Natural Res. v. Marr*, 54 Wash. App. 589, 593, 774 P.2d 1260, 1262 (1989) (citing *Safeco Ins. Cos. v. Meyering*, 102 Wash. 2d 385, 392, 687 P.2d 195, 200 (1984)) (stating “the paramount concern . . . is to ensure that the statute is interpreted consistently with the underlying policy of the statute”).

amendment is required because the text of the statute, related statutes, and historical context all indicate that the stock-watering exemption was intended to be limited when it was enacted.<sup>253</sup>

Between the limited and unlimited interpretation, the limited interpretation better advances the groundwater code's underlying policy of "regulating and controlling ground waters of the state"<sup>254</sup> and maintaining a "safe sustaining yield" of groundwater.<sup>255</sup> Increasing population pressures, declining groundwater levels, and Ecology's severe backlog of permits and lack of adequate funding are currently impeding sustainable management of Washington's groundwater resources.<sup>256</sup> Declining groundwater levels are especially significant in the dry eastern region of the state, which also contains most of state's livestock industry.<sup>257</sup> An unlimited stock-watering exemption could have a direct impact on the communities in eastern Washington that depend on groundwater. In an era of declining groundwater resources, the groundwater code's purpose of protecting senior water rights and managing groundwater in a sustainable manner is of primary importance. Allowing unlimited exemptions from the groundwater code's regulatory scheme undermines these important policy goals.

## CONCLUSION

Washington's stock-watering exemption for groundwater is limited to 5000 gpd under Washington's principles of statutory interpretation. When interpreting statutes, the court's primary goal is ascertaining and implementing the Legislature's intent.<sup>258</sup> The plain meaning and historical context of the exemption statute show that the Legislature intended to limit all exempt withdrawals to small withdrawals of 5000 gpd.<sup>259</sup> Contemporary groundwater management issues and the

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253. See *supra* Part V.A & V.B.

254. See WASH. REV. CODE § 90.44.020 (2006).

255. *Id.* § 90.44.130; see also *supra* Part I.A & Part I.B (discussing purposes of the surface and groundwater codes).

256. See ASHLEY & SMITH, *supra* note 10, at 75, 78–79, 83, and accompanying text; Bruhl & Ralston, *supra* note 12, at 13, and accompanying text; Dep't of Ecology v. Campbell & Gwinn, 146 Wash. 2d 1, 18, 43 P.3d 4, 14 (2002) (discussing Ecology's permit backlog and lack of funding).

257. See Skoldrud et al., *supra* note 13, and accompanying text.

258. See *Campbell & Gwinn*, 146 Wash. 2d at 9–10, 43 P.3d at 9 (citing *State v. J.M.*, 144 Wash. 2d 472, 480, 28 P.3d 720, 724 (2001)); see also *supra* Part IV.A (discussing the importance of legislative intent in statutory interpretation).

259. See *supra* Part V.A & V.B.

groundwater code's underlying policy goal of managing Washington's groundwater resources in a sustainable manner reinforce this interpretation.<sup>260</sup> While this Comment is limited to a discussion of the proper interpretation of the current stock-watering exemption, disputes over the proper interpretation of the exemption statute will not be truly resolved until the discussion is shifted away from what legislators intended in 1945 to a discussion of the proper role for exempt withdrawals today.<sup>261</sup> After years of encouraging both agricultural and urban growth, Washington must realize that water is a limited resource that cannot sustain all uses over time.<sup>262</sup> Revising the groundwater code to limit exempt uses and enhance Ecology's ability to regulate the state's water resources will be necessary to support future urban and agricultural growth in the state.<sup>263</sup>

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260. *See supra* Part V.C.

261. *See* Clarke, *supra* note 15, at 3.

262. *See* ASHLEY & SMITH, *supra* note 10, at 75, 84–85.

263. *See* ASHLEY & SMITH, *supra* note 10, at 75, 84–85. The Washington State Supreme Court acknowledged, "It is no secret that water availability is a crucial issue in this state, and will become even more so as time passes." *Campbell & Gwinn*, 146 Wash. 2d at 18 n.9, 43 P.3d at 13 n.9. The court went on to say, "The problems faced by developers and others seeking to appropriate water could be ameliorated to a degree if the Legislature would provide adequate funding for studies, resources, and personnel necessary to carry out the water resource laws and regulations." *Id.* at 18, 43 P.3d at 13.