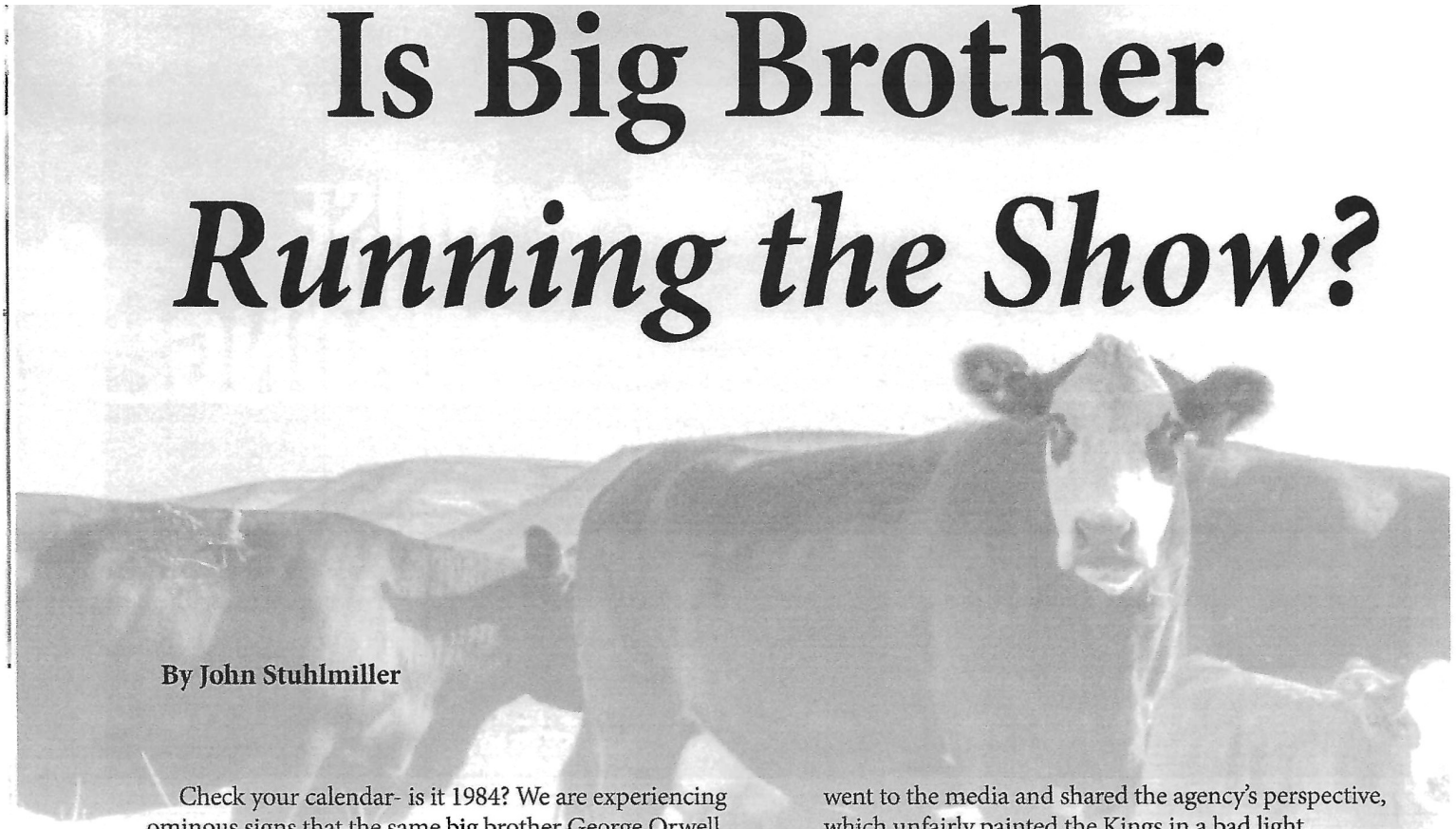
Is Big Brother *Running the Show?*



By John Stuhlmiller

Check your calendar- is it 1984? We are experiencing ominous signs that the same big brother George Orwell wrote about in his book *1984* is now running our state's regulatory and natural resource agencies.

We can see a glimpse into this potential future when we look at what the Department of Ecology has been doing lately. Ecology has brought a number of troubling cases against water users and other agricultural interests. These cases have been based on the agency's oversimplified, politicized narratives, not a hard look at the evidence and the law. Those Ecology narratives are reinforced and repeated because other agencies give deference to Ecology, but that deference is not warranted based on the facts and the law.

Consider the case of King Ranch: Based on an anonymous complaint, some grainy aerial photos taken out of context, and a theory about so-called "alkali wetlands," Ecology slammed the Kings with civil charges, and pressured the Department of Natural Resources (DNR) to cancel the Kings' grazing leases, which the Kings are contesting. Worst of all, Ecology's flimsy theory has led to a criminal investigation by the State against the Kings that would literally make customary industry ranching practices a crime—including both misdemeanor and felony crimes.

There are always two sides to every story. Ecology went to the media and shared the agency's perspective, which unfairly painted the Kings in a bad light.

Recently, the Kings pushed back with well-developed challenges not only to Ecology's enforcement against the Kings but also to Ecology's administrative authority to treat other ranchers, farmers, and citizens this way. The Kings' challenges point to Ecology's broken process for regulating wetlands and to regulations so vague it's impossible for citizens to understand them, much less comply. Ecology says it has absolute authority to declare existing agricultural areas untouchable and unavailable for continued agricultural use, on the grounds that Ecology thinks the areas might include sensitive sites such as "alkali wetlands," a type of "wetland" that the agency's own guidance documents admit are sometimes dry for years at a time. Ecology also says ranchers and others need advance permission from the agency before digging *anywhere* that might come in contact with *any amount* of surface water or ground water—permission that might be denied if Ecology decides to declare the area an untouchable type of wetland. Ecology's process gives no notice to ranchers or others about which areas Ecology might consider to be "wetlands," and it provides no real opportunity to even seek Ecology's permission (which isn't required in the first place).

When the Kings asked Ecology to explain what "pollution" could possibly have been caused by alleged activities in an existing agricultural area that are consistent with ranching industry practices, the agency said, "We have broad authority" and pointed the Kings to chapter 90.48 of the Revised Code of Washington. That chapter, the "Water Pollution Control Act" (essentially the state version of the Federal Clean Water Act), was obviously intended to prevent pollution. That law was passed when regulators were focused on downstream pollution from industrial pipes that dumped polluting chemicals directly into rivers, lakes, and other large water bodies. In this case, Ecology is saying standard ranching practices caused "pollution" by letting the existing soil fall back into the dugout stock pond created by the alleged digging activities. No citizen should be forced to spend time and money in court proving that such alleged activities didn't cause "pollution," but that's exactly what Ecology's process is doing to the Kings. Before an agency like Ecology takes enforcement action, the first thing it should do is try to find a peaceful solution through education and technical assistance. Common sense dictates that the agency should make at least some effort to walk the landowner or other alleged violator through the steps in the agency's reasoning and share proof that the alleged activity actually causes "pollution" and violates the law. But Ecology has refused to work cooperatively with the Kings.

Every Washingtonian deserves fair treatment and the presumption of innocence until proven guilty. We also deserve to have clear legal standards so we can know when an agency might consider an activity to be an environmental violation or a violation of some other law. The agencies say the increasing complexity of life dictates ever increasing restrictions, but when rules are unclear, regulatory agencies have to proceed carefully, erring on the side of providing *more* disclosure of reasoning and evidence and *more* due process of law, not *less* like Ecology is doing.

Ecology's position is that the Water Pollution Control Act generally applies to "waters of the state," with wetlands defined as a type of "surface water" in Ecology's surface water standards adopted under the Washington Administrative Code. "Wetlands," in turn, are defined as land areas that are inundated (flooded) or at least saturated (waterlogged) with water so often that the water transforms the soil over time into waterlogged "hydric" soils and causes water-loving plants to dominate the site. The trick is that agencies are often wrong about whether a particular area actually meets this definition, and they admit that the only way to know for sure is to hire an expert consultant to study your property and write an expensive report, which Ecology might throw in the trash and ignore.

The recent *Sackett* case, where the U.S. Supreme Court rejected a federal agency's overly-broad interpretation of the term "wetlands" under the federal Clean Water Act (CWA), confirmed the unique burdens that wetlands regulations impose on landowners and anyone else who might want to do any amount of digging:

> *Even if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands . . . "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property . . . And because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of "the waters of the United States" means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.*

Sackett highlights the unfairness of wetlands regulations and the complexities in the King case. Since the 1950s, the Kings have consistently exercised their exempt stock water rights under RCW 90.44.050 and put the land and water to full beneficial use with historic customary industry standards and permitted uses. In the early 2020s, Ecology misinterpreted aerial photos depicting alleged activities consistent with those historic activities to be in violation of the Water Pollution Control Act, but Ecology has not regulated such alleged "waters" in the past. **How could any rancher have known Ecology would suddenly decide to start treating water holes as "alkali wetlands"?**

Back to big brother, Ecology dropped the hammer on the Kings without helping them understand the agency's newly-invented legal interpretations, and without providing any opportunity to question Ecology's decisions besides a bringing a direct legal challenge (which the Kings did by appealing to the state Pollution Control Hearings Board). This is not how government agencies should treat Washington citizens. As directed by law, Ecology's first priorities should be public education, dialogue and cooperation with landowners and others in the regulated community, careful protection of statutorily exempt water rights and other property rights, and due process to citizens whose rights are being impacted by Ecology's interpretations, as required by state law and the Constitution.

The Kings are simply asking Ecology to back up and do its duty based on clear statutory authority, supported by state law and by common sense, with respect for private property rights including vested permit exempt stock watering. Ranchers and farmers should never be required to get a consultant before knowing whether or not they can operate as they have historically. Clear regulation, a vigorous, credible, truthful public education process, and open dialogue is essential before any enforcement takes place. This simply didn't happen with the Kings.

All farmers and ranchers need to take note of these actions by Ecology and DNR and be ready to defend your rights. Ecology is taking aggressive action to regulate existing and ongoing agricultural activities under the Water Pollution Control Act, and sometimes trying to prohibit those activities like the agency is doing on the King Ranch.

On one hand, Ecology is telling conservation districts, ranchers, and farmers that these kinds of issues are covered by local Voluntary Stewardship Programs like we have in Grant County and Douglas County. On the other hand, Ecology has started enforcing against operators like the Kings and others, such as Joe Lemire, a cattle rancher who was forced to stop letting his cattle drink from a creek on his property in Columbia County—, which was homesteaded in the 1800s and was continuously used for agriculture since that time—because Ecology convinced a majority of the state Supreme Court that the cattle were causing "pollution." As a result, Mr. Lemire was deprived of his vested stock water rights, and the land was converted to nonagricultural use.

Like the Kings and the Lemires, you may also be seeing Ecology try to impose additional restrictions on your existing and ongoing agricultural activities, even though these newly-invented restrictions are not clearly expressed in the law (and are often contradicted by the law). All landowners and operators should beware, especially those with DNR leases. Earlier this year, DNR and Ecology collaborated on these issues behind the scenes, outside of public view, and signed a secret a "Memorandum of Agreement" that gives Ecology absolute control over "wetlands" and "waters" issues in all DNR crop and grazing leases (and all other upland leases) going forward. Grazing and farming on public lands and private property are at risk.

Lest we forget, Ecology has a poor track record with agriculture in recent years. Two significant examples are Ecology's failure to deliver on the agriculture fuel tax exemption from the Climate Commitment Act, and the attempt to change the agency's Policy 1025 to eliminate agricultural water exemptions.

We all need to keep our eyes wide open and take action in support of the Kings, who are at the tip of the spear in this new push by Ecology to control every drop of water in the state, even isolated dugout stock ponds.