

STATE OF MICHIGAN
MECOSTA COUNTY CIRCUIT COURT

MICHIGAN CITIZENS FOR WATER
CONSERVATION, a Michigan nonprofit
corporation; R.J. DOYLE AND BARBARA
DOYLE, husband and wife; and JEFFREY R.
SAPP AND SHELLY M. SAPP, husband and
wife,

Plaintiffs,

Case N^o: 01-14563-CE

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation; and DONALD PATRICK
BOLLMAN AND NANCY GALE BOLLMAN,
husband and wife, a/k/a Pat Bollman
Enterprises,

Defendants.

Hon. Susan Hennigan Grant
By Assignment

James M. Olson (P18485)
Jeffrey L. Jocks (P67468)
OLSON, BZDOK & HOWARD, P.C.
Attorneys for Plaintiffs
420 East Front Street
Traverse City, MI 49686
Telephone: (231) 946-0044

Michael H. Dettmer (P12709)
Co-Counsel for Plaintiffs
420 East Front Street
Traverse City, MI 49686
Telephone: (231) 946-3008

John M. DeVries (P12732)
Douglas A. Donnell (P33187)
Jennifer A. Pupilava (P58949)
MIKA, MEYERS, BECKETT & JONES, PLC
Attorneys for Defendant Nestlé
900 Monroe Ave., N.W.
Grand Rapids, MI 49503
Telephone: (616) 632-8000

**PLAINTIFFS' MOTION AND BRIEF FOR SUMMARY DISPOSITION
FOR MODIFICATION OF THE CURRENT INJUNCTION
IN THE STIPULATED ORDER ON REMAND
PURSUANT TO MCR 2.116(C)(10)**

May 1, 2009

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MOTION FOR SUMMARY DISPOSITION

Plaintiffs, through their counsel, request this Court to grant summary disposition pursuant to MCR 2.116(C)(10) as follows:

1. This Motion for Summary Disposition is based on the facts set forth in the “Background Facts” section below. These facts are supported by the Plaintiffs’ Appendix of Exhibits, consisting of attached portions of this Court’s Opinions and Orders, this Court’s findings of facts, the Court of Appeals decision and affirmance of this Court’s findings of facts, trial transcripts, exhibits, deposition transcripts, deposition exhibits, pleadings, affidavits, and hearing transcripts.

2. Based on these facts there are no genuine issues of material facts related to the applicable law and legal arguments set forth in Arguments B and C of this Motion and brief.

3. Based on these facts and arguments, Plaintiffs submit this Court should grant summary disposition in favor of Plaintiffs, because the facts and circumstances since the January 25, 2006 Stipulated Order on Remand establish that the current injunction limits in the Order do not “maintain an adequate supply of water” to prevent or minimize harm to Plaintiffs riparian uses, rights, and enjoyment of the stream, lake, and adjacent wetlands. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 81-82, 111; 709 NW2d 174 (2005) (referred to below as *MCWC v Nestlé*).¹

4. Further, based on these facts and arguments, Plaintiffs submit that this Court should grant summary disposition in favor of Plaintiffs and deny Defendant’s request to increase its pumping by almost 30% (approximately 50 gallons per minute [gpm]), because Nestlé cannot show that the facts and circumstances demonstrate a basis for an increase in water supply or flows; therefore, there is no justification for an increase in Nestlé’s “fair participation” or to otherwise modify the injunction as in the current Stipulated Order.

¹A copy of the *MCWC v Nestlé* Court of Appeals Opinion is attached as **Ex 13**. Plaintiffs have compiled the exhibits in support of their Motion for Summary Disposition, in “Exhibits in Support of Plaintiffs’ Motion and Brief for Summary Disposition.” The exhibits will be referred to as “**Appx Ex ____**” or simply “**Ex ____**” in this Motion and Brief.

5. Finally, Plaintiffs request this Court to adopt the Plaintiffs' experts' recommended modification of the withdrawal rates and flow and stage criteria and other parameters to address the inadequate water during certain low flow and/or level conditions; in lieu of adoption of such proposed withdrawal or pumping rates to modify the injunction provisions of the Stipulated Order, the Plaintiffs request this court to schedule and conduct a hearing for the limited purpose of establishing the modification of the Order only as to a reduction of the withdrawal rates earlier in the Spring and slightly reduced rates during such low flow and/or level conditions.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

Introduction

Both parties have asked the Court to modify the current limits in the injunction. Each party has the burden of proving their specific request.

First: Plaintiffs request a narrow but significant modification to the injunction to require Nestlé "to maintain an adequate supply of water," *MCWC v Nestlé*, 269 Mich App at 81-82; to minimize the significant effects and impacts during low flow conditions, such as in the 2005 and 2007 spring and summer seasons. Overall, Plaintiffs request a drop of approximately 2% in Nestlé's pumping rate to minimize or avoid these impacts. Other than the modification of the injunction during times of inadequate water, water flows and levels, on average, have remained consistent since the 2006 Stipulated Order, and therefore the remaining parameters of the Stipulated Order (including Nestlé's proposal to pump 30 percent more) should not be disturbed.²

Second: Nestlé, on the other hand, requests the Court to modify the injunction across the board so it can pump on average approximately 50 gallons per minute more all year long – a 30% increase in pumping! *Id.* Unlike Plaintiffs, who request modification of the injunction to maintain an adequate water supply in certain low flow conditions, Nestlé wants more water. While the Court of Appeals' ("COA") criteria also recognize that the parties have a right to "fair participation" in the common groundwater that forms the Dead Stream, Thompson Lake, and the Impoundment, Nestlé

²For the Court's convenience, an overview of the springs, lakes, streams, well field and monitory locations for flows and levels is attached as **Appx Ex 12**.

cannot demonstrate that the facts or circumstances regarding flows, levels and other parameters have changed since the 2006 Stipulated Order. Since Nestlé was fully aware of its right of “fair participation” under the COA decision when it signed the Stipulated Order on Remand in lieu of a determination by this Court, there are no facts that justify an increase in participation through an increase in pumping.

Accordingly, for the reasons set forth below, Plaintiffs submit the Court should grant summary disposition as to their narrow request to modify the injunction by further limiting Nestlé’s pumping from mid-spring through the summer to minimize the “lag time” effects and protect the flow and levels in the summer season.³

In addition, Plaintiffs request summary disposition denying Nestlé’s request for modification of the injunction. Nestlé cannot demonstrate any increased change in the flow or supply of water, and therefore has no justification to increase the “fair participation” from the current 2006 Stipulated Order. Nestlé’s and Plaintiffs’ experts agree that recorded flows and levels have remained within the same range before and after the 2006 Stipulated Order. As a matter of law, therefore, the COA already applied and ruled on the “reasonable use balancing test” as to the facts of this case and affirmed the groundwater claim and injunction, 269 Mich App at 74-82. Since Nestlé cannot demonstrate a change in factual circumstances that flows and levels have increased, Nestlé cannot establish a basis for increased “fair participation” or pumping.

A. Background Facts, Rulings and Proceedings

The COA affirmed this Court’s findings of fact and conclusion of law that Nestlé’s pumping violated groundwater and that an injunction was the proper remedy. *MCWC v Nestlé*, 269 Mich App at 39, 40, 79, 82.⁴

³Plaintiffs request the Court to enter an order modifying the current injunction as recommended by their experts, Dr. David Hyndman and Dr. Mark Luttenton. See the Proposed Orders attached as **Appx Ex 2** (Appx II and Appx III). In the alternative, the Court is requested to grant summary disposition for Plaintiffs on the right to modify the injunction because of inadequate supply of water, and order a hearing limited to experts on the adjustment in the parameters to the current order to maintain an adequate supply of water in low flow conditions like those in 2005 and 2007.

⁴“Because plaintiffs’ riparian water rights are founded on property law (citation omitted), and
(continued...)”

[W]e affirm the judgement in favor of plaintiffs on the groundwater claim, but remand to the trial court to determine the appropriate parameters of the injunction and modify it accordingly. *Id.* at 81-82.

Further, it decided that “we are unable to determine what level of pumping ... is reasonable under the circumstances,” and, therefore, remanded the modification of the injunction to this Court to conduct a hearing to “determine what level of water extraction ... will meet the *critical discussed above.*” *Id.* at 81-82, 110-111. (Emphasis added.) The COA expressly mandated that this Court “shall modify” its original injunction order, and directed this Court to apply the following criteria to determine the appropriate level of water extraction :

“... will provide defendant with *a fair participation in the common water supply while maintaining an adequate supply for plaintiffs’ water uses.* *Id.*, at 81, 111 (emphasis added).

As noted above, except for the serious low flow and level conditions in 2005 and 2007, the facts and circumstances remain basically the same and the remaining parameters of the current injunction generally have succeeded and need not be changed.

1. Summary of this Court’s Opinions and Findings of Fact

This Court issued an Opinion and Order and halted Nestlé’s pumping on November 25, 2003, based on its “unreasonable use” test for groundwater law and impairment under the MEPA.⁵ Ex 3,

⁴(...continued)

award of damages in gross for complete loss of those rights is inappropriate. *See People v Hulbert*, 131 Mich 156, 166; 91 NW 211 (1902). ...the only just way to prevent harm is to *enjoin defendant from withdrawing water* from Sanctuary Springs to the extent that such withdrawals are *inconsistent with plaintiffs rights to make use of the same water resources.*” *MCWC v Nestlé*, 269 Mich App at 80.

⁵This Courts findings regarding effects (Tr Opinion, pp. 11-39) and impacts have been affirmed and stand as the factual basis for any MEPA claim; the trial court found an impairment in violation of the MEPA based on these findings. (Tr Opinion, p. 41 [“The factual analyses undertaken above apply ... the same theories” - groundwater and MEPA claims], *Id.*, pp. 62-64). The Court of Appeals remanded for an explanation of how these findings constituted a likely impairment contrary to Section 1703(1) of the MEPA. 269 Mich App at 96 (under heading “Remand”). The COA reversed this Court’s conclusion that there was an “impairment” under the MEPA, and remanded for this court to explain how its detailed findings constitute an impairment. 269 Mich App at 92, 111. This “likely impairment” issue is not covered by the instant Motion for Summary Disposition. However, based on the COA remand, this Court need only (1) review the findings of fact and explain whether or not and why there is or is not an “impairment” under the MEPA; (2) determine whether the underlying facts and circumstances on which these findings of facts are based remain generally the same or have significantly changed since the 2006 Stipulated Order. Based on “likely impairment,” this Court can modify the injunction in the Stipulated Order.

Tr Opinion, pp. 48-50, 65-66. The Court denied Nestlé's motion for new trial, stay, and reopening proofs on February 14, 2004. New Tr Opinion, pp. 34-35. The relevant findings of fact are:

a. There is a direct hydrological connection between the aquifer or tributary groundwater from which Nestlé extracts water for its bottled water and the springs, stream, Osprey Lake Impoundment, Thompson Lake, and the Tri-Lakes. **Ex 3**, Tr Op, p 11-12, 22.

b. Roughly, every gallon removed is a gallon from the springs, stream, and lakes.⁶ Specifically, the Dead Stream loses flow of 345 gpm for every 400 gpm pumped. *Id* at p 22. "There is no dispute but that Osprey Lake, Thompson Lake, Dead Stream and the seeps entering the Dead Stream will suffer a reduction in flow/stage." *Id.*, p. 13. Pumping 400 gpm exceeds the gallons per day rate of evaporation for Osprey Lake. *Id.*, p. 39.

c. Pumping at 400 gpm reduces the flow of Dead Stream by as much as 28.75 percent., *Id.*, p 22, and will reduce the level of the Dead Stream 2 inches or more on top of the effects caused by the many variables. *Id.* Pumping at lower rates reduces the level proportionately, so 200 gpm reduces it by 1 inch and 100 gpm by ½ inch. *Id.* "For example, with the pump rate at the time of trial being at or near 200 gpm, Dead Stream's stage was down by about one inch and its flow loss was near 15 percent." *Id.* The Court rejected Dr. Andrews' opinion that the level would drop only ½ inch at 400 gpm. *Id.*

d. Dr. Andrews' testimony is not credible compared to Dr. Hyndman's on the stage and discharge (flow and level) relationship of the Dead Stream and the effect of pumping. Dr. Andrews overstated flows by almost double and underestimated the effects. *Id.* p. 21. "In listening to their analyses and opinions I came to the generalized opinion that Dr. Hyndman's testimony and opinions are more credible and supportable than those of Dr. Andrews." *Id.*, p 10. This Court observed that Dr. Andrews testimony made him look like a "company man." *Id.*⁷

⁶"Nestlé's removal is on a 1:1 ratio of water removed from the subject watershed." **Appx Ex 3**, Tr Op, p 11.

⁷"Dr. Andrews' outburst regarding the importance of his work in this case to his client, Nestlé, and his view of Nestlé's interest in understanding the subject of his analysis here (June 6th transcript of his testimony at pp 182-183) throws a glimmer of light on him in the role of being a "company man."

e. “Nestlé’s pumping operation will result in a narrowing of the channel of the Dead Stream over time in an amount greater than four feet” – a physical loss of the stream. *Id.*, p 32.

f. Pumping at 400 gpm will lower the level of Osprey Lake and Thompson Lake by 4 to 6 inches. *Id.*, p 29. Thompson Lake and Osprey Lake are directly connected and their levels drop the same amount based on pumping. *Id.* Dr. Andrews opined that the drop at 400 gpm would be 2.5 to 3.5 inches; the court found “Osprey Lake and Thompson Lake will drop 4 to 6 inches.” *Id.*

g. The hydrological effects are masked by variables, such as beaver dams, precipitation, and winds. *Id.*, p. 12. ⁸

h. “Dead Stream wetlands will lose at least two inches of water level, and maybe more, at a pump rate of 400 gpm, with lesser losses at lower pump rates on a straight-line calculation.” *Id.*, p. 23.

i. “This record has much evidence regarding those flats, how much water was lost to expose them and how much water is needed to cover them.” *Id.*, p 24. The exposed mudflats interfere with Doyles’ riparian property rights, use, and enjoyment. “This area is where the infamous mud flats so often referred to at trial are located. We tried to paddle into and around the flats, but could not because of the mud that falls into the category of ‘too thick to drink, too thin to plow’. The nature of the mud as rotting organic matter becomes immediately apparent as its surface is disturbed, as with a canoe paddle. Stench is not too strong a word.” *Id.*, p. 17.

j. The Court found that the drop in levels will increase the temperature and render fishing in the even more shallow areas marginal, and pumping and reduction of flow and level will increase nutrient loading. *Id.*, p 31.

k. Shallow areas of the stream, like the “mudflats” at Doyles’, will be affected by vary small decreases in level from pumping, making navigation difficult and adversely impacting the stream and fishing. *Id.*, p. 32. Most harms such as this will occur during the low flow periods.

⁸“As such, they must be determined largely by observing changes in surface waters over time in an environment that is already subject to seasonal, cyclical and climatic variations, along with other variabilities, all of which we have little direct evidence of. Such variabilities can mask or can exacerbate the effects of Nestlé’s pumping.” **Appx Ex 3**, Tr Op, pp 17-20.

Id. Drops in higher flows also adversely impact the system because of the need to maintain the range of flows. *Id.*, p. 33. Dead stream wetlands were adversely impacted. *Id.* p 34.

1. Thompson Lake will be reduced by 6 inches at 400 gpm, and a proportional amount corresponding to the level of pumping, and this will result in loss of fish spawning habitat and area for swimming. *Id.*, pp. 29, 38.

2. New Trial and Post-Judgement Opinion and Order

a. “The question is not merely what has happened since the proofs closed but, rather, how does that new data move the existing data analysis in totality one way or another.” **Appx Ex 4**, New Tr Op, p 15. “The trial evidence clearly showed that it is important to look at as long a range of information as is available to ‘flatten the curve’ of short term anomalies ... Since Nestlé has not shown how the overall analysis would be changed if the newly-accumulated data were incorporated into it, balancing it against the long-term assessment of the trial evidence, it has not proven that merely having new information would move forward the controlling inquiries.” *Id.* at p 15.

3. The Court of Appeals Affirmed this Court’s Findings of Fact.

a. “Defendant argues that the trial court’s findings are speculative and not supported by the record. We disagree.” 269 Mich App at 41.

b. “[T]he record supports the trial court’s finding that the Dead Stream will lose 345 gpm in flow and that this loss will correspond to a drop of approximately 2 inches in stage, with lesser losses at lower pump rates on a straight [line] calculation.” *Id.* at 45.

c. “The trial court found that it [Dead Stream] would lose approximately 24 percent of its base flow and 2 inches in stage beyond the steams’s natural fluctuations given a withdrawal rate of 400 gpm.” *Id.* at 76.

d. “The trial court determined that the reduction in flow would raise the stream’s temperature and cause the stream to become choked with plant life,” and “that the channel would narrow by more than four feet.” *Id.*

e. “[T]he trial court noted that it was already a low flow stream subject to many natural variables. For these reasons, the trial court found that even a modest drop in water level would have dramatic consequences for the stream.” *Id.* at 75-76.

f. “The trial court determined that these effects would impair the Dead Stream’s aesthetic value and its usefulness as a fishery, and would impair recreational navigation of the stream. “ *Id.* at 76. “The loss of recreational use and the physical alternation will directly and substantially harm the riparian value of the Dead Stream.” *Id.* at 76,

g. “[T]he trial court did not abuse its discretion in refusing to reopen the proofs.” *Id.* at 52. “Because the trial court did not clearly err in making its findings and did not abuse its discretion, a new trial is not warranted.” *Id.* at 50, 53.

4. The Court of Appeals Affirmed the Groundwater Claim and Injunction Remedy, but Remanded to Modify the Injunction on a Determination of “Fair Participation” and “Maintaining An Adequate Supply of Water.”

a. “In the present case, plaintiffs will suffer substantial harm to their riparian rights if defendant’s pumping rate of 400 gpm is permitted. In addition to loss of recreational uses ..., there will be lasting changes to the natural characteristics of the stream ... Plaintiffs also have no adequate remedy at law. Consequently, the only just way to prevent harm is to enjoin defendant ... to the extent such withdrawals are inconsistent with plaintiffs’ correspondent rights to make use of the same water resources.” 269 Mich App at 80.

b. “[W]e are now confronted with the daunting task of determining what level of water extraction ... will provide a *fair participation* in the *common water supply* for defendant, but leave plaintiffs with an *adequate supply of water* for their own water uses.” *Id.* at 80-81 (emphasis added).

c. “[A]t trial Dr. Hyndman testified that the adverse effects ... vary depending on the current level of flow and suggested that the remedy might have to be tied to these fluctuations. [W]e are unable to determine on appeal what level of pumping ... is reasonable under the circumstances.. Therefore, we must remand this issue for determination by the trial court.” *Id.* at 81.

d. “Because we have found no reason to question the validity of the findings of fact already made by the trial court, no new evidence shall be permitted ... except as determined to

be necessary by the trial court, and the trial court shall give due regard to the trial court's earlier findings and credibility assessments." *Id.*

e. "At the hearing, the trial court shall ... determine what level of water extraction ...will meet the *criteria discussed above.*" *Id.* at 81. (emphasis added).

f. "Once the trial court has made this determination, it shall enter an order modifying the previous injunction accordingly." *Id.* at 81-82. "Therefore, we affirm the judgement of the trial court in favor of plaintiffs' groundwater claim, but remand ... to *determine the appropriate parameters of the injunction and modify it* accordingly." *Id.* at 82 (emphasis added).

5. The Stipulated Order on Remand

In lieu of a hearing on remand, Plaintiffs and Nestlé modified the injunction and established parameters for limiting pumping by mediation and Stipulated Order on Remand, January 25, 2006. Ex 5, Transcript, April 5, 2002, pp 2-5. Section I,A. and II,A. of the Stipulated Order established withdrawal or pumping limits based on the stage and flow parameters for various weeks, months, and seasons of the year. *Id.*, 2-3.

If the water withdrawals exceed the limits imposed under the stage and flow criteria, it is deemed an unreasonable use under ground water law (Sec. I, A) and likely impairment under the MEPA (Sec. II, A), and the pumping is prohibited by injunction. *Id.* p. 4. If pumping does not exceed these limits, it is deemed reasonable use and not an impairment under the MEPA.

The Stipulated Order provided that if an appellate court "modifies or reverses the COA November 29, 2005 Opinion and Order," then the contents of the stipulated order "shall be subject to *modification* pursuant to and *in accordance with the judgment or order of the appellate court.*" *Id.*, V.,A., p. 6. (emphasis added). The Stipulated Order also provided that after the COA order or the Supreme Court order, either party could request to mediate a modification of the injunction pumping limits. *Id.* V.,B., p. 6. If mediation fails, the Order provides that the

appropriate maximum *withdrawal rates and stage and flow criteria* shall be determined by the Circuit Court *in accordance with those principles and/or standards* and the trial record and the facts and circumstances (including without limitation monitoring and pumping data) through the date of such circuit court hearing. *Id.*, V.,B., p. 6 (emphasis added).

The COA terminated its jurisdiction, leaving this Court with jurisdiction only to modify the injunction as directed by the criteria set forth in its remand. The Stipulated Order established the procedure for further modification of the *injunction* parameters regarding “withdrawal rates and stage and flow criteria” and nothing else. The Stipulated Order did not (and could not) expand on this Court’s jurisdiction under the COA remand. As such, paragraph V,B., is limited to the modification of the injunction based on the “trial record” and “the facts and circumstances,” since the date of the Stipulated Order, January 25, 2006 – such as monitoring and pumping data, precipitation, or other physical factors relevant to the inquiry of whether “fair participation” and “adequate supply of water” have been maintained.

Nestlé argues that its right of “fair participation” should be viewed as is a zero sum game; it asserts under the “reasonable use balancing test” that it can extract its share of the water up to the point that there is no more water in the stream, lake, or adjacent wetlands.⁹ That is, it argues that riparians must suffer harm to their favored riparian rights down to the lowest denominator. Nestlé’s argument is illogical and ignores the reality of the tension for the modifying the injunction between “fair participation” and the principle “to maintain an adequate supply of water.” The principle of the COA remand directed this Court to look at two criteria: (1) “fair participation” in the common water supply shared by both parties; (2) “maintaining an adequate supply of water. The six-factor “reasonable use balancing test” was applied to the findings of fact in this case when the COA affirmed the groundwater claim and remanded for modification of the injunction.

6. The Michigan Supreme Court Decision.

On July 25, 2007, the Supreme Court held that plaintiffs had standing as to the harm and their interests in Dead Stream, Thompson Lake, and adjacent wetlands. *MCWC v Nestlé*, 479 Mich 280; 737 NW2d 447 (2007). The Court held Plaintiffs had no standing as to the Impoundment and wetlands 115, 112, and 301 because Plaintiffs had no interest or use in the “affected area” – The Impoundment and wetlands on the Sanctuary property. *Id.* at 297, 310. The Court remanded “to

⁹**Defendant’s Response to Plaintiffs’ Motion and Brief for Pre-Trial Ruling**, Jan. 16, 2009, p. 5. Nestlé completely ignores the “maintain adequate water” principle for modifying the injunction in this case, and argues for a retrial of the “reasonable use balancing test.”

the trial court for further proceedings consistent with this opinion.” *Id.* at 310. The modification of the injunction no longer includes the MEPA “likely impairment” of the Impoundment or Sanctuary wetlands.

B. Plaintiffs Are Entitled to Summary Disposition for Modification of the Injunction Limits Because under Certain Low Flow or Level Conditions Nestlé’s Pumping Rates Do Not Maintain an Adequate Supply of Water in Dead Stream and Thompson Lake.

1. Standard of Review for Summary Disposition

To grant a motion under MCR 2.116(C)(10) the court considers the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties to determine if a question of material fact exists. *Ashworth v Jefferson Screw*, 176 Mich App 737, 741; 440 NW2d 101 (1989). If there is no dispute as to a material fact necessary to grant summary disposition based on the applicable law, the court may grant summary disposition. While the court must give the benefit of all reasonable doubt to the opposing party, the opposing party bears the burden of showing that a genuine and material question of fact exists, and it may not rest on mere allegations or denials of the pleadings, but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine dispute to the controlling issue of law in question for trial. *Id.*

2. The COA Applied and Ruled on the Factors in the “Reasonable Use Balancing Test” and Affirmed the Groundwater Claim in favor of the Plaintiffs.

The COA listed six factors from case law to consider when applying the “reasonable use balancing test” to determine whether a groundwater extraction constitutes an unreasonable use:

- (1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use, (6) any other factor that may bear on the reasonableness of the use.” 269 Mich App at 69

In applying the factors, the COA made the following rulings:

- a. Nestlé’s off-track diversion for sale of water to places unconnected to the watershed is subject to a preference in favor of riparian owners or users, that “the needs of local water users must be met first.” *Id.* at 72.

b. The COA found that the Dead Stream location and local water supply were suitable for Nestlé's high-capacity water extraction and diversion. *Id.* at 75-76.

c. The recreational, retreat, and aesthetic considerations were proper riparian uses and interests and that Nestlé's use was beneficial. *Id.* at 74.¹⁰

d. Further, the Plaintiffs are entitled to a "preference as local water users." *Id.*, at 75.

e. The Plaintiffs' riparian interests were and will be significantly harmed, but jobs and taxes offset harm, so the harms and benefits factor does not favor either party. *Id.* at 76-77.¹¹

f. The COA affirmed the trial court's finding that it was not necessary for Nestlé to extract water from the Sanctuary. *Id.* at 77-78; Tr Opinion, pp. 64-65. "[D]efendant does not need to maintain such a high pumping volume at the Sanctuary Spring site in order to continue operations. In contrast, plaintiffs' water uses do not remove water from the system, but do require a minimum level of water, which cannot be mitigated through changes in the manner of use."¹² *Id.* at 77-78. Since the 2006 Stipulated Order, Nestlé has brought on-line or obtained permits for two-well fields in or near the City of Ewart with a capacity for spring water of more than 900 gpm. **Ex 6, Defendant Nestlé's Response to Plaintiffs' Second Interrogatories; Ex 7, Defendant's Responses to Pltfs' Third Interrogatories.**

g. The COA concluded that these factors "weigh heavily" against Defendant's pumping. 269 Mich App at 78.

¹⁰The COA applied the Restatement, Sec. 850A, for beneficial use, even though the Restatement has not been adopted in Michigan.

¹¹The record in this case contains a finding and recognition by Nestlé that its water extraction is entirely for a private purpose and profit. Hearing transcript, April 5, 2002, **Ex 5**. In any event, Nestlé has more than sufficient capacity for spring water from its City of Ewart and Twin Creek well fields. **Exs 5, 6 and 7.**

¹²Since trial, Nestlé has constructed and operates a well field in the City of Ewart and has obtained a permit for another well field upstream from Ewart, with a combined extraction rate of 910 gpm. **Defendant Nestlé's Response to Plaintiffs' Second Interrogatories**, Feb. 19, 2009, Answer to Interrogatory No. 24, p. 27. **Ex 6.** Nestlé does not need additional or even the existing production rate from the Sanctuary. 910 gpm exceeds a capacity of 474 million gallons a year. Nestlé produced and shipped 168 million gallons from Stanwood in 2008, more than any previous year. **Ex 7, Defendant's Responses to Pltfs' Third Interrogatories**, Apr. 7, 2009, Answer No. 22, pp. 15-16.

Based on these factors, the COA concluded that Nestlé’s pumping at 400 gpm was unreasonable, and remanded for the trial court to modify this Court’s injunction and determine what rate of pumping would be appropriate under its criteria for modifying the injunction.

As noted in the Background section of this Brief, the injunction was modified by the scope and parameters of Paragraph V. B. of the Stipulated Order on Remand, which controls this Court’s determination of whether the current injunction provisions in the Order should be modified and, if so, whether the parameters in the Order should be further modified.

Therefore, Plaintiffs request this Court to rule that Nestlé has no right to a “fair share” or “balancing test” in those circumstances where there is, for whatever reason, an inadequate supply of water for Plaintiffs to use and enjoy their riparian rights or interests. Thus, to this extent, Nestlé’s pumping is limited by those stages and flows required to assure enough water “to preserve plaintiff’s use or the values attributable to the water.” 269 Mich App at 77-78.¹³

3. The Scope of Legal “Principles and/or Standards” in the Stipulated Order on Remand is Limited to the “Criteria” Set forth by the Court of Appeals in Its Remand for a Modification of the Injunction.

The Stipulated Order on Remand, which this Court has ruled controls the July 2009 Hearing, is an *injunction* that modified the original injunction that prohibited Nestlé’s pumping. The injunction in the Stipulated Order stems from the fact that the COA affirmed the facts and liability on the groundwater claim, and remanded only the remedy – the injunction – part of this case to this Court for further proceedings. 269 Mich App 25, 81.¹⁴

In doing so, the COA specifically directed this Court to determine what level of water extraction from Sanctuary Springs “meet the criteria discussed above.” *Id.* at 81-82. The “criteria

¹³At the very least, Nestlé must “require a minimum level of water, which cannot be mitigated through changes in the manner of use.” 269 Mich App at 77-78. Pumping at rates that lower the stream or lake even a fraction of an inch during low flow conditions determines whether the stream has water and whether riparian rights are substantially impaired because of inadequate water supply. **Appx Ex 3**, Tr Op, p. 24, 32. “[C]ertain water uses, such as boating and recreation, as well as the maintenance of riparian property value, may require the court to protect the integrity of the entire stream or lake.” Restatement, Sec.850A. comment I, p. 231.

¹⁴“Therefore, we affirm the judgment in favor of plaintiffs on the groundwater claim, but remand to the trial court to determine the appropriate parameters of the injunction and modify it accordingly.” *Id.* at 82.

discussed above” refers to the principles and standards discussion in the COA’s decision under the heading “**D. Remedy**” *Id* at 79-81. After discussing the standards and affirming the injunctive Remedy, the COA discussed additional criteria for modifying the injunction based on the appropriate parameters for the fluctuations in flows and levels. The COA set forth the basic criteria for this Court to consider in modifying the injunction remedy: “provide defendant with a fair participation” “while maintaining an adequate supply.” *Id.* at 81-82, 111.

Section V, B. of the Stipulated Order provides that the

appropriate maximum withdrawal rates and stage and flow criteria shall be determined by the Circuit Court *in accordance with those principles and/or standards* and the trial record and the facts and circumstances (including without limitation monitoring and pumping data) through the date of such circuit court hearing.

Apart from the question regarding the scope of “the facts and circumstances” or range of evidence that can be introduced at the hearing, Circuit Court Order, Dec. 15, 2008, **Appx Ex 8**, the Court must decide the question of law as to what “principles and/or standards” govern the Hearing to modify the injunction.

Nestlé claims this Court should ignore these criteria for modifying the injunction under the Stipulated Order on Remand in favor of a retrial or sweeping hearing based on the “reasonable use balancing test.”

Plaintiffs submit that the “principles and/or standards” to modify the injunction are the “criteria” discussed and carefully set forth by the COA under the heading “D. Remedy” for a modified injunction; that is, the rulings by the COA concerning the modification of the injunction *after* its application of the “reasonable use balancing test” to this Court’s findings of facts and ruling in favor of the Plaintiffs on the groundwater claim.

Nestlé’s claim makes absolutely no sense. This Court’s jurisdiction on remand from the COA and under the Stipulated Order is limited to a modification of the injunction. The parties cannot by contract expand the jurisdiction of the circuit court.¹⁵ The scope of the meaning of “principles and/or standards” can not be interpreted more broadly than the jurisdiction to modify the

¹⁵Plaintiffs’ Motion and Brief to Limit Hearing to Jurisdiction On Remand, May 1, 2009.

injunction. Moreover, the meaning can only be determined within the context of exercising jurisdiction to modify the injunction. Indeed, that is exactly what the Stipulated Order directs this Court to do. Moreover, as described above, the COA has already ruled in favor of Plaintiffs and against Nestlé under the “reasonable use balancing test.” There is nothing for this Court to do but apply the criteria or principles in the COA decision relevant to its holding on modification of the injunction.

4. The Applicable “principles” in the COA Remand Order to the Circuit Court are “Fair Participation” and “Maintaining Adequate Water Supply.”

The Court of Appeals held that regardless of Nestlé’s “fair share,” the modified injunction must “maintain an adequate supply of water.” 269 Mich App at 67-68.¹⁶ This was based on the principle established by the Supreme Court that there must be an “adequate supply of water for the plaintiffs’ reasonable use of riparian rights.”¹⁷ In *Bernard v City of St. Louis*, the Court ruled that the defendant should not “interfere with an adequate supply of water for plaintiff’s reasonable use.” 220 Mich 159, 165; 189 NW 891 (1922).¹⁸ In *MCWC v Nestlé*, the Court of Appeals agreed with this interpretation of *Bernard*, and recognized that the Court did not apply a balancing test “to protect plaintiffs’ water supply of water.” 269 Mich App at 63.

In any event, Nestlé’s position is untenable. The facts and law in this case on the groundwater claim and injunction remedy have been finally decided. The only issue is modification of the injunction based on facts and circumstances since the Stipulated Order in January 2006. The controlling “principles and/or standards” under these circumstances are the “criteria discussed above” – the “fair participation” and “adequate supply of water” set forth by the COA in its opinion.

¹⁶ “[W]e adopt the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users.”

¹⁷ *Dumont v Kellogg*, 29 Mich at 423-424. Justice Cooley recognized an exception to this rule where a riparian or non riparian sought to remove the water to another watershed. 420 Mich at 421-422; *Kennedy v Niles Water Co*, 173 Mich 474, 475-477; *Hoover v Crane*, 362 Mich 42, 106 NW2d 563 (1960). Even in off-tract diversions of groundwater, the Michigan Court has recognized, are unreasonable where they “materially diminish the flow of a stream.” *Schenk v City of Ann Arbor*, 196 Mich 75, 84, 163 NW 109 (1917).

¹⁸ *Bernard*, unlike the present case, involved two competing groundwater users, and even though the city used the water off-tract an adequate supply of water had to be maintained for plaintiffs.

5. Nestlé's Position on the Meaning of the Stipulated Order Is Untenable.

Plaintiffs' position is that this provision, by its plain and common sense meaning, together with the trial court findings, the affirmance of those findings and the groundwater claim by the COA, and the remand by the COA for the sole purpose of modifying the injunction, necessarily limits the hearing to additional physical facts and circumstance that supplement the data and physical facts that are relevant to the issues and findings of fact by the this Court in its Opinion and Order/Judgment, Nov. 23 2003. Nestlé's position is that the phrase means it can retry the case, including new expert tests and new opinions aimed at the very facts that were tried and adjudicated by this Court concerning the stage ad flow discharge relationship, pumping, and the effects and impacts on the Dead Stream, Thompson Lake, and their wetlands. Nestlé treats the phrase as opening the door to a trial type hearing on *all* facts and opinions since 2006 relevant to the COA's reasonable use balancing test. Nestlé's line up of half of a dozen experts equals or could even exceed its effort at trial.¹⁹

Plaintiffs submit that Nestlé's position is unreasonable. First, the remand and, hence, Stipulated Order are limited to the "modification of the injunction." The Stipulated Order itself imposes (stage, flow and withdrawal rates) limits that are the "injunction" for the groundwater and MEPA claims. Second, the COA affirmed the groundwater claim based on its extensive application of the reasonable use balancing test to the facts and circumstances set forth in the findings of fact and trial record. Third, Nestlé's position, in effect, argues that the phrase should be interpreted as if the COA reversed the groundwater claim and remanded for a new trial. Fourth, there is absolutely nothing in the Stipulated Order that says the Plaintiffs and Defendants set aside the findings of the trial court or the COA decision. Fifth, there is nothing in the Stipulated Order that the parties intended a re-trial of the "reasonable use balancing test." Sixth, the Plaintiffs won the groundwater claim. Seventh, paragraph V,B of the Stipulation Order authorizing a modification only of "withdrawal rates" and "state and flows." Absent additional express language, it is unreasonable, if not absurd, given the long, intense, exhaustive trial in this case, to infer under these circumstances

¹⁹See Nestlé's expert witness, lay witness, and exhibit list, April 21, 2009.

from the paragraph V,B that the parties, particularly, Plaintiffs, agreed to a retrial or a broad new hearing on the reasonable use balancing test.

6. There Are No Additional Facts and Circumstances that Demonstrate the Water Supply Has Increased or Nestlé Has Been Harmed.

The flows in the Dead Stream during the period 2006 to the current date have remained the same as the flows for the stream for the period when pumping started in May 2002 to 2006. **Ex 1** Hyndman (Mar 2009), Fig. 1, p. 3. **Figure 1** shows the recorded flows from the Nestlé monitoring data and reports. As can be seen the flows in are within the range, if not a little less, shown on the graph from 1/1/06 to 1/1/09. According to **Ex 1**, Fig. 1 flows since 2006 have ranged between 861 and 2000 gpm. Nestlé's Dr. Andrews agrees. "From 2003 through 2008 the seasonal variation in flows in Deadstream (sic) was similar and flows during this period showed neither an upward or downward trend." **Ex 9**, Deposition Ex 1, Andrews (Feb 2009 Report), Fig. 7, p. 6. Although the this Court found Dr. Andrews had overstated flows and understated effects during the trial, even is exaggerated average annual flow for Dead Stream was 1,880 gpm.²⁰ **Ex 3**, p 9, 24. The trial court determined average base flow (the groundwater recharge component of flow) to be around 1200 gpm and average flows closer to 1500 gpm. **Ex 3**, Tr Op, p. 22.

There is no disputed fact that flows in Dead Stream has remained about the same, except for the lower precipitation in the period 2005 through 2007. Because Nestlé was fully aware of these fact and circumstances and its right of "fair participation" at the time it signed the 2006 Stipulated Order, it established its fair participation under groundwater law for the modified injunction at that time. Therefore, since Nestlé cannot demonstrate a change in the facts and circumstances or loss of this "fair participation" after it signed the Stipulated Order in 2006, there is no justification for its claim to increase pumping by almost 25 to 30%.

²⁰**Ex 3**, Tr Op, p. 21. "Such an exaggerated recharge lets his model balance with his too-high estimates of base flow in Dead Stream, overstate the water available for extraction and, thus, allow the model to greatly understate the effects of any given rate of water withdrawal. Remember: the more groundwater available, the smaller the cone/zone."

7. The Additional Facts and Circumstances Demonstrate the Current Order Has Not Maintained an Adequate Supply of Water Since the 2006 Order.

On the other hand, Plaintiffs experienced long periods of inadequate water along the edges of the stream near Doyles and above M-22 and around the rim of Thompson Lake. Exs 10A -10D, Doyle and Sapp photos. Based on a review of the extensive record of photos of these conditions, with dates and photos of the staff gauges at SG Doyles and SG Thompson Lake, it is readily apparent that there is not an adequate supply of water under these low flow and level conditions. Moreover, as determined by Judge Root and the COA, 400 gpm reduces the level of Thompson Lake 4 to 6 inches and the Dead Stream by as much as 2 inches.²¹ Further both Judge Root and the COA found that pumping at lower rates would result in a reduction of flow that can be calculated on a straight line basis.²² Accordingly, pumping at 200 gpm results in a drop in level of about 1 inch in Dead Stream and 3 inches in Thompson Lake, and 100 gpm about ½ inch and 1 ½ inches, respectively. During low flow conditions, a fraction to 1 inch of water is very significant and can make the difference between exposed bottomlands, improved aesthetics, navigation, kayaking or boating, and better fishing at those locations. Ex 3, Tr Op, p. 32-33.

In addition, both Dr. Hyndman and Dr. Andrews both testified at their depositions that there is a “lag time” between the rate of pumping and the alleviation of effects during the Summer in Thompson Lake and the Dead Stream. Appx Ex 1, Table 2, p 5, Appx Ex 11. The current Stipulated Order (Section I, A.) does not call for a reduction for summer or low flow conditions until July 1, 2009. The discovery of this lag time problem means that higher rates of pumping currently allowed by the order during the previous 60 days cannot be fully alleviated until the end of the Summer. In order to comply with the intent of the order, the summer pumping schedule and parameters must start in May of each year. This change should be made immediately by this Court as a ruling on partial summary disposition or modification of the injunction, independent of the modification of the stage and flow and pumping rates.

²¹See Section A.1, this Brief, *supra*.

²²See Section A.1, this Brief, *supra*.

When Plaintiffs signed the Stipulated Order in 2006, they did not agree to a lack of adequate water such as occurred in 2005 through 2007 because of lower precipitation. When these conditions occur, under the COA standard or criteria, “fair participation” must decrease, i.e., lower pumping, to maintain adequate supply of water. This has not happened. In fact, when Plaintiffs’ attorney requested Nestlé to reduce pumping when this occurred, Nestlé refused and hid behind its compliance with the current parameters in the Stipulated Order. The Stipulated Order contemplated further modification of the injunction parameters and pumping limits under these undisputed additional facts and circumstances.

Therefore, this Court should grant summary disposition to Plaintiffs based on the undisputed fact that the current order and rate of pumping has not maintained and “adequate supply of water” as required by the COA remand to modify the injunction. The Plaintiffs’ MCWC and Dr. Hyndman’s proposed parameters and pumping limits (Ex 2 Appxs. II and III) would minimize the harm to their riparian rights and prevent or minimize the effect, harm, or impairment from the additional loss of water during these low or inadequate water conditions. Moreover, these proposals would only lessen Nestlé’s current pumping rate by about 2 to 3%. Ex 1, Table 1, p. 5.

C. Application of the COA Remand Parameters or Principles of “Adequate Water” and “Fair Participation” Requires Summary Disposition for Plaintiffs Denying Nestlé’s Request to Increase Pumping by 30%.

1. There Is No Genuine Dispute to the Material Facts that the Average Flows and Levels Have Not Increased Since the 2006 Stipulated Order on Remand or the 2003 Trial Opinion and Judgement.

The facts and circumstances set forth under Section B. 6 & 7 are restated and incorporated by reference.

2. Nestlé Proposes to Increase Its Pumping Rate by 30% or Approximately 50 gpm.

Nestlé’s proposed modifications to the parameters of Section I, A and B of the Stipulated Order would generally increase pumping under current flow and stage parameters by 50 gpm. Ex 2, Appx. I. This would amount to a 25 to 30% increase in pumping over rates allowed under the order. Ex 1, Table 1, p 5.

3. Nestlé Can Not Demonstrate that It Is Losing Any “Fair Participation” in the Common Water Supply to Justify Any Modification of the Injunction to Increase Pumping.

The facts and circumstances set forth under Section B. 6 & 7 are restated and incorporated by reference. In fact, Nestlé’s pumping is further reducing water flows and levels in the Dead Stream when there has been inadequate water, such as 2005 and 2007. Under these additional facts and circumstances since the 2006 order, Nestlé cannot show a basis for an increase in “fair participation” or any modification of the injunction.

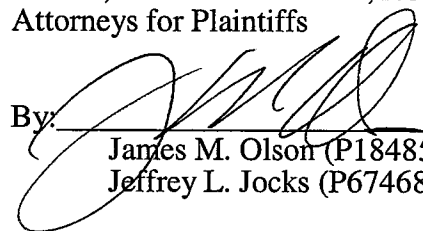
Therefore Nestlé’s request to increase its pumping rate by 50 gpm across the board should be denied because it can not establish a basis for increased “fair participation.”

Conclusion and Relief Requested

Plaintiffs request this Court to grant summary disposition under **Section C** of this Brief for Plaintiffs denying Nestlé’s request to modify the injunction. Further, Plaintiffs request this Court to grant summary disposition under **Section B** of this Brief for a modification of injunction in order to maintain an adequate supply of water during low flow conditions, such as Summers 2005 and 2007: (1) change the parameters so that the lower pumping rates go into effect earlier in May (“lag time”); and (2) the current low flow and stage pumping rates are reduced to minimize the effects and harm from such inadequate water conditions. Alternatively, Plaintiffs request the Court to grant partial summary disposition on undisputed modification of the injunction in order to shift the low flow season parameters and pumping rates to May, and set a hearing on the limited issue of establishing the and parameters for flow, stage, and pumping rates during inadequate water conditions.

Date: May 1, 2009

OLSON, BZDOK & HOWARD, P.C.
Attorneys for Plaintiffs

By: 
James M. Olson (P18485)
Jeffrey L. Jocks (P67468)