

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<sup>o</sup>: 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

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**PLAINTIFFS' MOTION AND BRIEF TO DECLARE AND PROHIBIT  
NESTLÉ'S APPLICATION OF THE COURT OF APPEALS' "ECONOMIC  
BENEFITS TO SOCIETY AND THE LOCAL COMMUNITY" AS AN  
UNCONSTITUTIONAL DEPRIVATION OF PRIVATE PROPERTY IN  
VIOLATION OF DUE PROCESS AND THE TAKINGS OF PRIVATE  
PROPERTY FOR A PUBLIC PURPOSE AND WITHOUT JUST  
COMPENSATION**

May 1, 2009

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Plaintiffs, through their undersigned attorneys, request this Court to declare and prohibit the application of the “Economic Benefits to Society and Community” element of the “reasonable use balancing test,” *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005), to the facts of this proceeding on the following grounds:

## I. Motion

### A. Facts and Proceedings

1. This Court has declaratory judgment, summary disposition, and motion authority to declare and adjudge that the “economics benefits and community benefits” element or factor of the “reasonable use balancing test” is unconstitutional on its face and as applied to offset or legalize the admitted substantial effects and harm riparian property rights, such as Plaintiffs, for a private purpose or use and/or to confer economic and societal benefits on the community incident to a private purpose as a basis to offset or excuse interference and harm to riparian rights and interests. MCR 2.116 and MCR 2.119.

2. Nestlé has claimed in its arguments, briefs, and the proposed testimony of Patrick L. Anderson that the substantial effects, harm, and interference to Plaintiffs’ private riparian property rights, interests, use and enjoyment are off-set or justified because of the economic and societal benefits to the community and state incident to its extraction, diversion, bottling and marketing water from its Stanwood Plant for private profit and gain.

3. In addition, Nestlé offers Patrick L. Anderson<sup>1</sup> as a witness to testify as to the economic and social benefits to the community and state incident to Nestlé’s Stanwood bottled water operation based on his report, “Net Economic Benefits of Nestlé’s Water Use of Mecosta County Property,” dated Jan. 29, 2009 (Andrews Deposition Ex 6)(a copy of his report is, attached as Exhibit

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<sup>1</sup>Plaintiffs do not waive any argument, objection, or other motion or claim against the foundation, competency, reliability, validity, or relevancy of Mr. Anderson’s Report or testimony, or any other such evidence in this matter.

as Exhibit A to **Plaintiffs' Motion in Limine and Motion to Strike the Testimony of Patrick L. Anderson**, May 1, 2009).

4. Through Mr. Anderson's report, Nestlé' seeks to offset the individual harm it is causing to Plaintiffs so it can increase pumping at rates 30 percent more than current rates and continue to pump at current rates under the Stipulated Order on Remand, January 25, 2006, so that the harm attributable to such pumping can be offset or justified by the purported economic and societal or community benefits. In his Summary, Mr. Anderson would offer the following assertions:

Question 1: What is the net economic benefit of the plant on the surrounding community?

Answer: We define "net economic benefit" as the change in employment, earnings, and property tax base due to the operation of the plant. This encapsulates costs, including opportunity cost, as well as benefits.

The Nestlé plant supports 559 jobs and \$48.4 million in earnings that would not exist in Mecosta County if not for the plant.

The Nestlé plant supports over \$48 million in taxable property value (almost \$100 million in true cash value) in Mecosta Township.

If not for the plant, property tax revenue would be \$242,000 lower in Mecosta County and \$35,000 lower in Mecosta Township.

Worn for the plant, property tax revenue would be lower by \$321,000 to local school millages, by over \$162,000 for the intermediate school district, and by almost 551,000 for the State Education Tax.

Question 2. What is the net fiscal impact of the plant's operations on the county and township?

Answer: We define "net fiscal impact" as the difference between the change in tax revenue and the change in government expenditures due to the operation of the plant.

The Nestlé plant's net fiscal impact on Mecosta Township, including its impact on local property tax revenue and local spending, is a positive \$33,717 annually.

The Nestlé plant's net fiscal impact on Mecosta County, including its impact on both local property tax revenue and local spending, is a positive \$217,331 annually.

5. Nestlé asks this Court to apply the taxes it pays and the jobs it provides incidental to its solely private purpose and substantial economic profits as economic and societal benefits to the community to offset the harms and interference with Plaintiffs' specific and individual private

property rights and interests. The harms to these riparian rights and interests are recognized by this Court's findings of fact and conclusions in its Opinion and Judgment/Order, November 25, 2003. These findings and conclusions were affirmed by the Court of Appeals in *Mich Citizens for Water Conservation v Nestlé Waters North America Inc, supra*.

6. This Court determined that there was substantial harm to Plaintiffs' riparian rights, interests, use and enjoyment in its Opinion and Judgment/Order November 25, 2003; as a result of such decision, and because Nestlé had feasible and prudent alternatives to operate its plant independent of the Sanctuary water source, this Court issued a permanent injunction requiring Nestlé to cease pumping from the Sanctuary water source. Tr Ct Op, at pp 50, 67. Since the trial, Nestlé' has on line or permitted a capacity of 900 gallons per minute at or near the City of Evert. See **Plaintiffs' Motion and Brief for Summary Disposition**, May 1, 2009, p. 12, n. 12.

7. As noted above, the Court of Appeals affirmed such harm to Plaintiffs' individual private riparian rights, 269 Mich App at 74-82; however, the Court of Appeals also ruled that the individual harm to Plaintiffs' private riparian property rights and interests as described above could be legally "offset by the economic benefits to society and the local community." 269 Mich App at 76-77.

8. Because of the Court of Appeals' application of the "economic benefits to society and local community" factor to offset individual harm to private property rights, Nestlé claims it can increase its total pumping rates by 30% across the board, despite the substantial harm caused by pumping at such high rates based on this Court's findings of fact affirmed by the Court of Appeals in *MCWC v Nestlé*. In effect Nestlé's proposed argument and the "economic and societal community benefit" element of the "reasonable use balancing test" isolate the substantial harm and interference with Plaintiffs' riparian property rights and interest and subordinate and justify such private harm and damage to the economic and social benefits to the community incident to Nestlé's private commercial water bottling and marketing operation.

9. The US Constitution, 5<sup>th</sup> and 14<sup>th</sup> Amends. (and the Mich. Const. 1963, Art. 1, Sec. 17) state:

[N]or shall any person be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.  
(5<sup>th</sup> Amend.)

[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Const 1963, art 10, § 2 states:

Sec. 2 Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law.

10. The 5<sup>th</sup> and 14<sup>th</sup> Amendments are applicable to the states. The substantial harm or interference to private riparian rights, interests, use, enjoyment or property value by the extraction and diversion of water for private purpose, private gain and private profit through the judicial action of the State constitutes a deprivation and denial of private property in violation of the due process and takings clauses of the U.S. and Michigan Constitutions. *First English Evangelical Church v Los Angeles*, 482 US 304; 107 S Ct 2378 (1987); *Nollan v California Coastal Comm'n*, 483 US 825,(1987).

11. Nestlé's request any balancing or offsetting of harms, interference, or damages to Plaintiffs private property rights and interests as described above constitutes a denial or deprivation of due process and takings of such private property for a private purpose, private use.

12. In the alternative, the application by this Court at the request of Nestlé of any balancing or offsetting of harms, interference, or damages to Plaintiffs private property rights and interests as described above constitutes a denial or deprivation of due process and unconstitutional takings of private property for a private purpose or incidental public purpose or public use.

Wherefore, Plaintiffs request this Court to declare and prohibit the application of the reasonable use balancing test element that legalizes or authorizes economic or social benefits for Nestlé's private purpose, profit, and gain can be used to harm and interfere with the rights of the individual Plaintiffs..

## II. Argument/Brief

Nestlé, on the face of their arguments and the Anderson report, ask this Court to apply the Court of Appeals “reasonable use balancing test” in a manner that would allow the stated economic and societal benefits to the community or public or incidental to its private purpose, gain and profit in a manner that offsets or “balances” away the individual harm, interference, loss or damage to Plaintiff’s private property rights and interests.

The right of exclusion or the right of complete possession and enjoyment is one of the essential elements of property in land. *Vanderklip v Grand Rapids*, 73 Mich 522, 535; 41 NW 677 (1888). Michigan recognizes a cause of action for inverse condemnation or “de facto” takings where an action on the part of the state or government interferes with or results in an encroachment on private property. *Pearsall v Eaton County Board*, 74 Mich 558, 561 (1889); *Hart v Detroit*, 416 Mich 488; 331 NW2d 438 (1982). A partial takings, interference, or diminution of property use or value can constitute a takings. *Pearsall, supra*; *Hart, supra*.

Moreover, a takings or exercise of the power of eminent domain cannot be effected for an incidental public use or purpose. The purpose must be directly connected and necessary before the takings is lawful. *Nollan, supra*; *Peterman, supra*. Here the nexus is to a private purpose and the benefits are only incidental, so Plaintiffs bear the burden as individual property owners for the benefit of private gain and purpose. Such a scheme to subordinate or justify the interference with private riparian property interests for the benefit of private gain and purpose is unconstitutional. *County of Wayne v Hathcock*, 471 Mich 4445, 684 MW2d 765 (2004).

Land bordering on a stream is riparian and lake littoral, although they are lumped together as riparian. *Thies v Howland*, 424 Mich 282, 287-288 n2; 380 NW2 463 (1985). Riparian rights involve property rights that, if interfered with by the government, are deprived of in violation of the constitutional. *Peterman v Dep’t of Natural Resources*, 446 Mich 177, 195, 521 NW2d 499 (19494); *Hilt v Weber*, 252 Mich 198, 226, 233 NW 159 1930); *Bott v Natural Resources Comm’n*, 415 Mich 45, 80; 327 NW2d 838 (1972). “There is no duty, power, or function of the state, whatever its

claimed or real benefits, which will justify it in taking private property.” *Hilt v Weber*, 252 Mich at 223.

In *Mumaugh v McCarley*, 219 Mich App 641; 558 NW2d 433 (1996), a trial court, in drawing the lines for a riparian plat, cut off Plaintiffs’ riparian property rights. The Court of Appeals held that the judicial action of the trial court in effect constituted an unconstitutional takings of private riparian property rights in violation of the federal and Michigan constitutions. 219 Mich App at 647. Riparian rights include the “right to enjoyment of the flow of the stream with no burden or hindrance by artificial means.” *Koopman v Blodgett*, 70 Mich 610, 616, 619; 38 NW 649 (1888)

In *Peterman, supra*, the physical interference and harm to Plaintiffs’ riparian frontage caused by the erosion from the state’s riparian and public trust construction of a boat ramp facility constituted a takings of riparian property rights. 446 Mich at 200. “The DNR set into motion destructive forces that naturally and directly caused erosion and eventual destruction or loss of part of Plaintiffs riparian waterfront property.” *Id.* Specifically, an interference with private water rights or use by government for an alleged public purpose can constitute an unconstitutional deprivation or takings. *Stock v Jefferson Twp*, 114 Mich 357, 362; 72 NW 132 (1897).

The application of law and decision of a court can, if it deprives a property owner of a property right, for a private purpose or without just compensation is a takings or violates the power of eminent domain. *Mumaugh, supra; Hilt v Weber, supra* (“There is no duty, power, or function, whatever its claimed or real benefits...”). The impact or interference on property holders is the same whether it is the legislature, an agency, or the courts. Generally, judicial action that results in a violation of the bill of rights protected by the 5<sup>th</sup> and 14<sup>th</sup> Amendments is unconstitutional. *Shelley v Kraemer*, 334 US 1, 68 S Ct 836 (1948); *Bridges v California*, 314 US 252, 62 S Ct 190 (1941).

In this case, the findings of fact, affirmed by the Court of Appeals, *MCWC v Nestlé, supra*, clearly establish physical interference and harm to Plaintiffs riparian property in the bed of their lake or stream, interference with their use and enjoyment, flow, navigation, and physical diminishment of the stream or lake. This occurs at pumping levels during trial (170 gpm) and would occur at the initially permitted 400 gpm. Nestlé’s proposed application and argument of the Court of Appeals’

“economic or societal benefits to the local community” to justify this harm or interference constitutes’ a deprivation of Plaintiffs’ riparian property rights, interests, use and enjoyment.

The benefit to the community, if any, is indirect and incidental to the jobs and taxes that any landowner and business is obligated to pay as a taxpayer. There is nothing unique, direct, or special about the benefits, and the primary benefit is private and economic gain. Therefore, the application by this Court of this test or factor for a primarily private purpose violates the power of eminent domain and would further deprive Plaintiffs’ of private property; it would also effect and constitute a takings. If the Supreme Court prohibits a municipality from diverting water that deprives or denies a private riparian water use, which is for a public purpose, based on a takings, *Stock, supra*, then clearly this Court cannot not allow Nestlé, which is engaged in a private purpose, to do what a city can not do.

### III. Conclusion and Relief

Based on the foregoing facts and law, Plaintiffs submitted that this Court should declare and prohibit Nestlé’s application or argument of the “economic or social benefit to the community” element of the “reasonable use balancing test” because it is an unconstitutional denial of due process and takings of property and/or is for an unconstitutional private purpose. Plaintiffs have no other remedy but for this Court to prohibit Nestlé from arguing this element of the “reasonable use balancing test,” and to refuse to apply this element or test and to exclude any evidence or testimony, including Patrick L. Anderson’s, that seeks to do so.

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Date: May 1, 2009

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