

STATE OF MICHIGAN

COURT OF APPEALS

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,  
Appellees/Cross-Appellants,

COA Docket N<sup>o</sup>: 254202

v

NESTLÉ WATERS NORTH AMERICA INC., a  
Delaware corporation,  
Appellant/Cross-Appellee,

Mecosta County Circuit Court  
Case N<sup>o</sup>: 01-14563-CE  
Hon. Lawrence C. Root, Circuit Judge

and DONALD PATRICK BOLLMAN AND NANCY  
GALE BOLLMAN, husband and wife, a/k/a Pat  
Bollman Enterprises,  
Defendants-Appellees.

---

James M. Olson (P18485)  
Scott W. Howard (P52028)  
OLSON, BZDOK & HOWARD, P.C.  
Attorneys for Appellees/Cross-Appellants  
420 East Front Street  
Traverse City, MI 49686  
Telephone: (231) 946-0044

John M. DeVries (P12732)  
Fredric N. Goldberg (P29057)  
William A. Horn (P33855)  
MIKA, MEYERS, BECKETT & JONES, PLC  
Attorneys for Appellant/Cross-Appellee Nestlé  
900 Monroe Ave., N.W.  
Grand Rapids, MI 49503-1423  
Telephone: (616) 632-8000

James R. Samuels (P32445)  
Samuels Law Office  
Co-Counsel for Appellees/Cross-Appellants  
305 S. Warren  
Big Rapids, MI 49307  
Telephone: (231) 796-8858

David L. Porteous (P28208)  
PORTEOUS & WHITE, P.C.  
Co-Counsel for Appellant/Cross-Appellee Nestlé  
P. O. Box 206  
Reed City, MI 49677-0206  
Telephone: (231) 832-3231

Chris A. Shafer (P48068)  
Co-Counsel for Appellees/Cross-Appellants  
P. O. Box 13038  
Lansing, MI 48901  
Telephone: (517) 371-5140

William M. McClintic (P17310)  
WILLIAM M. McCLINTIC, P.C.  
Attorney for Defendants-Appellees Bollmans  
1234 E. Broomfield Rd #4E  
Mt. Pleasant, MI 48858-9502  
Telephone: (989) 772-4206

---

**CROSS-APPELLANTS' BRIEF ON APPEAL ON THE PUBLIC TRUST DOCTRINE**

**ORAL ARGUMENT REQUESTED**

**PROOF OF SERVICE**

August 23, 2004

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES . . . . . iii

STATEMENT OF JURISDICTION . . . . . i

STATEMENT OF QUESTIONS INVOLVED . . . . . ii

STATEMENT OF FACTS AND PROCEEDINGS . . . . . 1

    Background Facts and Proceedings . . . . . 1

    The Resources at Issue . . . . . 2

    Nestlé’s “Spring Water “ Marketing Scheme . . . . . 4

    Impact of Water Removal and Diversion Operation on the Resources at Issue . . . . . 6

    The Claims in Plaintiffs’ Lawsuit . . . . . 8

    Summary Disposition Motions and Proceedings . . . . . 9

    The Trial . . . . . 11

    Standard of Review . . . . . 12

ARGUMENT . . . . . 13

    A. The Trial Court Wrongfully Dismissed Plaintiffs’ Public Trust Claims as to the Waters of the Dead Stream Because it Applied the Rigid Log-Floating Test for Navigability in Dead-End Private Lake Cases in Place of the Flexible Principle of Navigability Applicable to Michigan’s Streams . . . . . 13

        1. A basic principle of navigability for streams and public trust law is its flexible and dynamic nature based on public need . . . . . 15

        2. *Bott* does not prohibit a finding that the Dead Stream, with depths from one to three or four feet, is navigable and subject to the public trust because the Dead Stream is not a private lake or connecting stream case, particularly where it has been lawfully accessed and used by the public for canoeing, row boating, and fishing from the Tri-Lakes up to the State Highway M-20 Bridge . . . . . 18

        3. Public uses of streams within the scope of the navigability test included boats, navigation, and fishing . . . . . 20

    B. When *Bott* and Private Dead-End Lake Cases Are Juxtaposed to the Background Principles of Michigan Public Trust Law for Streams, the Dead Stream Is Navigable and Subject to the Public Trust . . . . . 23

    C. The Trial Court Should Not Have Dismissed All of Plaintiffs’ Public Trust Claims Under MCR 2.116(C)(8), by Ruling That the Public Trust in the Waters of the Dead Stream as a Matter of Law Cannot Be Established on Any Other Grounds, Especially Where There Was Undisputed Evidence That the Entire Stretch of the Dead Stream from the Tri-Lakes to the M-20 Bridge Has Been Accessed and Used for Boating, Canoeing, Kayaking, Fishing, and Duck Hunting . . . . . 26

    D. Independent of the Streambed, the Dead Stream Waters, Including Its Directly Connected Tributary Waters, Are Subject to the Public Trust. . . . . 32

|    |   |    |
|----|---|----|
| 1. | The waters of the Great Lakes, our inland lakes and streams, and the springs and tributary spring aquifers that feed the lakes and streams, are publicly owned. . . . . | 35 |
| a. | Michigan Common Law . . . . .   | 36 |
| b. | The Michigan Constitution 1963, art. 4, § 52 . . . . .  | 36 |
| c. | Michigan statutes . . . . .   | 38 |
| 2. | All public trust waters are owned by the State . . . . .  | 41 |
| 3. | Water that is tributary to public trust waters is subject to the public trust . . . . .   | 42 |
| E. | Nestlé’s Diversion and Sale or Diminishment and Alienation of Public Trust Waters Violates the Public Trust Doctrine . . . . .  | 45 |
|    | CONCLUSION AND RELIEF REQUESTED . . . . .   | 48 |
|    | PROOF OF SERVICE . . . . .  | 49 |

## TABLE OF AUTHORITIES

### CASES:

|  |  |
|--|--|
| <i>Anderson Development Co. v Travelers Indemnity Co.</i> , 49 F3d 1128, 1134 (CA 6, 1995)<br>.....        | 37   |
| <i>Arco Industries Corp. v American Motorists Ins. Co.</i> , 232 Mich App 146, 594 NW2d 61 (1998)<br>..... | 37   |
| <i>Arnold v Mundy</i> , 6 NJL 1, 71 (1821) .....   | 35   |
| <i>Atty General v Taggart</i> , 306 Mich 432; 11 NW2d 193, 196 (1943) . . . . .                            | 14, 17, 18, 20-22, 24,<br>26, 30, 31, 34, 35, 42 |
| <i>Bott v Natural Resources Comm'n</i> , 415 Mich 45, 327 NW2d 838 (1982) . . . . .                        | 9, 13-15, 18-27                                  |
| <i>Brenna v Edward D. Jones &amp; Co.</i> , 245 Mich App 156, 626 NW2d 917 (2001) .....                    | 13   |
| <i>Collens v New Canaan Water Co.</i> , 234 A2d 825 (Conn, 1967).....                                      | 42   |
| <i>Collins v Gerhardt</i> , 237 Mich 38; 211 NW 115 (1926) . . . . .                                       | 14, 16, 18, 21-24, 30, 34-36, 41, 42,<br>45      |
| <i>Dumont v Kellogg</i> , 29 Mich 420 (1874) .....   | 42   |
| <i>Giddings v Rogalewski</i> , 192 Mich 319, 158 NW 951 (1916) .....                                       | 19   |
| <i>Illinois Central Railroad v Illinois</i> , 146 US 387, 13 S. Ct. 110, 36 L Ed 1018 (1892) . . . . .     | 32, 46   |
| <i>Jackson Co. Hog Producers v Consumers Power Co.</i> , 324 Mich App 72, 592 NW2d 112 (1999)<br>.....     | 13   |
| <i>Just v Marienttte County</i> , 201 NW2d 761 (Wisc. 1972) .....  | 45   |
| <i>Kennedy v Niles Water Supply Co.</i> , 173 Mich 474, 139 NW 241 (1913) .....                            | 42   |
| <i>Kerley v Wolfe</i> , 340 Mich 350, 84 NW2d 748 (1957) .....   | 27   |
| <i>Lamprey v Metcalfe</i> , 53 NW 1139 (Minn 1893) .....   | 22   |
| <i>Mallard v Hoffinger Industries, Inc.</i> , 222 Mich App 137, 564 NW2d 74 (1997) .....                   | 12   |
| <i>McCardel v Smolen</i> , 404 Mich 89, 273 NW2d 3, 6 (1978) .....   | 27   |
| <i>Moore v Sanborne</i> , 2 Mich 519 (1853) .....  | 14-16, 18, 20-23, 34, 35                         |
| <i>Muench v Public Service Comm</i> , 53 NW2d 514 (Wis. 1952) .....  | 22   |
| <i>National Audubon Society v Superior Court of Alpine County</i> , 658 P2d 709 (Cal, 1983) . . . . .      | 44   |

|   |        |
|---|--------|
| <i>Ne-Bo-Shone Ass'n Inc. v Hogarth</i> , 81 F2d 70 (CA 6, 1936) . . . . .                  | 21     |
| <i>Oklahoma Water Resources Board v City of Lawton</i> , 580 P2d 510 (Okla, 1977) . . . . . | 44     |
| <i>Parks v Cooper</i> , 676 NW2d 823 (SD, 2004) . . . . .                                   | 40     |
| <i>People v Zimberg</i> , 321 Mich 655, 33 NW2d 104 (1948) . . . . .                        | 36     |
| <i>Pigorsh v Fawner</i> , 386 Mich 508, 194 NW2d 343 (1972), . . . . .                      | 19     |
| <i>Putnam v Kinney</i> , 248 Mich 410, 227 NW 741 (1929) . . . . .                          | 19     |
| <i>Ranson v City of Boulder</i> , 424 P2d 122 (Colo, 1967) . . . . .                        | 44     |
| <i>Ray v Mason Co Drain Comm'r</i> , 393 Mich 294, 224 NW2d 883 (1975) . . . . .            | 38     |
| <i>Schenk v City of Ann Arbor</i> , 196 Mich 75, 163 NW 109 (1917) . . . . .                | 42     |
| <i>Shively v Bowlby</i> , 152 US 1, 11; 14 S Ct 548; 38 L Ed 331 (1894) . . . . .           | 35     |
| <i>Smith v City of Brooklyn</i> , 54 NE 787 (NY, 1899) . . . . .                            | 42, 44 |
| <i>Smith v Globe Life Ins. Co.</i> , 460 Mich 446; 597 NW2d 28 (1999). . . . .              | 13     |
| <i>State Hwy Comm v Vanderkloot</i> , 392 Mich 159; 220 NW2d 416 (1974) . . . . .           | 38     |
| <i>U.S. Aviex v Travelers Ins. Co.</i> , 125 Mich App 579; 336 NW2d 838 (1983); . . . . .   | 37     |
| <i>Upjohn v New Hampshire Ins. Co.</i> , 178 Mich App 706; 444 NW2d 813 (1989) . . . . .    | 37     |
| <i>Winans v Willets</i> , 197 Mich 512, 163 NW 993 (1917) . . . . .                         | 19     |

**CONSTITUTIONS, STATUTES AND RULES:**

|                         |        |
|-------------------------|--------|
| MCL 324.1701 . . . . .  | 2      |
| MCL 324.1703 . . . . .  | 38     |
| MCL 324.30101 . . . . . | 38     |
| MCL 324.30101 . . . . . | 6      |
| MCL 324.30102 . . . . . | 38     |
| MCL 324.30106 . . . . . | 38     |
| MCL 324.30301 . . . . . | 6      |
| MCL 324.32702 . . . . . | 38, 39 |

MCL 325.1081 . . . . . 6

MCR 2.116(C)(10) . . . . . 9, 12, 30

MCR 2.116(C)(5) . . . . . 13

MCR 2.116(C)(8) . . . . . 10, 13, 29, 31

MCR 2.116(I)(2) . . . . . 31

MCR 2.116(I)(2) . . . . . 9, 10

Mich Const. 1963, art 4, § 52 . . . . . 36, 38

**MISCELLANEOUS:**

Hawaii Constitution art XI, sec 1 . . . . . 37

Haynes and Smary, eds., *The Public Trust Doctrine*, Chpt 13, Section 13.8, *Michigan Environmental Law Deskbook* (ICLE) . . . . . 45

Olson, *Public Trust Doctrine: Procedural and Substantive Limitations on the Government Reallocation of Natural Resources in Michigan*, 1975 Det CL Rev 161 (1975) . . . . . 46

*Putting the Public Trust Doctrine to Work* (US Dept. Commerce, National Public Trust Study, 1990) . . . . . 35

Sax, *The Public Trust Doctrine in Natural Resource L* . . . . . 45

Shafer, *Public Rights in Michigan Streams: Toward A Modern Definition of Navigability*, 45 Wayne L Rev 9, 14 (1999) . . . . . 21-24

*Symposium Issue: Eastern Water Law: Trends in State Legislation*, 9 Va En L J 287-321 (1990) . . . . . 40

Traver, Robert, Trout Madness (1989) . . . . . 16

Wilkinson, *Headwaters of the Public Trust Doctrine: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 Env't'l L Rev 425 (1989) . . . . . 41

## **STATEMENT OF JURISDICTION**

Plaintiffs/Cross-Appellants have taken a cross-appeal by right pursuant to MCR 7.203(A) of the Trial Court's denial of their motion for summary disposition and granting of summary disposition and judgment in favor of Nestlé and Plaintiffs' public trust claims set forth in Count IV of its Second Amended Complaint. The orders and judgments subject to this cross-appeal are the Order denying summary disposition for Plaintiffs and granting summary disposition to Defendant Nestlé, October 11, 2002, and the Order denying reconsideration, November 11, 2002.

## STATEMENT OF QUESTIONS INVOLVED

1. Did the Trial Court wrongfully dismiss Plaintiffs' public trust claims as to the waters of the Dead Stream by applying the rigid log-floating test for navigability in dead-end privately owned lake cases rather than the more flexible principle for valuable floatage applicable to streams? <sup>1</sup>

The Trial Court answered: No

Cross-Appellee's answer is: No

Cross-Appellant answered: Yes

2. Does the Dead Stream have a potential capacity for valuable floatage under the more flexible navigability test for streams and, therefore, subject to the public trust doctrine?

The Trial Court answered: No

Cross-Appellee's answer is: No

Cross-Appellant's answer is: Yes

3. Did the Trial Court wrongfully dismiss Plaintiffs' public trust claims under MCR 2.116(C)(8), by ruling that the public trust in the waters of the Dead Stream as a matter of law can never be established on any other grounds, especially where the evidence established that the entire stretch of the Dead Stream from the Tri-Lakes up to State Highway M-20 has been accessed and regularly used by the public for boating, canoeing, kayaking, fishing, and duck hunting?<sup>2</sup>

The Trial Court answered: No

Cross-Appellee's answer is: No

Cross-Appellant's answer is: Yes

---

<sup>1</sup> **Tab 1**, Cross-Appellants Appendix, Bench Opinion, Hearing on Summary Disposition, Tr. 8-9, Oct. 4, 2002; Hearing on Motion for Reconsideration, Bench Opinion, Tr. 13-14, 24, Oct. 29, 2002.

<sup>2</sup> **Tab 4**, Opinion Tr. 15, 17-18, 21-22, Bench Opinion, Oct. 29, 2002.c

4. Did the Trial Court wrongfully rule that the public waters of the Dead Stream, independent of a finding of no public trust in the streambed, are not subject to or protected by the public trust doctrine? <sup>3</sup>

The Trial Court answered: No

The Cross-Appellee's answer is: No

The Cross-Appellant's answer is: Yes

5. Does Nestlé's removal, diversion, and diminishment of the public trust waters from the Dead Stream for private sale and purpose violate the public trust doctrine?

The Trial Court answered: The Trial Court did not answer this question.

The Cross-Appellee's answer is: The Cross-Appellee has not answered this question, but would say "No."

The Cross-Appellants' answer is: Plaintiffs submit the answer is "Yes."

---

<sup>3</sup> *Id.*, Bench Opinion, Oct. 29, 2003 at 15-16.

## STATEMENT OF FACTS AND PROCEEDINGS

### Background Facts and Proceedings<sup>4</sup>

Plaintiff-Cross Appellant Michigan Citizens for Water Conservation is a Michigan nonprofit corporation made up of riparian owners (like Plaintiffs Doyles and Sapps) and members of the public who use and enjoy a fairly wide meandering stream that flows into the Tri-Lakes in Mecosta County, Michigan. Most disputes over the navigability and public trust in our lakes and streams pit private riparian owners against members of the public for trespassing. The instant appeal, however, is unique because the riparian owners and members of the public who use and enjoy the lakes and stream are on the same side against a non-riparian, in this case an international water marketing company, who has diminished and impaired the flow and character of a stream in which it has no recognized legal right.

After a long, intensive and complex trial, Plaintiffs prevailed against Defendant and Cross-Appellee Nestlé Waters North America, Inc.,<sup>5</sup> for violating the groundwater and streams law and

---

<sup>4</sup> It should be noted at the outset that the factual record for purposes of this cross-appeal consists of the record related to the summary disposition proceeding, which consists of the following: The Trial Court relied on revised statements of facts filed by the parties as agreed and set forth in the **Order Allowing the Filing of Statements of Fact with Added References to Exhibits Already on File with the Court Regarding Plaintiffs Pending Motion for Summary Disposition**, dated August 15, 2002, and attached as Exhibit 1 to the Order, Plaintiffs' Statement of Facts, and as Exhibit 2 to the Order, Great Spring Waters of America, Inc.'s Statement of Facts (now known as Nestlé). These statements of fact and the cross-motions for summary disposition were supported by affidavits and other documents. **Plaintiffs' Exhibits 1- 23** were filed in a bound blue-covered volume entitled **Exhibits to Plaintiffs Statement of Facts for Preliminary Injunction and Summary Disposition** and separately as **Exhibits 24-28**. **Defendants' Exhibits A-K** were filed in a volume entitled **Appendix to Defendant Great Spring Waters of America, Inc.'s Brief in Opposition to Plaintiffs' Motion for Summary Disposition**. In addition, while the record of this cross-appeal is limited to summary disposition proceedings, this Court may review, as necessary, for comparison purposes the actual findings by the Trial Court in its Final Opinion, Nov. 25, 2003 pursuant to MCR 7.216(A)(4).

Additionally, it should be noted that excerpts from relevant pleadings, opinions, and orders, are attached to this Brief in **Tabs 1-6**. Selected excerpts from **Plaintiffs Exs 1-28** and **Defendant's Exs A - K** are attached to this Brief in **Tabs 7-23** for the Court's convenience and ease of reference while reading this brief.

<sup>5</sup> Formerly Great Spring Waters of America, Inc., a subsidiary of The Perrier Group  
(continued...)

the Michigan Environmental Protection Act (now Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* (“MEPA”), because Nestlé’s pumping and diversion out of the watershed diminishes the flow and level of water in a stream and two lakes.<sup>6</sup> However, in the course of summary disposition proceedings before trial, the Trial Court dismissed Plaintiffs’ claims that Nestlé’s diversion and diminishment of the flow and level of the stream and two lakes violated the public trust doctrine. When Nestlé appealed the Trial Opinion after trial, Plaintiffs filed the instant cross appeal on what Plaintiffs submit was an improper dismissal of the public trust claims, largely because the unique circumstances of this dispute require a different analysis of public trust principles than applied by the Trial Court at the time of dismissal.

### **The Resources at Issue**

Two large deep blue springs form the headwaters of the Dead Stream, part of the West Branch of the Little Muskegon, which flows approximately one mile through an ancient biologically rich marsh to the Tri-Lakes: Blue Lake, Round Lake, and Lake Mecosta, a popular resort and residential area.<sup>7</sup> Today, these two large springs flow into the system under and along the north side of Osprey Lake, a 60-acre lake on the Sanctuary created by an expanded

---

<sup>5</sup> (...continued)  
of North America, Inc. Since mid-2002, Great Spring Waters is known as Nestlé Waters North America, Inc., a subsidiary of Perrier Vittel, S.A. and Nestlé, the Swiss international food giant. For consistency, we will refer to Defendant/Cross-Appellee throughout this Brief as “Nestlé.”

<sup>6</sup> *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, Opinion and Judgment/Order, Nov. 25, 2003, Cir. Ct. No. 01-14563-CE (Lawrence Root, Cir. Ct. Judge) (referred to in this Brief as “Final Opinion”), pp. 30-33, 48-58.

<sup>7</sup> To orient oneself with the setting, the springs, well field, stream, and lakes that form this hydrological system, see **Tab 7 ( Δ’s Appx Ex A, Figs. 1-1, 1-2, 3-1, 3-2); Tab 8 (Pltfs’ Ex 11a, 11b);** For testimony descriptions, see **Tab 9 (Pltfs’ Ex 20, pp. 55, 73-74, 78, 82); Tab 10 (Pltfs’ Ex 23, pp. 73-78); Plaintiffs Ex 28.**

impoundment.<sup>8</sup> Another smaller 30-acre lake, Thompson Lake, where Plaintiffs Jeffrey and Shelly Sapp live, is separated from Osprey lake by a narrow strip of land; the springs, spring aquifer, Dead Stream, Osprey Lake, Thompson Lake, the Tri-Lakes and adjacent marshes and wetlands are all hydrogeologically connected and form one flowing water system.

The Dead Stream and the Tri-Lakes are used frequently by the public and nearby riparians on the stream, like Plaintiffs and Doyles, for boating, canoeing, and fishing.<sup>9</sup> The stream is approximately 20 to 50 feet wide with an average depth of one to three feet.<sup>10</sup> It has the capacity to float commercially viable shingle bolt logs.<sup>11</sup> Historically, use of the stream was based on public use and evidence of logging at the turn of the century includes remnant saw logs in the bottom of the stream and Tri-Lakes.<sup>12</sup> The Dead Stream at Plaintiffs' Doyles home is typically wide and serene in both Summer and Winter.<sup>13</sup>

In response to public concern for the future ownership, conservation, and protection of Michigan's water resources, Plaintiffs and many citizens around the Tri-Lakes formed Michigan Citizens for Water Conservation, a Michigan nonprofit corporation ("Michigan Citizens"), now consisting of over 1,700 members from Michigan and beyond. Many members of Michigan Citizens own, use or enjoy riparian property rights on the Dead Stream, the West Branch of the Little Muskegon and Tri-Lakes system; others use the stream from the Tri-Lakes up to the M-20 Bridge. M-20 is a state highway that runs from Mount Pleasant to Big Rapids, and which crosses

---

<sup>8</sup> **Tab 7 (Δ's Appx Ex A, Figs. 1-2, 3-1).** Defendant Bollmans did not appeal the Trial Court opinions, orders, and judgments; **Tab 8** (1938 and 1958 Photographs).

<sup>9</sup> **Tab 9 (Pltfs' Ex 20, pp 55, 64-66, 73-74, 78, 82); Tab 10 (Pltfs Ex 23); Tab 11 (Pltfs' Ex 18, pp 18, 84); Tab 12 (Pltfs' Ex 19, p 23-24); see also Tab 13 (Pltfs' Ex 3).**

<sup>10</sup> **Tab 14 (Pltfs' Ex 10, pp 52-60); Tab 10 (Pltfs' Ex 23, pp.**

<sup>11</sup> *See Dead Stream Navigation Assessment, Tab 15 (Pltfs' Ex 27 at pp. 1-4).*

<sup>12</sup> **Tab 12 (Pltfs' Ex 19, p. 23-24); Tab 10 (Pltfs' Ex 23 , pp 62-65; Tab 15 (Pltfs' Ex 27 Photographs).**

<sup>13</sup> **Tab 13 (Pltfs' Ex 3B, Photograph) .**

the stream near the Doyles' property and the gauge stations established by Nestlé for monitoring effects on flows from pumping. M-20 provides lawful access to the stream for fishermen, boaters, duck hunters, and canoeists.<sup>14</sup>

Plaintiffs/Cross-Appellants R.J. and Barbara Doyle own and live on riparian property that runs along both sides of the Dead Stream about one-half mile downstream from the Sanctuary and just below M-20 Bridge at the confluence of one of the branches of Gilbert Creek and Dead Stream.<sup>15</sup> They and their family over the years have used and enjoyed the stream for its full length down to the Tri-Lakes for boating, fishing, and wildlife observation.

Plaintiffs/Cross-Appellants Jeffrey and Shelly Sapp own and live on riparian property on Thompson Lake, which is hydrogeologically connected to Osprey Lake. Jeffrey Sapp's father Paul Sapp owns property on Thompson Lake, and he and his wife, Rosanne Sapp, own a resort on Round Lake. Like Doyles, they and their guests, too, have enjoyed Thompson Lake and the Dead Stream for fishing, swimming and boating from M-20 Bridge to the Tri-Lakes dam, including the Tri-Lakes.<sup>16</sup> Paul and Rosanne Sapp are members of Michigan Citizens.

### **Nestlé's "Spring Water " Marketing Scheme**

Nestlé sells numerous brand-names of "spring water" throughout North America in various sized containers and bottles.<sup>17</sup> Previous to searching for a location in Michigan, Nestlé distributed its Ice Mountain "spring water" brand in Michigan from a water source in Pennsylvania. The Trial Court specifically ruled, and Nestlé's attorney admitted, that the pumping, diversion, and

---

<sup>14</sup> **Tab 7 (Deft's Ex A, Fig. 1-1); Tab 8 (Pltfs' Exs 11a, 11b).**

<sup>15</sup> **Tab 13 (Pltf's Ex 3, paragraphs 1-7, Ex 3B).**

<sup>16</sup> See record, **Pltf's Ex 2**, paragraphs 2-12.

<sup>17</sup> See **Tab 16 (Pltfs' Ex 14**, p ES-1, first paragraph) Some of the brands include Poland Springs from Maine, Ice Mountain from Pennsylvania, Deer Park from Maryland, Zephyr Hills from Florida, Ozarka from Texas, and Arrowhead, Calistoga, and Black Mountain from California. **Tab 17 (Pltfs' Ex 4**, pp 69-71).

marketing of the water out of the watershed and Great Lakes basin is for a wholly private purpose and for private profit.<sup>18</sup>

Under federal law, to sell “spring water” there must be a direct hydrological and geochemical relationship between the water pumped from the groundwater and the spring, and surface waters it feeds.<sup>19</sup> By late Summer 2000, Nestlé had performed aquifer water pump tests at the Sanctuary Property (“Sanctuary”), a large hunting reserve owned and operated by Defendants Patrick and Nancy Bollman.<sup>20</sup> These tests found that there was a direct hydrological connection between the spring aquifer that would become a large scale water source, the adjacent Dead Stream and Osprey Lake, and other surface waters downstream from the Sanctuary.<sup>21</sup> Roughly, for every gallon pumped and diverted, there would be one less gallon in the stream and riverine system.<sup>22</sup>

In late Fall 2000, Nestlé announced its project to develop the Stanwood plant and the Sanctuary for a well-field to divert water to its water plant for the solely private purpose of marketing, transporting, and selling the water for profit out of the watershed and beyond the surface water boundaries of the Great Lakes basin. In early 2001, Nestlé obtained a “deed” for the “title”<sup>23</sup> to the water under and within the Sanctuary and an infinitely renewable 99-year lease

---

<sup>18</sup> **Tab 6**, Hearing transcript, April 5, 2002, p. 37 (lines 10-21), p. 45 (lines 4-22).

<sup>19</sup> **Tab 18**, 21 CFR 165.110(a)(vi).

<sup>20</sup> **Tab 16 (Pltfs’ Ex 14**, p ES-1). The Bollmans did not join Nestlé in the appeal of the Trial Court’s final opinion, judgment, and order.

<sup>21</sup> **Tab 17 (Pltfs’ Ex 4, pp. 85-86); Tab 19 (Pltfs’ Ex 12, pp 41-43); Tab 16 (Pltfs’ Ex 14 [Δ’s Appx Ex A]**, p. ES-1, 2<sup>nd</sup> paragraph); **See also Pltfs’ Ex 5, Sec. 7.2, p. 7-3; Δ’s Appx Ex A, Sec. 5.2.4, p 5-7, Sec. 5.3.2, pp 5-8.** This direct relationship between the spring aquifer, springs, and stream or lakes are not in dispute.

<sup>22</sup> **Tab 16 (Pltfs’ Ex 14, Table 6-1); Tab 21, (Pltfs’ Ex 16, pp. 110-112, 115)**

<sup>23</sup> The “title” of course does not mean ownership of the water, but only the right to reasonable use, which of course was the question of law and fact that was decided, adversely to Nestle, after the trial by the Final Opinion, Nov. 25, 2003.

for the wells, pump stations, pipelines, monitoring and other test wells on the Sanctuary, as well as an agreed-to set of use restrictions.<sup>24</sup>

Nestlé applied for and obtained a permit from the Michigan Department of Environmental Quality (“MDEQ”) for the first two production wells as “Type IIa public water supplies” in August, 2001, and another two production wells in March, 2002, under the Safe Drinking Water Act (“SDWA”), MCL 325.1081, *et seq.* The SDWA only regulates wells to assure that there is enough yield from the aquifer and that the water is safe to drink.<sup>25</sup> The MDEQ approved continuous production of 400 gallons per minute (“gpm”) – 576,000 gallons per day or 210 million gallons a year. Plaintiffs and many citizens objected to the proposed MDEQ SWDA permit on various legal and factual grounds. The MDEQ’s staff advised Plaintiffs’ attorney that the MEPA did not apply, and waived the application of the Inland Lakes and Streams Act, MCL 324.30101, *et seq.* (“ILSA”), and Wetland Protection Act, MCL 324.30301, *et seq.* (“WPA”).<sup>26</sup>

### **Impact of Water Removal and Diversion Operation on the Resources at Issue**

For purposes of summary disposition only, Plaintiffs relied on Nestlé’s consultants’ hydrogeological reports and findings, which concluded that Nestlé had been or would remove and

---

<sup>24</sup> Many of the provisions of these documents were requested by Plaintiffs but claimed by Defendant to be confidential and not relevant, so were not required to be produced without redactions during the trial. But see Memorandum outlining the purpose and intent of the parties agreements. **Pltf’s Ex 9, Summary Disposition.**

<sup>25</sup> By its terms, the SDWA does not grant any rights or interest in the water. Water is a public interest or sovereign interest of the State; see **Argument D**, *infra*, p 32.

<sup>26</sup> See **Tab 20 (Deft’s Appx Ex E**, pp 12-13), concluding that “no activities at the Perrier production site are regulated by the provisions of Part 301 or Part 303.” Part 301 requires a permit for “diminishment” of any lake or stream. MCL 324.30102(d). Part 303 requires a permit for any “draining” of a wetland. MCL 324.30304(d) Ultimately, the trial court found after trial that reduction of flows and levels and narrowing of the stream and lakes were a “diminishment” under the plain meaning of the ILSA. Opinion, Nov. 25, 2003, pp. 56-57. The court also found that lowering the wetlands by the drop in water table as the result of the pumping constituted a “draining” of wetlands. *Id.* pp.58-60. ILSA declares that the water of Michigan’s lakes and streams is subject to the public trust doctrine, and protects these waters and related biological resources and commercial and recreational uses from pollution or physical impairment. MCL 324.30106.

divert large quantities of water from the immediate riverine and lake system at the headwaters of the West Branch of the Little Muskegon River.<sup>27</sup> These reports documented that pumping at the permitted rate of 400 gpm deprives the stream of between 347 to 365 gpm.<sup>28</sup> These reports also concluded that the pumping will divert water from and materially would diminish the *flow* of the Dead Stream by almost 20% for over one-half mile.<sup>29</sup> At the summary disposition stage, Defendant's experts claimed water *levels* would not be effected. Plaintiffs' expert Dr. Hyndman was of the opinion that stream flows would be reduced, on the average, well over 20%; the stream level would be reduced by an inch near Doyles' home and the levels of Osprey and Thompson Lakes would be reduced by much more.<sup>30</sup> Even after the stream flow joins the Tri-Lakes, the flow over the dam from the Tri-Lakes to the continuation of the Little Muskegon River will be reduced by over 3%.<sup>31</sup> It is no longer disputed that the level of the stream and two lakes will be

---

<sup>27</sup> **Tab 19 (Pltfs' Ex 12, pp 41-43) Tab 16 (Pltfs' Ex 14, Table 6-1 [from Deft's Appx Ex F , exhibit 2]** Nestlé diverts the water through a 12-mile pipeline to its bottling and container plant constructed near Stanwood, which is located outside of the West Branch of the Little Muskegon River watershed. From there the water is shipped and marketed out of the Muskegon River watershed and the Lake Michigan and Great Lakes basins..

<sup>28</sup> **Tab 16 (Pltfs' Ex 14, Table 3-2, Table 6-1) Tab 21 (Dr. Hyndman's Deposition, Pltfs' Ex 16, pp 110-112, 115).**

<sup>29</sup> **Tab 22 (Defendant's Brief in Opposition to the Plaintiffs' Motion for Summary Disposition, June 4, 2002, p.16)**, which stated: "The relevant percentages are that a 347 gpm reduction in total discharge from Osprey Lake to the Deadstream would represent a reduction of 9.1% in the highest flow of the Deadstream at M-20 ..., a reduction of 35.8% of the lowest flow ..., and a reduction of 17.9% of the average flow.... At the average of 200 gpm per day withdrawal expected over the remainder of the year, each of the percentages ... would be approximately halved." The Court of Appeals' current stay order authorizes Nestlé to pump 250 gpm on a monthly average. This means Nestlé can pump 400 gpm for a significant number of days, and that in any event stream flows are being significantly diminished. After trial, the Trial Court found that Defendant's experts had overstated recharge and average flows which caused the model to materially under-predict these effects.

<sup>30</sup> **See Dr. Hyndman Affidavit, Pltfs' Ex 24, ¶¶ 3 and 4.** After trial, the Trial Court found that flow would be reduced by 29%, and level by as much as 2 inches. Final Opinion, Nov. 15, 2003, pp. 30-33..

<sup>31</sup> **Tab 16 (Pltfs' Ex 14, Table 6-1, line SG 105 [downstream from Tri-Lakes].**

lowered.<sup>32</sup> As a result of such reductions, the water resources of the stream, lakes, and wetlands have been or are likely to be impaired.<sup>33</sup>

### **The Claims in Plaintiffs' Lawsuit**

Plaintiffs filed the initial complaint for temporary and permanent injunctive relief on June 15, 2001, immediately after Nestlé announced it would break ground for construction of the plant. The original complaint sought to stop Nestlé from starting construction of the plant until the water rights, production wells, pipelines, and zoning issues related to the water well facility and the bottling plant were finally decided. The Trial Court denied any temporary injunctive relief because the construction of the plant itself was separate from the water wells and water issues. However, the Trial Court repeatedly stated on the record that since the Court had not yet determined the water issues, Nestlé proceeded at its own risk if it went ahead with construction of the plant, well field, and related facilities.<sup>34</sup> Nestlé ignored these warnings and started construction before it received a permit for the first two water production wells under the Safe Drinking Water Act or the trial over the water rights issues. Despite the pending lawsuit and trial court's warnings, Nestlé continued construction and started pumping and diverting water commercially in late April 2002.

Summary disposition and trial proceedings were based on Plaintiffs' Second Amended Complaint. The Second Amended Complaint alleged six counts:

---

<sup>32</sup> It is not surprising that the Trial Court found that the flow, width, and level of the Dead Stream and the level of Osprey and Thompson Lakes would be diminished, materially effected, and impaired. The Trial Court found the stream flow would be diminished by as much as 28%, and that the levels of the stream would be dropped by as much as 2 inches, and the two lakes by as much as 6 inches. Opinion, Nov. 25, 2003, pp 30-33. The Trial Court also found based on Nestlé's experts' own testimony that the stream would be narrowed by four feet or more. *Id.*

<sup>33</sup> *See, e.g., Dr. Hyndman's Deposition, Pltfs' Ex 16, pp 136-137; Dr. Madsen Affidavit, Ptf's' Ex 28; Final Opinion, pp. 30-40.*

<sup>34</sup> Temporary Restraining Order Hearing Transcript, June 19, 2001, pp. 9-10, 11-12, 14-16.

**Count I** sought injunctive relief based on the remaining five counts; **Count II**, unlawful diversion of riparian and tributary spring water; **Count III**, unlawful or unreasonable diversion and sale of groundwater (including tributary groundwater); **Count IV**, unlawful diversion, subordination, diminishment, or impairment of public trust in these waters; **Count V**, unlawful private appropriation of public water resources; and **Count VI**, violation and likely impairment of water, natural resources, and public trust under the Michigan Environmental Protection Act.

### **Summary Disposition Motions and Proceedings**

Plaintiffs filed their motion for partial summary disposition on May 17, 2002 under MCR 2.116(C)(10) based on a column of undisputed facts: Nestlé's diversion of water out side of the watershed would admittedly diminish the flow of the Dead Stream by almost 20 percent. Plaintiffs requested summary disposition on Counts II and III, because Nestlé's undisputed diversion and material diminishment of the flow invaded private riparian interests in the stream. Plaintiffs requested summary disposition on only a portion of Count IV (Public Trust on the basis of the argument that the navigability test under *Bott v Natural Resources Comm'n*, 415 Mich 45, 327 NW2d 838 (1982) resulted in the Dead Stream bing navigable as a matter of law, and that the diminishment of the Dead Stream's flow violated public trust law<sup>35</sup>). Defendants opposed the motion for partial summary disposition and requested a motion for summary disposition pursuant to MCR 2.116(I)(2) on part of the groundwater claim under Count III and all of Plaintiffs' claims alleged in Counts II, IV, and V as a matter of law. The Trial Court treated Defendant's opposition and request for summary disposition on the entire public trust claim on grounds other than

---

<sup>35</sup> It is emphasized that Plaintiffs did not ask for summary disposition on any other grounds alleged in support of its groundwater claims under Count III and its public trust claims under Count IV, because these other grounds admittedly involved questions of fact at that earlier stage in the proceeding. See **Tab 2**, Hearing Oct. 11, 2002, pp. 19-21.

navigability as a cross-motion for summary disposition for failure to state claims as to Counts II, III, IV, and V under MCR 2.116(C)(8).<sup>36</sup>

The Trial Court denied Plaintiffs' request and granted Defendant's motion for summary disposition under MCR 2.116(I)(2). The Trial Court dismissed Count II, part of Count III, Count IV to the extent based on navigability, and Count V of the Second Amended Complaint.<sup>37</sup> It dismissed Count III only to the extent that the pumping and diversion of groundwater tributary to a stream out of the watershed constituted a *per se* violation of groundwater law. It dismissed Count IV based on navigability because Plaintiffs had not shown that the Dead Stream was navigable under the larger than 20-foot log test requirements in *Bott*.<sup>38</sup>

Defendant Nestlé filed a motion under MCR 2.116(C)(8) for dismissal of the remaining grounds for Plaintiffs' public trust claims as alleged in the Second Amended Complaint. The Trial Court granted the motion but with serious reservations about the overly narrow log-floating test in *Bott* as follows:

Quite frankly, were the court writing on a clean slate, I would be inclined to a different conclusion.<sup>39</sup>

The dismissal of these remaining grounds for the public trust claims was done without affording Plaintiffs an opportunity to establish other methods of establishing navigability under *Bott* or other Michigan public trust case law. Plaintiffs then moved for reconsideration, which the trial court denied.<sup>40</sup>

As a result of these opinions and orders, the Trial Court rejected all of Plaintiffs' claims for violation of the public trust doctrine applicable to the Dead Stream. This included a rejection

---

<sup>36</sup> **Tab 2** (Trial Court Hearing, Oct. 11, 2002, pp 18-20).

<sup>37</sup> **Tab 3** (Order dated October 14, 2002).

<sup>38</sup> *Op. cit.* 415 Mich 45, 327 NW2d 838 (1982).

<sup>39</sup> **Tab 4** (Hearing and Bench Opinion, Oct. 29, 2002, pp. 15-16).

<sup>40</sup> *Id.* at pp. 14-24.

of the potential capacity for navigability, the existence of public access to and use by the public of the stream, and the diversion or diminishment of even non-navigable waters can violate the public trust in the water as distinct from trespass on bottomlands.<sup>41</sup>

### **The Trial**

A trial followed over the diminishment and impairment of the lakes, streams, and wetlands under Count III on the common law of groundwater and Count VI on the MEPA claim. It is understood that this Cross Appeal is limited to the record below pertaining to summary disposition proceedings. However, Plaintiffs believe that a very brief summary of the Trial Court's findings may aid this Court's understanding of the public trust claims in relation to the ultimate painstaking findings and conclusions of the Trial Court.

After 19 days of trial, 27 witnesses, 360 exhibits, 3,700 pages of transcript, and 2 days of closing argument, the Trial Court issued its final Trial Opinion and Judgment on November 25, 2003. The Trial Court heard extensive expert testimony, particularly that of Nestlé's hydrogeologist, Dr. Charles Andrews, and Michigan Citizens' expert, Dr. David Hyndman. After careful consideration and detailed explanation of their testimony, and finding the testimony of Nestlé's chief expert biased in some material respects, the Trial Court found in favor of Plaintiffs on both Count III and Count VI. The Trial Court's opinion was based on the diminishment of flow and/or levels of the stream, lakes, and wetlands resulting from a continuous pumping and diversion from the tributary aquifer for sale out of the watershed and Great Lakes basin. The Trial Court also concluded that continuous pumping would diminish riparian property rights and impair the stream, lakes, wetlands and water-related resources in violation of the MEPA.<sup>42</sup>

The Trial Court issued a permanent injunction, and ordered Nestlé to turn-off the wells at the Sanctuary location because of the invasion of Plaintiffs' private property rights and violation

---

<sup>41</sup> *Id.*

<sup>42</sup> Final Opinion, Nov. 25, 2003, pp 41-50; 51-60

of the MEPA. Nestlé filed a motion for stay of the injunction, which was denied on December 15, 2003.<sup>43</sup> Nestlé filed an interlocutory appeal and motion for immediate consideration and stay in the Court of Appeals on December 15, 2003. On December 16, 2003, the Court of Appeals denied leave to appeal, but issued a stay that capped pumping at 250 gpm on a monthly average, unless modified, for the duration of this appeal.<sup>44</sup>

Nestlé filed a motion in the Trial Court for a new trial or amendment of judgment. After extensive review and argument, the Trial Court denied this motion by opinion and entered an order on February 13, 2004. On March 4, 2004, Nestlé filed a claim of appeal from the November 25, 2003 final opinion and judgment/order, and the February 13, 2004 opinion and order denying the motion for new trial and/or amendment of judgment. On March 19, 2004, Plaintiffs filed their Claim of Cross Appeal of the dismissal of the public trust claim by summary disposition and the denial of the motion for reconsideration.<sup>45</sup>

### **Standard of Review**

Appeals from orders and judgments on summary disposition are reviewed de novo. *Mallard v Hoffinger Industries, Inc.*, 222 Mich App 137, 564 NW2d 74 (1997).

The Trial Court denied Plaintiffs' Motion for Summary Disposition under MCR 2.116(C)(10) and granted Defendant Nestlé's Motion for Summary Disposition in its favor under

---

<sup>43</sup> After trial, the Trial Court found that because of systemic variables in natural conditions, continued pumping at even lower levels due to reduced flows and levels placed the entire Dead Stream system at risk. Final Opinion, pp. 30-33.

<sup>44</sup> *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc.*, Ct. App. Docket No. 252717.

<sup>45</sup> Plaintiffs, by not cross-appealing the dismissal of Counts II, part of III, and V, do not waive or limit arguments in their Appellees' Brief that are inherent in any response to arguments or issues raised by Nestlé's appeal. Plaintiffs will respond to Nestlé's appeal of the Trial Court's opinions and orders following trial in their Appellees' brief.

MCR 2.116(I)(2). A motion for summary disposition under MCR 2.116(C)(10) or cross-motion under MCR 2.116(I)(2) is based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(C)(5), and considered in a light most favorable to the non-moving party. *Smith v Globe Life Ins. Co.*, 460 Mich 446; 597 NW2d 28 (1999). The Court may grant summary disposition if the evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to “judgment as a matter of law.” MCR 2.116(C)(10), (G)(4); *Quinto v Cross & Peters Co.*, 451 Mich 358; 547 NW2d 314 (1996).

The Trial Court also granted Defendant’s Motion for Summary Disposition under MCR 2.116(C)(8). In determining whether Defendant is entitled to judgment as a matter of law, a court must accept as true Plaintiffs’ well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the Plaintiffs’ favor.... *Brenna v Edward D. Jones & Co.*, 245 Mich App 156, 151, 626 NW2d 917 (2001) citing *Jackson Co. Hog Producers v Consumers Power Co.*, 324 Mich App 72, 77, 592 NW2d 112 (1999).

## ARGUMENT

**A. The Trial Court Wrongfully Dismissed Plaintiffs’ Public Trust Claims as to the Waters of the Dead Stream Because it Applied the Rigid Log-Floating Test for Navigability in Dead-End Private Lake Cases in Place of the Flexible Principle of Navigability Applicable to Michigan’s Streams.**

As mentioned above, the primary basis for the Trial Court’s ruling on the public trust issue was that Plaintiffs had not shown that the Dead Stream was navigable under the larger than 20-foot log test requirements in *Bott v Natural Resources Comm’n*, 415 Mich 45, 327 NW2d 838 (1982). Plaintiffs submit that the Trial Court applied *Bott*, too narrowly when considered in light of other applicable precedents on navigability and the public trust of *streams* in Michigan. As will be seen, the “navigability test” for streams, as opposed to privately owned dead-end lake cases, such as *Bott*, is a more flexible principle based on the notion of “valuable floatage,” not just for 20 foot logs at the turn of the century, but for boating and the more quiet pursuit of fishing.

Because of the unique concerns for protecting the seclusion associated with privately owned lakes, a series of Michigan cases, culminating in *Bott*,<sup>46</sup> have fashioned a very rigid rule for navigability or public access and use of wholly privately owned dead-end lakes. However, this appeal involves questions about the navigability and public rights or use of a stream that is accessed from a series of lakes below the stream and a state highway right of way that crosses the stream near the Doyles' residence. Moreover, navigability and public and riparian rights have been diminished by a stranger (Nestlé) with no rights in the stream or its water.

The principles of navigability and public trust in streams control the outcome in this case, beginning with *Moore v Sanborne*, 2 Mich 519 (1853) , *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926), and ending in *Atty General v Taggart*, 306 Mich 432; 11 NW2d 193, 196 (1943). These cases are not the same as *Bott* or other dead-end lake cases. Therefore, they remain solid precedent for streams like the Dead Stream. Unlike *Bott*, this case does not involve the invasive nature of boating and trespass into a wholly privately owned lake, but the invasive diversion and/or diminishment of a stream by a non riparian for a wholly private purpose without any right to the stream or adjacent riparian lands.<sup>47</sup> Accordingly, the proper application of these stream cases requires reversal of the Trial Court's sole reliance on the more narrow navigability test for privately owned lakes expressed in *Bott*.

Specifically, the Trial Court ruled that the public trust doctrine did not apply because Plaintiffs had not alleged or established facts sufficient to show that the stream was navigable under *Bott*.<sup>48</sup> The Trial Court interpreted *Bott* to mean that a Michigan stream was not navigable, and

---

<sup>46</sup> 415 Mich at 46-47, fn3 at 48; 327 NW2d at 839, fn3 at 840.

<sup>47</sup> As a general rule, riparian rights include the corporeal right to flow of a stream which cannot be disrupted by artificial means or severed or alienated from the land. *Thompson v Enz*, 379 Mich 667, 677, 681; 154 NW2d 473, (1967), or severed and diverted or removed from a watershed "by any means." *Dumont v Kellogg*; 29 Mich 420, 422 (1874).

<sup>48</sup> **Tab 1** (Bench Opinion, Oct. 4, 2002, pp. 8-9); see also **Tab 4** (Bench Opinion, Oct. 29, 2002, pp. 13-14, 24).

therefore not subject to the public trust, if it does not have the capacity to float logs that are at least 20 to 40 feet in length.

As I've studied the cases in Michigan, they define, for purposes of navigability in regard to the log floatation test, logs of 20 to 40 feet in length. And, applying that standard, Dead Stream is not a navigable stream and, therefore, its waters are not subject to the Public Trust Doctrine based on navigability.<sup>49</sup>

The Trial Court rejected any other basis for establishing navigability under Michigan law. But not surprisingly, the Court was uncomfortable with the application of *Bott* to the facts of this case: “[if *Bott* was not binding] I would be inclined to a different conclusion.”<sup>50</sup> Indeed, after the Trial Court heard all of the evidence and grasped the “nuances” of public trust law, it indicated it may have ruled in favor of Plaintiffs and encouraged this cross appeal as follows:

... , and the motions regarding Public Trust issues were while I was on the upslope of the learning curve. It is not until relatively recently late in the case that I began to understand the import and nuances of this concept, but had already ruled on it. I have still not fully considered the breadth of the issue, but wouldn't be surprised that a chance to do so may be presented as it is probable that the Plaintiffs will cross-appeal in the appellate proceedings that are a virtual certainty.<sup>51</sup>

**1. A basic principle of navigability for streams and public trust law is its flexible and dynamic nature based on public need.**

From almost the State's inception, our Supreme Court rejected the English common law limitation that the navigability of lakes and streams depended on the actual ebb and flow of tides. It has also rejected the federal test that limits navigation to commercial navigation – the so called “navigable-in-fact” test,<sup>52</sup> *Moore, supra*, at 524. The Court chose to define its own test for the

---

<sup>49</sup> **Tab 1** (Bench Opinion, Oct. 4, 2003, p. 8)

<sup>50</sup> **Tab 2** (Hearing Oct. 29, 2002, pp. 15-22).

<sup>51</sup> Opinion and Order Regarding New Trial, Feb. 13, 2004, pp 41-42.

<sup>52</sup> See *The Daniel Ball*, 77 US (10 Wall) 557, 563 (1870).

navigability of Michigan's streams,<sup>53</sup> and enlarged both the common law and federal navigability tests because the Pine River (the river at issue in *Moore*) had the "capacity for *valuable floatage*, irrespective of actual public use, or the extent of public use," *Id.*, at 523-24. The Court added:

[t]he length and magnitude of many of our rivers, the occasions and necessities for their use, and the nature and character of our internal commerce, *all require a liberal adaptation of those doctrines to our circumstances and wants, and to a condition of things*, both as to capability of our streams for public use, and the occasions for such use, entirely different form, and in many respects altogether new to, those which concurred to establish the common law rule, and we accordingly find that in all the States *that rule has been enlarged so as to meet the condition and wants of the public and the necessities of trade and commerce.* *Id.* at 522 (emphasis added).

The Court elegantly assured that the heritage of our common law of public trust and the integrity of our streams would meet both the current anticipated and future unanticipated needs and interests of Michigan and its citizens. The principle for navigability and public trust in streams is dynamic and flexible, and far less rigid than the test for dead-end lake cases:

The servitude of the public interest depends rather upon the purpose *for which the public requires the use of its streams*, than upon any particular mode of use – and hence ... *the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient.* *Id.* at 525 (emphasis added).

In *Collins, supra*, the Court addressed a dispute on another Pine River, a known trout stream in Lake County. Reminiscent of the adventurous escapades of one of Robert Traver's antagonists,<sup>54</sup> Collins stretched barbed wire over the river. After Gerhardt climbed over the wire to fish, Collins sued Gerhardt for trespassing on his stream bed. Relying on *Moore*, decided over

---

<sup>53</sup> *Fox River Paper Co. v Railroad Comm of Wisconsin*, 274 US 651, 655; 47 S Ct 669, 671; 71 L Ed 1279 (1927); *Southern Idaho Fish & Game Ass'n v Picabo Livestock, Inc.*, 528 P 2d 1295 (Idaho 1974). "... in all other respects, the states are free to prescribe their own definitions of navigability, and, when not in conflict with federal dominion, 'the exclusive control of waters is vested in the state, whether the waters are deemed navigable in the Federal sense or in any other sense.' *Bott, supra*, at 858, n 10.

<sup>54</sup> Traver, Robert, *Trout Madness* (1989).

70 years earlier, the Court found that the stream bed belonged to Collins but the stream was navigable and belonged to the state and its people:

In view of modern social and economic conditions, and the flexibility of the common law in adapting itself to the changing needs of the people, *we shall not consider the term navigability in too technical commercial sense, or seek out some ancient test* in determining if Pine River belongs in the class legally regarded as public waters. *Collins, supra*, at 116 (emphasis added)

\* \* \*

It [referring to *Moore*] lays down a sensible rule based on the necessities of the people and saves for them all of the valuable public uses of which their rivers are capable. *Id.* at 117.

Importantly, the courts are vested with both the power and duty to assure that the public use and riparian rights in these waters are preserved; however, irrespective of the ownership of the bed of the stream and rights of riparian owners, the public's right in the water is paramount to the extent of its public value and use of the stream.

In yet another fishing case, the Court found that the Little Branch of the Pere Marquette River was navigable and subject to the public trust. In *Taggart, supra*, the Court held that a fairly shallow (one foot deep) tributary of a larger stream was navigable for fishing purposes, even though it was marginally used for floating logs during the State's timber era. Once again it was argued that navigability should be governed by more ancient doctrines not adapted for Michigan lakes and streams, but once again the Court rejected such a rigid test.

While [*Moore v Sandborn*] only disposed of the right of floatage and did not decide that a floatable stream has the status of waters navigable for all purposes, the public character of water was held to be determined by reference to the public necessity for its use. *It is this broad underlying principle rather than the narrow rule of [Moore] which was in effect adopted* by the court in *Collins v Gerhardt* ... when it held that floatability determined the public character of a stream and affixed therein the public right of fishing. [*Taggart, supra*, 11 NW2d at 196-97 (emphasis added)]<sup>55</sup>

---

<sup>55</sup> See also *Attorney General v Hallden*, 51 Mich App 176, 214 NW2d 856 (1974) (“... members of the public have a right to navigate ... on waters of this state which are capable of being navigated, by oar or motor propelled craft.”). This follows from the “capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs” test set forth (continued...)

When it comes to streams, the principle, to have meaning, should not be applied rigidly as was done by the Trial Court in this case. Rather it should be applied as a “broadly underlying principle” to determine capacity for any “valuable floatage.” *Moore* at 523-24.

2. ***Bott* does not prohibit a finding that the Dead Stream, with depths from one to three or four feet, is navigable and subject to the public trust because the Dead Stream is not a private lake or connecting stream case, particularly where it has been lawfully accessed and used by the public for canoeing, row boating, and fishing from the Tri-Lakes up to the State Highway M-20 Bridge.**

As noted at the outset. *Bott* should not be read to control issues of navigability and public trust for all of Michigan’s streams. Such a broad reading would not only ignore the fact that *Bott* is the latest in a line of private “dead-end lake” cases, but would petrify the dynamic and flexible nature of navigability test and public trust for streams. *Moore, Collins and Taggart, supra*.

In *Bott*, Justice Levin, writing for the majority, primarily relied on the principles in private lake cases<sup>56</sup> to protect *Bott*’s private lake from those wanting access to his lake by dragging canoes or small boats up a very shallow, choked stream.<sup>57</sup> The Majority opinion’s primary concern was that the “recreational” test proposed by the dissenting opinion was itself overly broad, and would wipe-out the seclusion afforded privately owned lakes,<sup>58</sup> and not so much about the navigability test

---

<sup>55</sup> (...continued)

in *Moore* over one hundred years earlier, before such public use was so *valuable*, *Moore, supra*, 2 Mich at 525-26, and recognizes that the capacity of use is not just logs, but boats, rafts or other floatable craft.

<sup>56</sup> *Bott, supra*, 415 Mich at 60-61. Justice Levin specifically noted his concern that the dissent’s proposed “recreational test” for navigability “would overrule the dead-end lake rule stated in *Winans v Willetts*.” *Id.* at 61.

<sup>57</sup> Some evidence indicated the streams had been cleared by others who wanted to drag their boats up the outlet creek. See the account in *Id.* at 58-59, n 3.

<sup>58</sup> Throughout the opinion, Justice Levin carefully premised his reasoning on the concerns of private lake owners as distinct from those who own property on streams that are lawfully accessed or used by the public. In *McCardel v Smolen*, 404 Mich 89, 96; 273 NW2d 3, 6 (1978), the public “had access to the lake from the dedicated streets....” He was concerned that looking only at “needs of the public [would] enlarge the recreational access of one group of littoral (continued...)

for fly fishing streams: “Fishing is a quiet sport” but “general boating [is] intrusive and jarring.” *Bott, supra* at 843.

In *Giddings v Rogalewski*, 192 Mich 319, 158 NW 951 (1916), the Court held that a small 25 acre lake with no inlet or outlet was not open to the public for fishing. The Court held that the “true test of [navigability] is whether the waters under consideration are capable of being used by the public as thoroughfares or highways... It is difficult to conceive of a highway beginning, extending its whole length, and ending, in the interior of the private estate of a single owner.” *Giddings, supra* at 324-25. In other words, without a need or history of access, the “true test of navigability” is not met. In *Winans v Willets*, 197 Mich 512, 163 NW 993 (1917), the Board extended the private lake rule to a 100 acre lake with no inlet and an outlet that was apparently navigable, and held that “the lake is not a public, navigable body of water, and is a privately owned pond.” *Winans, supra* at 518.

Finally, in *Putnam v Kinney*, 248 Mich 410, 227 NW 741 (1929), the Court ruled that the public had no access or right of navigability in a wholly private lake, and in *Pigorsh v Fawner*, 386 Mich 508, 194 NW2d 343 (1972), excluded the public from using a 74 acre lake. Both cases were governed by a “rule of property” that the public had no right to access or use a wholly owned private lake. *Pigorsh, supra* at 345.<sup>59</sup>

---

<sup>58</sup> (...continued)

owners and users who have access to one lake and desire to have access to another lake.” *Bott, supra* at 62. He pained over a rule that would grant a right of passage “along a trickle between nearby navigable lakes.” *Id.* at 64. In other words, Levin and the majority opinion was more concerned about invasive noise of general boating in the dead-end lakes than less intrusive quietness of fishing or other more passive activities.

<sup>59</sup> If there is lawful access to an otherwise navigable lake for boating and canoes, a privately owned lake may be used by others. *Kerley v Wolfe*, 340 Mich 350, 84 NW2d 748 (1957). Defendant fenced off the neck of a lake to prevent riparians in one portion of the lake from boating over the larger area of the Lake. The Court held both portions of the lake were “navigable in fact by small boats and canoes” and that the fence interfered with the lawful rights of plaintiffs as riparian owners. “So long as boatable waters stand or flow in the upper reaches of this inland lake, people having lawful access to such waters may boat upon and fish in the same...” *Kerley, supra* at 356. If the “lawful access” is provided by a public access, then members of the public would likewise be able to boat and fish on such a navigable lake.

Justice Levin's majority opinion in *Bott*, undoubtedly, was driven by *Winans* and these other private dead-end lake cases. The opinion stresses the importance of protecting the privacy of privately owned lakes and impugned a broad "recreational-boating" test that would disregard a "rule of property" that safeguards these private lakes and their inlet and outlet creeks from trespass.<sup>60</sup> Levin rightly decried the dissent's "recreational-boating" test because it equated the need for general boating without any test of the capacity for "valuable floatage" – for logs or boats – as required by *Moore, supra*. In that sense, the dissent in *Bott* appeared to be as overly broad as Levin's majority opinion was inflexible and narrow.

Therefore, the proper test is one that looks to the factual circumstances surrounding a stream and public need, and then determines whether, based on the natural condition of the stream, there is a capacity for "valuable floatage" without regard to the size of the log or boat as it relates to the public use or need in question. In this way, where public use involves fishing, with its inherent passive nature, on a smaller stream, as opposed to a narrow or choked creek, a Court can determine the capacity of the stream for navigability on a more practical floatage test. As noted by Justice Levin, the *Taggart* case recognized that its navigability test for fishing would not cover "very small streams on private property, which have not been used by the public for logging *or for boating*" or "private and ponds." *Bott, supra* at 71.

*Bott* does not prohibit the application of the test of navigability found in the *Moore-Collins-Taggart* trilogy of cases when it comes to determining the capacity of Michigan's streams. Applying the *Moore, et al.* trilogy, premised on the underlying principle of flexibility and "floatage," to streams such as the Dead Stream should result in a finding of navigability. Dead Stream is not a creek or "small stream on private property."

**3. Public uses of streams within the scope of the navigability test included boats, navigation, and fishing.**

---

<sup>60</sup> 415 Mich 45, 327 NW2d at 841-843, 847.

In the instant appeal, the Trial Court not only confined the navigability test to the more rigid formula in *Bott* of 20 to 40 foot-long logs, it also ruled that the use of floatage is confined to only “commercial interests.”

Now the Public Trust doctrine is primarily, as I’ve learned in my research, a doctrine protecting, largely, *commercial interests*. It covers such things as boats, but in the shipping sense, not the recreational sense ... (Tab 1, Bench Opinion, Oct. 4, 2002, p 6)

As is clear from *Moore, Collins* and *Taggart*, while the extension of the public trust was based on the floatage of logs in *Moore, Moore* and these other cases involving streams did not limit the circumstances of what might serve as a test establishing navigability to commercial interests in logs. Historically, streams provided “valuable floatage,” *Moore, supra*, for using logs as the sole test. This is not true today. Fishing is a billion dollar a year business in Michigan.<sup>61</sup>

In *Collins*, apart from the test for navigability, the court recognized that the scope of public use or rights in a navigable stream under the English common law extended “the public right of *fishing and other public rights* which all citizens enjoy.” *Collins, supra* at 48 (emphasis added).. The Court concluded that the test of “what constituted navigability ... was whether it had the capacity for carrying boats and accommodating, commerce and travel.” *Id.* at 83. Leisure, boating, and travel all constitute aspects of the “valuable floatage” inherent in the notion of commerce and should not be limited to commercial logs.

So long as *water flows and fish swim* in Pine River, the people may fish at *their pleasure in any part of the stream* ... In this right they are protected by a high, solemn and and perpetual trust.<sup>62</sup>

That navigation in the proper circumstances could turn on even non-commercial navigational capacity was affirmed in *Ne-Bo-Shone Ass’n Inc. v Hogarth*, 81 F2d 70 (CA 6, 1936), recognizing

---

<sup>61</sup> Shafer, *Public Rights in Michigan Streams: Toward A Modern Definition of Navigability*, 45 Wayne L Rev 9, 14 (1999).

<sup>62</sup> *Collins, supra* at 49.

the *Moore* test based on “valuable floatage and public rights,” and again in *Taggart, supra*,<sup>63</sup> where the Court considered “boating” to be a method for determining navigation except for “very small trout streams on private property which have not been used by the public for logging or for boating.” *Taggart, supra* at 443.

The trouble with *Bott*, again, is that it fashioned an overly rigid and narrow test to protect the privacy of owners of dead-end lakes from invasive uses by the public over very marginal outlet or inlet streams. The creeks in *Bott* and its companion case *Nicholas* were only 8 and 6 inches deep, and the record indicated that trees and brush were cleared and in some places people had to get out and shove their boats over the shallow areas. *Bott, supra* at 58-59, n 5. The streams in *Collins* and *Taggart* were not inlets or outlets, and were at least capable under natural conditions of floating a log or boat. Given the flexibility and dynamic nature of the navigability test adopted by *Moore, Collins* and *Taggart* for stream cases, this Court can, on sound principle, extend the test for navigability of streams to include the valuable capacity to float a boat.

Many states, including Michigan’s sister states that were carved out of the Northeast Territory, have extended the log floating test to include also the capacity to float boats for recreational purposes like fishing.<sup>64</sup> In *Lamprey v Metcalfe*, 53 NW 1139 (Minn 1893), the Supreme Court of Minnesota held that navigability could be based on the capacity for boating or sailing. “[S]o long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule.”<sup>65</sup> *Lamprey, supra*. at 1144. The Michigan Supreme Court

---

<sup>63</sup> See also *Kerley, supra* at 355, holding the lake was “navigable in fact by small boats and canoes.” While this case involved lawful access to an entire lake by riparian, the same would be true for the public who gained lawful access to navigable waters from a public site or facility.

<sup>64</sup> Shafer, *Public Rights in Michigan’s Streams, supra* n 67, at 41-47; A. Dan Tarlock, Law of Water Rights and Resources, Sec. 8.05(2) (1995 Supp.).

<sup>65</sup> Recall that the common law rule recognized navigability for title based on boats for commercial purposes, trade, or travel. *Moore, supra* at 523. Whether for commerce, trade, or travel, if the stream has the capacity for “valuable floatage,” it should include more than strictly commercial interests in floating logs.

cited *Lamprey* with approval in *Collins*. *Collins, supra* at 43. The Wisconsin Supreme Court held in *Muench v Public Service Comm*, 53 NW2d 514, 519 (Wis. 1952):<sup>66</sup>

Since 1911 it is no longer necessary in determining *navigability of streams* to establish a past history of floating of logs, or other use of commercial transportation, because *any stream* is ‘navigable in fact’ which is *capable of floating any boat, skiff or canoe of the shallowest drift used for recreational purposes*. (Emphasis added.)

In conclusion, the Trial Court wrongfully limited the test of navigability to only “commercial interests” in logs. Clearly, “value” or “commerce” in its plain meaning includes boats, the presence of a public access and use, or the right of fishing or other valuable interests in the need or use of flowing streams. Accordingly, the Trial Court’s denial of summary disposition in favor of Plaintiffs and granting of motion for summary disposition in favor of Defendant Nestlé should be reversed.

**B. When *Bott* and Private Dead-End Lake Cases Are Juxtaposed to the Background Principles of Michigan Public Trust Law for Streams, the Dead Stream Is Navigable and Subject to the Public Trust.**

If the Trial Court had followed Michigan’s more flexible rule for navigability of streams, rather than the rigid rule of *Bott* adapted to insulate private dead-end lakes, it would have concluded that the Dead Stream was subject to the public trust.

In *Moore* the Court adopted its own state test for navigability and application of the public trust doctrine “to our circumstances and wants, and to a condition of things, both as to capability of our streams for public use, and the occasion for such use.” *Moore, supra* at 522. The Court held the public’s right to use navigable waters “embrace[d] *all* streams upon which in their natural state,

---

<sup>66</sup> See *Diana Shooting Club v Husting*, 145 NW 816 (Wis 1914); *Mentor Harbor Yachting Club v Mentor Lagoons, Inc*, 163 NE2d 373 (Ohio, 1959); *Coleman v Schaeffer*, 126 NE2d 444 (Ohio, 1955). It makes little sense to separate the floating of a boat or canoe for recreational purposes from trade or commerce. Recreational boating and fishing adds \$3 to \$4 billion a year to Michigan’s economy. Michigan Boating Industries Ass’n, Boasting About Michigan Boating (1997), cited by Shafer, *Public Rights in Michigan’s Streams, supra* n 67 at n 25.

there is capacity for *valuable floatage*, irrespective of the fact of actual public use, or the extent of such use.” *Id.* at 523-24.

In *Collins* the Court nullified a private riparian’s effort to block off a stream for fishing, and found the stream was navigable. The Court found that the flexible test in *Moore* was “a sensible rule based on the necessities of the people and saves for them *all of the valuable public uses of which their rivers are capable.*” *Collins, supra* at 44.<sup>67</sup> The Court noted that “people had *other uses* for the rivers and streams” and that the “river in its natural state is still *potentially capable for use for floatage purposes.*” *Id.* at 43-46 (emphasis added).

Just as *Bott* completed the last in a line of our Supreme Court’s private lake cases, *Taggart, supra*, rounded out the Supreme Court’s navigability and public trust principles for streams. Defendants dredged along the banks of the Little South Branch of the Pere Marquette River to stop fishermen from wading upstream. There the trial court found the stream too shallow to be considered navigable. The Supreme Court rejected defendant’s argument that *Collins* should be overruled, and instead found that its principle was controlling in favor of a finding of navigability and public trust: “[T]he public character of water was held to be determined by reference to the public necessity for its use. It is this broad underlying *principle* regarding our circumstances and wants, and to a condition of things, both as to capability of our streams for public use rather than “a *narrow rule* of [Moore] which was in effect adopted by the court in *Collins v Gerhardt* ....” *Taggart, supra* at 196-197. In other words, based on *Moore*’s principle of flexibility, the Supreme Court in *Collins* and *Taggart* has already determined that the test for navigability of our streams is far broader than the test in *Bott* or, for that matter, even *Moore*.

---

<sup>67</sup> A study in 1979 by the U.S. Corps of Engineers found that approximately 10,000 miles of streams were used historically for fur trading or log floatage. Shafer, Chris A., *Public Rights in Michigan Streams* at 31. The Supreme Court rebuffed an attempt to overrule *Collins*’ flexible valuable floatage for public use navigability test, holding that valuable floatage and public rights in *Collins* and *Moore* did not offend any established “rule of property.” *Ne-Bo-Shone Ass’n, Inc. v Hogarth*, 81 F2d 70 (CA 6, 1936).

In this case, Plaintiffs established that Dead Stream is accessible by riparian owners and members of the public who use public access sites on the Tri-Lakes and from M-20.<sup>68</sup> Plaintiffs uncontested affidavits also established that members of the public and other riparians used small boats and canoes or kayaks to travel upstream from the Tri-Lakes to M-20 Bridge, which is part of the waters that are diminished by Nestlé's pumping and diversion.<sup>69</sup> Plaintiffs' affidavits also undisputedly show that Plaintiffs Doyles and Sapps or their families and guests boat or canoe and fish the Dead Stream from their riparian property on the Dead Stream.<sup>70</sup> Boy Scouts used the Dead Stream for fishing and boating.<sup>71</sup> Members of the public have floated the Dead Stream for boating and fishing.<sup>72</sup> Moreover, there was no real dispute that Dead Stream is 20 to 50 feet wide and has a depth of one to three or four feet.<sup>73</sup> Finally, it was undisputed that, historically, during the timber era, cedar shingle bolts were shipped from the area near the M-20 Bridge,<sup>74</sup> and that the stream in its natural state, especially during periods of high flows,<sup>75</sup> has the potential capacity to float shingle bolts.<sup>76</sup> There was no dispute that the stream has the capacity for floatage of boats or that there is a history of public access and commercial use.

---

<sup>68</sup> **Tab 13 and 23 (Pltf's Exs 2 and 3 [affidavits regarding stream and use]; Tab 7 (Fig. 1-1);**

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* and **Tab 9 (Pltfs' Ex 20, pp. 64, 66 [RJ Doyle fished the stream for 55 years]).**

<sup>71</sup> **Tab 10 (Pltfs' Ex 23, p. 68-69, 78).**

<sup>72</sup> *Id.*, **Tab 9 (Pltfs' Ex 20, pp. 64-66, 73-73, 78, 82); Tab 11 (Pltfs' Ex 18, pp. 77, 83-84, 96-97)..**

<sup>73</sup> **Tab 9 (Pltfs' Ex 20, p. 55); Tab 10 (pp 68-69, a "river" right up to the springs").**

<sup>74</sup> **Tab 15 (Pltfs' Ex 27); Tab 12 (Pltfs' Ex 19, pp 23-24).**

<sup>75</sup> It is recognized that natural seasonal conditions that support the capacity to float logs is sufficient to establish navigability under the log floating test. *Attorney General v Taggart*, 11 NW2d at 196.

<sup>76</sup> **Tab 10 (Pltfs' Ex 23, pp 50-56, 63-64, 68-76); Tab 12 (Pltfs' Ex 19, p. 23 [Mr. Welsh remembers the stream wide enough for the Boy Scouts to fish, boat, and canoe up the Dead Stream almost every day when at camp, at p. 78]).**

By comparison, the *Bott* case, even if applied as a standard for streams, involved small creeks and not a stream the size and character of the Dead Stream. Similarly, the Little South Branch of the Pere Marquette, found navigable and subject to the public trust for fishing in *Taggart*, is clearly much smaller than the Dead Stream.

For these reasons, the Dead Stream is navigable from Doyles to the Tri-Lakes and, therefore, subject to the public trust. The *Moore trilogy* of cases, not *Bott*, are the primary law in Michigan for determining the navigability and public trust for streams like the one presented in this case. Accordingly, based on the record, the Trial Court should be reversed and summary disposition should be granted in favor of the Plaintiffs.

**C. The Trial Court Should Not Have Dismissed All of Plaintiffs' Public Trust Claims Under MCR 2.116(C)(8), by Ruling That the Public Trust in the Waters of the Dead Stream as a Matter of Law Cannot Be Established on Any Other Grounds, Especially Where There Was Undisputed Evidence That the Entire Stretch of the Dead Stream from the Tri-Lakes to the M-20 Bridge Has Been Accessed and Used for Boating, Canoeing, Kayaking, Fishing, and Duck Hunting**

After the Trial Court dismissed Plaintiffs public trust claims because of the narrow, more than 20 foot log test under *Bott*, Plaintiffs argued at a hearing on the settlement of the order that the other grounds for its public trust claims set forth in the Second Amended Complaint had not been dismissed and could be shown at trial. The Trial Court agreed:

... I believe that plaintiff was presenting and attempting to do so clearly, although it was frankly confusing, as is often the case during a complex motion for summary disposition, because this was plaintiffs' motion, on the Public Trust Doctrine based on their argument that shingle bolts, which they were characterizing as logs, a characterization I disagreed with, could be commercially floated down Dead Stream and, as such, that water should be impressed with a public trust.

\* \* \*

... And Mr. Olson explains, beginning at 53, line 19 [Hearing Transcript. Oct. 4, 2002<sup>77</sup>], that they're arguing *Bott*, B-o-t-t, today,

---

<sup>77</sup>

**Tab 1** (Bench Opinion Oct. 4, 2002, p. 53-54)

but goes on to explain – and, again, I’m paraphrasing now — that there are other bases for imposition of the public trust.<sup>78</sup>

As a result, the Trial Court entered an Order that dismissed Plaintiffs’ public trust claim only on the narrow navigability test in *Bott*.<sup>79</sup>

Yet apart from the navigability test, *Bott* recognized that another way of demonstrating public trust or the public right of navigation on a lake or stream is to show the existence of *lawful* public access, *Bott, supra* at 58, n 1, 61, n 8 citing *McCardel v Smolen*, 404 Mich 89, 96; 273 NW2d 3, 6 (1978), and *Kerley v Wolfe*, 340 Mich 350, 84 NW2d 748 (1957) There is no dispute in this case that Plaintiffs and members of the public access the stream from Tri-Lakes and M-20 Bridge and have used the stream for boating, fishing, and canoeing for many years. Thus, on *McCardel* alone, Plaintiffs established public trust based on public access and use.

*Bott* also recognized two other ways to prove navigability even under its narrow log floating test:

In many cases, there will undoubtedly be evidence whether a waterway was used for floating logs at an earlier time. Such evidence might justify a determination of navigability. If no reliable history is available, a litigant could produce evidence in at least a two other ways. He [sic] might obtain a number of large logs and float them down the stream in question. Alternatively, he could establish navigability by surveying the body of water as the DNR did in the instant cases and comparing its dimensions (width, depth, rate of flow) to the reported dimensions of streams already found to be navigable. *Bott, supra* at 72.

Plaintiffs Second Amended Complaint also alleged that water tributary to a stream was part of surface waters and subject to the public trust:<sup>80</sup>

72. The Sanctuary Springs are a tributary to and part of these surface waters; therefore, the spring water is impressed with a public trust.

---

<sup>78</sup> **Tab 2** (Hearing on Motion to Settle Record, Oct. 11, 2002, pp 18-20),

<sup>79</sup> **Tab 3** (Order Oct. 14, 2002).

<sup>80</sup> Plaintiffs alleged over 20 paragraphs related to the public trust, ¶¶ 1,5,9,10,12-16,37,39-41,72-79,92-92, Second Amended Complaint).

73. These spring waters, whether considered surface water or groundwater, are also property of a special character that are integrally connected to the surface and public trust waters of the state, and, therefore impressed with a public trust.

74. The State's interest, title, or use of resources and property impressed with a public trust cannot be disposed of, alienated, or subordinated for a primarily private purpose.

75. A private property owner may make reasonable use of surface water or groundwater impressed with a public trust in connection with that owner's productive use of that land, but the private owner cannot withdraw, divert, diminish, or use such waters so as to alienate or destroy the title in, or subordinate or impair the public trust interest in the water or the natural resources dependent on it.

76. Defendant Perrier's proposed private purpose in withdrawing, diverting and/or exporting the waters from Sanctuary Springs will unlawfully convert, dispose of, alienate, or subordinate the public trust interest in the springs and the unconfined aquifer.

77. Defendant Perrier's proposed conduct will result in the unlawfully appropriation or taking of the public waters and related natural resources without express statutory authority or approval of the State with due recorded findings, and without compensation, contrary to the public trust doctrine.

78. Defendant Perrier's proposal will also diminish and impair the public trust in the natural resources dependent on the water that Perrier plans to withdraw and divert from the watershed, including springs, wetlands, streams, lakes, and animal and plant life.

Plaintiffs' limited their Motion for *Partial* Summary Disposition on navigability to the showing that the stream had the capacity to float commercially viable shingle bolts. But Plaintiffs did not waive the other grounds (some of which were factually contested) under the Public Trust Count. Moreover, on October 4, 2002 the Trial Court denied Plaintiffs' Motion for Partial Summary Disposition solely because Plaintiffs had not at that time demonstrated the stream had the capacity to float 20 to 40 foot long logs.

As I've studied the cases in Michigan, they define, for purposes of navigability in regard to the log floatation test, logs of 20 to 40 feet in length. And applying that standard, Dead Stream is not a navigable

stream and, therefore, the Dead Stream is not subject to the Public Trust Doctrine based on navigability.<sup>81</sup>

The Court entered the Order on 14, 2002, that expressly limited the Court's ruling to navigability based on a narrow commercial log floating test. Subsequently, Plaintiffs moved for reconsideration because they wanted to be able to pursue other ways or grounds at trial to show navigability or the public trust.<sup>82</sup>

7. Plaintiffs' **Second Amended Complaint**, Count IV, public trust, pp 12-13, on its face is not limited to any length of logs or the log-floating test for navigability.

8. Plaintiffs' motion for summary disposition on public trust was confined only to the undisputed facts that the stream in its present capacity is fairly wide (25 feet or more) and deep enough (on the average 2 to 3 feet) to float shingle bolts, which were historically floated down the stream for commercial transport. Plaintiffs did not request a disposition in their favor on historical logging, the length of logs that were floated, and whether such commercially-sized logs could be floated on the stream today. These involved clearly disputed facts, which Plaintiffs understood would have to be proved at trial.

\* \* \*

11. Plaintiffs also submit that there remain serious and disputed questions of fact as to the application of the public trust to the extent of navigability: (1) the historical facts or present day capacity of the stream to float 4-foot long commercially viable shingle bolts; or (2) the capacity of the stream to float commercially viable logs that are 8 to 12 feet in length; (3) one of the navigability tests in *Bott*, includes that if a stream has the "capacity" or is "susceptible" to be navigable or have a commercial use because its depth and width is comparable to a known navigable stream with similar dimensions, *Bott v Natural Resources Comm*, 415 Mich 45, 327 NW2d 838 (1982); (4) the navigability of the stream based on the floating of boats, canoes, rafts or other means of navigation or travel ((because the unique facts regarding the pertinent stretch of the Dead Stream do not involve a dead-end private lake or headwaters, and the case is distinguishable from *Bott*); and (5) public trust imposed by long-standing public access and use for fishing, boating, canoeing.

Nestlé then moved for summary disposition to dismiss all of the other ways in which Plaintiffs could establish navigability or prove public trust in the water of the Dead Stream under MCR

---

<sup>81</sup> **Tab 1** (Bench Opinion, Oct 4, 2004, p 8).

<sup>82</sup> Plaintiffs' Motion for Reconsideration, Oct. 15, 2002; See also Amended Motion for Reconsideration.

2.116)(C)(8).<sup>83</sup> In dismissing all of the Public Trust Count, the Trial Court ruled on both reconsideration of Plaintiffs' MCR 2.116(C)(10) and Defendant's MCR 2.116(C)(8) motions.<sup>84</sup> The Trial Court reasoned that his ruling "went beyond the issue presented by the plaintiffs and ruled on issues raised by defendants."<sup>85</sup> The Court decided that its previous ruling granted summary disposition to Defendant on all questions involving "the extent of the navigability test" for application of the public trust doctrine.<sup>86</sup> In doing so, the Court ruled on *all* navigability issues, even though Plaintiffs had not yet raised them and there remained, at least, genuine questions of material fact for trial.

The Court not only ruled that navigability was limited by the 20 to 40 foot log test, but "found that there was no genuine issue of material fact but that the Dead Stream by its physical characteristics is not capable of commercially floating such logs."<sup>87</sup> However, based on the evidence on both sides, there remained a genuine question of material fact; the parties had not completed discovery and preparation for trial; the opportunity remained for Plaintiffs to show the ways in which navigability could be established as outlined in ¶¶ 7, 8, 11, and 12 of its Motion for Reconsideration quoted above, but this was cut-off by the Court's decision. The Court stated "... there may be different ways of establishing whether a particular stream is navigable under that test [Bott], and one of them is by comparison with other streams found to be navigable. That is not, however, a different test of navigability. It is a method of establishing the one test that there is, commercial floatation of commercial logs of a 20 to 40 feet length."<sup>88</sup>

---

<sup>83</sup> Defendant's Motion for Summary Disposition of Public Trust Count IV, Oct. 14, 2004.

<sup>84</sup> **Tab 4** (Bench Opinion, Oct. 29, 2002).

<sup>85</sup> *Id.*, at 12.

<sup>86</sup> *Id.*, at 13.

<sup>87</sup> *Id.*, at 19.

<sup>88</sup> *Id.*, p 19.

It is quite evident that the Trial Court refused to look at the difference between *Bott*, a dead-end case, and *Collins* and *Taggart*, stream cases, which were shallow but fished and used by the public, much like the Dead Stream. Based on the facts of those cases, the Court couldn't have made factual findings; *e.g.*, the Little South Branch of the Pere Marquette River in *Taggart* was shallowly 1 foot deep. Dead Stream, which is the West Branch of the Little Muskegon, ranges from 1 foot to 3 or 4 feet.<sup>89</sup>

The Trial Court also addressed other grounds for the public trust raised by Plaintiffs' Second Amended Complaint: "Plaintiffs believe there remain questions of fact as to other bases for the application of the public trust, such as public access and use, recreational test ... [because] the unique facts regarding the pertinent stretch of the Dead Stream do not involve a dead-end private lake or headwaters."<sup>90</sup> Yet, once again, the Court summarily dismissed these other grounds.

The Michigan Supreme Court has considered the merits of the recreational use test, and I'm going to treat that the same as the public access and use test, and has rejected that, staying instead with the navigability test which, aside from commercial shipping, deals with the log-floatation test that the Court has applied. So, to the extent that the Plaintiffs, in Count IV, are relying on tests other than commercial navigability, summary disposition must be granted to the defendants.<sup>91</sup>

The stretch of the Dead Stream (West Branch of the Little Muskegon) is clearly navigable based on the photographs, measurements, affidavits and deposition testimony described above. At the very least, genuine questions of material fact remained for trial.

Further, as discussed under **Argument B**, above, the *Bott* decision recognized an exception to the private dead-end lake rule and navigability, where there was *lawful* access, such as the public access to Dead Stream from the Tri-Lakes and M-20. The area has always been accessed and used by the public; the navigability of this stretch has never been in question. The Trial Court should not have dismissed the lawful public access and use claim under *McCardel*, *supra*.

---

<sup>89</sup> **Tab 9 (Pltfs' Ex 20, p. 55)**

<sup>90</sup> **Tab 4**, pp. 14-15.

<sup>91</sup> *Id.*, at 15.

The Trial Court should not have dismissed *all* of Plaintiffs’ public trust claims pursuant to MCR 2.116(I)(2) and 2.116(C)(8), where substantial questions of fact and opportunity to present proofs in support of the valid allegations of navigability or other ways of establishing the public trust existed within the allegations of the Second Amended Complaint and the undisputed facts on the record of summary disposition. Accordingly, if this Court does not find navigability and public trust under **Argument B**, above, it should either find the public trust applies based on lawful public access and riparian and public use or remand to the Trial Court for further hearings on other ways to establish navigability or public trust.

**D. Independent of the Streambed, the Dead Stream Waters, Including Its Directly Connected Tributary Waters, Are Subject to the Public Trust.**

When the United States Supreme Court extended the public trust doctrine to waters and bottomlands of the Great Lakes in *Illinois Central Railroad v Illinois*, 146 US 387, 453-54, 13 S. Ct. 110, 118-19; 36 L Ed 1018 (1892),<sup>92</sup> it recognized that the public trust could, under appropriate circumstances, apply to any public property of a special character:

*So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be entirely beyond the control of the state.*<sup>93</sup> (Emphasis added)

The Supreme Court did not limit the public trust doctrine to navigable waters. By its plain and clear language, the Court realized that the public trust doctrine sprang from the same considerations of parklands or other public property of a “special character.” And, navigable waters are listed only as an example – “like lands under navigable waters” – not the exclusive lands or property that could be held subject to the doctrine. The streams and tributary groundwater of

---

<sup>92</sup> See fn 98, *infra*.

<sup>93</sup> *Id.* at 453. The public trust doctrine has been recognized to protect parklands and other public resources of a special character. *Paepcke v Public Building Comm’n of Chicago*, 263 NE2d 11 ( Ill. S. Ct. 1970); *Wade v Kramer*, 459 NW2d 1025 (Ill. 1984); *Robbins v Dep’t of Public Works*, 244 NE2d 577 (Mass S. Ct. 1969); *Michigan Oil v Natural Resources Comm’n*, 71 Mich App 667, 249 NW2d 135 (1976); see generally, Olson, *A Cross Roads in Publicly Owned Natural Resources Law*, 56t U Det L J 739, 861-69 (1979).

Michigan are public resources, that is public property in the same sense as other water and land resources have been held to be subject to a public trust. The application of the common law public trust doctrine is a particularly judicial function and duty.

As described in the **Statement of Facts**, the spring aquifer, two large springs under the headwaters of the stream and Osprey Lake Impoundment, all of which flow into and form the Dead Stream are one single hydrogeologically connected system. For every gallon pumped and diverted from the Sanctuary, a gallon is removed from this spring-stream-lake system. Pumping at the rate of 400 gpm, or even the present 250 gpm under this Court's modified stay order,<sup>94</sup> continuously reduces anywhere from 15% to 28% of the flow, with a corresponding drop in level of the Dead Stream and Osprey and Thompson Lakes. A drop in flow at these rates narrows the channel and eventually will choke-off the stream from navigation, canoeing, rowing, or fishing.

Based on the above, Plaintiffs submit that the entire stretch of Dead Stream, from the Tri-Lakes to above the M-20 Bridge, is subject to the public trust. In any event, the Tri-Lakes and connecting stream and channels are subject to the public trust, and the Dead Stream is subject to the public trust at some point upstream from the Tri-Lakes.

From the spring aquifer that is being pumped and diverted by Nestlé down to the Tri-Lakes is a little over one mile of stream. From the spring aquifer and headwaters to Doyles' and M-20 is about one-half mile of stream. All of the water constitutes one flowing system. The fish, including trout and northern pike that spawn in the marsh grass during early springs with seasonally high flows, migrate and use the entire stream.<sup>95</sup>

In light of the underlying public ownership of these water resources of the state and principles of the public trust doctrine, Plaintiffs submit that the facts in this case present a proper situation for

---

<sup>94</sup> Ct. App. Docket No. 252717, Order, Dec. 16, 2003.

<sup>95</sup> Fish and related wildlife are owned by the State and subject to the public trust. *Attorney General v Hermes*, 127 Mich App 777, 784-785; 339 NW2d 545 (1983); *People v Horling*, 137 Mich 406, 100 NW 691 (1904), and the fish remain property of the state coextensive with the rising and falling seasonal waters of a stream and lake. *Id.*, ; *People v Collison*, 85 Mich 105, 48 NW 292 (1891).

the Court to apply the public trust doctrine to the waters and fish of the Dead Stream, irrespective of whether the stream and stream bed are navigable under the test in *Moore, Collins, and Taggart, supra*. These stream cases involved trespass claims between private riparian landowners and the public or other riparians who wanted access to the surface water or streambed for boating and fishing. But here, a *non-riparian* international food corporation claims the right to divert the flow or water in the Dead Stream itself, which in turn impairs the character and functions of the stream that maintain the support for aquatic organisms and use and enjoyment by riparian owners and members of the public who have access for boating, fishing, and canoeing – all of which are protected public trust uses.

The intruder or trespasser in this case is a private company with no rights in the stream or its water whatsoever, who physically pumps and removes the water that flows into the stream, dropping the natural flows and levels of the water in the stream. The public waters that flow into navigable streams can and should be made subject to the public trust for purposes of protecting the waters and public trust uses that make up public trust waters and bottomlands downstream.

This court has the authority to define the limits of the public trust doctrine in public waters of the state, without interfering with any private rights of lawful use under the common law.<sup>96</sup> As will be seen, the legislature has already declared that water is a public resource and held in trust. A public trust in public water itself, separate from the bed of the stream, does not interfere with riparian ownership or lawful riparian uses of the water.<sup>97</sup> It simply means that these critical public waters cannot be alienated or allocated for primarily private purposes without express legislative

---

<sup>96</sup> As noted by Justice Cooley, water is a “moveable, wandering thing.” Because of the nature of water, like air or wildlife, it is not owned by anyone, but only used; that is the right usufructuary, a right of use of water in connection with and to benefit the land or estate. These rights of use are necessarily limited in relation to use by others who *share* the use of the water *based on their land ownership or possessory interest* in common. See also Tarlock, *The Law of Water Rights and Resources*, 3-11 (1995) “The special characteristics of water have led courts to define all water rights- riparian and appropriative- in terms of the right to use rather than ownership of the corpus of water.”

<sup>97</sup> See *Parks v Cooper*, 676 NW2d 823, fn 115 (SD, 2004).

authority consistent with the public interest of the State.<sup>98</sup> Thus, even private riparian owners, tourists, or businesses that rely on the flow of water for their plant or facility would be protected from the diversion and diminishment of these waters. It will also assure a continued flow and level of those portions of lakes and streams that *are* subject to the public trust under the navigability test in the *Moore, Collins, and Taggart* trilogy. It is difficult to conceive of our State's vast streams, in which our fish live and persons recreate, subject to alienation by others for the purpose of selling the water elsewhere without express legislative consent that is consistent with public trust standards.

**1. The waters of the Great Lakes, our inland lakes and streams, and the springs and tributary spring aquifers that feed the lakes and streams, are publicly owned.**

For water is a *moveable, wandering thing*, and must of necessity of continue *common by the law of nature*.<sup>99</sup>

The Institutes of Justinian (Roman Civil Law) recognized a public right in water as a commons. This commons – the sea, lakes, and streams – could be used by ordinary citizens to meet their basic needs under the doctrine of *jus publicum*.<sup>100</sup> Under English common law, the basis of the common law inherited by the states here, water under the sea and rivers was held by the Crown in trust for citizens, for drinking, fishing, and navigation. *Shively v Bowlby*, 152 US 1, 11; 14 S Ct 548, 552; 38 L Ed 331 (1894); *Arnold v Mundy*, 6 NJL 1, 71 (1821).

Of this later kind [referring to things common to citizens] ... are air, the running water, the sea, the fish, the wild beast (citations omitted). But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can

---

<sup>98</sup> The most fundamental principle in public trust law is that these unique public resources of a special character, such as land and waters, cannot be reallocated, alienated, or subordinated without the express consent of the state, and then only for a valid public trust purpose. *Illinois Central Railroad v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892), *aff'd* 154 US 225; 14 S Ct 1015; 38 L Ed 971 (1894); *Obrecht v National Gypsum Co.*, 361 Mich 399; 105 NW2d 143 (1960); *People v Babcock*, 38 Mich App 336, 351; 196 NW2d 489 (1972).

<sup>99</sup> **Cooley's Blackstone**, Vol. I, chap 2, p 16.

<sup>100</sup> *Putting the Public Trust Doctrine to Work* (US Dept. Commerce, National Public Trust Study, 1990), pp 3-11.

be had; ... therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for their common use and benefit. *Arnold, supra* at 49.

**a. Michigan Common Law**

The definition of rights and interests in property and water law are normally left for each state to decide.<sup>101</sup> As a result, most decisions regarding water law are made at the state level.<sup>102</sup> In *People v Horling*, 137 Mich 406, 100 NW 691 (1904); *see also People v Collison*, 85 Mich 105, 48 NW 292 (1891), the Court held that the state had the inherent sovereign power in resources that are, like fish, migratory in nature, and that their “ownership is in the whole people of the state.” 137 Mich at 412. To enjoy or use these sovereign resources is a “privilege, and not of private right.” *Id.* In *People v Zimberg*, 321 Mich 655, 658, 33 NW2d 104 (1948), the Court upheld a ban on selling any fish caught in Lake Erie because fish is a public resource, and that “an individual may acquire only such limited or qualified property interest therein as the state chooses to permit.”

In *Collins, supra*, the Michigan Supreme Court distinguished between the nature of the private riparian ownership of the streambed subject to the public trust from the ownership of the water itself. Fish need flowing waters. Flowing waters provide habitat for fish. Both are migratory and not capable of private ownership.

But he (Mr. Collins) *does not own the water*, and he *does not own the fish*. So far as they are capable of ownership they *belong to the state* for the common benefit of the people. [*Collins, supra* at 45.]

**b. The Michigan Constitution 1963, art. 4, § 52**

Michigan citizens declared under our 1963 Constitution that:

Sec. 52. The conservation and development of the natural resources of the state are hereby declared to be of *paramount public concern* in the interest of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water, and

---

<sup>101</sup> fn. 53, *supra*.

<sup>102</sup> See also *Osborne v Circuit Court Judge*, 114 Mich 644; 72 NW 982 (1897); *Attorney General v Hermes*, fn 101, *supra*.

other natural resources of the state from pollution, impairment, and destruction.<sup>103</sup>

In response to Art, 4, Sec. 52, Michigan enacted the Michigan Environmental Protection Act in 1970,<sup>104</sup> which has become a source of the developing common law of environmental quality. In the context of these provisions, the courts have ruled that the law “clearly indicates the state’s interest in its natural resources.” *U.S. Aviex v Travelers Ins. Co.*, 125 Mich App 579; 336 NW2d 838 (1983); *Anderson Development Co. v Travelers Indemnity Co.*, 49 F3d 1128, 1134 (CA 6, 1995). Similarly, insurers’ defense in pollution insurance cases that groundwater is part of the “property of the insured” have failed because of the State’s “ independent interest, behind the titles of is citizens, in all the air and earth (i.e., its natural resources) within its domain.” *Upjohn v New Hampshire Ins. Co.*, 178 Mich App 706; 444 NW2d 813 (1989); See also *Arco Industries Corp. v American Motorists Ins. Co.*, 232 Mich App 146, 594 NW2d 61 (1998).

The State of Hawaii’s Constitution, Article XI, Section 1 is similar to that of Michigan:

Section 1. For the benefit of present and future generations, the State and its political subdivisions *shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources*, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. *All public natural resources are held in trust by the State for the benefit of the people.* Hawaii Constitution art XI, sec 1.

In the case *In the Matter of Water Use Permit Applications*, the Hawaiian Supreme Court ruled that this provision, together with the state’s sovereignty over its common lands and water, applied to groundwater of the state. 9 P3d 409 (2000). It held that the public trust imposed a duty

---

<sup>103</sup> See **Const 1963, art 4, § 52**, MCL (West Publishing, 2003), p 67. The Official Convention comments noted that this was “ a new section recognizing the public concern for the conservation of natural resources and calling upon the legislature to take appropriate action to guard the *people’s interest in water*, air, and other natural resources.” *Id.* Under Michigan’s common law, most of which developed long before Art. 4, Sec. 52, water, including groundwater, has not been viewed as the property of the landowner.

<sup>104</sup> Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* (“MEPA”). The MEPA prohibits conduct that will or is likely “to pollute, impair, or destroy the air, water, or natural resources or the public trust in those resources.”

on the state to assure that the water was used for the public interest, that it was subject to global and long-term planning, and that groundwater would not be diverted in a way that would impair the public trust.

**c. Michigan statutes**

The MEPA was adopted in 1970 in response to the constitutional mandate, Mich Const. 1963, Art 4, Sec. 52, to protect the air, water, and natural resources of the state from pollution, impairment, and destruction, *State Hwy Comm v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974). The MEPA established an environmental right to protect the “air, water, or natural resources, or the public trust in these resources.” MCL 324.1703(1). *Ray v Mason Co Drain Comm’r*, 393 Mich 294, 224 NW2d 883 (1975). Given the plain language of the MEPA, the Legislature has determined that water is subject to a public trust.

The Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, *et seq.* (“ILSA”) has specifically defined inland lakes and streams and protected them from impairment or diminishment under the application of the public trust doctrine. ILSA defines an inland lake or stream as “a natural or artificial lake, pond or impoundment; a river, stream or creek...or any other body of water that has definite banks, a bed, and visible evidence of a continued flow or occurrence of water...” MCL 324.30101(f). ILSA prohibits conduct that would “create, enlarge, or diminish an inland lake or stream.” MCL 324.30102(d) unless permitted in accordance with the criteria in Section 6. A permit may be issued only if it is found “that the structure *or project* will not adversely affect the *public trust* or *riparian* rights.” MCL 324.30106.

The Great Lakes Preservation Act, MCL 324.32702, declares:

- (a) A diversion of water out of the basin of the Great Lakes may impair or destroy the Great Lakes. The legislature further finds that a limitation on such diversions is authorized by and is consistent with the mandate of section 52 of article IV of the state constitution of 1963 that the legislature provide for the protection of the air, water, and other

natural resources of the state from pollution, impairment, and destruction.

(b) Water use registration and reporting are essential to implementing the principles of the Great Lakes charter and necessary to support the state's opposition to diversion of waters of the Great Lakes basin and to provide a source of information on water use *to protect Michigan's rights when proposed water losses affect the level, flow, use, or quality of waters of the Great Lakes basin.*

(c) *The waters of the state are valuable public natural resources held in trust by the state, and the state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment.* (emphasis added)

The waters of the Great Lakes basin are defined as “the Great Lakes and all streams, rivers, lakes, connecting channels, *and other bodies of water, including groundwater,* within the Great Lakes basin.” MCL 324.32701.<sup>105</sup>

Based on the common law and Michigan’s express statutory declarations,<sup>106</sup> Michigan’s waters are publicly owned and subject to a public trust.<sup>107</sup>

---

<sup>105</sup> The GLPSA provides that “the waters of the Great Lakes within the boundaries of this state shall not be diverted out of the drainage basin of the Great Lakes,” MCL 324.32703, but the prohibition applies only to diversions of Great Lakes waters after September 30, 1985. MCL 324.32704.

<sup>106</sup> The Legislature has also defined Michigan’s “waters of the State” to include “groundwaters, lakes, rivers, streams, all other water courses and waters within the confines of the state.” MCL 324.3101(i). The migration of fish includes the power to protect all fish in waters, whether seasonal or not, in which they migrate. *People v Horling, supra*, 137 Mich at 412. That the state does not own, as sovereign for its people, the waters in which the fish spawn, feed, and migrate, is incompatible with the fundamental rights of the people in all things that flow or are moveable and used in common. See *Parks v Cooper*, 676 NW2d 823 (S.D. 2004).

<sup>107</sup> Other states have declared waters public resources or held in trust. New Hampshire’s Groundwater Protection Act is intended to “protect the natural quality of the groundwater resource of the state” and declares that while groundwater is “primarily a local resource” the state has “a general responsibility for groundwater management and the public trust and interest.” N.H. Rev. Stat. Secs. 485-C:1. California has declared water as public. Water Code, Sec. 102. The Water Code, Section 12922 also states that “the people of the State have a primary interest in the correction and prevention of irreparable damage to, or impaired use of, the groundwater basins of the State ....” Like, Michigan, California courts have recognized that the state is entitled to damages for damage to this property of the state. *Selma Pressure Treating Co. v Osmose Wood Preserving Co. of America, Inc.*, 221 Cal App 3d 1601 (1990). See generally *Symposium Issue: Eastern Water Law: Trends in State Legislation*, 9 Va En L J 287-321 (1990).

(continued...)

In *Parks v Cooper*, 676 NW2d 823, 2004 SD 27 (2004), the South Dakota Supreme Court recently held that the waters of a fluctuating non-meandered system of lakes were subject to the public trust doctrine, even though it ruled the beds of the lakes were not under traditional navigability analysis:<sup>108</sup>

From our examination of the statutes and precedent, we conclude that the State of South Dakota retains the right to use, control, and develop the water in these lakes as a separate asset in trust for the public.

\* \* \*

Today, we acknowledge, in accord with the State's sovereign powers and the legislative mandate, that all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public.<sup>109</sup> *Parks, supra* at 838-39.

Similarly, Michigan, carved out of the Northwest Territory, and granted ownership of the waters and beds of navigable streams and lakes when it entered the United States, can under the state's inherent sovereign power to define the limits of public trust law hold that the water, as separate from the concerns for private property associated with the beds, is held in trust for the public. In this way, the courts in Michigan have the inherent common law power to protect the trust in public waters and fish, *Collins v Gerhardt*, *People v Horling*, *Arnold v Mundy*, *Parks v Cooper*,

---

<sup>107</sup> (...continued)

New Jersey's water law declares that the people of its state "have a paramount interest in restoration, maintenance, and preservation of water quality ... and public water supplies," and the object of the law is "to restore and maintain the chemical, physical and biological integrity of the waters of the State, including groundwaters, and the public trust therein..." N.J.S.A. 58A:11A-2.

Delaware's water law provides that in the state's exercise of sovereign power, through its Department of Natural Resources and Environmental Control, has control over the development and use of the "water resources of the state," and that the responsibility for management and regulation of these assets rests in the state "as trustee" of its water resources for the public benefit. 7 Del. Code 6001. No one can withdraw water for allocation without a permit or license from the state, and then only if conservation and environmental standards have been met and the withdrawal complies with both regional and state-wide water plans and policies.

<sup>108</sup> However, although the water was subject to the public trust, the public did not have the right to use the waters for public recreation since the lakes had never been meandered and did not meet the navigability test. 676 NW2d at \_\_\_, 2004 SD at 48-49.

<sup>109</sup> Several other states have held that water is subject to the public trust doctrine separate from bed ownership.

*supra*, and to assure that water resources remain public resources regardless of rights of use or privilege as may be defined by the common law or statute.

## **2. All public trust waters are owned by the State.**

The public trust doctrine establishes an independent basis that the title of waters are owned or held by a state.<sup>110</sup> Lakes and streams, as discussed in Arguments B and C, above, either under the federal test or a particular state's own unique test of navigability,<sup>111</sup> are owned by the state and held in public trust for its citizens to protect their paramount right to access and use for boating, fishing, swimming and navigation. Michigan's title and public trust in the Great Lakes and all of its inland lakes and streams is paramount except for the federal government's power under its easement for navigation that was reserved when it conveyed the bottomlands and waters to Michigan as a condition to statehood in 1837. The nature of Michigan's public trust interest was described in *Collins*:

It will be helpful to recall that Michigan was carved out of the Northwest Territory; that the territory was ceded to the United States by Virginia; that the United States held this territory in trust for future states to be created out of it; .... *that when Michigan entered the Union of States, she became vested with the same qualified title that the United States had; that these waters and the soil under them passed to the state in its sovereign capacity impressed with a perpetual trust to secure to the people their rights of navigation, fishing and fowling.*<sup>112</sup>

Therefore, under public trust law Michigan owns title to all waters coextensively with the waters subject to the public trust.

---

<sup>110</sup> See e.g., Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970); Wilkinson, *Headwaters of the Public Trust Doctrine: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 Env't'l L Rev 425 (1989).

<sup>111</sup> For a fairly recent analysis of these tests and the expansion of the public trust doctrine to more non-traditional waters, see *Arizona Center for Law in the Public Interest v Hassel*, 172 Ariz 356; 837 P 2d 158 (1991). The court held that the legislature's attempted disposition of certain river beds violates the public trust doctrine.

<sup>112</sup> *Collins, supra* at 46-47.

**3. Water that is tributary to public trust waters is subject to the public trust.**

If the public trust doctrine can be expanded under the state common law under principles of navigability, *Collins, Taggart, supra*, could it not also be expanded to protect streams because of the state's need for protecting its water resources and the recreation, farming, and industry that depend on them, against diversion for the purpose of selling the water out of the stream and watershed that supplies it? Plaintiffs submit the answer is "yes." Even if the waters above M-20 Bridge or the Doyles are found non-navigable or not subject to the public trust on the common law or statutory bases discussed above, the public trust doctrine prevents the diversion or diminishment of these waters to protect the public trust waters, fish, and resources that are part of them. It also can be used to protect the public trust uses because of diminished flows or levels of water in the stream.

A riparian owner has only a right to reasonable use of water so long as the use, which is shared in common by other riparians and the public, is connected with the riparian land. *Thompson v Enz, supra*. However, the riparian can never divert water from a stream for transfer out of the watershed. *Dumont v Kellogg*, 29 Mich 420, 421 (1874); *Kennedy v Niles Water Supply Co.*, 173 Mich 474, 139 NW 241 (1913). Similarly, an owner of land has the right to the reasonable use of the groundwater beneath it so long as it's connected to the land, or if not, so long as it does not diminish or materially diminish the flow or level of a riparian's lake or a stream or the public trust. *Schenk v City of Ann Arbor*, 196 Mich 75, 85-91; 163 NW 109, 113-114 (1917), relying on *Smith v City of Brooklyn*, 54 NE 787 (NY, 1899); *Collens v New Canaan Water Co.*, 234 A2d 825 (Conn, 1967).

Waters that are subject to the public trust doctrine cannot be diverted and sold without express legislative authority consistent with public purpose and other public trust standards.<sup>113</sup> The diversion and sale of waters tributary to these public trust waters likewise should not be able to be diverted. Otherwise the moment a stream was not navigable or subject to the public trust under traditional

---

<sup>113</sup> *Illinois Central Railroad, supra*.

principles, the stream or its tributary waters, including springs and spring aquifers like those pumped in this case, could be diverted and the non-navigable and navigable portions of the stream diminished and impaired. Moreover, fish would not be able to freely migrate if a private owners could cut-off or drain waters that are a part of or connected to the lakes or navigable streams to which these waters flow. *People v Horling, supra*, 137 Mich at 412,413-14; *Parks v Cooper, supra*.

Defendants may argue that this would impinge on common law rights to use riparian or groundwater, but this is not true. Even if not subject to the public trust, these waters are publicly owned and their flow is protected by centuries of riparian property law principles. The law recognizes reasonable use by a riparian owner, but the riparian cannot divert it out of the watershed. Likewise, the law recognizes reasonable use of groundwater by the landowner, but not the wholesale diversion of tributary groundwater or springs that feed a public stream. If this were so, the law would sanction landowners or their lessees to do indirectly what the law prohibits directly. The water that replenishes the public trust or our public waters would be subordinate to the diversions and diminishment by others – even those with no riparian rights to use the stream itself. If riparian law does not permit the diversion of water out of the watershed, or public trust waters cannot be diverted or diminished without express government authority for a public purpose, then the public trust doctrine should not permit the diversion of tributary waters that result in the same diminishment.

The facts of the instant appeal prove the point. Here, the spring aquifer and springs or tributary groundwater are undisputedly directly connected. A gallon up the pipe and diverted to Nestlé’s plant eleven miles away is a gallon out of the stream forever. The diversion of the water diminishes and impairs the water and stream. If the court sanctions a diversion for sale of the water by a non riparian that diminishes or impairs public waters of the state or the public trust in those waters, the future of Michigan’s streams and public trust waters would be at the mercy and subordinate to alienation or diversion of water outside our watersheds and beyond.

In the *Mono Lake* case, the California Supreme Court held that the diversion of water from a non-navigable tributary stream is subject to the public trust doctrine. *National Audubon Society*

*v Superior Court of Alpine County*, 658 P2d 709 (Cal, 1983). The court held that the waters of Mono Lake are subject to the public trust doctrine, and that the doctrine extends to the non navigable water upstream from the Lake. Extraction and diversion of non-navigable tributary water that impaired the public trust in Mono Lake violated the public trust.

The same principles to protect stream flow and public trust waters have been extended to tributary groundwater to guard streams from diversions of tributary groundwater that interacts and replenishes the stream. In *Oklahoma Water Resources Board v City of Lawton*, 580 P2d 510 (Okla, 1977), the Court was faced with the question of whether water from a “ground water formation” that “comes to the surface in the form of a spring, then forms a definite stream,” should be classified as ground water or spring water. *Oklahoma Water Resources Board, supra* at 511. The applicant in that case intended “to encase the spring, thus tapping the source of the spring before it could reach the surface.” *Id.* Despite this plan to capture water before it reached the surface, the Court held that

The test is not how immediately spring water forms a definite stream, but rather, whether the spring water forms a definite stream. *If it forms a definite stream, it is public water from its inception and may not be diverted for private use unless appropriated as stream water. . . . [W]e hold that when natural spring water forms a definite stream, the water in the stream and the spring itself, from its inception, is to be classified as stream water and appropriated as such. Id.* at 513.

In accord, *Ranson v City of Boulder*, 424 P2d 122 (Colo, 1967) ( water tributary to a stream was part of the stream because the spring “was tributary, first, to an unnamed intermittent stream, and then in turn to Coal Creek and Boulder Creek”); *see also Smith v City of Brooklyn, supra*; the public trust has also been recognized in wetlands that are adjacent and directly connected to streams. *Just v Marienttte County*, 201 NW2d 761 (Wisc. 1972).

Accordingly, based on the common law of public trust, stream or riparian law, and the law involving the relationship between tributary springs or groundwater, this Court should and can hold that a diversion of water by a non-riparian, whether it is stream water or its connecting tributary groundwater, that diminishes the flow or level of public trust waters in the stream violates the public

trust doctrine.<sup>114</sup> Indeed, under public trust principles, this Court cannot allow diversions and diminishment or impairment of public trust waters, not least not without express legislative authority to the contrary, and then only if it meets the public trust standards discussed in **Argument E**, below.

**E. Nestlé’s Diversion and Sale or Diminishment and Alienation of Public Trust Waters Violates the Public Trust Doctrine**

As demonstrated above, the Dead Stream or its waters are impressed with or subject to protection by the public trust. This Section of the Brief shows how Nestlé’s diversion and sale of directly connected tributary water violates the traditional standards of the public trust doctrine.

The public trust is a “high, solemn, and perpetual trust, which it is the duty of the state to forever maintain.” *Collins, supra* at 49, and the Courts, therefore, should eye with great skepticism any attempts to encumber public trust waters for private purposes or gain.<sup>115</sup> As noted by Professor Sax, in his seminal article on public trust law, courts take a dim view of actions the effects of which are “either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.”<sup>116</sup> This same view has been uniformly followed, beginning with the *Illinois Central Railroad*, (“free from interference of private parties”), in which the U.S. Supreme Court held invalid a scheme that would subordinate Lake Michigan to a private development.<sup>117</sup>

---

<sup>114</sup> It should be noted that the Trial Court found a violation of the public trust under its holdings that the diminishment and impairment of the Dead Stream and its riparian and public trust interests required a permit under the Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, *et seq.* (“ILSA”). Final Opinion, Nov. 25, 3003, pp 48-56.

<sup>115</sup> Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich L. Rev. 471, 490 (1970). See also Haynes and Smary, eds., *The Public Trust Doctrine*, Chpt 13, Section 13.8, *Michigan Environmental Law Deskbook* (ICLE) NOT UPDATED. See *Illinois Central, supra*; *People ex rel Scott v Chicago Park District*, 360 NE2d 773 (1976) (holding a disposition of public trust property for business and jobs was not a public purpose). Michigan adopted and followed *Illinois Central* in *Collins* and *Obrecht*, 361 Mich 399, *supra*.

<sup>116</sup> *Id.*

<sup>117</sup> *Illinois Central Railroad, supra* at 452-454.

Michigan has adopted traditional public trust principles.<sup>118</sup> They are summarized as follows:

- A. the alienation or allocation must be “in accordance with the regulatory assent of the State” consistent with the public interest in the public trust, and the present or future use of the waters by the public;<sup>119</sup>
- B. the public trust in these waters cannot be disposed, alienated, or diverted for purely private purposes;<sup>120</sup> private actions cannot subordinate the public trust.<sup>121</sup>
- C. public trust waters and bottomlands cannot be impaired by “nibbling” effects; that is, Michigan has rejected a *de minimis* rule for public trust cases.<sup>122</sup>

In summary, a public trust alienation or subordination of the public trust is allowed only when “in accordance with the regulatory assent of the State,”<sup>123</sup> and then it is valid only under two narrow circumstances: (1) improvement of the public interest in the public trust and (2) without impairment of the public trust.<sup>124</sup> Thus, the public trust cannot be alienated or subordinated by a private use unless a statute authorizes it and the State “in due recorded form” determines that the private use of public trust waters falls within one of these narrow exceptions. Finally, the public trust must be administered consistent with the trust’s purposes.<sup>125</sup>

As established in the Statement of Facts, Nestlé is diverting and selling waters that results in an undisputed diminishment, alienation, or subordination of the flow of the Dead Stream by almost

---

<sup>118</sup> Olson, *Public Trust Doctrine: Procedural and Substantive Limitations on the Government Reallocation of Natural Resources in Michigan*, 1975 Det CL Rev 161 (1975).

<sup>119</sup> *Nedtweg v Wallace*, 237 Mich 14, 20; 208 NW 51 (1926); *Obrecht*, *supra* at 413; see also section 1703(1) of the Michigan Environmental Protection Act, MCL 324.1701 *et. seq.*; Haynes and Smary, eds. *The Public Trust Doctrine*, *supra* n124.

<sup>120</sup> *Illinois Central Railroad*, *supra*; *Obrecht*, *supra*; *Babcock*, *supra*; *Sax*, *supra* n 115.

<sup>121</sup> *Collin*, *supra* at 47; *Obrecht*, *supra* at 412.

<sup>122</sup> *People v Broedell*, 365 Mich 201, 204-05; 112 NW2d 517, 518-19 (1961).

<sup>123</sup> *Obrecht*, *supra* at 413.

<sup>124</sup> *Id.* at 412.

<sup>125</sup> *Id.*; *Illinois Central Railroad*, *supra*; *Defenders of Wildlife v Hull*, 18 P3d 722, 730 (2001).

20 percent for over one-half mile,<sup>126</sup> and at least half that much for a mile.<sup>127</sup> The waters are undisputedly robbed of a gallon of water for every gallon pumped and diverted out of the watershed and beyond. The Legislature of Michigan has not passed a law expressly authorizing such a diversion and sale of water that encumbers or alienates a Michigan stream in this manner. Nestlé's purpose is wholly private. The diminishment of flow is detrimental to public trust purposes, such as boating, canoeing, and fishing.

While there may be disputed questions of fact regarding diminishment and impairment of the stream, the water, water related resources, and uses on the record at summary disposition, those identical issues were finally determined by the Trial Court after the extensive trial on diminishment and impairment of the stream by diversion of tributary groundwater under Count III and impairment of the public trust under the MEPA in Count VI. The Final Opinion, Nov. 25, 2003, made specific findings under Count III Groundwater Law and Count VI The MEPA that the pumping and diversion by Nestlé diminished the flow, dropped the level, and would narrow and eventually choke the life blood out of the Dead Stream. The findings under Count III involved diminishment, harm, or impairment to the Dead Stream and its water resources. The findings under Count VI involved "impairment of the air, water, or other natural resources, or the public trust in those resources." Clearly, the trial found a diminishment and impairment of the stream, its flow, and related resources.

Accordingly, this Court can find a violation of the public trust doctrine as a matter of law based on the undisputed facts that are part of the record of the summary disposition proceedings, or apply the public trust standards to the findings by the Trial Court upon ruling on the merits of the trial that is on appeal to this Court by Nestlé.

Alternatively, since the Trial Court is the trier of fact and has firm grasp of the witnesses and credibility of the witnesses regarding these sometimes complex scientific factual questions, this Court

---

<sup>126</sup> After trial, the Trial Court found the flow was diminished by 28 percent, and the level dropped by 2 inches. Final Opinion, pp. 30-33. During seasonally low flows, the reduced flow and level caused a mud flat and the stream was no longer navigable. *Id.*, at 32.

<sup>127</sup> **Tab 16 (Pltfs' Ex 14, Table 6-1).**

should remand to the Trial Court for application of the public trust doctrine and standards to the facts as determined based on the record of the trial that was held in the Summer of 2003, and to award Plaintiffs costs and attorney fees as allowed by law.

### **CONCLUSION AND RELIEF REQUESTED**

Plaintiffs and Cross-Appellees request this Court to reverse the Trial Court's denial of summary disposition and granting of summary disposition to Defendant and Cross-Appellee Nestlé, and rule as a matter of law that the Dead Stream or its waters are subject to the public trust. Further, Plaintiffs and Cross-Appellants request this Court to find, based on the record below, that Nestlé's pumping, diversion, and sale of tributary groundwater that diminishes the flow and alienates the stream or these public trust waters violates the standards under public trust law and is unlawful. Alternatively, Plaintiffs request this Court to remand the public trust claim to the Trial Court to determine, based on the extensive trial record and its findings in its Final Opinion, whether Nestlé's conduct violates the public trust doctrine.

OLSON, BZDOK & HOWARD, P.C.  
Attorneys for Plaintiffs/Cross-Appellants

Date: August 23, 2004

By: \_\_\_\_\_  
James M. Olson (P18485)

### **PROOF OF SERVICE**

On the date below, I sent by first class mail a copy of **Cross-Appellants' Brief on Appeal with Index of Tabs Appendix** to the counsel of record of all parties to this cause, at their business address(es) as disclosed by the pleadings filed in this matter.

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.

Date: August 23, 2004

By: \_\_\_\_\_  
Doreen J. Schramski, Legal Assistant