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° 254202

v

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

Mecosta County Circuit Court
Case N° 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.

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APPELLEES' BRIEF ON APPEAL
(ORAL ARGUMENT REQUESTED)

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INTRODUCTION AND SUMMARY[1]

Most controversies over groundwater or lakes and streams are between competing users who use the water in connection with riparian or overlying land. This controversy, however, is between riparian property rights that have been invaded and diminished by the pumping, diversion and sale of water from a tributary spring aquifer by a non- riparian: Appellant Nestlé Waters North America Inc – an international water marketing company.

Nestlé Waters North America Inc. ("Nestlé Waters" or "Nestlé") is engaged in the business of extracting and marketing water for distribution out of the West Branch of the Little Muskegon River Watershed. Over objections by the Plaintiffs-Appellees Michigan Citizens for Water Conservation and Doyles and Sapps (collectively "MCWC"), who represent interests of riparian land owners and others, and the warnings of the Trial Court that the company proceeded at its own risk,[2] Nestlé constructed four high-capacity wells to pump and divert 210 million gallons of water per year from a spring aquifer that forms the headwaters of a stream and two lakes. From there Nestlé pipes water to a plant in another watershed 12 miles away, and from the plant it markets and ships the water in bottles and other containers as "spring water"[3] beyond the watershed and mostly outside of the Great Lakes Basin.[4]

Neither party disputes that there is a direct connection between the spring aquifer – Nestlé Waters diverts water on a 1:1 basis. For every gallon pumped and diverted a gallon is removed

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[1]For purposes of this Brief, references to exhibits are cited as "Pltfs' Ex __ [number]" or "Def's Ex __ [letter]." If an exhibit or a reference is included in MCWC's Appendix filed with this Brief, it will be cited as "Tab __ [number]." References to the trial transcript are cited as "_____, 2003 [date], T ___ [page(s)]." References to the Trial Court's November 25, 2003 Final Opinion and Judgment/Order are cited as "Trial Op., p. __ [page(s)]." References to the Trial Court's February 13, 2004 Opinion and Order on Nestlé's Motion for New Trial or Amendment of Judgment are cited as "New Trial Op., p. __."

[2]Hearing on Plaintiffs' Motion for Temporary Injunction, June 9, 2003, T 9-14 Tab 1.

[3]21 C.F.R. Sec. 165.110(a)(vi). See Tab 13.

[4]Trial Op., pp. 11-12. For a map of the Great Lakes Basin, see Plfts' Ex 68. Tab 2 (See Court's question of Andrews. (May 21, 2003, Pt. 1, T 127.)

from the stream system.[5] Nestlé Waters' deprives a stream, lake, wetland system of 250,000 to 500,000 gallons of water a day, permanently reducing the naturally occurring seasonal and cyclical flows and levels of the aquifer, lakes, and stream.

As is explained in Argument I, infra, the common law of Michigan follows a discrete set of principles that protect the flow and level of its lakes and streams from diversions and sale outside of their respective watersheds. These principles are uniquely applicable to conflicts involving a diversion of water from a tributary shallow aquifer for private sale by a non-riparian where the diversion diminishes and impairs the property rights of riparians in a stream.

However, Nestlé argues for a sea-shift in Michigan's water law. It argues that this Court should follow a general rule that governs disputes between landowners who use the groundwater in connection with the overlying land. It also wants this Court to follow a wide-open standard that would allow Nestlé, as a non-riparian, to divert and export the water out of a watershed unless a plaintiff riparian proves such a diversion has caused "substantial and direct injury;"[6] in other words, it wants this Court to adopt a very lenient, vague, and unpredictable standard for all future conflicts between groundwater marketers and riparians in Michigan. Such a sea-shift in the law would sacrifice riparian property rights, industry, businesses, farming, tourism dependent on water. The rights of these existing riparian owners and commercial interests, and the hundreds of thousands of jobs that depend on this water, would be subjected to vastly expanded regional, national, and even global competition for water.

Nestlé's diversion and marketing of its "spring water" significantly diminishes the flow of stream from 20% to over 30% in Summer or longer-term periods of low precipitation. "There is no dispute that Osprey Lake, Thompson Lake, and Dead Stream will suffer a reduction in flow/stage."[7] The Trial Court properly found that the diminishment and impairment of the stream and lakes violated riparian rights and Michigan's property law. Simply put, the Court decided that

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[5]Trial Op., p. 11.

[6]Nestlé relies on the Restatement of Torts, 2d, Sec. 358, discussed at Argument I, E,2, infra. (Nestlé's Appx, Tab 7.)

[7]Trial Op., p. 13. "Stage" is a hydrological term for "level."

the common law does not permit non-riparians – who pump large quantities of water from a spring aquifer and divert it out of a watershed in the same manner as if the end of the pipe was in the stream – to do under the law what riparians cannot do themselves.

As described in Argument II, infra, the common law that has developed under the Michigan Environmental Protection Act, MCL 324.1701, et seq. ("MEPA") prohibits conduct that is likely to impair water, water resources, or the public trust in those resources, unless a defendant affirmatively pleads and proves there are no feasible and prudent alternatives to its conduct. Nestlé failed to plead and prove the affirmative defense, and the Trial Court properly found, based on extensive evidence from experts for both parties, that Nestlé's diminished the flow, level, and width of the stream, and dropped the levels of two lakes and several wetlands. The Trial Court also properly found that, as a matter of fact, this has impaired and will continue to impair these features and their water dependent aquatic resources.

As presented in Argument III, infra, through its Appellant's Brief and media campaign, Nestlé has tried to paint a picture that the diversion of this much water would not effect or impair riparian interests or the environment. Yet, despite a series of changes in the company's experts' assumptions and computer models – even a substitution for the company's chief expert – the conclusion was inescapable: no matter what reports, models, or arguments Nestlé's experts came up with, stream flow would be considerably diminished, its level and width materially dropped, and the lake levels materially lowered. On the other hand, MCWC's experts concluded that the effects and impairment would be even greater than the effects conceded by Nestlé's experts.

Nestlé has tried to "spin" the Trial Court's decision as "extreme." As will be seen, the Trial very thoroughly and carefully followed traditional water law principles dating back more than 100 years. Nestlé's has obfuscated the soundness of the Trial Courts findings of fact and rulings of law, by alleging hyper-technical and peripheral mistakes, most of which are unfounded and others of which are minor and immaterial. The Trial Court meticulously weighed evidence and the credibility of the witnesses,[8] and waded through the complexities and variabilities of this

[8]Trial Op., pp. 9-10.

rich, biologically diverse single aquatic system.[9] The Trial Court properly concluded that this hydraulically connected system of tributary groundwater, springs, stream, alkes, and wetlands would be diminished and impaired. Nestlé would have this Court impose a hyper-vigilant standard that would impose an impossibly heavy burden on this Court and circuit courts, leading to an infinitely unnecessary repetition of disputes that have been seriously, diligently, ethically, and finally decided. As can be seen from the extraordinary efforts of the Trial Court in this case, not even Nestlé's hyper-standard could lead to a different result.

Nestlé also asserts that the Trial Court abused its discretion in refusing its request to supplement evidence two months after the close of proofs or as part of its Motion for New Trial or Amended Judgment. In both instances, Nestlé urged the Court to consider a thin slice of additional monitoring data collected over a short period of abnormally high rain fall. But this slice of data was selective and cumulative, and would not change the basic findings of fact tempered by 19 days of proofs, cross examination, rebuttal, reply, and sur-rebuttal. Updated versions of the same exhibits, reports, or arguments by Nestlé's experts would not lead to a different result. None of the alleged errors are of any substance.[10]

Since the Trial Court released its final decision on November 25, 2003, Nestlé clamored that the Trial Court's decision was "radical." It has also tried to find cover under the umbrella of other influential groundwater users – such as manufacturers, farmers, ski areas, municipalities, tourists. As will be seen, this clamoring is not accurate, and does nothing to advance the reality and seriousness of the questions raised by this appeal. Appellant Nestlé Waters wants "spring water" – as much of it can get.[11] To do this, Nestlé needs a shift in Michigan's property and water law so it can exploit Michigan's shallow spring aquifers. These spring aquifers are the fountain of Michigan's treasured lakes, rivers, and trout streams, and the valuable riparian rights, commerce, fishing, boating, and recreation that depend on them. It is Nestlé's arguments, not the

[9]Id.

[10]New Trial Op. pp. 5-11, 12-16, 26-34. Tab 25.

[11]Sipriano v Great Spring Waters of America Inc, 42 Tex S Ct J 629; 1 SW3d 75 (1999). Great Spring Waters of America is now Nestlé Waters North America Inc.

Trial Court's decision, that would radically alter long-established riparian and groundwater common law principles that shield riparian rights and Michigan's lakes, streams, and watersheds.

Given the rising tide of global water scarcity and the unpredictability of effects due to global climate change, the economic and ecological value of the State's or Great Lakes Basin water resources are far too great to place at risk over such a dramatic shift in the common law.[12] Michigan's water and its water dependent industries, businesses, farms, and recreation, and the jobs that go with them, would be subordinated to the demands of a global market place.[13] Such a shift would weaken Michigan's existing legal standards and strap the State's exercise of its property power[14] or inherent police power and control to protect the waters of the State or the public trust.[15] Private and public interests beyond our watersheds or the Great Lakes Basin would be able to argue that Michigan's future water law and regulations, including current efforts to safeguard the Great Lakes or Michigan's water,[16] are trumped by claims asserted under international investment treaties like the North American Free Trade Agreement or World Trade Organization, the commerce or takings clause.[17]

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[12]Schwartz and Randall, "Imagining the Unthinkable," An Abrupt Climate Change Scenario and Its Implications for the United States National Security (Pentagon, Oct. 2003). While only a "scenario," the study highlights the importance of proceeding with utmost caution in shifting law in favor of diversions and exports to a larger universe of competition.

[13]Freyfogle, Eric, T., Water Rights and the Common Wealth, 26 Envtl L 27, 33-34, 48 (1996) Tab 42.

[14]See Cross-Appellants' Brief on Appeal on the Public Trust Doctrine, Argument D.3, pp. 42-48.

[15]Opinion of Attorney General Mike Cox, Regulation of Waters of the State, OAG No. 7162, September 23, 2004, pp. 2-4, 7. Tab 3; See Gleick, Peter, The New Economy of Water: The Risks and Benefits of Globalization and Privatization of Water (Pacific Institute, 2002), www.pacinst.org/reports/new-economy.htm. The author points out the importance of public control despite the detriments and benefits of privatizing water.

[16]Draft Implementing Agreements for Annex 2001,Council of Great Lakes Governors, released for public comment on July 19, 2004, www.michigan.gov/Annex2001Process; or www.michigan.gov/deq/0,1607,7-135-3313_3677-97094--,00.html.

[17]See Been, NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls, 32 ELR 11001 (Sept. 2002); Gantz, Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA, 31 ELR 10646 (June 2001); Dhooge, The North American Free Trade Agreement and the Environment, 10 Minn. J. Global

(continued...)

Michigan water law jealously protects riparian property and the State's interest in maintaining the flow and levels of our lakes and streams.[18] Lowering the standard to allow diversion of water up to the point of "substantial and direct harm" would irreversibly tilt the gradient of Michigan water law in favor of diversion and export with untold cost to the economy, communities, and environment.[19] Such a radical departure would weaken Michigan's ability to fashion sound policy or control of its destiny[20] in the face of one of the most complex issues known to humankind in the 21st Century.[21]

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Water Bodies and Resources at Issue

Two large cold, deep sapphire springs form the headwaters of the Dead Stream which is the upper part of the West Branch of the Little Muskegon River.[22] The springs and stream flow through a biologically diverse and rich tussock marsh that has been there since the last Glacial

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[17](…continued)
Trade 209 (2001). In Metalclad v Mexico, the trade tribunal ruled that Mexico's subsequent change of mind in prohibiting a permitted waste dump gave rise to an award of $16.7 million. ICSID Case No. ARB(AF)/97/1, Award, p 131, at http://www.worldbank.org/icsid/cases/mm-award-e.pdf; United Mexican States v Metalclad, 2001 B.C.S.C. 664, ¶ 70 (Brit. Col. Sup. Ct. 2001). In Methanex Corp v United States, Draft Amended Claim, at http://methanex.com/investorcentre/mtbe/draft-amended-claim, a Canadian company filed a Chapter 11, NAFTA damage claim of $970 million against the United States as a result of California's banning of its MTBE as a gasoline additive because of MTBE's substantial carcinogenic risks. See Waren, Paying to Regulate: A Guide to Methanex v United States, 31 ELR 10986 (Aug. 2001).

[18]Bott v Natural Resources Comm'n, 415 Mich 45; 327 NW2d 838 (1982).

[19]Gleick, New Economy of Water, supra; Freyfogle, Water Rights and the Common Wealth, supra.

[20]Press Release, Mike Cox, Attorney General of Michigan, comments that Annex 2001 Great Lakes Agreement weakens current state authority to limit diversions, October 17, 2004. Tab 4.

[21]Postel, Sandra, Pillars of Sand (Norton 1999), Argument D.1; Gleick, Peter, "New Economy of Water: The Risks and Benefits of Globalization and Privatization" (Pacific Institute 2002), www.pacinst.org/reports/new-economy.

[22]May 5, 2003, T 79-85.

age,[23] then into the Tri-Lakes: Blue Lake, Round Lake, and Lake Mecosta, a popular resort and residential area.[24] Today, these two large springs flow under and along the north side of Osprey Lake, a 60-acre lake on the "Sanctuary" created by an impoundment,[25] and sustain smaller 30-acre Thompson Lake which is separated from Osprey Lake by a narrow strip of land. The springs, spring aquifer, stream, lakes, and adjacent marshes and wetlands are hydrogeologically connected as a single flowing water system.

The Sanctuary is a private deer hunting reserve comprised of approximately 850 acres, owned and operated by Defendant Bollmans who purportedly deeded "water rights"[26]and entered into a lease so Nestlé could construct and operate it's the high-capacity wells.[27] The Sanctuary, well-field, streams, lakes, and wetlands are entirely within the West Branch of the Little Muskegon River watershed.[28] Appellant's plant is in a different watershed.[29] The West Branch

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[23]See photographs from early years of this century, Plfts' Ex 51; Def's Ex Cr, Plate 3.

[24]Aerial photo, April 2002, Plate 3, Def Ex Cn. (Tab 6) The springs, well field, stream, and lakes that form this hydrological system are also depicted in many photographs, including: Dead Stream at Doyles' home, Plfts' Ex 90Al, Ao, and 94. Pltf's Ex 4A, 4B, 86, 86A, 86B, 86M, 89A, 89B, 89C, 90Ae, & 90Af (Tab 7). Photos of Thompson Lake, Pltf's Ex 90Ah, 90Al, 90Ao, 90Ap, 90Aq, 92B, 92C, & 92D (Tab 8). For testimony descriptions of Dead Stream, see Plaintiff Sapp, May 5, 2003, T 78-81; Welch May 9, 2003, pp. 6-8. For a description of the biologically diverse features, see freshwater biologist Dr. Mark Luttenton's reports and field notes, Plfts' Ex 66, 67, and the extensive stream photos in Pltf's Ex 66A, 2-13; wetland biologist Dr. Barbara Madsen's report, Pltfs' Ex 62, 78A-C, and Nestlé's stream biologist Mr. Cozad's report. Def's Ex Da. See also Def. Ex Cr, pp. 3-6, 3-9, 3-10, 3-12, 3-13, 3-14, 3-17, 3-18.

[25]See Def's Ex Cr, Fig. 1-2, 3-1. Def Ex Cn, Plate 1 (Locator Map), Tab 9. Def Ex Cn, Fig 1-1 (showing the features as they are today with Bollman's expanded artificial impoundment). See Plfts' Ex 51, a 1938 photograph of the springs, stream, marsh and lakes before any impoundment, Tab 5.

[26]To the extent the "water rights" deed purports to convey riparian waters, it would unlawfully violate the rule against severance and alienation in Thompson v Enz, Argument I, B, infra.

[27]Def's Aa (Tab 9); Def's Ex Cr, Figs. 1-1, 1-2, 3-1, 3-2. Defendant Bollmans did not joined in any of Nestlé's appeals.

[28]May 23, 2003, Pt. 2, T 157-158; June 4, 2003, Pt. 1, T 89-90.

[29]Trial Op., p. 12; June 4, 2003, T 89-91.

of the Little Muskegon River flows to the Muskegon River which flows into Lake Michigan.[30] The Sanctuary consists of meadows, forest cover, and many and varied wetlands and small creeks that discharge into and out of some of the wetlands and into Osprey Lake and Dead Stream. The understory and ground vegetation has been cleared by overgrazing of the deer herd.[31] There are 23 wetlands within the Sanctuary site alone, including conifer swamps, marshes, shoreline wetlands, bogs and a lake-like wetland.[32] Sediments on the Sanctuary are mostly porous gravel and sand outwash deposits left as the last glacier retreated 12,000 years ago. Outwash sediments allow rapid movement of groundwater because they have relatively higher hydraulic conductivity values.[33] Defendant's experts classified the glacial till in the western portion of the site as clay with a very low conductivity value of 1.0,[34] which in their computer models operated essentially as a "boundary" such that the predictions showed no effects on wetlands. In fact, the western portion of the site consists of a heterogeneous mixture of gravel, sands, silts, clay, with a lower range of porosity and conductivity values.[35] Lenses or channels of sand and gravel are frequently found in glacial till, creating conduits for rapid groundwater flow.[36]

Part of the precipitation that falls on these outwash and glacial till deposits provides the source of water for the springs, lakes, streams, and wetlands on the Sanctuary. The amount of

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[30]Tab 2.

[31]Def's Ex Aa; Def. Ex Da, pp 11-12; May 5, 2003 T 83-85.

[32]Def's Ex Da, pp. 10-12, 13-18, and Fig. 3.2. p. 14.

[33]May 9, 2003, T 123, 126. "Hydraulic conductivity" is a coefficient that is proportional to the ability of water to flow through a particular mixture or characterized sediment. Id., T 120-122.

[34]However, Nestlé's former expert assigned a hydraulic conductivity value of 100-600 ft. per day. Def's Ex Cs, Vol II, Appx E, p. E-3, E-4, Layer 2.

[35]May 9, 2003, T 125-129. See Table (Tab 10) compiled from Def's Ex Cm, Cn, Ct, at p 27; Plaintiffs' Reply to Defendant's Post-Trial Brief (shows the heterogenous nature of sediments in zones that were characterized by Nestlé's experts as having lower hydraulic conductivity values associated with just silts and clays). See Defendant's own characterization as glacial till, Def's Ex Cn, p. 1-7; Ex Cr, p. 4-4; Ex Cs, Vol II, Appx E, pp. E-3, E-4, Layer 2.

[36]Sometimes referred to as an "esker." May 9, 2003, T 129-131.

water that reaches the water table is called "recharge."[37] Precipitation averages about 32 inches a year in this region, and generally less than one-third of that recharges groundwater. The remainder flows overland to surface waters or is returned to the atmosphere by the natural processes of transpiration and evaporation. The groundwater discharges from the Sanctuary directly to the Osprey Lake and the Dead Stream with focused flows in higher conductivity channels at the springs that underly Osprey Lake.[38] Recharge is a critical parameter in any computer model calibrated to predict the effects of pumping on flows and levels. If recharge is over-stated, the model will under-predict the effects on surface water resources.

Nestlé's well-field extraction operation[39] diverts water from this spring aquifer, springs, stream, lake, and marsh/wetland system. "The mechanisms of harms under study here involve the direct diversion of water that would otherwise have appeared at the surface via the Sanctuary Springs as well as a lowering of the groundwater table ...."[40] These basic facts formed a primary focal point of proofs and the Trial Court's findings.[41]

The Plaintiffs' and Appellees MCWC, Doyles, and Sapps

Plaintiffs Doyles and Sapps joined many other riparians and citizens to form Michigan Citizens for Water Conservation, a Michigan nonprofit corporation and IRS 501(c)(3) charitable organization ("MCWC"), which has grown to 1,800 members from Mecosta County, the State, and nation, including some 265 members who own riparian properties in the immediate Dead Stream -Tri-Lakes watershed.[42] Plaintiffs Doyles own riparian property on both sides of the Dead Stream just below M-20 Bridge, approximately one-half mile downstream from the Nestlé well-

[37]May 9, 2003, T 116-118.

[38]See generally, MPI Report, Def Ex Cr, p. 4-1.

[39]See Plfts' Ex 40B (Def's Ex Cr, Fig 1.2).

[40]Trial Op., p. 12.

[41]Trial Op., pp. 12-13.

[42]Trial Op., p. 7; May 5, 2003, T 29.

field.[43] Their family and guests have used and enjoyed the stream for its full length down to the Tri-Lakes for boating, fishing, and wildlife observation.[44] Plaintiffs Sapps own and live with their three young children in a home with 345 feet of frontage of Thompson Lake. The legal description of their property extends under Thompson Lake.[45] Paul and Rosanne Sapp own a larger parcel on Thompson Lake, and a resort on Round Lake; they, too, are members of MCWC. Their family and their guests have enjoyed Thompson Lake and Dead Stream for fishing, swimming and boating for several generations.[46] Other riparians and the public access the stream for canoeing, fishing, or hunting from the Tri-Lakes or M-20 Bridge.[47]

Nestlé's Water Extraction and Marketing Scheme

Nestlé markets "spring water" in bulk containers or bottles throughout the United States and Canada from fifteen different plants located in the United States and Canada.[48] To label and sell its Ice Mountain brand as "spring water," Nestlé has to satisfy Food and Drug Administration

[43]M-20 is a state highway provides lawful access to the stream. May 5, 2003, T 112-113, 115-118. Doyles' goal in the lawsuit is to preserve their riparian rights, especially from diversion. Id., p. 129.

[44]Pltf's Ex 4A, 4B, 86, 86A, 86B, 86M, 89A, 89B, 89C, 90Ae, & 90Af. (Tab 7)

[45]Pltfs' Ex 4C; May 5, 2003, T 47-53.

[46]May 5, 2003, T 84-90, 94, 98-100; Pltfs' Ex 6.

[47]May 5, 2003, T 28-32; Plfts' Ex 2C-2F, canoe trip by people from Tri-Lakes to Doyles at M-20 bridge, Tab 12.

[48]Nestlé brand names include Ice Mountain in Michigan, Ohio, and Pennsylvania; Poland Springs in Maine; Crystal Springs in Florida; Deer Park in Maryland; and Osarka in Texas. Nestlé markets the Ice Mountain brand in Michigan from the Michigan and Pennsylvania water sources and plants. (May 6, 2003, T 194-195) When there is a shortage of water at one plant, Nestlé trucks water from spring water sources in other states. (Id., T 194-195).

regulations[49] that require a demonstration that the water pumped and sold from the shallow aquifer is the same water as the springs and the Dead Stream.[50] It pipes the water from the Sanctuary Springs water source to the plant in Stanwood, Michigan, where the water is packaged in different size bottles and containers, the transported for sale into Illinois, Indiana, Minnesota, Ohio, and Wisconsin, Kentucky,[51] and beyond. Most of the water is diverted and exported outside of the boundaries of the Great Lakes Basin.[52] Nestlé conceded and the Trial Court ruled that Nestlé's pumping, diversion, and water marketing project is solely a private purpose.[53]

In late 1999, after unsuccessfully attempting to locate a water bottling operation in Wisconsin, Nestlé[54] contacted Michigan officials for assistance in locating and funding a site for a water source and plant to market spring water - in bottles or containers - throughout New York, Pennsylvania, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, and quite likely Kentucky. In late Summer 2000, Nestlé's consultants, Malcolm Pirnie, Inc. ("MPI"), installed test wells on the Sanctuary – Defendant Bollmans' private deer hunting ranch.[55] As stated in a MPI Sept. 2000 Report, a 7-day pump test conducted at 689 gallons per minute ("gpm") nearly stopped the flow from the springs to Osprey Lake along its north,[56] showing a significant direct effect on surface waters and springs.

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[49]21 CFR 165.110(a)(2)(vii). Tab 13.

[50]May 6, 2003, T 184-185. The water pumped from the spring water has the same geochemical "imprint" as the stream. Deft's Ex Cw, MCWC's Tab 11, p. 7-3 to 7-4. Ironically, while Nestlé sells "spring water, it claimed it is merely removing groundwater. See Defendant's Brief in Opposition to Summary Disposition, June 4, 2002, p. 19, Tab 23.

[51]Id., T 189-191,193.

[52]Pltfs' Ex 68.

[53]Hearing transcript, April 5, 2002, T 44-46. Tab 14.

[54]Previously named Great Spring Waters of America, Inc. or The Perrier Group.

[55]See Def's Ex Cr, MPI May 2001, pp ES-1-2.

[56]Def's Ex Cw, pp 7-2, 8-2.

In March and April 2001, MPI conducted further pump tests,[57]and found that "The spring water was a source of the Dead Stream."[58] The springs are "beneath the lake [Osprey Lake Impoundment, formerly upper headwaters of Dead Stream]."[59] MPI concluded that the aquifer would be drawn down by over 20 feet at a pumping rate of 400 gpm,[60] and actual measurements taken of flows in the Dead Stream (a/k/a "Osprey Lake Outlet Channel") downstream at M-20 Bridge during the pump test showed a dramatic drop in flows.[61]

In April 2001, Defendant Nestlé filed its application for its first two high-capacity wells with the MDEQ for permit under the Safe Drinking Water Act, MCL 325.1001, et seq. ("SDWA").[62] After a public hearing in May 2001 and before obtaining the SDWA permit and easements and permits for the pipeline, Nestlé pressed ahead with construction of the plant. On June 18, 2001, Plaintiffs filed their original complaint for a temporary restraining order, because Nestlé had not obtained the necessary permits. The Trial Court denied the restraining order because the construction of the plant was separate from the water rights issues; however, the Trial Court warned Nestlé that if it proceeded with construction, it did so at the company's own risk.[63] Defendant Nestlé continued construction and began operations with full knowledge of this risk.

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[57]May 2001 Report, Def's Ex Cr.

[58]May 9, 2003, T 26.

[59]Id., T 17.

[60]See Def's Ex Cr, Sec. 5.1, p 5-1.

[61]Mr. Cozad's measurements showed a drop of 65% on April 4, 2001, at a pumping rate of 689 gpm. Plfts' Ex 43A, Cozad report, p. 23, and field notes. Tab 15.

[62]The SDWA requires a permit to assure three things: (1) that the water is safe to drink; and (2) that aquifer source is sufficient to yield the proposed demand; and (3) that the wells are efficient. Rule 815 requires "(d) Satisfactory yield tests have been completed on the test well or the well capacity has been established to the satisfaction of the department" and "(e) Water quality analyses show results meeting the state drinking water standards." R325.10815. It should be noted that evaluation of impacts on lakes, streams, or wetlands is not expressly required by the SDWA or its rules.

[63]Hearing transcript, Plaintiffs' Motion for Order to Show Cause Why a Preliminary Injunction Should Not Issue, June 19, 2001, pp. 44-46. Tab 1.

The pumping and diversion of water will drain wetlands in violation of the Wetland Protection Act (now Part 303 of the Natural Resources and Environmental Protection Act), MCL 324.30301, et seq. ("WPA"), and diminish the flows, levels, and area or size of the stream, and two lakes in violation of the Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, et seq. ("ILSA"). During its review of the SDWA permit application, MDEQ did not assert its regulatory jurisdiction under the WPA and ILSA. As a result, the interference with riparian rights, impairment water resources, the public trust, and environment, or the consideration of alternatives were not reviewed as required by the standards of the ILSA and WPA.[64] However, these factual and legal issues are identical to those finally decided by the Trial Court under the common law (Count III of the Complaint) and MEPA (Count VI of the Complaint).[65]

In August 2001, MDEQ issued the SDWA permit for the first two production wells.[66] In January 2002, Nestlé applied for two more high-capacity wells, which were approved in April, bringing the total withdrawal rate of the four wells to 400 gpm.[67] In early May, Nestlé started commercially pumping and marketing its Ice Mountain "spring water." Initially it pumped on the average 130 gpm, but by the time of trial it pumped on average 160 to 170 gpm a day.[68]

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[64]See MCL 324.30102(d) and R281.811(e) (ILSA) and MCL 324.30311(4)(b) (WPA). Def's Ex Dn, pp. 12-13 (Tab 16).

[65]The Trial Court ruled that Nestlé's request for remand of the impairment or degradation issues to MDEQ was barred by res judicata and collateral estoppel. These issues were determined by the Tr Opinion, Nov. 25, 2003; New Trial Op., Feb. 13, 2004, p. 32.

[66]Def's Ex Ae.

[67]May 15, 2003, Pt. 2, T 221-222. At trial, plant manager Brendan O'Rourke testified that the Stanwood plant would be doubled in size beyond the 500 gpm capacity. (Id., T 185.) When first questioned, he denied any knowledge of attempts to obtain water sources elsewhere within the general area of the Stanwood plant, then admitted that exploratory well permits had been applied for in Osceola County, approximately 30 miles north of the Mecosta County Stanwood plant. Id., T 186; Def's Ex Af.

[68]May 6, 2003, T 198.

The Claims As Tried

Plaintiffs Second Amended Complaint sought injunctive relief under Count I and declaratory relief for unlawful diversion of riparian, tributary spring water (Count II), unlawful diversion and sale of tributary groundwater (Count III) unlawful diversion, impairment, and alienation of the public (Count IV), appropriation of a public resource for private purpose (Count V), and impairment of water and related water resources contrary to the Michigan Environmental Protection Act, MCL 324.1701, et seq. ("MEPA"). After extensive summary disposition motions and reconsideration, the Trial Court dismissed Counts II, IV, and V.[69]

The Trial Court ruled during summary disposition that off-tract diversion and sale of groundwater would be unreasonable when there is actionable injury,[70] but left open the questions of law and fact as to whether "the diminishment of flow may or may not be injury." [71] Nestlé argued in its Trial Brief that Plaintiffs' groundwater claim in Count III was limited solely to Plaintiffs use of groundwater and excluded any claim for diminishment and impairment of surface water or riparian rights.[72] MCWC requested a ruling on the issue before trial,[73] and the Trial Court ruled:

> … this Court will consider riparian rights in relationship to groundwater withdrawals and that whatever effects may result to riparian bodies, bodies of standing water at the surface that are tied to the subsurface activities of defendant….[74]

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[69]Count IV (Public Trust Doctrine) has been Cross-Appealed by MCWC.

[70]Hearing transcript, Opinion on Motions for Summary Disposition, October 4, 2002, T 15-19, Tab 17.

[71]Id., p. 22.

[72]Nestlé's Trial Brief, April 29, 2003, p. 39. Tab 18.

[73]Plaintiffs' Motion and Brief for Ruling Before Trial, May 2, 2003, p. 2. Tab 19.

[74]May 5, 2003, T 6-7.

After two adjournments, largely to accommodate a change in Nestlé's experts and revisions to its hydrogeological report, the case proceeded to trial on Counts I, III and VI.

The Trial

The trial started on May 5, 2003 and lasted 19 days, 27 witnesses, 360 exhibits, 3,700 pages of transcript, and post trial briefs tied to the record. Proofs closed on July 3, 2003.[75] The trial involved extensive and detailed expert testimony, including lengthy cross examination, rebuttal, reply, and surrebuttal.

The hydrology experts were Dr. David Hyndman from Michigan State University for Plaintiffs, and Dr. Charles Andrews from a private firm in Washington, D.C for Nestlé. In the end, the Trial Court, based on what it had heard and seen throughout the trial, had to resolve the methodologies, testimony, opinions, and credibility of these "dueling hydrologists."[76] The Trial Court ultimately found Dr. Hyndman's testimony more consistent and closely tied to the evidence and reality than Dr. Andrew's nearly total reliance on less reliable computer simulations and predictions.[77] The Trial Court found Dr. Andrew's testimony to be "wooden," and Dr. Hyndman's more credible than Dr. Andrews'.[78] Dr. Andrews was offered as an expert with environmental sensibilities, but on cross examination he acknowledged that he had served as an expert for defendant polluters, including when asked Pacific Gas & Electric, the villain in the feature film "Erin Brockovich."[79] Near the end of the several long summer days of testimony, Dr. Andrews became nearly messianic in an "outburst regarding the importance of his work in this case to his client."[80] His overstatement of recharge (available water) and parameter estimation for

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[75]July 3, 2004, Pt. 2, T 188-189.

[76]Trial Op., pp. 9-10, 13-16.

[77]Trial Op., pp. 16 [2d paragraph]; pp. 10-15..

[78]Trial Op., pp. 10, 11, 15, 16, 20-22, 25, 29, 30.

[79]May 21, 2003, T 32-36, Tab 20.

[80]June 6, 2003, T 182; Trial Op., p. 10.

his model which resulted in an under-prediction of the effects of pumping[81] prompted the Trial Court to cast Dr. Andrews in "the role of a 'company man.'"[82]

Nestlé filed a motion to supplement the record with additional rainfall and monitoring data and two new exhibits prepared by Dr. Andrews, which was heard before the start of closing arguments on September 9 and 10, 2004. The parties tried to stipulate the supplemental admission of the data[83] in exchange for stipulation of several photographs of staff gauges on the Dead Stream. Defendant's also asked to supplement the record with proposed Exhibits Ly, an update of one of Dr. Hyndman's exhibits, and Lz, another report by Dr. Andrews. When the parties couldn't agree on a quid pro quo exchange, the Trial Court heard arguments, dropped back to his earlier reluctance to open up the record over the same complex issues, and denied the motion because the record was closed on July 3, 2003, except by stipulation the view on July 9, 2003.[84]

Effects and Impairment of Nestlé's Diversion Operation on the Stream and Lakes

Understanding effects requires a familiarity with some basic scientific principles, which both experts carefully explained to the Trial Court. Dr. Hyndman described what happens to a "gaining stream," "losing stream," and wetlands when hydraulically connected groundwater is captured and removed by pumping.[85]

Another important principle is "Darcy's Law" which states "flow is proportional to gradient in elevation of water" for groundwater systems, such as the one at issue in this case.[86] This means that as the slope in the water table changes (such as from pumping as shown in Pltf's

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[81]Trial Op., p. 10.

[82]Id.

[83]Def's Exs Aw-5, Ba-5 through Br-5, Ca-5, Lx; Tab 41 [previous stipulation and order as to same data, but not Lx]

[84]Sept. 9, 2003, T 5-23.

[85]May 19, 2003, T 95-135; Plfts' Ex 76A, 76B, 76C, Tab 21.

[86]Id., T 101.

Ex 76B [Tab 21], above), the flow increases or decreases. So when water levels drop, due to pumping for example, the water flows toward the depression.

A very basic principle is that of "recharge" (the amount of water coming into a watershed that percolates to groundwater). Recharge must equal the "discharge" (the base flow of water leaving the stream or lake system at its downstream point).[87] This is also true for total precipitation in and out of a system, including the additional run-off and precipitation to surface water, evaporation and transpiration. If water is diverted and permanently removed from the watershed, an imbalance occurs until a new steady state (balance) is reached.[88] Thus, removing 400 gpm from the groundwater-surface water interface of the Dead Stream permanently lowers the water table and reduces the flows and the levels of the stream and two lakes, and at least three wetlands.

Nestlé's consultants' May 2001 hydrogeological report concluded that Nestlé's removal of water would deprive the stream of 347 gpm,[89] and diminished the flow of the stream by 23%.[90] Based on the pumping and flow data, the stream flow will drop by 28.5% due to pumping at base flow, and about 15% at 200 gpm.[91] From this Dr. Hyndman concluded that the level of the stream would drop significantly.[92] Nestlé's experts represented in its May 2001 report, submitted with its application for the SDWA permit from the MDEQ, that there would be no impacts to any

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[87]Base flow is the stream's stable flow, i.e., the groundwater component of flow without variables. Trial Op., p. 20; May 19, 2003, T 125-126.

[88]Trial Op., p. 30, lines 1-2.

[89]Table 6-1, Pltf's Ex 40, Source: Hydrogeologic Assessment Report, May 2001, Def's Ex Cr (Tab 22)

[90]Def's Ex Cr, Table 6-1, Tab 22. This was also admitted by Defendants: "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." Defendant's Brief in Opposition to the Plaintiffs' Motion for Summary Disposition, June 4, 2002, p.16. Tab 23.

[91]Trial Op., p. 22.

[92]Plfts' Ex 58a.

downstream surface waters or wetlands. It maintained this position through summary disposition in June 2002.[93] Dr. Hyndman pointed out that Nestlé's experts used the wrong computer model software, the effect of which was to assume an infinite amount of water at the boundary of groundwater and a lake and stream, so the model would not show much effect on levels. So Nestlé brought in Dr. Charles Andrews to "try to repair what had been done."[94]

Dr. Andrews concluded in an August 2002 report that flows in the stream would drop by 19.7%, but estimated that the levels of Osprey and Thompson Lakes would be reduced by 4 inches.[95] This nullified representations to MDEQ that there would be no impacts to surface waters.[96] He also eventually conceded, without qualifying the amount, that the reduction of flow in the stream would reduce the level of the stream and at least two wetlands.[97] In two more addenda to his August 2002 report, Dr. Andrews modified his own opinion, predicting from his computer model (with overstated recharge) that the stream would be reduced by 17%, the lakes by 2½ inches, and two wetlands a few inches. Nestlé set out only some of the opinions and reports in a Table at page 10 of Appellant's Brief. The Table does not account for the other reports and opinions that were exhibits and part of the record of the trial.[98] Nonetheless, the Table shows a material diminishment in the flow of the stream, reductions in the levels of the stream and lakes, and a reduction in levels of at least two wetlands. The differences between just those represented on this Table, taking into account all of the other testimony and opinions on recharge,

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[93]Def's Ex Cr, p. ES-4, p. 1-6.

[94]Trial Op., p. 6.

[95]Def's Ex Cn, Appx E, Table 3 [also Table 4-1, line 1; Table 4-2, lines 1,2, p. 4-5]. Tab 24.

[96]MDEQ made no independent findings on impacts, but compiled and summarized the information. Def's Ex Dn. As for impact determinations, it relied on Nestlé's May 2001 report. Deft's Ex Cr supra.

[97]Id., Table 4-2, lines 3,4,7. Dr. Andrews ultimately agreed with Dr. Hyndman that a reduction in flow of Dead Stream will reduce the level of Dead Stream. May 21, 2003, Pt. 1, T 61-66.

[98]Def's Ex Cr, Table 6-1, Tab 22; Def's Ex Cn, Appx E, Table 3, Tab 24. (Note the two lakes would drop 6 inches.)

flows, levels, and sediment characterization, were resolved by the Trial Court after listening or reviewing all of the testimony and exhibits. Despite these factual differences, the testimony regarding material hydrological effects caused by pumping and diverting "spring water" is summarized below.

a. Dead Stream

Dr. Hyndman concluded from actual data, as wells as from modeling, that the flows of the Dead Stream will be reduced by 24% to 39%.[99] MPI had originally predicted the flow would be diminished by 23%, but Dr. Andrews modified this to 17% to 19.7%. Dr. Hyndman prepared rating curves based on the data, which showed flows and levels at a pumping rate of 400 gpm would reduce the level of the stream by 1 to 2 inches.[100] Dr. Andrews predicted by his model, even with its under-predictions, that the stream would drop by ½ inch at 400 gpm pumping.[101] But as Dr. Hyndman testified and the Trial Court found, Dr. Andrews set the average of flows in Gilbert Creek at 3,800 gpm, when according to Dr. Hyndman it is only 2,000 gpm.[102] This allowed Dr. Andrews to essentially double the recharge from 9 inches to 18 inches in his model for the Sanctuary, which resulted in an under-prediction of effects on both flows and levels. Dr. Andrews conceded that if he lowered recharge numbers in his model, the depth and area of the cone of depression and effects of the pumping would be greater.[103] During Nestlé's pump tests in March-April 2001, its stream expert measured drops in Dead Stream at M-20 Bridge near

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[99]At base flow of 1200 gpm, by 28.5% (Trial Op., p. 22), and at or below 1000 gpm, common for summer months, by 34.5% to 39%. See Def's Ex Ca-3, Ca-4, Ca-5, which show flows in Dead Stream between 1000 to 1200 in Summer months.

[100]Plft's Ex 58A, Table 2 and Fig. 3.

[101]Tab 29.

[102]Andrews' base flow estimates at Gilbert Creek, SG-101, Def's Ex Cf. Tab 25.

[103]Trial Op., pp. 20-21; May 5, 2003, T 95, 101, 134-148. See also Cones of Depression, Def's Ex Cf, Fig. 8, Ex Ck, Fig. A-2, Ex Cl, Fig. 14, and Ex Cr, Fig. 6-6 [MPI McDonald]. At the .05 contour, the drop in level of water table is 6 inches. Any surface water at base conditions is also lowered. At trial, Dr. Andrews testified MW-111S, which is south of Osprey Lake, dropped 1.2 inches. The cone of influence at .1 or 1.2 inches is extensive. If these figures are adjusted for the almost doubled recharge, the cone of depression is deeper and has a greater lateral extent. Defendant's cone of depression, Tab 26.

Doyles of 50% to 65%, and, after trying to argue it was due to blockage in the outflow of Osprey Lake to the stream, admitted that the MPI's documented blockages did not occur on the dates of the test.[104]

Nestlé's own stream expert testified that a reduction in flow of 17% to 19% would narrow the stream channel by 2 to 4 feet.[105] At flow reductions of 28% or more, the narrowing of the stream will be greater.[106] During the trial in late May and early June, Nestlé continued pumping at average rates of 160-170 gpm. The last remnants of a beaver dam that had been deteriorating since January were removed by kayakers, causing a slight drop in the stream at Doyles which turned the stream in the area to turn into a mud-flat.[107] Dr. Andrews testified that this was due to the removal of the beaver dam. That evening Dr. Hyndman conducted an elevation survey of the flats and tied it to the staff gauge at Doyles, which showed that if pumping was stopped the stream would rise ½ inch and cover the mud-flat.[108] By the end of the trial, a large area of the stream at Doyles' was gone, replaced with sediments and vegetation that permanently altered their riparian property and its use.[109] Dr. Hyndman testified that at such levels at the then pumping rate of 170 gpm dropped more than 1 inch, and that the mud flats would be covered by another ½ inch of water.[110] Nestlé's plant manager, Mr. O'Rourke, testified when shown the photographs of the mud flats testified that if his company would stop pumping if impacts like these were caused by

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[104]May 16, 2003, Pt. 1, T 50-56; May 23, 2003, Pt. 1, T 58; June 4, 2003, Pt. 1, T 9-12, 30-32.

[105]May 22, 2003, Pt. 1, T 163, 212-213, 215. Dr. Hyndman testified to like effect. June 5, 2003, Pt. 1, Tr 33-34.

[106]May 23, 2003, Pt. 1, T 46-47.

[107]Tab 7, Tab 28. The Trial Court considered this an event due to low flow conditions, but the photographs of the Doyles stretch of stream before and after the drop in level demonstrated that it takes very little drop in level to seriously and irreparably injure the stream. See also Pltfs' Exs 4A, 4B, 4C, 86, 86A, 86B, 86M, 89A, 89B, 89C, 90A.

[108]Pltf's Ex 100A-S, 100A-1 to 100D-1.

[109]For more photos of Dead Stream, see Pltf's Ex 93, June 8 to June 28, 2003.

[110]For exposed and impacted bottomlands of the stream at Doyles, see photos, Pltf's Ex 93; Pltf's Ex 86C, 86D, 86E, 86H, 86J. (Tab 27.) Testimony of Dr. Hyndman, June 5, 2003, Pt. 1, T 69-73. Tab 28.

Nestlé. Nestlé has never reduced or stopped its pumping despite the subsidence in water, mud-flats, and subsequent permanent alteration of the stream at Doyles' residence.[111]

b. Osprey Lake

Dr. Hyndman showed by actual data and calculation that Osprey Lake will be lowered by up to 6 inches. Dr. Andrews's last addendum to his models predicted it would be lowered by 2.3 to 4 inches. Again, if his overstated recharge is adjusted, the effects would be greater.

c. Thompson Lake

Dr. Hyndman and Dr. Andrews both predicted drops in Thomson Lake from 2.25 to 6 inches because the lake is in essentially a one to one relationship with Osprey Lake. Dr. Hyndman is of the opinion that it will drop 3 to 6 inches. Dr. Andrews changed his opinion from a 4 inch drop to 2.25 inches in his last addenda report. Again, if the overstated recharge is adjusted, the effects would be greater than 2.25 or 4 inches. "[T]hese lakes suffered losses at the time of trial and are likely to drop around six inches at a pump rate of 400 gpm."[112]

d. Tri-Lakes

Experts predicted even a 3% decline in the flows out of Tri-Lakes, a large volume of water.[113]

e. Wetlands

The wetlands in the area were identified by number according to a site Location Map.[114] The primary wetlands at issue during trial were Wetland 115, 112 and 301. Dr. Hyndman observed a 1 to 2 foot or more drop in Wetland 115, and simulated a drop due to pumping of 1.9 to 2.2 feet.[115] Dr. Andrews' model predicted there will be only a slight drop in Wetland 115,

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[111]Eg., stream levels tied to pumping using a rating curve, Pltfs' Ex 58A, Fig. 3 and Table 2; See Def's Ex Bc-4 to see hydrograph of levels.

[112]Trial Op., p. 38.

[113]Tab 9 shows Tri-Lakes; Tabs 24, 29 & 30.

[114]Def's Ex Aa, Tab 9.

[115]Pltf's Ex 58A, Table 6, Tab 30.

because he assumed a barrier of low conductivity between it and the well-fields.[116] The barrier assumed nearly impervious sediments when in fact the sediments were heterogeneous with higher conductivity regions.[117] Many exhibits showed continuous sand, gravel, or mixture of these and silts in this region. MPI's geologist misinterpreted soil boring results to support Dr. Andrews "barriers."[118] The Trial Court rejected these artificial low conductivity values or "barrier" to predicting effects as not credible.[119]

Dr. Hyndman expected a significant measured drop of Wetland 112/301, and simulated a drop in Wetland 112 of over 8 inches, and in Wetland 301 of 1.2 inches.[120] Dr. Andrews simulated a drop in Wetland 301 of 2 inches by the end of the drier Summer season, and only a negligible drop in Wetland 112, again because of assumed low conductivity values under the wetland. The Trial Court discounted Dr. Andrews testimony in favor of Dr. Hyndman's.[121] The Trial Court found that the above effects would have significant adverse impacts and would impair the aquatic resources of the stream, lakes, wetlands, and related water resources.[122]

Impairments of Water and Aquatic Resources

Dr. Barbara Madsen testified as Plaintiffs' wetland expert. Dr. Madsen testified that the extensive tussock marsh wetlands along Dead Stream have high biological values, and would be

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[116]See Def's Ex Cm, pp 5, 6, Figs 4-7. Compare the shape MPI's cone of depression in Fig. 6-6 with the lopped-off cone of depression of Dr. Andrews' Figs. 14 and A-2 in Tab 26. See also Tab 40.

[117]See, e.g., Def's Ex Cf, Fig. 8. The cone of depression shows this "barrier" of assumed low conductivity as a straight line on the western boundary. Tabs 10 & 26.

[118]May 19, 2003, Pt. 1, T 56-59, 62, 63; Def's Ex Cn, Sec. 1-5, p. 107, "Glacial Till." See the mixture of sand, gravels, silts, and clay from Nestlé's soil borings. Tab 10.

[119]"Defendant's arguments on this point are rejected." Trial Op., pp. 25.

[120]Pltf's Ex 58A, Table 6, Tab 30.

[121]Trial Op., pp. 25-26.

[122]Trial Op., e.g., pp. 33-38, 48-49. "The factual analysis undertaken above apply essentially the same under both theories [groundwater and MEPA]." Id. at p. 41 (top).

impaired.[123] The same was true for the value and impacts on Wetland 115 on the Sanctuary property.[124] Dr. Madsen testified to similar effect as to the reductions in levels of Wetland 112/301, a sedge/fen. Seasonal fluctuation in level was about 1 to 2 feet, but observed a 3 feet drop below May 2002 when pumping started.[125] Even an additional 3 inch drop would cause a loss of 10% of the wetlands.[126] Dr. Hyndman predicted 6 inches to 1 foot, so the reduction in size would be doubled.[127] The permanent reductions cause a "seasonal shift" in hydrology, which Defendants hydrographs demonstrated.[128] Dr. Madsen refuted assumptions by Dr. Andrews, for purposes of his model, that the sediments under wetlands were impermeable with low conductivity, thus preventing his model from predicting much effect on levels. She found no such sediments below Wetlands 112 and 115.[129] Dr. Madsen also refuted Nestlé's experts testimony that there would be no biological impacts.[130] The Trial Court found significant biological wetland impacts.[131]

Plaintiffs stream biologist was Dr. Mark Luttenton. He testified that the tussock marsh along the Dead Stream was a viable spawning habitat.[132] Where Nestlé's expert Mr. Cozad said

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[123]May 14, 2003, Pt. 1, T 17-18, 21-22, 23-26, 28; Id., Pt. 2, T 198, lines 22-24; July 1, 2003, Pt. 1, T 35; Plfts' Ex 63.

[124]May 14, 2003, Pt. 1, T 44-49, 107-109; July 1, 2003, Pt. 1, Tr 36-37; Ex 62B.

[125]May 14, 2003, Pt. 1, T 74-75, 82, 90, 124,

[126]Id., T 152, 154; it is the permanent reduction that causes adverse effects. Id., T 92-93, June 6, 2003, Pt. 1, T 48-49.

[127]June 4, 2003, Pt. 2, T 172.

[128]Def's Ex Bo; May 15, 2003, Pt. 1, T 15-16, 18, 22, 160.

[129]June 4, 2003, Pt. 2, T 83, 184-185.

[130]See May 14, 2003, Pt. 1, T 117-125. Nestlé's expert omitted wetland 115 from his report. Id., T 117; Plfts' Ex 62, p. 11.

[131]Trial Op., pp. 33-38.

[132]Both Luttenton and Cozad agreed with this. May 22, 2003, Pt. 1, T 190, 201, May 6, 2003, Pt. 1, T 96, 104-105; July 2, 2003, Pt. 1, T 21, lines 19-20, T 15-23.

the stream had no pike or trout, Dr. Luttenton found several.[133] Where Mr. Cozad said the water was to shallow for pike to spawn, Dr. Luttenton found evidence that the water fluctuated and had been much higher, demonstrating that when the natural level of the stream was reduced by pumping it would impair spawning.[134] Dr. Luttenton also testified that narrowing of the stream would be greater and with more significant loss of aquatic habitat.[135] Further, Nestlé's expert's reliance on "average flows" for evaluating effects and impacts "nullifies the potential of those fish being able to survive in that system, because they're not dependant on only that average flow rate."[136] He testified that a 1 to 2 inch drop in the Dead Stream would cause significant impairment,[137] and that a drop in level of Thompson Lake, from 3 to 6 inches, will significantly impact fish habitat and the fish community.[138] The Trial Court found significant impacts to the stream, such as temperature, nutrient loading, fishery, recreation, and aesthetics.[139]

The Trial Court's Final Opinion and Judgment/Order

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 concluded that the stream, lake, and related water resources had been and will be materially diminished and impaired.[140] The Trial Court's opinion was based on the undisputed facts that Nestlé's pumping and diversion of water from the spring aquifer at the Sanctuary has diminished and will diminish

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[133]May 14, 2003, Pt. 1, T 93, 95-96, 97, 118. 130; Plfts' Ex 67A- 2, 3, 11 & 10 (good spawning habitat).

[134]May 15, 2003, Pt. 1, T 89-90; July 2, 2003, Pt. 1, T 6, 7, 110-111; Plfts' Ex 98A, 98B.

[135]July 2, 2003, Pt. 1, T 23-26, 27-29.

[136]May 15, 2003, Pt. 1, T 119, lines 5-8. The proper measure is "average seasonal low flow." Id. T 123, 24, 129.

[137]May 15, 2003, Pt. 1, T 131-140; July 2, 2003, Pt. 1, T 27-29, 93. A small change in levels of the stream has major impacts as show in photos, Tab 27.

[138]May 15, 2003, Pt. 1, T 141-145; July 2, 2003, Pt. 1, T 32-35, Plfts' Ex 92A, 92B.

[139]Trial Op., p. 33 (top).

[140]Trial Op., p. 18.

the flow and/or levels and narrow the stream, reduce the level and diminish the size of the lakes, and drop the level and reduce the area of State protected wetlands.[141] The Trial Court found that Dr. Andrews overstated recharge to groundwater, and that this caused the model to under-predict these effects. Given the undisputed fact that Nestlé's diversion of the water is for private sale of the water out of the watershed, the Trial Court concluded that continuous pumping and diversion of the water and its hydrological effects would impair the stream, lakes, wetlands and water-related resources.[142]

The Trial Court issued a permanent injunction, and ordered Nestlé to turn-off the wells at the Sanctuary location because it found Nestlé had invaded Plaintiffs' riparian property rights and violated the MEPA. The Court found that because of the numerous natural variables in the Dead Stream and Lake system, particularly seasonal, annual, and cyclical changes in flows and levels due to changes in precipitation, and the temporal nature of beaver dams, any continuous pumping at the levels proposed, or the lower levels of pumping during the trial (averaging 150 to 170 gpm), there was no viable rate of pumping, as conducted or proposed by Nestlé, that would not cause a diminishment or impairment of the surface water and related water resources.[143]

Post-Judgment Proceedings

Nestlé filed motions for new trial or amendment of judgment and stay or suspension of injunction.[144] After extensive review and argument, the Trial Court denied the motion for new trial on February 13, 2004, because nothing raised or offered by Nestlé was new or, alternatively, would materially change or even tend to change the findings or conclusions or the result. New Trial Op., Feb. 13, 2004, pp. 34-35.

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[141]Trial Op., pp. 30-33.

[142]Trial Op., pp. 41-50; 51-60

[143]Trial Op., p. 50.

[144]The Trial Court denied Nestlé's motion for stay because it proceeded with full knowledge of the risks, could continue using plant without the Sanctuary well field, and had created its employees lay-offs by its own internal decisions. Bench Op., Dec. 13, 2003. Nestlé filed an interlocutory appeal, and the Court of Appeals issued a conditional stay in lieu of granting leave.

Immediately after the final decision on November 25, 2003, Nestlé berated the Trial Court's decision in the news media. Because of the flurry of news media reports, the Trial Court responded to possible misconceptions by the parties or public by appending a Postscript to his New Trial Opinion. The Trial Court carefully separated any personal observations or potential bias from any possibility of prejudice. Until after his final decision, the record shows now complaints or objections by the parties from the outset of the lawsuit.[145]

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.[146]

ARGUMENTS

I. THE TRIAL COURT PROPERLY FOLLOWED LONG-STANDING PROPERTY LAW PRINCIPLES THAT PROTECT RIPARIAN LANDOWNERS AND PUBLIC WATERS FROM PRIVATE DIVERSION AND SALE OUT OF WATERSHED BY A NON-RIPARIAN.

A. Standard of Review

This Court's review of a questions of law is de novo. Fultz v Union-Commerce Assoc, 470 Mich 460, 463; 683 NW2d 587, 590 (2004). As will be seen the Trial Court properly interpreted and applied legal principles under Michigan water and property law to the unique facts and circumstances of this case. Further, an error of law does not require remand where the findings of the trial court are not clearly erroneous and the legal standard adopted by the appellate court when applied supports a decision to affirm. MCR 2.613(C).

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[145]Trial Op., pp 4-5, 9. "In the final analysis I would hope that any such research would also have revealed that I value my integrity as a judge above any such personal predilections." Id., p. 5, lines 2-4. "Anticipating the motion just decided above, I did not engage in public conversation regarding the case, as the Code of Judicial Conduct requires." New Trial Op., Postscript, p. 35. "I am a judge deciding a case.... I merely decided the legal and factual merits of the controversy before me." Id.

[146]On March 19, 2004, Plaintiffs cross-appealed the dismissal of the public trust claim by summary disposition and the denial of the motion for reconsideration, and filed their Brief of Cross-Appellants on August 20, 2004. In addition, the Trial Court awarded taxable costs under MCR 2.625 and taxable expert fees under RJA 2164, MCL 600.2164, and, alternatively apportioned these same taxable costs, under Sec. 3(3) of the MEPA, MCL 324.1703(3). Nestlé filed a claim of appeal on the award or apportionment of these costs, and briefs have been filed by the parties. COA Docket No. 256153

B. The Trial Court Correctly Ruled that a Non-Riparian Cannot Pump, Divert, and Sell Water from Springs that Directly Feed A System of Lakes and Streams Where the Diversion Results in a Diminishment of the Flow, Level, and Size or Impairment of the Lake or Stream in Which Plaintiffs Have Riparian Property Rights.

MCWC's water law claim is firmly anchored in long-established property law principles that prohibit diversions of water from watersheds, especially where the diversion by a non-riparian is for a private sale and diminishes the flow or level of a lake or stream, impacting a riparian's property right. Dumont v Kellogg, 29 Mich 420 (1874); Kennedy v Niles Water Supply Co, 173 Mich 474; 139 NW 241 (1913); Hoover v Crane, 362 Mich 36; 106 NW 563 (1960); Thompson v Enz, 379 Mich 667; 154 NW2d 473 (1967), and Schenk v Ann Arbor, 196 Mich 75; 163 NW 109 (1917). Read together, these cases stand for three propositions:

(1) Riparian rights to the use water in general are subject to the limitation that the use is reasonable and does not unreasonably interfere with another's use. However, riparian rights are connected with the land and can never be severed or alienated from the land. Thompson, 379 Mich at 686-87; Little v Kin, 249 Mich App 502; 509-11, 644 NW2d 375 (2002), aff'd 468 Mich 699; 664 NW2d 749 (2003). See also Cameron, Michigan Real Property Law 2d, § 3.8, p. 91 (bottom).

(2) It is unlawful for a riparian owner to divert water by any means from a lake or stream for use off-tract or out of the watershed where it diminishes in any way by any means the flow of a lake or a stream. Dumont, 29 Mich at 421; Kennedy, 173 Mich at 475; Hoover, 362 Mich at 42.

(3) The use of groundwater is proper so long as it is reasonable and does not interfere with the use of another competing groundwater user, Schenk, 196 Mich 75.[147] But if it is off-tract, the use cannot materially diminish the flow or level of a spring, lake, or stream. Schenk, supra, 196 Mich at 83-84. The Michigan Supreme Court in Schenk quoted from Smith v City of Brooklyn, 52 NY Supp 983 (1898); aff'd 160 NY 357; 54 NE 787 (1899), at length:

> … whatever may be the rule with respect to the right of landowner to use the water percolating through the earth, and thereby affect the sources of wells or

[147]See Getches, Sax, Thompson, et al., Tarlock, and Getches, Tabs 32, 33, 34.

springs upon his neighbors lands, he may not divert and diminish the natural flow of a surface stream by preventing its usual and natural supply, thereby causing, through suction or other methods, a subsidence of its waters.

* * *

… the water of a natural surface stream is for the benefit of all the riparian owners, and that to divert or to diminish its flow in any way is an interference with a natural right, which gives rise to an action for injury. 196 Mich at 84-85.

Schenk adopted the "reasonable use" rule as did most other states east of the Mississippi,[148] but at the same time recognized a further limitation that forms the basis for actionable injury, where the diversion is out of a watershed and results in a diminishment of flow, level, or size of a stream.

This limitation is consistent with the rule that protects the common property rights in a stream shared by riparian owners from diversions of the stream beyond the watershed. See Dumont, supra; Kennedy, supra; Hoover, supra. The limitation is particularly applicable where the water is diverted out of the watershed and sold in distant markets or lands. Smith v City of Brooklyn, supra and Schenk, supra, 196 Mich at 85; see also Collens v New Canaan Water Co, 155 Conn 477; 234 A2d 825 (1967).

With these background principles in mind, the Trial Court in this case was faced with a situation not directly ruled on in Michigan: does the rule or limitation prohibiting diversions from a watershed apply when a non-riparian party pumps the source of the riparian water – i.e., a spring aquifer – instead of the pumping from the riparian water body itself? Fortunately, the above background principles of Michigan water law provided guidance:

I begin this common-law ruling fully aware that I am stating a rule of law that has not been announced by any reported Michigan case to date, but I also note it is not in conflict with any either. I believe the rule(s) about to be set out consistent with the "thread" of Michigan common law regarding water uses. Trial Op., pp. 45, 47.

[148]See Argument I.C, infra. It should also be noted that western states follow a similar rule, although perhaps even more strict. Tributary groundwater that supplies a stream is considered part of the stream, and cannot be diverted by those without the appropriated rights in the stream. Katz v Walkinshaw, 141 Cal 116; 74 P 766 (Cal 1903); Ranson v City of Boulder, 161 Colo 478; 424 P2d 122 (Colo 1967); see Sax, "We Don't Do Groundwater: A Morsel of California History," 64 Denver Water L. Rev., 269, 284 (2003).

After filtering through the case law, the Trial Court discerned three distinct categories of disputes over competing uses of water:[149]

(1) Disputes between competing riparian users of water from a lake or stream.

(2) Disputes between competing groundwater users with no direct connection to a lake or stream.

(3) A hybrid of (1) and (2). Disputes between a competing riparian and groundwater users where there is a direct connection between the surface water and the groundwater, and particularly where there is a diversion of water by the groundwater owner out of the watershed.

The riparian reasonable use rule applies to Category (1) (uses between competing riparian owners). See Hoover, supra; Dumont, supra; Thompson v Enz, supra, But if a riparian owner diverts the water from the stream and out of the watershed, the diversion would be held to be unlawful per se. See Dumont, supra; Hoover, supra, particularly where the flow, level, or size of the stream is diminished.

The so-called American Rule or "reasonable use" rule[150] applies to Category (2) (uses between competing groundwater users). If the use is applied to overlying land or estate, the so-called American Rule or "reasonable use" standard applies; if the water is diverted off-tract for use or sale elsewhere, it may be unlawful per se under the general rule barring off-tract diversion or severance of water from the estate to which it attaches or benefits;[151] or it may be unreasonable or actionable injury if there is an interference with a neighbor's competing groundwater use, well, spring, or surface water. In Schenk, Michigan adopted this rule to a municipal well field. The City of Ann Arbor set up pumps near the edge of the city and diverted water a few miles to its municipal water plant. 196 Mich 75. From the reported facts, the water was not diverted out of the watershed. Id. The Court applied the "reasonable use" rule and held that the city could not divert water off-tract and harm a the wells of neighboring landowners. The Court also noted that the city would be liable if the off-tract diversion "interfered with in his right to the reasonable

[149]Trial Op., pp. 9 [lines 6-8], 44-46.

[150]See Sax, Thompson, et al.,Tab 33, Tarlock, Tab 34.

[151]Argument 2.D, infra; Tarlock, Law of Water Rights and Resources, Tab 34.

user of subsurface water upon his land or if his wells, springs, or streams are thereby materially diminished in flow…." Id. at 83 (quoting Meeker v City of East Orange, 77 NJL 623; 74 A 379 (1909) (emphasis added).

The rules for Category (3) involve direct conflicts between a riparian's rights in a stream or lake and a non-riparian's extraction and diversion of groundwater that has a direct hydraulic connection to a stream. While Schenk did not specifically involve this situation, the cases relied on by the Court from other jurisdictions did. The Trial Court traced and drew on these basic principles that protect the flows and levels of lakes and streams, and in combination with the principles in Schenk, including the precedents relied on by the Supreme Court from other jurisdictions, Trial Op., pp. 44-50, reasoned that the fact that the water is coming from the ground, as opposed to coming from the riparian itself, makes no difference:

> I hereby hold that riparian interests are superior to conflicting groundwater interests, and that the latter must yield to the former in cases of conflict. Trial Op., pp. 47, 48 [emphasis added].

Nestlé argues that this holding "'adopts … an absolute and unprecedented preference for riparian over groundwater' interests without legal reasoning or explanation."[152] The premise of Nestlé's argument is that the Trial Court intended the words "riparian interests are superior … to conflicting groundwater interests" to control all disputes between a riparian and groundwater users. Clearly, Nestlé's argument misses the mark. A reading and understanding of the Trial Court's decision reveals that he intended a very narrow set of rules, arising out of a direct "conflict" between a riparian and non-riparian where the diversion effects hydraulically connected lakes and streams.

> The focus in the common-law is only those portions of the ecosytem to which the property law concepts of groundwater versus riparian rights attach. Trial Op., p. 9.

The Trial Court explained that its holding applied only "when there is a conflict." Trial Op., p. 47, and in particular what was meant by "conflict:"

> As examples I refer to the effects on the stream's stage and flow. Those are part of the riparian interests as they are a foundation for them. Id.

[152] Appellant's Brief, pp. 25-26.

The "foundation" the Trial Court refers to is fundamental protection of flows and levels of lakes and streams from effects due to diversions out of a watershed, under Dumont, supra; Hoover, supra; Kennedy, supra; Schenk, supra. The Trial Court then specifically described the effects and impacts from diminishment of flow and level that define the circumstances where such a conflict "must yield to riparian interests." Id. The Court noted that this occurs only when "the physical parameters of the stream itself will be lessened," a fact, in this case, that was admitted by Nestlé's own expert.[153]

In other words, the Trial Court made a very limited ruling, consistent with common law principles in Michigan and elsewhere, and held that riparian rights prevail only where a non-riparian, who has no common riparian right in the lake or stream, pumps and diverts the tributary groundwater that has a direct hydrological connection to the stream, and such diversion is out of the watershed and results in actual physical effects, such as diminishment in flow, level, or size. In doing so, the Trial Court honored the long-established riparian law principle barring the diversion of water out of a watershed, but stopped short of applying its ruling to other conflicts that may arise between riparians and non-riparians. The Trial Court simply did not permit a non-riparian to do what a riparian cannot do under precedents dating back over 100 years.

1. Nestle's Claims of "Widespread Disruption To Groundwater Users in Michigan" Are Inconsistent With the Trial Court's Ruling and Are Simply Wrong.

Nestlé has fixated, out of context, on the word "superior," likely to engender fear and sympathy from other groundwater users who are really not affected by the decision, such as those described in Appellant's Brief, p. 33. The fixation and fear is unfounded. New Trial Op., pp. 35-37. For example, farmers use groundwater on crops in connection with their own land, so there is no off-tract diversion and they are subject to rules of reasonable use. These uses are not affected by the holding of the Trial Court. Trial Op., p. 3; New Trial Op., pp. 35-37. Municipal and domestic uses serve homes, residences and businesses that use the water in connection with land and in the local community or watershed. Utilities use groundwater for cooling waters,

[153]Table, p. 10, Appellant's Brief; see also Cozad and Luttenton testimony, Argument III.B.1, infra, and transcript references.

which is also in connection with the generation of electricity on the overlying land. Manufacturers and producers use water in connection with industrial processes or as incorporated into a product, not for sale where water is itself the product. Nestlé's cry, in Appellant's Brief, p. 33, that the Trial Court's "standard … threatens to cause widespread disruption" or would be "devastating to the economy" is unsupported by evidence, common sense, and reality.[154]

If anything, a ruling in favor of the arguments fobbed by Nestlé would cause the devastation to the economy, jobs, and property rights that Nestlé claims it is so worried about. Presently, property and water rights in riparian systems – including domestic, commercial, industrial, navigational, and recreational uses – depend on the integrity of the quantity of water (flow and level).[155] Manufacturing, as well as the State's water discharge and waste water discharge permit regimes, all depend on flow and level. Farmers depend on a predictable and stable supply of water in the watershed where they farm. So do the electrical utility, boating, fishing, ski areas, golf courses, resorts, marinas, and other recreational and tourist industries.[156] A shift in property or water law that allows the removal of water from a stream, or a shallow aquifer that feeds the stream, would favor diversion and export past the point of substantial injury to Michigan's economy, recreational resources, and environment.

As the Trial Court explained, "this case is about Defendant's pumping operation in and from the Sanctuary Springs area in the shallow unconfined aquifer referred to in this case and nothing else." Trial Op., p. 3 (emphasis added). The Court also noted:

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[154]Freyfogle, Water Rights and Common Wealth, 26 Envtl L 27, 31-34, 49-50 (1996). The author notes, "A related assumption in water-rights logic is that, like other commodities, water is transferrable, sufficiently so as to give rise to a functioning market. … The assumption that water is smoothly transferred, from place to place and use to use, is an idea firmly grounded in a pre-ecological era; it is an idea that makes sense only in a realm of economic theory detached from any real waterway or watershed. … In the abstract ,water flow is a water flow; it is the fungible widget of microeconomic theory. In real life, the matter is much more complicated."

[155]Id.

[156]Cameron, Michigan Real Property Law, § 3.8. For example, Michigan is number one with registered boats, with combined sales of $502,177,000 in sales in 1995 alone. Michigan Boating Industries Ass'n, "Boasting About Michigan Boating," (1997); Schafer, Modern Definition of Navigability, 45 Wayne L Rev 9, 13, n25-28, and accompanying text.

> During the trial the defense introduced … information regarding water uses and sources for selected municipalities, commercial, agricultural and industrial purposes. This information however interesting, in final analysis was not particularly important and, frankly, is adverse to the parties introducing it.
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> While it is obvious that there are many accepted consumptive water uses in Michigan, including beverage uses, the core question in this case is not resolved by this information.
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> * * *
>
> I clearly recognize that water is included in many lawful products made in Michigan and exported out of the watershed the water comes from.... As I have clawed my way up the learning curve presented by this case I came to discern the potential differences presented by other commercial and municipal water usages and that presented for analysis in this case. Trial Op., p. 40.[157]

Diverting water from a shallow aquifer that diminishes the flow, level, or size of a lake or stream, and causes other harms unique to such riparian and ecological systems, is a diversion of the water from the riparian's common right in the stream, no matter what size the container. The Trial Court imposed the common law's recognition that riparian rights in a stream are not a commodity turned over to strangers, like non-riparians, that have no legal connection or reality in the stream.

If Nestlé's argument and proposed standard were adopted by this Court, all riparian water, including the shallow aquifers or tributary waters that feed them, would be subordinate to diversion and export of water, and property and riparian rights would be drastically shifted. Such a sea-shift, in effect, would grant water rights for those who want to divert the groundwater for private sale superior to the economic, riparian property, and the ecological reality embedded in the stream itself.[158] Nestlé's proposed standard is akin to appropriation doctrine of the Western

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[157]See also Trial Op., p. 60-61, regarding interpretation of the GLPA, MCL 324.32703: "waters of the Great Lakes within the boundaries of this state shall not be diverted out of the drainage basin of the Great Lakes." ("However, if water is the product, the rationale loses its logical force in face of the higher social value of preserving water as water. To argue that Defendant's bottled water is a product in which water is incorporated ignores that water, by its nature, must be containerized to be handled. Packaging it only makes it easier to transport and to market. Id. [original emphasis]).

[158]Freyfogle, Water Rights and Common Wealth, 26 Envtl L 27, 31-32, 49-50; Tab 42; Freyfogle, Water Justice, Def's Appx 7. "… water is always in use, particularly freshwater. Water left in lakes and streams supports fish and wildlife, aids navigation, dilutes and flushes pollution, and yields substantial aesthetic and recreational benefits." Despite being cited by Nestlé in its Appellant's Brief, the author would eschew a non-riparian's diversion of water for sale out

(continued…)

states,[159] and would lead to untold negative consequences on Michigan users and property law and water rights.

As noted above, the "reasonable use" rule applies as between neighboring owners whose claims arise out of injury to their competing groundwater uses or interests. However, when a groundwater withdrawal takes from an aquifer directly connected to a stream, most jurisdictions in both riparian and western appropriation states recognize a more stringent limitation than the reasonable use standard. See e.g., Smith, supra; Collens, supra; Katz v Walkinshaw, 141 Cal 116; 74 P 766 (Cal 1903); see also Argument I.C, infra; see also Tarlock, Law of Water Rights and Resources (Clark Boardman Callaghan, 1995), pp. 4-51 to 4-22 (Tab 34); Sax, We Don't Do Groundwater: A Morsel of California History, 64 Denver Water L. Rev. 269, 283, 284, 314 (2003). The Trial Court noted the uniqueness of this case in relation to the extraction and diversion that actually diminishes the flow, level, and physical parameters of the stream:

> The law recognizes property rights to this stream, most directly in named Plaintiffs Doyle, but also in those Plaintiffs riparian to bodies of water which the Dead Stream is sufficiently connected that they have access to the Dead Stream via their property.
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> * * *
>
> The impacts of Nestlé's operations on the Dead Stream deserve full analysis under this area of Michigan's property law. Trial Op., p. 43.

The reason behind this is the obvious fact that riparian interests are property rights connected with land, purchased by those who have paid the price for the use, enjoyment, and possession of the riparian rights that go with the title to the riparian land in the watershed where the water flows. Riparian rights include the corporeal right to flow of a stream that cannot be alienated by artificial means, Thompson, 379 Mich at 677, or diverted from a watershed "by any

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[158](…continued)
of a watershed where it would diminish flows and impair a stream or lake. Thompson v Enz, 379 Mich 667, supra, recognizes the importance of these substantial benefits protected by riparian rights.

[159]Katz v Walkinshaw, supra. For accounts of the devastating effects of such a holding, see Reisner, Marc, Cadillac Desert: The American West and Its Disappearing Water (1986); Powledge, Fred, Water: The Nature, Uses, and Future of Our Most Precious and Abused Resource (1982); Wilkinson, Charles, Crossing the Next Meridian: Land, Water, and the Future of the American West (1992); Freyfogle, Water Rights and Common Wealth, supra.

means." Dumont, 29 Mich at 422. The also include recreational and aesthetic use. Thompson, supra.

Such a sea-shift in property rights, given the economic, recreational, and biological importance of water in Michigan, with all of its complex economic, social, and ecological complexities, should not proceed without planning, study, and deliberation. In Bott v Natural Resources Comm'n, 415 Mich 45; 327 NW2d 838 (1982), the Court rejected arguments that would have overturned long-established privacy of dead-end lake riparian property law solely because of an argument of public need.[160] The Court noted,

> Even were it granted that a need for expanded public recreational uses is a value that has hardened into social consequences, we cannot ignore the conflict with another well-recognized norm, the unfairness of eliminating a property right without compensation. This Court has previously declared that stare decisis is to be strictly observed where the past decisions establish "rules of property" that induce extensive reliance. 415 Mich at 77-78.

The Supreme Court refused to expand public access based only on need, as opposed to other legal precedents or rules and shift the law in a manner that diminished the rights of riparians who have acquired private lakes or streams in reliance on long-standing legal principles. Id. The same is true in the instant appeal. Nestlé's quest to overturn established rules of riparian rights and related property law principles would open the flood-gates for the diversion and export of water by non-riparians at the expense of long recognized common riparian rights and the stream, lake and watershed.

For these reasons, the Trial Court properly followed basic property law principles of riparian and groundwater law.

> Distilling … all of this discussion to a rational, and enforceable, rule of law, I have reached the following conclusion. In cases where there is a groundwater use that is from a water source underground that is shown to have a hydrological connection to a surface water body to which riparian rights attach, the groundwater use is of inferior legal standing than the riparian rights. In such cases, as here, if the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body. This is not a pure per se rule in that it does require a showing that the flow to/in the surface water body has been affected to a degree that there is a level of confidence that the effect(s) are not part

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[160] The scope and limits of the dead-end lake rule of private riparians against public access over surface waters have been fully addressed in MCWC's Cross-Appellants' Brief on Appeal on the Public Trust Doctrine, Aug. 20, 2004.

> of the natural forces at work on the surface water(s) … The next step in the rule is in cases where, again as here, the groundwater use is shown to have measurable and proven negative impacts on the riparian body/bodies, with the analysis not having any component regarding whether the use is off-tract/out of watershed….
>
> In this case the Defendants' water-extraction activities from the Sanctuary Springs wells run afoul of both of the standards just stated above by a comfortable margin. As such, they are hereby enjoined. Trial Op., pp. 48-49 [emphasis added.].

The arguments urged by Nestlé are legally inconsistent with these basic water law principles and precedent, and would undermine – if not destroy – the economic security and quality of life in Michigan.[161] In contrast, the Trial Court made careful and specific findings based on the proofs and record, that Nestlé's activities have diminished the flow, level, size, and physical impairment of the stream and two lakes. Based on these specific and extensive findings, the Trial Court's decision was consistent with established principles and applied a solid legal analysis in finding Nestlé's activities constitute actionable injury under Michigan law. Because the actionable injury is continuing, the Trial Court's permanent injunction was proper.[162]

2. The Trial Court's decision is also consistent with case law from other jurisdictions that have addressed watershed or off-tract diversion of tributary groundwater where it diminishes flow, levels or impairs a surface waters and riparian interests.

The Trial Court's decision is also consistent with the mainstream of water law jurisprudence. The decisions from other states that have addressed the hybrid situation regarding a direct conflict between riparian surface waters <u>and</u> hydraulically connected groundwater. In such circumstances, the courts will prohibit the diversion out of the watershed if in fact the stream and groundwater have a direct hydrological connection and the pumping and diversion of water for sale results in a diminishment of flow, level, size or other characteristics. The courts recognize the right to withdraw and use groundwater, and rightly so, but it is a qualified right at most, and cannot be exercised where it clearly diminishes a lake or a stream and the rights of riparians who hold and use rights to these surface waters in common.

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[161]As noted by the Trial Court, Michigan is the ""winter-water wonderland" state. Trial Op., p. 66.

[162]The appropriateness of that injunction and remedy is addressed in Argument IV, infra.

In Collens, supra, the court resolved this conundrum between non-riparian groundwater use and riparians and influent waters. As in this case, the defendant put in a series of wells that were pumping the tributary groundwater from a stream. The court concluded:

> It is immaterial in what manner the diversion of the stream by the defendants is effected. Diversion or diminution of the natural flow of a surface stream to the detriment of the riparian owners by the defendant's pumping water from the wells supplied by the underground waters which support the visible stream is an interference with the rights of riparian owners which entitles them to injunctive relief. Smith v City of Brooklyn, 160 NY 357, 360, 54 NE 787, 45 LRA 664. It has been recognized as a proposition of hydraulics that the flow of a stream may be diverted or diminished by the use of wells as was found to have occurred in the present case. 234 A2d at 831 [emphasis added]; citation omitted.

The Collens case is consistent with Justice Cooley's decision in Dumont, supra, 29 Mich at 421, that an upper riparian land owner cannot diminish the flow of a lower riparian "by any means," and the Supreme Court's decision in Schenk, also quoting Smith, supra. The Smith court noted:

> That the diversion and diminishment of the stream were caused by and arresting and collecting the underground waters, which, percolating through the earth, fed the stream, does not affect the question. When the fact was established upon proofs that the defendant's works and wells had caused, by this subsidence of water, a diversion of the stream's natural flow in its channel, the injury was proved and plaintiff's cause of action established. 160 NY at 361.

The law generally limits off-tract diversion of water for sale at the expense of other private landowners who use the water in common on their own property. Martin v City of Linden, 667 So2d 732 (Ala. 1995); Rothrauff v Sinking Springs Water Co., 14 A2d 87 (Pa. 1940); See also Forbell v City of New York, 164 NY 522, 526-27; 58 NE 644 (1900), which followed Smith, supra:

> In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do.... But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in plaintiff's land ... and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and others whose lands were thus clandestinely sapped..... We recognize the fact that the water supply of a great city is of vastly more importance.... But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to plaintiff. at 527.[163]

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[163]See also Meeker v City of Orange, 74 A 375 (NJ) (quoted by the Michigan Supreme (continued...)

The same limitation applies to tributary groundwater in the West. In Katz v Walkinshaw, supra (also quoted in Schenk, at 86,) the court established a rule that removal of percolating water in the soil that diminished the waters flowing in a stream was prohibited. In Colorado Ground Water Comm'n v North Iowa-Bijou Groundwater Mgmt Dist, 77 P3d 62, 70 (Colo. 2003), the court held that the use of "tributary" groundwater, which is connected to surface water, is unlawful because it would reduce the surface water available to those who had rights in the stream. See also McClintock v Hudson, 74 P 849, 850-51 (1903) ("[T]here is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the flow, and no reason for applying a different rule to the two classes …"). Those who appropriate groundwater that is hydraulically connected to a stream cannot diminish the flow or surface of the stream. See Sax, We Don't Do Groundwater, Tab 33, at 283-84.

3. A majority of leading water law experts recognize the rule that tributary groundwater that is directly connected to a lake or stream cannot be diverted off-tract or out of the watershed, especially where there is diminishment of flow or similar hydrological effects or impacts.

Generally, there is no common law right for a private person to divert and sell water off-tract – that is, disconnected or severed – from the riparian land from which it may be withdrawn and diverted. Cameron, Real Property, supra, § 3.8, p. 9. This is also the general rule, in the majority of riparian law jurisdictions that have considered the question, regarding diversions or off-tract sale of tributary groundwater.[164] As noted by four of the most widely recognized experts in American water law- Professors Sax, Thompson, Leshy, and Abrams:

> American Reasonable Use. This is a modified rule of capture. It adds two wrinkles to the absolute ownership rule: The water must be (a) put to a reasonable use, (b) on the overlying tract. Applying the on-tract limitation, P may obtain an injunction against E's pumping of groundwater for export. Sax, Thompson, Leshy,

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[163](…continued)
Court in Schenk):

> … but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom … if his wells, springs, or streams are thereby materially diminished in flow.

[164]Twenty-nine states, Michigan among them, follow these riparian principles. Getches, Waterlaw in a Nutshell, 3d Ed (1997), p. 53, Tab 32.

> Abrams, Legal Control of Water Resources: Cases and Material, 3d Ed (West Group, 2000), p. 364. (Tab 33)

Another nationally recognized authority, A. Dan Tarlock, reaches the same conclusion:

> Use of overlying land is per se reasonable under the reasonable use rule and use of non-overlying land is per se unreasonable. Tarlock, Law of Water Rights and Resources (Clark, Boardman, Callaghan, 2000). (Tab 34)

Schenk, supra, considered a municipal diversion off-tract to be "reasonable," but only if the city's pumping did not interfere with another groundwater user or diminish another's spring or stream. A city's use of water for nearby residents has a much closer relationship to the land and surrounding community, than a private entity whose main purpose is to export the water for private gain. The key here is that the diversion is for sale of the water as opposed to an industrial, farming, or other consumptive uses that benefits the overlying estate or surrounding community. Even under traditional reasonable use principles, Nestlé's wholly private withdrawal and export of water for sale to distant places is disfavored.[165]

But the Trial Court in this case did not apply this general rule. Rather it fashioned a narrower rule that is limited to actual conflict and diminishment of flow and level of a riparian stream by a non-riparian's diversion:

> I have and do reject [Plaintiffs'] argument than any diversion of groundwater "off tract" is per se unlawful. Such a holding would run counter to much of the commercial and economic activity of not only Michigan, but the United States... There must be a valid source of water to incorporate into products in commerce. To think otherwise is parochialism in the extreme. Trial Op., p. 47.

The Trial Court's holding in this case is consistent with and wholly supported by recognized riparian and groundwater law principles.

B. Nestlé Waters Reliance on the Court of Appeals Decision in Maerz v United States Steel Corporation is totally misplaced.

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[165]A rule that allowed the private sale of groundwater as a commodity, under any circumstances and detached from the land, would be shared by all landowners, which over time would place the sale of water above the needs of residences, industries, who use it. If such a rule were allowed, the fate of lakes and streams, and the rights of riparians and the public in them, would be doomed as described in Garret's Hardin, "Tragedy of the Commons;" See Glennon, Robert, Water Follies (Island Press 2000), Chapt. 15, p. 209-210. Tab 35.

Nestlé argues that its extraction and diversion of tributary groundwater for sale elsewhere should be treated as the same as any other use of groundwater, and that it should not be held accountable to anyone absent a showing that its extraction has caused serious and direct injury to another landowner's use of his or her water.

Nestlé pins its argument entirely on Maerz v US Steel Corp, 116 Mich App 710; 323 NW2d 524 (1982),[166] and Restatement Torts, 2d, § 858.[167] Nestlé argues that Maerz adopted Section 858 for all conflicts involving groundwater use in Michigan, including those where a non-riparian, like Nestlé, diverts and sells the water off-tract or out of the watershed that is directly connected to and diminishes a riparian lake or stream. It claims that its diversion and sale of water can never be prohibited unless a riparian proves there has been "substantial and direct harm."[168] It also argues that, even if it is held liable under this standard, it should be limited to damages in tort law, and not an injunction for interference or invasion with property rights.

Appellees submit that Nestlé Waters arguments are unsupportable as a matter of law, inconsistent with the prevailing rule of Michigan water law and the law of other jurisdictions, and would promote a disastrous water policy for Michigan's economic and ecological security. Nestlé's wrong interpretation of the law if adopted would cause an unprecedented shift in Michigan property law, depriving riparian land owners, businesses, farmers, and recreational users, who depend on maintaining flows and levels of surface waters, of their historical property and public rights.

1. The Maerz case involved a dispute between two competing groundwater users (one a well owner and user and the other a quarry mine operator), and has no application to this case which involves a direct conflict between riparian owners and a non-riparian.

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[166]See Maerz v US Steel Corp, Presque Isle Circuit Court Case N°. 79-000569(CZ), Complaint and Demand for Jury Trial (January 22, 1979), and First Amended Complaint (July 18, 1979), Tab 36.

[167]See Appx to Appellant's Brief, Vol. 2, Tab 7, p. 258.

[168]Appellant's Brief, Argument I.B.3, p.29-30.

Nestlé cites only Maerz and cases involving disputes between competing users that occurred in connection with the use of groundwater on or incident to their overlying land. In other words, not one case involved a conflict between a riparian and non-riparian or a diversion and sale of the water out of a watershed. Not one case supports Nestlé's position that it can withdraw, divert and sell water out of a watershed where it physically diminishes or impairs riparian's surface waters.

The plaintiffs in Maerz owned residential and business properties in Presque Isle County. Defendant U.S. Steel operated a limestone quarry within 1500 feet of plaintiffs' property, which involved the use of explosives and the removal of large quantities of water from the quarry with pumps. Plaintiffs' complaint relied on for trial claimed negligence, strict liability from abnormally dangerous activities, and nuisance, and sought damages before a jury for loss of potable water on their properties.[169] In other words, it was not a property law case. The lower court dismissed the case at summary disposition, largely on the basis that damages caused to other groundwater users by the defendant's use of groundwater in connection with its quarry operation were reasonable as a matter of law and not actionable. This Court reversed, holding that the plaintiffs could maintain an action for the unreasonable interference with their use of their right to use groundwater. The basic question in the case was whether Michigan still followed the "rule of capture" or absolute use rule of English common law in Acton v Blundell, 12 M&W 324; 152 Eng. Rep. 1223 (1843).

The "rule of capture"[170] was rejected in favor of the modified American or "reasonable use" rule for groundwater in Schenk, supra. Maerz extended the limitations imposed by the reasonable use rule under Schenk, involving competition between two groundwater users: one diverting it off-tract and the other using it on his or her overlying land, 116 Mich App at 717. Maerz relied on Schenk as well as Meeker v City of East Orange, 77 NJL 623; 74 A 379 (1909), a leading authority for applying the "reasonable use" rule for resolving disputes between overlying landowners who have rights based on landownership to use in common the groundwater. Maerz

[169]For the complaint and amended complaint in Maerz, see Tab 36.

[170]See Sipriano v Great Spring Waters of America Inc, 42 Tex S Ct J 629; 1 SW3d 75 (Tex. 1999)

also recognizes that Schenk relied on Meeker. Thus, it is clear that Maerz intended that competing groundwater uses were governed by the rule of reasonable use.[171]

The reasonable use rule embodies both conflicts between competing groundwater users who use the water in connection with their land and those who divert it off-tract. But it also embodies conflicts between a riparian and non-riparian who diverts and sells it beyond the watershed and diminishes the flow, level, or other physical characteristics of a riparian stream or lake. In an attempt to circumvent this limitation, Nestlé also argues that Maerz adopted the Restatement of Torts, 2d, Sec, 858, for all groundwater cases in Michigan. As discussed below, this is not the law in Michigan, and most certainly does not apply to direct conflicts involving riparian versus non-riparian tributary groundwater users at issue in this appeal.

2. Section 858 of the Restatement, Torts, 2d, was not adopted as the common law for all groundwater withdrawals involving a diminishment of riparian surface waters by a non-riparian groundwater user.

Maerz first rejects the rule of capture or absolute use rule in favor of extending the reasonable use limitations of Schenk to all competing groundwater users. 116 Mich App at 720.

> In summary, our analysis of these cases leads us to conclude that they do not establish as the law of Michigan that extraction of underground water for a purpose connected with the land from which it is withdrawn is, per se, not actionable.

But then the Court references the Restatement of Torts:

> We further hold that the principles expressed in Restatement of Torts, 2d, Sec. 858, p. 258 are consistent with the Michigan adjudications on the subject and the general trend of decisions in other states, are less harsh and arbitrary and more fair and just that the English rule or lesser modifications of the English Rule, and should be followed in Michigan. 116 Mich App at 720. (Emphasis added).

Maerz involved a claim by one landowner using groundwater against another landowner abusing that groundwater. The claims were based in tort and did not involve any conflict with property rights of riparians. Thus, Nestlé's attempts to compare Maerz to this case is like

[171]There are four different groundwater principles followed by the different states in the U.S.: (1) reasonable use or the so-called "American Rule"; (2) correlative rights; (3) Restatement of Torts, 2d, Sec. 858; and (4) the absolute use or rule of capture. Michigan is not a correlative rights state. See Sax, We Don't Do Groundwater: A Morsel of California History, 64 Denver Water L. Rev. at 283, 284, 314 (2003). The Maerz decision's reference to "correlative rights" is probably the result of confusion in the differences of these rules.

comparing apples to oranges. It simply does not fit. In its strictest sense, Maerz held that the reasonable use doctrine applied to conflicts between competing on-tract groundwater users, and nothing more. This can be gleaned from the statement that Sec. 858 of the Restatement "is consistent with" Michigan case law "adjudications on the subject" and "should be followed." Other "adjudications on the subject" means Schenk and the cases cited in the opinion, including Meeker and Smith v City of Brooklyn, supra. These decisions recognize the special rule that forbids diversions out of watersheds or off-tract where they diminish or impair the flow, level, or character of a stream. All that can be said of Maerz, is that it recommends that Sec. 858 "should be followed," but, presumably, only where consistent with reasonable use principles.

In any event, even if the Restatement of Torts, 2d recognizes the preference within the reasonable use doctrine that protects riparians from diversions or harm inflicted by private non-riparians:

> The rules stated in Secs. 850-857 for determining liability for unreasonable use of streams and lakes are made applicable to the determination of liability for unreasonable use of groundwater. Sec. 858, comment d., p. 260.
>
> Some courts have applied the reasonable use theory in cases between riparians and the natural flow theory in cases between a riparian and non riparian. Sec. 850A, p. 212. (Emphasis added)

This is exactly the law of Michigan under 100 years of Michigan Supreme Court water law. Dumont, supra; Kennedy, supra; Hoover, supra. And this is why the Trial Court was bound to follow these rulings and held that Nestlé's pumping, diversion and sale of water out of the watershed, where it diminished the flow and/or level of the stream, was unreasonable or actionable under the circumstances of this case.

> a. Riparian preferences over nonriparian. The basic principle of riparian law is that rights to the water of a watercourse or lake belong to the owners of the riparian lands. A nonriparian may acquire a right to the water by grant from a riparian proprietor or permit or license from the state, ... and non riparian members of the public may have certain rights in public waters ...; but otherwise a nonriparian has no interest or property in the water. Therefore no use he (sic) makes is entitled to protection from infringement by one who uses the water pursuant to a riparian right. Sec. 856, Comment a, pp. 241-242.

Again, this is precisely the established rule of law in Michigan under Dumont and progeny, supra, and Thompson, supra.

> Some courts, principally those that do not allow nonriparian uses by riparians (see § 855, Comment b), regard watercourses and lakes as existing for the benefit of the adjacent land rather than for the benefit of the owners of the land. These courts regard riparian rights as inseverably attached to the land and incapable of being sold. In these jurisdictions, a true grant of riparian rights is not permitted and the only recourse of a nonriparian needing a water supply is to buy his peace from every riparian who may have a future use of the water. Sec. 856, Comment Subsection (2)(b), p. 244.

Once again, Michigan is such a jurisdiction. Thompson, supra. See Cameron, supra, § 3.8.

This is why the Trial Court recognized that the withdrawal and diversion by non-riparian Nestlé for its private water supply violated Plaintiffs' riparian property rights where Nestlé's activities diminished the flow and level of the stream. The Trial Court actually applied a more narrow fact specific test based on diminishment of flow or level, rather than a per se non-diversion of a stream by a non-riparian. Dumont, Kelly, Hoover, Schenk [Smith, Forbes, Meeker} supra. This, of course, is why the Supreme Court, Schenk, followed Smith in recognizing that Ann Arbor, a municipality, could pump and divert water within the same watershed only if it did not materially diminish the flow or level of a spring, lake, or spring. Schenk, supra.[172]

Maerz is not a riparian rights case. There is simply no way to read Maerz as having adopted the Restatement of Torts, in part or in its entirety; and Maerz certainly did not shift Michigan's entire body of water law to subordinate Michigan riparian property rights to a

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[172]These same principles are recognized by the Restatement for interferences with watercourses or streams by non-riparians:

> 857. Harm by Nonriparian to Riparian Proprietor
> Sec. I Except as stated in Subsections (2), (3), (4), a non riparian is subject to liability for a use of the water of a watercourse or a lake that interferes with the right of a riparian to use the water.
>
> * * *
>
> … the riparian has a preference to the use of the water and may initiate his use at anytime. .. Restatement of Torts, 2d, Sec. 857, Comment a., p. 250.

diversion and sale of water by a non-riparian to the point of "substantial and direct injury." As noted in the Restatement itself, Section 858 is subject to a preference for riparian interests.

Therefore, the Trial Court necessarily and correctly held that diversion of water from a spring aquifer by Nestlé, a non-riparian, constituted actionable injury where it was determined on the facts that: (1) the spring aquifer was directly connected and formed the underflow of the stream itself; and (2) the withdrawal and diversion diminished, in this case significantly, the flow and level of the Dead Stream and the level of two lakes. For these reasons, the Trial Courts decision under the groundwater Count III of the complaint, as amended, should be affirmed.

C. Nestlé's Criticism of the Trial Court is Uncalled For and Out of Place.

Nestlé goes to great lengths in its brief to label the Trial Court's interpretation and application of these common law property principles as "extreme" or "radical."For the reasons state above, Nestlé has absolutely no basis to label the Trial Court's careful, conservative, and well reasoned decision as "extreme" or "radical." Nestlé's entire legal argument turns on convincing this Court that there should be a sea-shift in Michigan water law from a property-based system to a tort-based damage approach for all water conflicts in Michigan. And Nestlé intends this, even if it means turning riparian rights and the rights of other users who depend on the protection of flow and level against diversions on-end.

Nestlé's fixatation on the word "superior" is overblown. There is no basis to its speculation of how it threatens other users whose interests are far from the facts and issues in this case and the narrow scope of the Trial Court's decision. As previously noted, the Trial Court used the word "superior" only in reference to the direct and actual conflict where a non-riparian pumps and diverts groundwater out of a watershed that has a direct hydraulic connection to the surface water and a riparian owner's interest.

The Trial Court's ruling most certainly does not create a "Draconian standard" that applies in all instances at all times as conjured up by Nestlé.[173] Under established water law, a diversion of water for sale out of the watershed is unlawful or unreasonable per se, and at the very least

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[173] Appellant's Brief, p. 34, n28.

cannot diminish the flow or level of a stream, or harm other riparians. Dumont, supra; Hoover, supra; Kennedy, supra. Moreover, a withdrawal of water directly from a stream for artificial purposes that lowered the groundwater and interfered with uses of others would be governed by the reasonable use rule under either riparian law or groundwater law. Thompson, supra. As previously noted, virtually all groundwater uses by others described at page 33 of its Appellant's Brief involve uses in connection with the overlying land or consumptive uses that are related to farming, manufacturing, municipal water plants, or public utilities. None of these other groundwater uses divert and sell water outside of a watershed under circumstances that diminish the flow or level of a riparian lake or stream.[174]

In any event, the quantities of use of groundwater dramatize that these are uses of groundwater aquifers and not "spring aquifers" or groundwater directly connected to a lake or stream like the facts of this case. Indeed, the Trial Court ruled that the data regarding these other uses was not relevant, and actually helped Plaintiff.[175] The Trial Court carefully noted the narrowness of its ruling, and was mindful of the very concerns raised by Defendant. Defendant Nestlé's mis-characterization and wrong and unfair criticizism of the Trial Court's decision should be disregarded.

II. THE TRIAL COURT PROPERLY FOUND NESTLÉ'S CONDUCT HAS OR IS LIKELY TO IMPAIR THE WATER, STREAM, LAKES, WETLANDS, AND THE AQUATIC RESOURCES IN THESE WATERS, IN VIOLATION OF THE MICHIGAN ENVIRONMENTAL PROTECTION ACT.

The Trial Court found Nestlé's conduct does or is likely to "impair" the "air, water, natural resources, or the public trust…" in violation of Section 1703(1) of the MEPA, MCL 324.1703(1), on two grounds: First, Nestlé's conduct was found as a matter of fact to impair the water, stream, and two lakes, and associated wetlands and aquatic resources. Second, Nestlé's conduct violated a legal standard or requirement of a federal or state law, in this case the Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, et seq. ("ILSA") and Wetland Protection Act (now Part 303 of the Natural

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[174]Further, the evidence and statistics cited by Nestlé in its Appelallant's Brief are outside of the record, and should be disregarded.

[175]Trial Op., pp. 39-40; New Trial Op., pp. 36-38.

Resources and Environmental Protection Act), MCL 324.30301, et seq. ("WPA"), which is a prima facie violation of the MEPA under Dwyer v City of Ann Arbor, 79 Mich App 113; 261 NW2d 231 (1985) and Nemeth v Abonmarche Development Co, 457 Mich 16; 576 NW2d 641 (1998).[176] Because Nestlé failed to plead or establish the affirmative defense of no feasible and prudent alternative to its conduct, its conduct was prohibited, subject to the injunctive remedy, as a matter of law.[177] Sec. 1703(1); Ray v Mason Co Drain Comm'r, 393 Mich 294, 313; 224 NW2d 883 (1975); Wayne County Health Dep't v Olsonite, 79 Mich App 668; 263 NW2d 778 (1977).

Nestlé's Appellant's Brief makes three arguments which can be summarized as follows: MCWC and Plaintiffs do not have standing to bring a suit under the citizen suit provisions of the MEPA; Plaintiffs failure to obtain permits under the ILSA and WPA does not violate MEPA, because the MDEQ's rules under these Acts do not require permits and the failure to obtain a permit is not a "pollution standard" under Nemeth, supra; and based on the record the impairment of the water and related water resources does not meet the threshold for establishing a prima facie case under the MEPA. These three arguments are addressed in reverse order, starting with the Trial Court's substantial findings of fact about the impairment of the ecosystem at issue.

A. Standard of Review.

Questions of law under the MEPA are reviewed by appellate courts de novo. Questions of fact under the MEPA are reviewed by the clearly erroneous standard of MCR 2.613(C). Wayne County Dep't of Health; supra, 79 Mich App at 694. Under this test, a finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. Tuttle v Dep't of Highways, 397 Mich 44; 243 NW2d 244 (1976); City of Hancock v Hueter, 118 Mich App 811, 815 (1982). In the application of this principle, regard shall be given to the to the special opportunity of the trial court to judge the credibility of the witnesses. MCR 2.613(C).

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[176]Trial Op., p. 58 as to ILSA, p. 60 as to WPA.

[177]Trial Op., pp. 58,60, 64,

B. The Record in this Case Clearly Supports a Finding that Nestlé's Conduct Has, Will, or is Likely to "Impair" the Water, Stream, Lakes, Wetlands, and Related Aquatic Resources.

The Trial Court's opinion makes extensive findings of fact and details substantial impairment to the water and natural resources at issue in the case. These findings of impairment lead in part to the Trial Court's conclusion that Plaintiffs had established a prima facie case "under multiple MEPA theories." Despite these findings, Nestlé asserts that the Trial Court never made a finding of "impairment" of the natural resources, and that the findings that it did make did not raise to the level of an impairment. Neither of these arguments are correct.

1. The Trial Court Expressly Found that Plaintiffs Had Established "Impairment" of the Resources at Issue

Plaintiffs here clearly alleged and proved "pollution or impairment" in violation of Section 1703(1) of the MEPA, and the Trial Court expressly found "impairment" as a matter of fact,[178] both under the WPA and on the merits of the facts in the case. Trial Opinion, pp. 60, 63 ("In the final analysis, this case has been decided in Plaintiffs' favor under MEPA even though Plaintiffs had to make the traditional showing....") Based on the Trial Court's factual finding that "impairment" violated Section 1703(1) of the MEPA, which finding is not clearly erroneous, it is not necessary to even decide the issues raised by Nestlé for the first time on appeal.

In particular, the Trial Court's opinion contains nine pages of "specific ecological impact findings" establishing the impairment to the resources at issue. See Trial Op., pp. 30-39. The Trial Court then refers back to these findings in order to conclude that these ecological impact findings constitute impairment for purposes of the MEPA analysis:

> The battleground here, thus, centers on the issue of whether or not the facts presented involve actions by the Defendants that constitute an impairment of these resources to the level that court-ordered action is appropriate.
>
> The interested reader (or the near-terminally bored) is referred to my discussions regarding my assessment of these Plaintiffs' claims and the evidence above, as well as my assessment of the Defendants' responses. Based on the analysis I went through above I find here that Plaintiffs have set forth a prima facie MEPA case in their case in chief regarding Osprey Lake, Thompson Lake, Dead Stream, the Dead

[178]The word "impair" is defined as "to make or cause to become worse, diminish in value," or "to weaken" or "lessen." Random House Dictionary of the English Language, Unabridged Edition, p. 713.

> Stream wetlands as well as wetlands 115, 112 and 301 under multiple MEPA theories. Trial Op., p. 60.

The Trial Court then also looked to the pollution or degradation control standards of ILSA and the WPA as further buttress its conclusion that Plaintiffs had established a prima facie MEPA case. As is discussed in more detail below, a violation of these standards or conditions can also establish a prima facie case under Section 1703(1) the MEPA. The Trial Court specifically found that ILSA and WPA presented substantive environmental protection standard, and that Nestlé's activity was in violation of that standard. Trial Op., p. 57 ("the impacts to those resources are measurable and harmful such as to be "unlawful" as that term is used in section 30106"); and Trial Op., p. 60 ("balancing of this particular use of groundwater in the form of spring water from this particular ecosystem, with the resulting effects and impacts set out in the factual analysis portion of this opinion, results in the conclusion that Nestles' beverage bottled-water operation falls on the losing side of the balancing of the public interest in it, as compared to the price the wetlands here in contention are paying and will pay, considering all interests, including the public's, in these wetlands").

In short, despite Nestlé's assertion to the contrary, the Trial Court's opinion is very clear that it found an impairment of natural resources, constituting a violation of MEPA.

2. The Trial Court Did Not Err When It Found That the Impacts of Nestlé's Pumping Constituted an Impairment of the Resources At Issue.

Nestlé also challenges the Trial Court's findings as not rising to the level of impairment "as a matter of law." It then asks this Court to effectively apply the so-called Portage-factor test from City of Portage v Kalamazoo Road Comm'n, 136 Mich App 276; 355 NW2d 913 (1984). However, determination of impairment is done on a case by case basis and not by some rigid set of legal limitations. Nemeth v Abonmarche Development, supra at 35; Ray v Mason Co Drain Comm'r, supra at 309. As such, the Trial Court's determination that the impacts to the natural resources in this case constituted an impairment is a factual determination that should be subject to a clearly erroneous standard.

No matter what standard of review is used, however, the Trial Court's findings rise to the level of impairment in this case. The Trial Court made twenty eight pages of factual findings, nine of which were directly "specific ecological impact findings." Trial Op., pp. 11-39. Nestlé attempts to pull isolated findings of fact in order to justify its position. However, the Trial Court properly recognized that the determination of impairment must be based on the impact to the entire ecosystem:

> I also want to note that to constitute an "impairment" under MEPA, a particular activity under analysis need not necessarily cause a dramatic "all-at-once" disaster to a resource. Many resources have value as a component of a larger ecosystem, but little apparent value standing alone. Loss or impairment of enough components of a larger ecosystem creates a risk of systemic "death by a thousand cuts" sufficient to stop what may appear to be a minor impairment. The cumulative effect of a series of minor impacts may in many cases (including this one) be of sufficient concern to warrant court action against each of those impacts that appear minor and inconsequential by themselves. This is part of the case-by-case analysis the Legislature requires of the courts under MEPA. Trial Op., p. 60.

In so holding, the Trial Court properly rejected Nestlé's contention that the impacts in this case did not rise to the level of an impairment. As such, there is no factual basis for Nestlé's invitation to use Portage as "guidance" in order to artificially reject Plaintiffs' claims as a matter of law.

In addition, not only are the Portage factors factually inappropriate in this case, they are legally inappropriate as well. Portage fashioned a four-factor test for a prima facie showing of "impairment" of the "natural resources" element part of the MEPA ("... air, water, natural resources, or the public trust."). In order to establish a way to show "impairment" of the elk herd in the Pigeon River Country, the Supreme Court found that the herd (wildlife) was scarce, unique, and not replaceable. Environmental Action Council v Natural Resources Comm'n (Pigeon River), 405 Mich 741, 760; 275 NW2d 538 (1979).[179] Subsequently, this court applied this approach to wetlands which were not of state-wide concern, and found no impairment. Kimberly

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[179]Ironically, one of the central arguments by the defendant oil company in the Pigeon River case in the Supreme Court was that the threshold should be set high. In reaching the result it did, the Supreme Court rejected this argument and found that the "lynchpin" of the MEPA – the "pollution, impairment, or destruction" standard should not be set too high to frustrate the action-forcing mechanism of the Act to bring about better alternatives to conduct found to degrade the environment. Environmental Action Council, at 760.

Hills Ass'n v Dion, 114 Mich App 495 (1982).[180] Then in Portage the court applied the approach in Environmental Action Council (Pigeon River), supra, to trees proposed to be cut as part of the widening of a county road. The court found that the trees were not unique and were replaceable.

In Nemeth, supra, the Supreme Court reversed the Court of Appeals use of the Portage factors in a case involving "water" protected from soil erosion by the SESCA. The Court held that the threshold for establishing a prima facie case turned on the language of MEPA itself and its decision in Ray, supra, and not the Portage factors. "One of the primary purposes of the MEPA is to protect our natural resources before they become scarce. The "Portage factors" have "stifled the development of the law of environmental quality." Nemeth at 37.

Accordingly, the Portage factors may "guide" some cases, but not this one. This case involves "water" and it is water that involves protected streams and lakes under ILSA and wetlands safeguarded by the WPA. The Trial Court found an impairment and direct physical effects and impacts to riparian rights and the Dead Stream, lakes, and wetlands. When looked at as a whole, as the Trial Court did, these impacts constitute a substantial impairment under the MEPA.

Finally, even if the Portage factors are applied, the degradation and physical impairment of these state regulated and protected waters establishes impairment in violation of MEPA. Based on the testimony of Plaintiffs' experts, as well as Defendants' Cozad, who admitted the stream would be significantly lowered and narrowed, there is abundant evidence to conclude that these state-protected water resources have been or are likely to be impaired.

C. The Trial Court's Conclusion That Nestlé's Lack of Permits under the ILSA and WPA Constitutes a Violation of an Environmental Standard Is Not Affected by the Michigan Supreme Court's Recent Decision in Preserve the Dunes v TechniSand.

As discussed above, the Trial Court found that Nestlé's activity constituted an impairment in violation of the MEPA, and, in part, was guided by the substantive standards of ILSA and the

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[180]The trial court decision in Kimberly Hills pre-dated the Wetlands Protection Act (WPA), which declared wetlands to be rare, unique, and of substantial significance. Where there are regulated wetlands under the WPA, like those at issue in the instant appeal, even assuming for the sake of argument that the Portage factors applied, they are satisfied by this legislative intent.

WPA. It also found that the failure to obtain a permit under these statutory schemes was, itself, and independent basis for Plaintiffs' MEPA claims. A violation of a standard, condition, or failure to obtain a permit under a federal or state environmental statute constitutes a prima facie case under Section 1703(1)the MEPA. Dwyer v Ann Arbor, supra; Nemeth, supra. In Nemeth, the Supreme Court held that the failure to obtain a permit required by the Soil Erosion and Sedimentation Control Act, MCL 324.9101, et seq. ("SESCA"), was a violation of a "pollution standard" and, therefore, a prima facie showing under the MEPA.

The Trial Court also applied Nemeth, and found that Nestlé's failure to obtain permits under the ILSA (to "diminish the area of a lake or stream" without permit is prohibited, MCL 324.30102(d)) and WPA (to "drain surface area of wetland" without a permit is prohibited, MCL 324.30304(d)) for activities that, as a matter of fact, diminished a stream and two lakes, constituted a violation of the MEPA.

> … I believe that ILSA presents an excellent standard for environmental protection, which neither parties, the DEQ nor I can authorize activities to. I adopt it as one o the MEPA standards applicable to this case.
>
> * * *
>
> The Act [WPA] does not limit the mechanism of the withdrawal of wetland surface water, it just plainly brings such under the scope of the act, making withdrawals without permits or exemption unlawful.
>
> * * *
>
> In going through the analysis set out in Section 30311, which I find to be an appropriate standard for the protection of the environment under the MEPA, I also hereby find that the balancing of this particular use of groundwater in the form of spring water in this particular ecosystem, with the resulting effects and impacts set out in the factual analysis portion of this opinion, results in the conclusion that Nestlé's … operation falls on the losing side …. As such, Plaintiffs are hereby found to have presented a prima facie case under the MEPA using this WPA standard. Trial Op., p. 58-60.

The Trial Court simply exercised its authority of judicial review under Nemeth and stepped into to enforce the plain meaning of the ILSA and WPA, through the citizen suit enforcement mechanisms of MEPA.

Nestlé makes three sub-arguments. First, it claims that under Preserve the Dunes v Dep't of Environmental Quality, 471 Mich 508; 684 NW2d 847 (2004), the Supreme Court rejected the Sand Dune Mining Act ("SDMA") "permitting" requirement as standard because it does not

contain and "antipollution standard." [181] Then Nestlé reasons that "plaintiffs have not alleged that Nestlé's activities cause "pollution," and like the SDMA, neither ILSA nor WPA 'contain[s] an antipollution standard.'" Nestlé's arguments miss, if not twist, the meaning of Nemeth and Preserve the Dunes. In Nemeth, the failure to obtain a permit or file the required soil erosion plan under the SESCA was a violation of the MEPA. Preserve the Dunes upheld and relied on Nemeth to distinguish the SMDA from the SESCA. According to the Supreme Court, the problem with Plaintiff's claim in Preserve the Dunes was that all the DEQ did was find that the sand mining company's activity was "eligible" to apply , and then issued a permit under the SMDA. Preserve the Dunes is not based on failure to obtain a permit, like Nemeth, but a dispute with the DEQ over its decision that the area of the dune to be mined was eligible for a permit. This problem, specifically, was addressed by the Trial Court in this case, when it noted that Nestlé's operations were not exempted from permit requirements of the WPA, such as established drains. Trial Op., p. 59. As such, Nestlé had to obtain permits and failed to do so.

D. The Plain Meaning of the WPA and ILSA Does Not Authorize an Exemption or Refusal to Apply the Requirement for a Permit Where Nestlé's Pumping and Diversion of Water Has Undisputedly Diminished and Narrowed a Stream and Two Lakes, and Drained the Surface Water from Certain Wetlands.

Nestlé argued that certain regulations adopted by MDEQ (formerly the MDNR) under the Inland Lakes and Streams Act and Wetlands Protection Act narrowed the permit requirements of these Acts. Section 30102 of the ILSA states:

> Except as provided in this part, a person without a permit from the department shall not do any of the following:
>
> ***
>
> (d) Create, enlarge, or diminish an inland lake or stream.

MDEQ R281.811(e) states:

> "Enlarge or diminish an inland lake or stream" means the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity or placement of fill or structures, or the manipulation or operation, or removal of fill or structures, to increase or decrease water levels in a lake, stream, or impoundment.

[181] Appellant's Brief, pp. 43-44.

Section 30103 lists a number of exceptions to the permit requirement, but none of these even arguably applies. Without a permit pursuant to 30306 and its standards, such as "not adversely affect the public trust or riparian rights" or "not unlawfully impair … the waters or natural resources of the state," the Nestlé's pumping and diversion of water is prohibited.

Similarly, Section 30304(d) of the WPA states:

> Except as otherwise provided in this part or by a permit obtained from the department under sections 30306 to 30314, a person shall not do any of the following:
>
> ***
>
> (d) Drain surface water from a wetland.

Section 30305, MCL 324.30305, created a number of exemptions, none of which remotely applies to Nestlé's pumping and removal of water with the lowering of water table and draining of surface water from a wetland. Without a permit pursuant to Sections 30306 to 30314, the activity is prohibited.

The Trial Court carefully analyzed the law as applied to the undisputed facts in this case and properly rejected Nestlé's argument. Trial Op., pp. 55-57 (ILSA), 58-60 (WPA).

A fundamental principle of statutory construction and administrative law is that agencies are bound in the exercise of their authority to apply the law as written. Agencies cannot narrow the scope of authority required for permits, for example, by exempting activity from permit requirements mandated by the plain language of the statute. Natural Resources Defense Council v Costle, 568 F2d 1369 (D.C. Cir. 1977). In Costle, EPA adopted rules that created exemptions for certain point discharges that were prohibited unless permitted under the Clean Water Act ("CWA"). The D.C. Circuit held that the EPA's passage of a rule that exempted certain activities from the permit requirements of the CWA was unlawful where Congress had not authorized such an exemption under the CWA.

> We insist, as the Act insists, that a permit is necessary; the Administrator has no authority to exempt point sources from the NPDES program. But we concede necessary flexibility in the shaping of the permits that is not inconsistent with this Act. 548 F2d at 1382.

In accord, see Koontz v Ameritech Services Inc, 466 Mich 304 (2002), no interpretation necessary where statute unambiguous; Consumers Power v PSC, 460 Mich 148, 157, n8; 596 NW2d 126

(1999), an agency interpretation cannot overcome the plain meaning of a statute; Reiss v Pepsi Cola Metropolitan Bottling Co Inc, 249 Mich App 631; 643 NW2d 271 (2002), affirming WCAC decision that administrative rule was invalid and inconsistent with the governing statute; Guardian Industries Corp v Dep't of Treasury, 243 Mich App 244; 621 NW2d 450 (2001), holding interpretive rules invalid when they conflict with underlying statute.

Similarly, ILSA prohibits the activities that "... diminish an inland lake or stream" unless permitted. The MDEQ has no authority to create to narrow the range and create exemptions from activities that "diminish an inland lake or stream." MDEQ R281.811(e) narrows the activities requiring a permit under ILSA to "dredging" or "filling" that would decrease surface area of a lake or stream. Nothing in the ILSA authorized it to do so. Likewise, MDEQ has no authority under the WPA to create an exemption by narrowing the plain meaning of "drain the surface water from a wetland." Moreover, nothing in the WPA authorizes the MDEQ to narrow the plain meaning of the Act as to prohibited activities where no permit has been obtained.

The MDEQ and Court are not free to change the meaning of the ILSA or the WPA by rules or interpretation in the absence of legislative authority or intent to do so. The plain meaning of ILSA and WPA required Nestlé to obtain permits.[182] MDEQ ignored this plain language when it determined Nestlé's activities would not be subject to the ILSA and WPA. Nestlé went ahead and constructed and operated the wells and diminished the stream, two lakes, and certain wetlands without obtaining a permit. There is no deference to an agency interpretation or rule, where the agency rule or action is not authorized by the Legislature. NRDC v Costle, supra.

Finally, Nestlé argues that the Trial Court abused its discretion in not remanding the case to the administrative agencies, as provided in Section 1704(2) of the MEPA (Appellant's argument II(C)). As noted previously, the parties tried and the Trial Court finally decided, as a matter of fact, that such conduct will diminish physically impair and harm these lakes, stream, and wetlands, in violation of Sec. 1703(1) of the MEPA. The Court made it very clear that a remand would be inefficient since the parties had already litigated the issues that would be reviewed by the agency

[182]Consumers Power v PSC, 460 Mich 148, 157, n8; 596 NW2d 126 (1999).

anyway. Trial Op., p. 55. In addition, any remand for Nestlé to re-litigate these factual determinations is barred by the doctrines of res judicata and collateral estoppel.[183] As such, the Trial Court did not abuse its broad discretion in refusing to remand the case to the agency.

E. Plaintiffs and MCWC Have Standing to Bring the MEPA Citizen Suit for the Diminishment and Impairment of the Stream, Two Lakes, Wetlands, and Related Aquatic Resources, All of Which Are a Single Aquatic System Affected by Nestlé's Pumping and Diversion of Water from the Watershed.

Nestlé also belatedly attempts to raise questions of Plaintiffs' standing to protect some of the natural resources at issue in the case. First, Nestlé failed to plead or argue at trial that any of any of the Plaintiffs lacked standing to bring suit under the common law or the MEPA. Standing must be raised as an affirmative defense in a defendant's first responsive pleading, otherwise it is waived. Scheffler v Alsgaard, 2002 WL 345868 (Mich.App. Mar 05, 2002) (NO. 225215), citing Stanke v State Farm Mutual Auto Ins Co, 200 Mich App 307, 319; 503 NW2d 758 (1993). Since Nestlé never plead standing as an affirmative defense, it has been waived. In addition, while the factual basis for standing may be raised at any time during trial, once the proofs are closed, the issues argued, and a final decision and judgment entered, the issue is waived for appeal. FMB-First Michigan Bank v Bailey, 232 Mich App 711, 718; 591 NW2d 676 (1998) (Issues raised for the first time on appeal are not "properly preserved for appellate review").

Second, Plaintiffs Doyles and many members of MCWC have riparian rights and interests in the flows, level, and quality of the stream, lakes, and adjacent wetlands that are directly connected to the same spring aquifer that has been affected and impacted by Nestlé's pumping and diversion operation.[184] The cone of depression caused by the pumping extends under and lowers the entire aquatic or riverine system. See Tab 40. The effects on wetlands on the Sanctuary and adjacent to the stream, the effects and impairment of the stream and lakes are windows of adverse impacts all caused by Nestlé's activities to one and the same aquifer and aquatic water system.[185]

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[183]New Trial Op., p. 32.

[184]Trial Op., p. 7.

[185]Trial Op., p. 11: "Thus, the stream and lakes, as well as certain wetlands and surface
(continued…)

Third, Plaintiffs' riparian rights and interest in the associated resources are far more directly impacted than the interests of the downstream recreational users found to have standing by the Supreme Court's recent decision in National Wildlife Federation, supra. In National Wildlife Federation, the Court followed the standing principles in Friends of the Earth v Laidlaw, 528 US 167; 120 S Ct 693 (2000), and held that fishermen who fished several miles downstream from defendant's proposed mining activities have an interest that may be affected, and therefore have standing to maintain a citizen suit under the MEPA. Id. at 184-185; National Wildlife Federation, supra, at 629-630.[186]

Fourth, MEPA is the legislature's response to the constitutional mandate of Const 1963, art 4, § 52, to pass laws "for the protection of the air, water, and natural resources of the state from pollution, impairment, or destruction." Even Justice Scalia, whose standing principles formed the basis of the majority opinion in National Wildlife Federation, recognized that legislative enactments granting "any person" a right to enforce by suits as "private attorneys general" should be read to grant "expanded standing." Bennet v Spears, 520 US 154, 165-166; 117 S Ct 154 (1977).

Fifth, even if Nestlé's untimely challenge to standing is accepted as true, it limited to only the Osprey Lake Impoundment and Wetlands 112, 115 and 301. The Trial Court still found more than enough impairment to the remaining streams, lakes and natural resources at issue to uphold the Court's conclusion that Nestlé is violating the MEPA.

III. THE TRIAL COURT'S FINDINGS OF FACT WERE AMPLY SUPPORTED BY THE RANGE OF TESTIMONY AND EXHIBITS ADMITTED FROM BOTH APPELLANT AND APPELLEE, AND APPELLANT'S ATTEMPTS TO OFFER "SUPPLEMENTAL" OR "NEW" EVIDENCE IS CUMULATIVE AND COULD NOT POSSIBLY LEAD TO A DIFFERENT RESULT.

A. Standard of Review

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[185](…continued)
springs and seeps, all are actually features of the subject aquifer in areas that it touches or intersects the surface."

[186]"'[C]oncerned' that the mine expansion will irreparably harm their recreational and aesthetic enjoyment" adequate to meet the standing test in Laidlaw and Lee v Macomb Co Bd, 464 Mich 726, 729; 629 NW2d 910 (2001).

Questions of fact are reviewed by the clearly erroneous standard of MCR 2.613(C). Wayne County Dep't of Health, supra, 79 Mich App at 694. Under this test, a finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. Tuttle v Dep't of Highways, 397 Mich 44; 243 NW2d 244 (1976); Kitchen v Kitchen, 465 Mich 654; 641 NW2d 245 (2002); City of Hancock v Hueter, supra, 118 Mich App at 815. In the application of this principle, regard shall be given to the to the special opportunity of the trial court to judge the credibility of the witnesses. MCR 2.613(C).

An appellate court will not overturn a trial court's denial of a request to supplement the record unless there is a showing the trial court abused its discretion. People for the Use & Benefit of the E.P. Brady & Co v Gilliland, 354 Mich 247, 253; 92 NW2d 289 (1958); Jackson v Sabuco, 21 Mich App 430; 175 NW2d 532 (1970). While the Court of Appeals is guided by the general abuse of discretion standard, the question of reopening proofs is a matter "within the sound discretion of the trial court" with which the appellate courts rarely interfere. "On issues of reopening proofs, this Court's attitude has generally been one of noninterference." Knoper v Burton, 12 Mich App 644; 648 163 NW2d 453 (1968), rev'd on other grounds, 383 Mich 62; 173 NW2d 202 (1970). Decisions denying a new trial or to amend the judgment are also within the sound discretion of the trial court, and are not reversed unless there is a showing of an abuse of discretion. Bosak v Hutchinson, 422 Mich 712, 737; 375 NW2d 333 (1985).

B. The Trial Court's Findings Were Based on Solid Analysis and Ample Evidence that the Defendant's Conduct Has and Will Continue to Diminish and Impair the Flow, Level, Size, and Aquatic Resources Associated with the Dead Stream and two Lakes.

Like its other arguments, Nestlé makes inflammatory accusations that the Trial Court's findings are not supported by the record or an accurate understanding of what actually happened. As will be seen, the Trial Court had a firm grasp of the facts, opinion of experts, and the credibility of the witnesses, and its decisions are amply supported by the record. Nestlé has again overstated things, and the assigned errors are largely immaterial and peripheral to the basic evidence, data, and opinions upon which the Trial Court based its findings. Under no stretch of the imagination were the Trial Court's carefully developed and extensive findings of fact clearly

erroneous. Moreover, the Trial Court heard the witnesses, particularly the experts, and had a clear understanding of their credibility, or in the case of Dr. Andrews, lack of credibility.

1. The Trial Court's findings of fact are supported by ample evidentiary support.

Nestlé claims the Trial Court's findings concerning the effects concerning wetlands "exceeded those of the experts." A review of the evidence demonstrates that this is not true. Nestlé points to the Chart at page 10 of its Appellant's Brief. The Chart is prepared for its Brief, and is not evidence. Moreover, the Chart does not contain all of the opinions of experts or the range of evidence on the effects of pumping on the levels of the four wetlands 115, 112, and 301. Dr. Hyndman testified that the pumping would reduce Wetland 115 by more than a foot.[187] Dr. Madsen, wetlands expert also qualified at trial in wetland hydrology, testified that a significant reduction of the size of Wetland 115 will occur.[188] She testified that a reduction more than one foot, as testified to by Dr. Hyndman, would reduce this 10 acre wetland by up to 80%[189] and that the net permanent reduction of the entire range of natural fluctuations will alter and impair its size and quality.[190] Dr. Hyndman did not limit the extent of the drop in Wetland 115, because his model predicted 1.9 to 2.2 feet.[191] Accordingly, the Trial Court's decision that Nestlé's pumping and diversion will result in a material effect and impairment of Wetland 115 is supported by the expert testimony.

Dr. Madsen, given her own experience in hydrology of wetlands, testified that from the recorded data on Fig. 8 of Dr. Hyndman's Report, Plaintiffs' Exhibit 58A, it was her testimony

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[187]Plfts' Ex 58A, Fig. 5, p. 7.

[188]May 14, 2003, Pt 1, T 44-45.

[189]July 1, 2003, Pt 1, T 36-37.

[190]Op Cit., T 45-46, 49.

[191]Pltf's Ex 58A, Table 6, Tab 30.

that level of wetland 112/301 had dropped as much as 2 to 3 feet after pumping started.[192] Dr. Hyndman testified that the range in the drop of 112 would be 3 inches to 1 foot.[193] She testified that pumping with these drops in level would result in significant alteration and reduction in size and quality of the these wetlands.[194] She also testified that even a 3 inch drop would also adversely impact the size and values of the wetland.[195] The Trial Court's findings were clearly within the range of expert testimony, and Nestlé's argument that the findings "lack any basis" or are "little more than speculation" is simply untrue.

Nestlé turns to the Dead Stream effects, and argues slices of testimony and takes them entirely out of context to reconstruct a partial set of facts to support its argument that the Trial Court had no basis for its findings that Dead Stream flow, level, and size would be significantly reduced and the stream and adjacent wetlands impaired. Nestlé points to the Court's observation about the variabilities in the stream makes it difficult to predict effects "on any given day." The Trial Court, however, did not base its decision "on any one day," but rather the entire record, including over 2½ years of data on stream flows and levels, from which Dr. Hyndman was able to show that as flow is reduced, the level of the stream went down and will go down by as much as 2 inches. The Trial Court first noted that it was the variabilities that can actually mask or exacerbate the effects of Nestlé's pumping. Trial Op., p. 12. The Court pointed out that Nestlé started pumping in May 2002, at a time when the annual cycle would expected to be dropping, the effect of which was to mask the effects due to pumping. Id. Also, the Trial Court correctly noted that "all parties agree that Nestlé's pumping has affected surface waters as well as groundwater. Thus, there is no dispute that Osprey Lake, Thompson Lake, Dead Stream, and the seeps feeding the Dead Stream will suffer a reduction in flow/stage." Id. p. 13. The Court also noted that these effects extended beyond the .5 foot contour line of Dr. Andrews' predicted cone of depression.

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[192]May 14, 2003 Pt. 1 T 75, 82.

[193]June 4, Pt. 2, T 172; June 5, 2003, Pt 1 T 59.

[194]Id., T 90, 91, 124.

[195]May 14, 2003, Pt. 1, T 152-154.

Id. The Court found that "I find it extends to … all water bodies claimed by Plaintiffs to be affected. In short, I agree with Plaintiffs on the hydrological evidence, rejecting Defendant's evidence to the contrary." Id. p. 14. The Trial Court found Dr. Andrews attempt to predict the effects on the entire system, rather than draw conclusions from effects that occurred on the actual data, was inferior to Dr. Hyndman's testimony. Id. p. 16. Dr. Hyndman did not "mix and match" from computer models to actual data and opinions to look at effects, but took "a 'microanalysis' approach to examining components of the system to understand them." Id.

Unfortunately, Nestlé did not explain this approach in its Brief, but instead has represented Dr. Hyndman's as a systematic opinion, rather than the more tailored approach taken by Dr. Hyndman in first using actual data to calculate effects from pumping on flows ands levels, and then using computer modeling to look at separate components where the data was not that clear, such as with the wetlands testimony, discussed above. For example, at page 61 of Appellant's Brief, Nestlé represents that the Trial Court selected 345 gpm as the flow reduction in the stream due to pumping, which is at the "at the very top of the range of Dr. Hyndman's testimony." Yet, Nestlé does not tell you that Dr. Hyndman's report[196] applied actual data and rating curves, using Dr. Andrews' number of 345 gpm reduction in flow,[197] as appropriate, for determining effects on the Dead Stream, but designed a computer model to verify his conclusions from the data during pumping for testifying about the effects on Wetland 115; this model run used 265 gpm flow reduction in the stream only for the sole purpose of seeing whether there was a basis to conclude that there was a "channel" of sand and gravel somewhere between 115 and the well field which would explain the reduction in levels observed from the data.[198] Thus, all the Trial Court did for the Dead Stream findings was to use the 345 gpm flow reduction number that was agreed to by both experts. The Trial Court did not pick the "very top of the range," because Dr. Hyndman never testified that, as to the Dead Stream effects, there was a range.

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[196]Plfts' Ex 58A.

[197]No one ever disputed that 340 to 345 gallons per minute from pumping at the permitted rate of 400 gpm would be removed from the Dead Stream. May 21, 2003, Pt 1, T 7.

[198]Pflts' Ex 58A, Table 6. Tab 30.

Also, Nestlé claims the Trial Court "went to the very top (2 inches) of Dr. Hyndman's range" when it came to the effect on level. In fact, Dr. Hyndman testified that the drop in the stream would be greater than 2 inches when the base flow in the stream drops below 1100 gpm.[199] The base flow did reach base flows below 1100 gpm before and during the trial, and the level of the stream dropped significantly, especially when the last remnants of the beaver dam were removed below Doyles at the end of May 2003.[200] The record supports the Trial Court's finding that the stream would drop "at least 2 inches."

Next, Nestlé points to the variables in the stream as making it "impossible" to analyze effects. Appellant's Brief, p. 20. But a reading of the Trial Court's findings as a whole makes it clear that this is why the experts had to study the data and provide opinions on the effects to the stream from pumping. Both experts did do this, but the Trial Court rejected Nestlé's experts opinions concerning effects, and adopted Dr. Hyndman's. Trial Op., pp. 14, 20, 22. The Court observed that "… [A]n overstatement of available groundwater [recharge], thus understating the effects." The Trial Court found that Nestlé's Dr. Andrews overstated recharge in the area "immediately upstream … from the well field to be very high." Id., p. 21. "Dr. Andrews' use of a variable recharge rate, concentrating very high recharge in the area of the watershed that would most immediately feed the well field here, is suspect. Such an exaggerated recharge lets his model balance with his overstated base flow in streams and the water available for extraction and, thus, allow the model to greatly understate the effects of any rate of water withdrawal." Id. The Trial Court accepted, understandably, Dr. Hyndman's testimony as the more accurate and found that the stream "will drop approximately two inches." Id., p. 22. Thus, the Trial Court did not pick "the top of the range," and, based on the evidence as a whole, there was no "impossibility" of reaching the findings that the Court did. The Trial Court very carefully and with full explanation of its reasoning found effects to the Dead Stream based on the record.

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[199]June 5, 2003, Pt 1, T 72-73.

[200]This is when the confluence of a branch of Gilbert Creek and the Dead Stream channel at Doyles' turned into a mudflat. June 5, 2003, Pt. 1, T 69-71.

As a final example – there are others – of how Nestlé, like Dr. Andrews, has wrongly characterized things, Nestlé says the Trial Court was wrong in saying that Mr. Cozad "understated the extent of Dead Stream's narrowing" or that "the trial court … had no basis for its finding that the stream would narrow more than four feet." Appellant's Brief, p. 63. First, as noted above, the Trial Court found that Dr. Andrews had overstated available groundwater and under-predicted effects. Second, Mr. Cozad relied on Dr. Andrews predictions. Third, Dr. Luttenton testified that Mr. Cozad's testimony regarding stream narrowing was too low,[201] and Dr. Hyndman testified that a drop in level would significantly narrow the stream channel near Doyles.[202] It was both reasonable and proper for the Court to conclude the stream would narrow more than four feet.

2. The Trial Court's decision is based on and supported by the credible scientific hydrological opinions in the record.

Nestlé next attacks the Trial Court for having relied on his own scientific opinions that are without basis in the record. Nestlé represents in its Appellants Brief at page 63 that Dr. Andrews disproved Dr. Hyndman's hypothesis regarding a channel of conductivity sediments between Wetland 115 and the well-field, and the Trial Court should not have tried to reach its own conclusion that such a connection existed. First, Dr. Andrews' testimony was found not to be as credible as Dr. Hyndman. Second, specifically, Dr. Andrews erected an artificial "barrier" in his own model to prevent the model from predicting any effect on Wetland 115.[203] Third, Dr. Hyndman testified that pumping had lowered the level of Wetland 115 based on actual data with pumping around 160 gpm and had a significant effect,[204] which is preferable to just relying on a

[201]July 2, 2003, Pt 1, T 23-29.

[202]June 5, 2003, Pt 1, T 33-34.

[203]See the actual higher conductivity sediment profiles from borings along a line and throughout the area between the well-field in Wetland 115 and Osprey Lake. May 19, 2003, T 56-63; Def's Ex Cm, Figs. 3 & 4; Def's Ex Bt, Bv [Connecting IV to IV']. Table in Plaintiffs' Post-Trial Reply Brief, p. 26-28, Tab 39. The Table shows a very heterogeneous mix of sand, gravel, glacial till, and some silts and clays.

[204]May 12, 2003, Pt. 1 T 149-151; Pltfs' Ex 58A, Fig. 4, p. 6; Fig. 5, p. 7.

model.[205] Fourth, Dr. Andrews himself testified that a hydrogeological relationship existed between Wetland 115 and MW 111s, which is south of Osprey Lake.[206] The pumping undisputedly affects the springs under Osprey Lake, so a channel of highly conductivity materials would connect 115 to the lake and then the direct relationship of the springs to the lake would tie the well field to 115. The point here is this: Dr. Hyndman found a drop in 115 based on actual data, and the Court's findings in this regard are supported by the evidence. Dr. Hyndman showed a channel or connection between 115 and the well field, which corroborates his actual data; just where the channel is doesn't change the evidence that supported the findings based on the actual data. Compared to the discredited clay "barrier" hypothesis of Dr. Andrews, the Trial Court made proper findings, which under no stretch was poor science or hydrology or clearly erroneous.[207] In any event, the alleged error that the Trial Court relied on "fingers" from Wetland 115 to the Lake is immaterial to the evidence on the whole record.

Nestlé assigns another peripheral mistake at page 64 of Appellant's Brief that the Trial Court made an error when he stated that if Wetland 115 is 30 feet higher than Osprey Lake, the water would drain from the wetland at a faster rate. Whether or not it flows downward faster or not does not change and opinions of Dr. Hyndman and Dr. Andrews or the Trial Court's findings based on the actual evidence. Dr. Hyndman was found more credible, and he testified there was significant effect on wetland levels in 115 from the existing pumping; his model supported that opinion. The Trial Court's finding that pumping has and will drop the level of Wetland 115 by 1 foot or more was proper and not clearly erroneous.

3. The Trial Court did not "mix-and-match" fact-finding as between Dr. Hyndman and Dr. Andrews, but understood the difference between the two experts approaches with their computer models and that the models aside, the opinions of Dr. Hyndman were based on actual data during pumping.

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[205]May 12, 2003, Pt. 1, T 152, 154-155.

[206]May 13, 2003, Pt. 2, T 111-113; May 19, 2003, Pt 2, T 194.

[207]Plaintiffs' Post-Trial Brief, pp. 41-43; Plaintiffs' Post-Trial Reply Brief, pp. 26-31 Tab 39.

Nestlé tries to make a big deal out of the difference in flow assigned by Dr. Hyndman for his last computer model run just before trial and the model's reduction in flow in Dead Stream at 260 gpm, instead of the 345 gpm assumed in earlier runs. Then it accuses the Trial Court of relying on this last model, yet also relying on Dr. Hyndman's testimony that the reduction in flow is 345 gpm. All agreed that as for calculation from actual data, not computer models, of actual effect from pumping, the flow was reduced by 345 gpm. Nestlé's claim here is a ruse; nothing is contradictory. Nestlé know very well that computer models can be designed for different goals, and because of that, specific areas of the model's domain may show, based on the running of the model, different flow reductions than actually measured. Dr. Hyndman's last model run was designed to look at the levels of wetlands (not flows) to corroborate his opinion based on the data that pumping had and would drop the levels in the wetlands. Models are tools to look at how reality might operate, but are not reality. Even Dr. Andrews admitted they are less reliable than opinions based on actual data. The actual data and Dr. Hyndman's opinions show a significant drop in the flow of the stream and levels of the lakes and stream, and in Wetlands 115, 301, and 112.[208] The model runs while helpful were not the primary basis of the Trial Court's findings:

> After considering all the evidence I am convinced that wetlands 115, 112, and 301 are indeed being impacted by Nestlé's pumping to date … This conclusion is supported by observations and data collected from those areas. … I am agreeing with Dr. Hyndman that the data and observations should carry more weight than modeling where there is sufficient evidence regarding such. Trial Op., p. 15.

Further, the Trial Court was very mindful of the differences in models, and the difference in the purpose for which each run was designed.

> I accept as the better approach to modeling … to be that taken by Dr. Hyndman: use a model to try to understand what the objective evidence is showing. As such, Dr. Hyndman's approach was not to try to model the entire system to get it to balance, but rather to take a more "microanalysis" approach to examining components of the system to understand them. If there is sufficient hard evidence, even Dr. Andrews agrees that is the best approach. Trial Op., p. 16.

Accordingly, the Trial Court applied a realistic, logical, and proper analysis in reaching his findings, and there was no error, and surely no clearly erroneous error.

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[208] Pltfs' Ex 58A, Tables 1, 2, 3, 6, 7, Tab 30.

C. The Trial Court Did Not Commit Reversible Error or Abuse Its Discretion in Denying Nestlé's Request to Supplement the Record at Closing Arguments More than Two Months after the Close of Proofs or to Deny the Motion for New Trial, Where the Basis of the Request Was Cumulative and Would Not Lead to a Different Result.

After the close of proofs on July 3, 2003, the parties stipulated to supplement the record with updated monitoring, precipitation, and pumping data[209] to cover the date of the view by the Court and attorneys for the parties on July 9, 2003. The Order was entered on September 2, 2003.[210] As noted in the Counter-Statement of Facts, Nestlé filed another motion to supplemental the record with yet another round of the same data, together with a proposed new exhibit that represented an update of one of Dr. Hyndman's exhibits,[211] and another report by Dr. Andrews based on the updated data that offered another report from Dr. Andrews with a flawed rating curve covering a short period from the end of May to late August, 2003.[212] After reviewing the motion and hearing arguments on September 9, 2003, just before closing arguments on the entire case, the Trial Court denied the request because the parties had been given an opportunity at the end of trial to offer more testimony or evidence, and knowingly and willingly agreed the trial had finally come to an end, and that proofs were closed.

The updated data from July to late August is cumulative by definition, and, in any event, immaterial when compared to the 2 ½ years of the same data that formed the basis of expert opinions, exhibits, and findings of fact by the Trial Court. The new report proffered by Dr. Andrews' rehashed arguments that he could have refined or testified about before the trial or his last day of testimony. Moreover, his attorneys did not reserve any matter at the close of proofs. The mud flat occurrence and the variations in flow and stage at the confluence on certain days were not material to the Trial Court's overall findings. Trial Op., pp. 17, 20, 32. Moreover, the matter had been addressed by extensive expert direct, cross examination, rebuttal, reply, and

[209]Def. Ex Lv (Pumping Record through July 12, 2003).

[210]Tab 41. (flows, levels, precipitation, Def. Exs. Aw-4, Ax-1, As-1, Ba-4 through Br-4, and Ca-4.

[211]Proposed Def. Ex Ly.

[212]Proposed Def. Ex Lx.

surrebuttal testimony. Further, in response to Dr. Andrews' similar report attached to Nestlé's motion for new trial, Dr. Hyndman's refuted Dr. Andrews's methodology and report, and stated that it would not materially change any basic fact or findings.[213] To reopen proofs under these circumstances would have been to invite an endless trial on basic findings as to effects of pumping on the diminishment or impairment of flows, pumping, and levels that will not change. The Trial Court did not abuse its discretion in refusing to open up the record to lengthy repetitive expert testimony, rebuttal, and even more replies over the same basic events, data, and opinions of the record. It was within his sound discretion to do so.

After the Trial Court issued its opinion, Nestlé filed a Motion for New Trial and Amendment of Judgment along with its motion fo stay on December 16, 2003. The motion alleged several grounds based on mistake, weight of the evidence, "new" evidence, and contrary to law. It also attached all of the exhibits and yet another revised and lengthy report by Dr. Andrews, with yet another rating curve and new calculations based on increased precipitation during the period of September through November 2003.[214] The point of all this was to once again try and introduce other evidence that explained the mud flat situation during trial, and to introduce new data and opinions based on abnormally high rainfall during the Fall of 2003, to argue, once more, that pumping did not have any effects on level during the exposure of the mud flats at Doyles. As the Trial Court noted, the import of this event was that "The mud flats at Doyles' is an isolated, if obvious example of the effect of even less than a two inch drop in this system."[215]

MCWC filed a seriatum Brief in Opposition to New Trial, dated January 6, 2004, with exhibits, including the affidavit by Dr. Hyndman. This response and attachments, together with the record, clearly showed that Nestlé's new trial and amendment of judgment motion was without any merit, and would not change or lead to a different result or decision. At the hearing on February 13, 2004, the Trial Court reviewed the motions and heard extensive arguments by counsel

[213]See Exhibit 2 to Plaintiffs' Brief in Response to Nestlé's Motion for New Trial and/or Amended Judgement, dated January 6, 2004.

[214]Defendant's Motion for New Trial, Dec. 16, 2003, Exhibit 5.

[215]Trial Op, p. 32.

for Nestlé and MCWC. The parties and the Court went through each and every alleged error or mistake, and Nestlé tried to even add more arguments beyond the scope of its motion.[216]

Dr. Hyndman reviewed all ten of the alleged mistakes of the Trial Court, and found that Nestlé was either wrong or the mistake would not change his opinions ands testimony. He also noted that Nestlé could have taken flow measurements and level readings of the confluence or downstream from Doyles at anytime before or during the trial, but did not, and that in any event, Dr. Andrews "new" report was based on wrong science and would not otherwise materially change evidence or opinions.[217] If anything, his opinion that "Tab 1" to Dr. Andrews report attached to Nestlé's motion proved that cone of depression reached the Dead Stream, and that the cone of depression would be deeper and more extensive if Dr. Andrews used the correct recharge values as testified to during the trial.[218]

On February 13, 2004, the Trial Court released a 42-page written decision and order, denying the motion for new trial or amendment of judgement. The decision goes through each and every allegation and response by the Plaintiff, relying on both the motions and response and the record of the hearing. In several instances, the Court adopted by reference, in addition to his own reasoning, the position as set forth by MCWC. Excerpts of MCWC's position are attached to this Brief as Tab 38 and by Nestlé to its Appellant's Brief as Tab 6.

Indeed, Nestlé's underlying proposition that a change in precipitation requires an opening of proofs would mean that a case of this magnitude would never end.[219] It would mean that if precipitation drops because of seasonal low flows or drought-like conditions for a few months, then more proofs, cross examination, rebuttal, reply would go on ad nauseum. Parties would be riding

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[216] New Trial Hearing Transcript, Jan. 13, 2004, in its entirety, T 1-133 shows this.

[217] Hyndman Affidavit, dated January 5, 2004, supra, paragraphs 4-6. As noted by Dr. Hyndman, Nestlé's experts also had not furnished him with all of the electronic data. Paragraph 6.

[218] Id., paragraph 5.

[219] Reminiscent of a Samuel Beckett or Tennessee Williams play.

the precipitation curve into infinity for no material purpose.[220]In any event, Nestlé built its whole case around "average flows" as opposed to "base flows" in the stream and system, so whatever arguments they may make about "periods of normal precipitation" had already been covered exhaustively during trial.[221] Moreover, several wet periods like Fall 2003 exist in the range of existing data.[222]

The Trial Court made no error, and most certainly did not abuse its discretion in calling a halt to what all counsel agreed was finished at the close of proofs. Further, for the reasons stated in the Trial Court's detailed New Trial Opinion and as described above, the Trial Court did not commit any reversible error of law, and did not abuse its discretion regarding any material mistake of fact or in denying Nestlé's Motion for New Trial and Amendment of Judgement. For the reasons, the Trial Court's Final Decision of November 25, 2003 and Opinion and Order denying a new trial, February 13, 2004, should be affirmed.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ISSUING AN INJUNCTION THAT PROHIBITS PUMPING AND DIVERSION OF WATER FROM THE SPRING AQUIFER ON THE SANCTUARY WHERE IT CLEARLY INVADED PLAINTIFFS' RIPARIAN RIGHTS AND VIOLATED THE MANDATE TO PROTECT WATER AND WATER RESOURCES FROM IMPAIRMENT UNDER THE MICH CONSTITUTION, ART 1, SEC. 4, AND THE MEPA.

A. Standard of Review.

The issuance of an injunction is not to be disturbed by the appellate courts absent an abuse of discretion. Michigan Coalition of State Employee Unions v Civil Service Comm'n, 465 Mich 212, 217; 634 NW2d 692 (2001). Injunctions are particularly appropriate to protect private riparian property rights from continuing invasion, diminishment, or harm. See Pierce v Riley, 16 Mich App 419; 168 NW2d 309 (1969).

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[220]Nestlé considered less than a year of data adequate to show no impacts in its flawed report filed with the MDEQ in May, 2001, so why should it claim one more slice of data after 2 ½ years of data is needed.

[221]Dr. Andrews admitted he observed flows were higher than base flows. Base flows should be used, not "average" or "normal." Trial Op., pp. 20-22; May 12, 2003, T 112-113; June 5, 2003, Pt. 1, T 91.

[222]Def' Exs Ax-1; Az-1, and Lv (pumping records).

B. The Trial Court Properly Issued an Injunction to Prohibit or Limit Pumping and Diversion of Water outside of the Watershed Where it Invaded Plaintiffs Riparian Rights and Impaired water and water related resources Contrary to the Dictates of the MEPA.

The Trial Court held that Nestlé's diversion of water from the spring aquifer resulted in a diminishment and impairment of a stream and lakes in which Plaintiffs or members of MCWC have riparian property rights. The Trial Court also held that these effects would impair the streams, lakes, adjacent wetlands, hydraulically connected wetlands, and related aquatic resources in violation of the MEPA. Finally, the Trial Court found that this invasion of riparian rights was continuing, and would continue under varying natural and transient conditions as long as Nestlé continued pumping and diverting water from the spring aquifer at the Sanctuary. In other words, the pumping lowers the water table in an extensive area, thus diminishing the stream, lakes, and wetlands and resources hydraulically connected to the water table. The effects, impairment, and actionable harm are unavoidable except by an injunction that prohibits pumping from this spring aquifer and stream/lake/wetlands complex.

As established by the Trial Court and the foregoing sections of MCWC's Appellees Brief, the facts and liability have been properly and finally determined. Nestlé is liable and the underlying factual and legal basis is uncontestable. Thus, the only question for the Court's review as to the injunction is whether the Trial Court abused its discretion. This review must defer to the Trial Court's specific knowledge, observations, considerations on weight and credibility of the evidence, and findings of fact.

Michigan Supreme Court precedent has affirmed injunctions to protect private property right. Michigan courts grant injunctive relief to prohibit or prevent continuing invasions of a private right to real property. See MCL 600.2919(3); Schadewald v Brule, 225 Mich App 26; 570 NW2d 788 (1997). And, in cases specifically holding there is an actionable injury or unreasonable diversion of tributary groundwater out of a watershed that interferes with, diminishes, or impairs private riparian rights in lakes and streams, the Supreme Court has required injunctive relief. In City of Battle Creek v Goguac Resort Ass'n., 181 Mich 241, 141 NW 441 (1914), the Court held that a riparian had no right to divert and sell water to the city, absent a prescriptive right, and

would exercise injunctive relief to protect other riparians from such unlawful use. Even in Schenk, supra, case involving competing groundwater users, the Court made very clear that the injunction issued by the trial court was "modified" only because plaintiffs had suffered past, but not continuing harm; and that if such harm occurs and continues in the future, the plaintiff was entitled to petition the court for an injunction. 196 Mich at 92.

In virtually all water and riparian rights cases involving a wrongful diversion of water from a watershed or lake or stream, the Court has sustained an injunction for the wrongful interference with riparian property rights. Stock v City of Hillsdale 155 Mich 375; 119 NW 435 (1897); Kennedy v Niles Water Co., supra. The only exceptions to injunctive relief are where the defendant has acquired the right to invade the riparian rights of others by (1) deed, lease or license, (2) prescription, or (3) legislative enactment for a valid public purpose. Bernard, v City of St. Louis, 220 Mich 159; 189 NW2d 891 (1922), Stock, supra. Even in a case involving an off-tract (but not out of watershed) diversion between competing groundwater users would be properly enjoined where the interference and actionable injury is continuing, Schenk at 75.

There are compelling reasons under the MEPA, as well as the fact that groundwater and surface waters are "waters of the state"[223] or "valuable public resources held in trust by the state,"[224] that the Trial Court's injunction and its scope should be affirmed.

The Mich Const 1963, art 4, § 52 declares:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount concern in the interest of the health, safety, and general Michigan statutes also recognize the states's interest welfare of the people. The legislature shall provide for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction. [emphasis added]

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[223]See MCL 324.3101(i) defining 'waters of the state' to mean "groundwaters, lakes, rivers, and streams and all other water courses...." See also recent opinion by Attorney General Mike Cox, OAG No. 7162, Tab 3. See also, US Aviex Co v Travelers Ins Co, 125 Mich App 579; 336 NW2d 838 (1983); Upjohn Co v New Hampshire Ins Co, 178 Mich App 706, 720; 444 NW2d 813 (1989) (citations omitted), rev'd on other grounds, 438 Mich 197; 476 NW2d 392 (1991); Arco Industries Corp v American Motorists Ins Cos, 232 Mich App 146; 594 NW2d 61 (1999); Anderson Development Co v Travelers Indemnity Co, 49 F3d 1128, 1134 (CA 6, 1995).

[224]See MCL 324.32702(c): "... 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] See also Cross-Appellant's Brief on the Public Trust Doctrine, Aug. 20, 2004. See Mike Cox, OAG No. 7162, supra, Tab 3.

Additionally, Section 1703(4) of the MEPA, MCL 324.1704, expressly authorizes injunctive relief to prevent the actual or likely impairment of the, water, natural resources, and public trust. The Trial Court found explicitly that Nestlé's operation has and will continue to impair the water, streams, lakes, wetlands, and entire interrelated system, and, therefore, Nestlé's conduct is prohibited. As such an injunction is required.

Nestlé did not plead or prove it has no alternative water source. It packages Ice Mountain water from a groundwater well at the plant. The evidence, especially the testimony of plant manager Brendan O'Rourke, establishes that Nestlé constantly trucks water from one location to another at which the limits of water, environment, or others rights, such as riparian rights of the Plaintiffs here, have imposed a limitation on or required pumping to cease to protect or minimize harm to these interests. Mr. O'Rourke finally admitted, and testified when asked by the Trial Court, that the Defendant would cease pumping when it has caused significant effects, even if it meant laying off employees or trucking water to the plant from other water sources, as it has trucked water from Maryland to Pennsylvania when they had to stop pumping because of lack of water and adverse effects.

As has been repeatedly noted, Defendants diversion and marketing of water to distant lands or places is a wholly private venture and purpose, and the only reason the invasion of Plaintiffs' riparian rights is necessary is that Nestlé wants the words "spring water" in its Ice Mountain label. It did not prove that it could not bottle or package other water, as it is already doing at the plant and elsewhere. It is only because of the marketing desire to sell "spring water" under FDA regulations so it can charge a higher price, that Nestlé pumps and diverts water from the shallow spring aquifer that supplies the flow and levels of the lakes and streams in which Plaintiffs' have riparian interests. Trial Op., pp. 63-64.

As underscored by the Trial Court, and acknowledged by Nestlé from before it started construction of the plant, well field, and pipeline from the well field to the plant, Nestlé at all times has proceeded at its own risk. Basically, Nestlé made an intentional and calculated business decision or gamble, and lost. Proceeding with its own risk with full knowledge of the potential

losses and costs does not justify its position. MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc., 465 Mich 303: 633 NW2d 357 (2001).

Actionable injury and the injunction should be affirmed. The Court found that because of the variabilities and complexities, periods of low precipitation or drought throughout the year and in the future, there is no situation where the stream, lakes, and wetlands will not be diminished and/or impaired. Trial Op, p. 18-19, 22, 33, 49-50. The irreparable damage is well established by the physical change, loss of size and quality, and impairment or injuries described in the record. The damage is irreparable, because the pumping imposes a permanent physical loss and encumbrance on these riparian rights, surface waters and wetlands. This permanent alteration, diminishment, and impairment,.and loss to the natural flows and levels is at the expense of established riparian and public rights in these surface waters for the sole private gain and purpose of Nestle.

The issuance of the injunction by the Trial Court was proper, consistent with the unique and complex sensitivities of this single spring/aquifer/surface water/wetland system, and not an abuse of discretion. For these reasons, the Trial Court did not abuse its discretion, and the injunction ordered by the Trial Court should not be disturbed.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Plaintiffs-Appellees MCWC, Doyles, and Sapps, request this Court to affirm the Decision and Judgement/Order of the Trial Court, November 25, 2003, and to affirm the Trial Court's Decision and Order Denying New Trial and/or Amended Judgment, February 13, 2004. Nestlé has not established that the Trial Court made any clearly erroneous decision or order, material error of law, or otherwise abused its discretion.

Plaintiffs-Appellees also ask this Court to Dissolve the Temporary Stay of the Trial Court's Injunction Prohibiting Nestlé from Unlawfully Invading and Diminishing or Impairing the Riparian Interests Protected by Michigan Property Law, and/or from impairing or likely impairing the water, stream, lakes, wetlands contrary to the MEPA.

In the event this Court determines that the injunction, as it now reads, should be refined, Plaintiffs submit that this Court should affirm liability, dissolve the stay and continue the Trial Court's injunction pending any remand to the trial court. In such case, the alternative should prohibit any pumping rate when it diminishes the flow, levels, size of the lakes and stream or wetlands. Any remand order should recognize that Nestlé pushed ahead at its own risk and has caused a violation of Plaintiffs' rights and the MEPA.

However, if this Court considers remand for tailoring the Trial Court's injunction to flows and levels, it should do so only with respect to the circumstances of this lawsuit, and caution the courts and the bar that future water conflicts that fall within the facts of this case will be bound by the holding and rule of law of this Court's decision. Further, this Court should condition any such remand for such injunction hearing on Nestlé's payment the costs and fees incurred by Plaintiffs, in such proceedings, pursuant to RJA 600.2164 and Section 1703(3) of the MEPA, because it is in the interests of justice.

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Attorneys for Defendants/Appellees

Date: October 27, 2004

By:____________________________
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PROOF OF SERVICE

On the date below, I sent by first class mail a copy of Appellees' Brief on Appeal (Oral Argument Requested) and Appendix of Exhibits to Appellees' Brief on Appeal to Appellant's counsel of record, John M. DeVries, Mika, Meyers, Beckett & Jones, PLC, 900 Monroe Ave., N.W., Grand Rapids, MI 49503-1423.

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

OLSON, BZDOK & HOWARD, P.C.

Date: October 27, 2004

By:____________________________
Doreen J. Schramski, Legal Assistant