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Orders appealed from:

Circuit Court Opinion and Judgment Order, November 25, 2003 (**Tab 2**), Mecosta County Circuit Court;

Court of Appeals Decision, *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2006) (**Tab 1A**)

**STATEMENT IDENTIFYING JUDGMENT AND ORDERS APPEALED FROM,
GROUNDS, AND RELIEF SOUGHT**

Plaintiffs-Appellants, Michigan Citizens for Water Conservation, Inc.; R.J. and Barbara Doyle; and Jeffrey R. and Shelly M. Sapp (“Plaintiffs”) ask this Court to grant their Application for Leave to Appeal from the following decisions and orders:

(1) Circuit Court Opinion and Judgment Order, November 25, 2003 (**Tab 2**), Mecosta County Circuit Court;¹

(2) Court of Appeals Decision, *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2006) (**Tab 1A**) and Remand Order (**Tab 1B**), November 29, 2005 (retaining jurisdiction);

(3) Order Denying Motion for Reconsideration, January 26, 2006 (**Tab 3**);

(4) Order disposing of the matter after remand, February 14, 2006. (**Tab 4**); which incorporates the Circuit Court Stipulated Remand Order (**Tab 5**).

Plaintiffs appeal these decisions and orders under the authority of MCR 7.302(C)(4)(c) (disposal of all issues by the Court of Appeals after remand proceedings) and MCR 7.302(B)(2),(3)&(5) (issues of substantial public interest, major jurisprudential significance, or important unresolved questions of law).

Plaintiffs seek reversal of the portion of the Court of Appeals’ opinion vacating the injunction granted by the trial court prohibiting Nestlé from withdrawing water from the springs that form the Dead Stream and its associated water resources. Plaintiffs also seek reversal of the Trial Court’s opinion, which was affirmed by the Court of Appeals, that the Dead stream is not a public trust water body and that the public trust doctrine is not applicable to this case.

¹ All attachments to this Application for Leave are designated as a “**Tab**” number corresponding to the Tab in the **Plaintiffs-Appellants’ Appendix In Support of Application for Leave to Appeal**. In addition, references to Trial Exhibits in the Application for Leave to Appeal are designated by their Trial Exhibit number by “**Ex ___**” and a “Tab” number to correspond with the Appendix. Plaintiffs’ trial exhibits were designated by numbers, while Defendant’s trial exhibits were designated by letters.

QUESTIONS PRESENTED FOR REVIEW

I. Water Law Questions

- A. Did the Court of Appeals err in repudiating the common law doctrines governing water use that were adopted by this Court in *Dumont v Kellogg* and *Schenk v City of Ann Arbor*, which include legal distinctions based on the tract, watershed and aquifer where water is used, and replacing those doctrines with a balancing test from the Restatement of Torts which recognizes no such distinctions?

The Court of Appeals said: No

Plaintiff-Appellants say: Yes

Defendant Appellee Nestlé will say: No

- B. Did the Court of Appeals err by holding that a non-riparian may impair the rights of riparian property owners through the pumping of spring water, subject to a balancing test that places the rights of the riparian and the non-riparian on equal legal footing?

The Court of Appeals said: No

Plaintiff-Appellants say: Yes

Defendant Appellee Nestlé will say: No

II. Public Trust Question

Did the Trial Court and Court of Appeals err in dismissing Plaintiffs' public trust claims where Plaintiffs established that the stream was large enough to float commercially valuable shingle bolt logs, there was a history of logging activity in the area, and the removal of spring water impaired public trust uses of surface water?

The Court of Appeals said: No

Plaintiff-Appellants say: Yes

Defendant Appellee Nestlé will say: No

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Sax, Legal Controls of Water Resources, 3d ed, p. 27	12, 22
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Stoebuck & Whitman, The Law of Property (3d ed), pp. 421-430	14, 22

STATEMENT OF FACTS AND PROCEEDINGS

Except as clarified below, the facts and proceedings set forth in the decisions of the trial court and the Court of Appeals, are adopted by reference. **Tab 2**, Tr Op, pp. 7-40; *MCWC v Nestlé*, 269 Mich at 35-49.

In December 2000, Defendant-Appellee Nestlé Waters North America (“Nestlé”) obtained a deed purporting to convey to Nestlé the water rights in a 600-acre hunting preserve called the “Sanctuary” in Mecosta County.² A river called the Dead Stream originates from a spring on the Sanctuary property, which is now covered by a man-made lake called Osprey Lake. *MCWC v Nestlé*, 269 Mich at 35. The Dead Stream flows out of the lake and roughly one mile to the southeast until it joins a channel that connects Blue Lake and Lake Mecosta.³ These two lakes, together with a third lake called Round Lake, are known locally as the “Tri-Lakes.” The Dead Stream flows into the West Branch of the Little Muskegon River, which flows into Lake Michigan. The trial court found that there is a direct connection between the spring and the Dead Stream; every gallon of water pumped from the Sanctuary property represents a gallon of water that does not flow into the Dead Stream and onward through the system.⁴

Michigan Citizens for Water Conservation, Inc. (“MCWC”) is a non-profit corporation dedicated to the protection and conservation of Michigan’s water resources. MCWC was formed after Nestlé’s predecessor (Perrier Group of America) announced its plans to extract and sell water from the Dead Stream watershed. MCWC has over 2,000 members, many of whom are riparian property owners⁵ in the Tri-Lakes area.

² **Dft Ex Fm, Tab 10**

³ *Id.*

⁴ **Tab 2**, Tr Op., p. 11.

⁵ While technically, property owners on lakes are “littoral” owners, the term “riparian” is used in this brief to refer to both.

R.J. and Barbara Doyle live on property that is riparian to the Dead Stream, approximately one-half mile below the Sanctuary property where the spring is located. Jeffrey and Shelley Sapp own property on Round Lake and Thompson Lake, a small 20-acre lake next to the Dead Stream, where they live with their children. The named Plaintiffs, other riparian members of MCWC, and members of the public all use the Dead Stream for recreational purposes from the Tri-Lakes area up to the Doyles' home and the bridge on State Highway M-20.⁶

In 2001, over objections by the riparians, Nestlé's predecessor began construction of four high-capacity wells on the Sanctuary property. The wells are capable of pumping 400 gallons of groundwater per minute, 500,000 gallons per day, and 210 million gallons per year. After it is pumped, the water is transported 12 miles through a pipeline to a bottling plant in Stanwood, Michigan. The water is bottled at the plant and sold under the "Ice Mountain" brand. The bottling plant is outside of the watershed of the Dead Stream and outside of the source aquifer for the spring. Ice Mountain water bottled at the plant is marketed throughout the Midwest, including to areas outside the Great Lakes basin.⁷

In June 2001, just before Perrier began construction of the plant and the wells, Plaintiffs filed suit in Mecosta County Circuit Court. Plaintiffs sought a temporary restraining order to stop construction of the plant pending a determination of claims involving common law water rights, public trust, the Michigan Environmental Protection Act, MCL 324.1701, *et seq.* ("MEPA"), and zoning. The trial court denied the request for a TRO because the construction of the plant was not the harm sought to be addressed by the request for the injunction. However, the trial court warned that Nestlé "will have to assume the risks that accompany the business decisions," and that "[h]aving

⁶ **Tab 13**, Affidavit of Paul N. Sapp, ¶¶ 4-5, and Affidavit of Terrill K. Swier, ¶¶ 10-14 (submitted as Exhibits 20 and 5, respectively, to Plaintiffs' Motion for Summary Disposition); **Tab 11**, Deposition of Walter Welsh, May 10, 2002, pp. 67, 74-78; **Tab 12**, Deposition of Ceo E. Bauer, March 19, 2002, pp.48, 84.

⁷ **Tab 2**, pp. 11-12; *see also* **Tab 19**, map of the Great Lakes Basin, **Pltf's Ex 68**.

done so to its detriment will not be considered as an argument against future equitable proceedings.” *MCWC v Nestlé*, 269 Mich App at 36, n 9.

After later amendments, Plaintiffs’ complaint contained six counts. Count I requested injunctive relief against the construction of wells, wellhouses, and pipelines for the water extraction and diversion operation. Count II alleged that Nestlé’s actions were unlawful under the common law doctrine governing the use of surface water. Count III alleged that Nestlé’s actions were unlawful under the common law doctrine governing the use of groundwater.. Count IV alleged that Nestlé’s actions violated the public trust doctrine.⁸ Count V alleged that Nestlé’s diversion and sale of water without the consent of the State was an unlawful taking of a public resource. Count VI alleged that Nestlé’s actions would impair natural resources in violation of the Michigan Environmental Protection Act (Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* (“MEPA”).

In May 2002, Plaintiffs filed a motion for partial summary disposition on the surface water, groundwater, and public trust counts. Plaintiffs argued that a diminishment of a stream by a non-riparian was unreasonable per se, and that it was undisputed that the stream was navigable and subject to the public trust doctrine. Nestlé filed a counter-request for summary disposition. Through a series of rulings, the trial court dismissed all of Plaintiffs’ claims except groundwater (Count III) and MEPA (Count VI) prior to trial.⁹ *MCWC v Nestlé*, 269 Mich App at 37, 103.

Trial was held for 19 days in a series of sessions between May 5 and September 10, 2003. On November 25, 2003, the trial court issued a 67-page Opinion and Judgment/Order (**Tab 2**). The

⁸ **Tab 14**, Second Complaint, November 12, 2001. See Argument II for more discussion of the public trust claim.

⁹ **Tab 7**, Bench Op, p. 8; **Tab 8**, Bench Op., pp. 18-24. The trial court later had misgivings about dismissing the public trust claims: “Frankly, were the court writing on a clean slate, which I’m not, I would be inclined to a different conclusion.” *Id.*, pp. 15.

trial court's opinion consisted of four parts.¹⁰ The first part of the opinion was the factual findings, which were set forth in about 30 pages.¹¹ Among the trial court's findings were the following:

- The spring from which Nestlé pumps has a direct hydrological connection to the Dead Stream and the lakes it flows into; for every gallon pumped from the spring, nearly a gallon (85%) is removed from the stream.¹²

- The pumping had and would continue to diminish the flow of the stream by up to 29%; reduce the level of the stream and two small lakes by several inches; and reduce the stream's width by 4 or more feet.¹³

- Even at lower pumping rates, the stream and natural resources associated with it had already been adversely impacted.¹⁴

- Nestlé's hydrologist overstated the volume of recharge to the stream and the flow of water in the stream, resulting in greater-than-predicted reductions in flow and worse impacts.¹⁵

- The reduction in water flows would impair the biological character and functions of the lakes, stream, and adjacent wetlands, and it would harm both the resources and Plaintiff's riparian rights. Photographs introduced during trial showed water shortages during the summer of 2003

¹⁰ *Id.*, Factual Findings pp. 7-40, Legal Analysis and Application to Groundwater Count III and MEPA Impairment Count VI, pp. 40-65, and Relief.

¹¹ *Id.*, pp. 7-40.

¹² *Id.*, pp. 22.

¹³ **Tab 2**, Tr Op., pp. 30, 47: These effects are even greater during seasonally lower flows in the Summer or other months due to changes in precipitation over longer periods of time. *Id.*

¹⁴ **Tab 2**, p. 47. "[P]umping has to date adversely impacted, and will do so to a greater extent at 400 gpm." Nestlé's own brief conceded this: "The relevant percentages are that a 347 gpm reduction in total discharge from Osprey Lake the Dead Stream would represent a reduction of 9.1% in the highest flow of the Dead Stream at M-20..., a reduction of 35.8% of the flow, and a reduction of 17.9% of the average flow. At the average of 200 gpm per day withdrawal ... each of the percentages would be approximately halved." **Tab 15**, Deft's Brief in Opposition to Plaintiffs' Motion for Summary Disposition, June 4, 2002.

¹⁵ **Tab 2**, Tr Op., p. 47. An outburst by this hydrologist on the stand led the trial court to describe him as a "company man." *Id.*, p. 10.

when Nestlé was pumping at an average rate of 150 gallons per minute, or 37.5% of the wells' capacity.¹⁶

- The pumping was an unreasonable use under Michigan law. The pumping was for a use off the tract and out of the watershed and aquifer from which it was taken. The pumping measurably diminished the amount of water in the streams and lakes and interfered with Plaintiffs' exercise of traditional riparian property rights.

- The pumping impaired natural resources under the MEPA.¹⁷

- Due to the complexity of the hydrological system, and the difficulty of ascertaining a threshold below which the impacts could be considered acceptable, there was no satisfactory remedy but to prohibit pumping from the wells.¹⁸

After the trial court issued its opinion, Nestlé filed a motion for stay pending appeal. The trial court denied the motion because Nestlé had proceeded with construction of the wells and bottling plant at its own risk, and because the company could bottle water from other sources at the plant if it chose. Nestlé filed a motion for stay with the Court of Appeals on December 15, 2003, which was granted the next day. The stay order allowed the company to pump up to 250 gallons per minute pending appeal.¹⁹ The trial court denied Nestlé's motion for new trial and other relief on February 14, 2004.²⁰

¹⁶ **Tab 17**, photos (**Pltf Ex 4A, 4B, 4C, 86, 86A, 86B, 86E, 86M, 89A, 89B**). The photographs show the flow and level of the Dead Stream at Doyle's residence and M-20 Bridge have been diminished during summer low flows to the point that there is nothing but mud where they and others once canoed and fished; *see also* **Tab 26**, Dr. Hyndman's trial testimony.

¹⁷ **Tab 2**, Tr Op, pp. 41, 63 ("The factual analysis above apply the same to both theories [groundwater and MEPA claims].")

¹⁸ The trial court also awarded taxable costs and expert witness fees as costs under RJA 631.2164. This issue is moot by stipulated order on remand from the Court of Appeals. Stipulated Remand Order, **Tab 5**, p. 5.

¹⁹ **Tab 18**, COA docket entries

²⁰ *Id.*

Nestlé filed a claim of appeal on the trial court’s judgment from the trial and its order denying post-judgement relief.²¹ Plaintiffs filed a cross-appeal on the dismissal of their public trust claims.

The Court of Appeals issued its Decision and Remand Order on November 29, 2005 (**Tab 1A and 1B**). The Court of Appeals’ opinion upheld the trial court’s factual findings, including the findings relative to the reductions in water that would result from Nestlé’s pumping, the impacts to natural resources, and the interferences with Plaintiffs’ riparian rights. *MCWC v Nestlé*, 269 Mich App at 76.

The Court of Appeals’ opinion contains three main holdings relevant to this appeal. First, the Court of Appeals affirmed the trial court’s conclusion that the pumping is an unreasonable use of groundwater that is tributary to and directly connected to adjacent lakes or streams under Michigan’s common law. *Id.* at 79. The Court of Appeals affirmed the trial court’s detailed findings (*Id.* at 52), concluding that “the loss of recreational use and the physical alternation of the Dead Stream will directly and substantially harm the riparian value of the Dead Stream.” *Id.* at 76. However, in reaching its conclusion on the groundwater claim, the Court of Appeals rejected long-standing precedent in favor of a “balancing test.” The balancing test adopted by the Court states that each user of groundwater or surface water is entitled to make use of a portion of that resource regardless of whether the water is retained in the source watershed or aquifer or transported out of it. Under the balancing test, the court held that Nestlé was pumping more than its fair share of the stream, but that Nestlé was entitled to pump a substantial portion of the stream for sale outside the watershed, including outside of the Great Lakes basin.²²

Second, the Court of Appeals affirmed the trial court’s conclusion that the public trust doctrine did not apply because (1) the stretch of the waters in question were not navigable; and (2)

²¹ *Id.* Nestlé filed a claim of appeal on the award to Plaintiffs of expert witness fees as costs, which was consolidated with the instant appeal. As noted above, the costs issue has been settled and is now moot.

²² **Tab 19**, Great Lakes Basin Map (**Pltf Ex 68**).

the public trust doctrine did not preserve the State’s sovereign title in the water distinct from the navigability test. *MCWC v Nestlé*, 269 Mich App at 97.

Third, the Court of Appeals’ opinion retained jurisdiction and remanded the injunctive remedy to set pumping limits consistent with the new “balancing test,” and to clarify the “impairment” findings under the MEPA.²³ The Court also modified the stay pending appeal, and reduced Nestlé’s pumping limit from a 250 gpm monthly average to a 200 gpm weekly average.²⁴

Plaintiffs filed a motion for reconsideration of certain aspects of the Court of Appeals’ opinion.²⁵ The motion for reconsideration challenged the new balancing test propounded by the court under the common law of water use; argued that the trial court had made sufficient findings for affirmance of its MEPA decision; and argued that the Court of Appeals improperly narrowed the scope of the public trust doctrine. The Court of Appeals denied Plaintiffs’ motion for reconsideration on January 26, 2006 (**Tab 3**).

The trial court judge declined the Court of Appeals’ request that he return from retirement to hear the remand proceeding, and Kent County Circuit Judge Dennis C. Kolenda was assigned to preside over the remand. In lieu of a hearing, the parties entered a stipulated remand order on January 25, 2006 (**Tab 5**). The stipulated remand order set interim pumping limits until further hearings, if necessary, after this Court reviews the matter.²⁶ After the filing of the stipulated remand order, the Court of Appeals entered a final order on February 14, 2006 (**Tab 4**). This timely Application for Leave to Appeal follows.

²³ **Tab 1B**, COA Remand Order.

²⁴ *Id.*, Remand Order, Part IV, p. 2.

²⁵ **Tab 20**, Plaintiffs/Appellees’ Motion for Reconsideration or Modification, Dec. 19, 2005.

²⁶ *Id.*, ¶ I, pp. 2-4. The Stipulated Order also resolved the factual findings regarding “impairment” by agreeing to interim pumping limits, and it settled the expert cost issue which is now moot. *Id.*, p. 5.

ARGUMENT

INTRODUCTION

Nothing less than the future rights and interests in Michigan’s water are at stake in this appeal, including the rights of private riparian landowners, the public trust, and the sovereign power of the State against federal and international interests. Appellant Nestlé Waters wants “spring water”²⁷ for its scheme to market water elsewhere – as much as it can get. Fortunately, Michigan is a reasonable use state with distinct common law limitations that protect riparian rights and values from the removal of water from lakes, streams, or their spring aquifers and tributary groundwater for use or sale off tract and out of the watershed.²⁸ Unfortunately, the Court of Appeals’ opinion in this case substantially undermines these protections by repudiating this Court’s prior water law precedent and creating a new “balancing test” for certain water withdrawals.

The trial court and Court of Appeals both reached the factual conclusion that Nestlé’s removal of water has caused and will cause substantial harm to the Dead Stream (*MCWC v Nestlé*, 269 Mich App at 76),²⁹ and that harm will be even greater at Nestlé’s planned increased rates of pumping.³⁰ The trial court held that the common law does not allow non-riparians to remove groundwater to do under the law what riparians cannot do themselves: pump large quantities of water from a spring aquifer, remove it out of a watershed for sale, and materially diminish or harm a

²⁷ **Tab 16**, 21 CFR Sec. 165.110(a)(vi).

²⁸ For purposes of this Application, the terms “tributary groundwater” and “spring aquifer” are used interchangeably. While in a general sense all groundwater becomes a lake or stream as part of the larger water cycle, these terms refer to groundwater that has an immediate and direct hydrological connection to a lake or stream; that is, a lake or stream is formed or sustained by the recharge from the spring aquifer or tributary waters, and a lake or stream is materially diminished if a portion of the spring aquifer is removed before it reaches the lake or stream. *See* US Geological Survey Diagram, **Pltf Ex 76B**, **Tab 6**. *See* Argument I, A, *infra*, and cases cited in that Section.

²⁹ **Tab 2**, pp. 7-30.

³⁰ **Tab 2**, Tr Op., p. 47 “... Defendant’s pumping has to date adversely impacted, and will do so to a greater extent at 400 gpm.”

stream as if the end of the pipe was in the stream itself. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 56, n 33; 709 NW2d 174 (2006).³¹

The Court of Appeals affirmed the trial court's conclusion that Nestle's water removal was unreasonable. But in doing so the appeals court reversed the trial court's reliance on the established precedents that limit off tract and out of watershed removals, particularly for sale and where a removal materially or measurably diminishes the flow or level of a lake or stream and interferes with riparian rights. The Court of Appeals repudiated this Court's prior precedent for both groundwater and surface water, and then adopted a new "reasonable use balancing test" that eliminated this limitation between riparians and those who remove and transfer water from a spring aquifer. *MCWC v Nestlé*, 269 Mich App at 69.

Boiled down, this new "balancing test" substantively shifts the common law of water and property in Michigan from a riparian/reasonable use state to an allocation law state. If not overturned, this new "balancing test" will create new rights of non-riparian out of watershed users of tributary groundwater in all of Michigan's lakes and streams. Non-riparians who want to exploit and sell tributary groundwater out of a watershed and the Great Lakes Basin have now been granted rights in the stream that are no different than riparian owners, and lower riparian owners will be forced to suffer the harm of this change in their private riparian rights. The traditional common law protections for these riparian property owners will have been substantively altered and subordinated to non-riparian diversions that cause unreasonable or even substantial harm.

The other important issue presented in this appeal is the application of the public trust doctrine to Michigan's water resources. Despite substantial evidence of recreational and commercial use the public uses of the water resources at issue in this case, the trial court ruled that the water was not protected by the public trust doctrine because the stretch of the stream below the Nestlé well-

³¹ The trial court further held that the significant diminishment and adverse impacts to the stream and lakes rose to the level of "impairment" of water and related natural resources contrary to the Michigan Environmental Protection Act, MCL 324.1701, *et seq.* ("MEPA").

field was not navigable under a narrow “20 to 40 foot log floating” test.³² The Court of Appeals opinion upheld this narrow reading of the public trust doctrine what constitutes a navigable water body. In doing so, the court rejected the application of the public trust doctrine as a cause of action to protect public trust waters from harm caused by the removal of large quantities of non-navigable waters from the headwaters of navigable public trust waters.

This Court recently rebuked an effort to restrict the application of the public doctrine to block public access to the bottomlands of the Great Lakes below the ordinary high water mark as determined by the common law. *Glass v Goeckel*, 473 Mich 667; 703 NW2d 58 (2005). Restricting the public trust doctrine to only those streams that have the capacity to float logs 20 to 40 foot in length has the same effect. Further, rejecting the application of the public trust doctrine to prevent or remedy the interference with public trust uses form removals of water that diminishes public trust waters will not leave the public trust doctrine “alive and well.” *Id.*

The Court of Appeals decision is clearly erroneous and contrary to existing precedent or established principles of water and public trust law. If it is not overturned, Michigan’s economy and treasured waters will suffer irreversible long term effects, given the rising tide of the global water crisis, that are detrimental to the public interest and the sound jurisprudence of Michigan.

I. THE COURT OF APPEALS ERRED BY REPUDIATING DISTINCTIONS IN THE COMMON LAW WATER USE DOCTRINES ADOPTED BY THIS COURT BASED ON THE TRACT, WATERSHED OR AQUIFER OF USE, AND THE STATUS OF THE USER AS A RIPARIAN OR NON-RIPARIAN, IN FAVOR OF A BALANCING TEST THAT RECOGNIZES NO SUCH DISTINCTIONS

Standard of Review

The Supreme Court reviews questions of law *de novo*. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

³² **Tab 8**, Bench Op, Oct. 29, 2002, p. 8.

A. The Court of Appeals’ Elimination of Firm Distinctions Based on Whether Water Is Used On-Tract and in the Source Watershed or Aquifer, or Off-Tract and Out of the Source Watershed or Aquifer, Is Contrary to Precedent

1. The Court of Appeals Misinterpreted Michigan Precedents on the Tract, Watershed and Aquifer of Use

a. Introduction and Summary on Michigan Water Law Precedents

The trial court ruled that an off-tract, out-of-watershed use of groundwater cannot “measurably diminish” the flow of surface water to another riparian:

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 of the natural forces at work on the surface water(s). I accept Plaintiffs’ counsel’s suggestion that, in this case, a showing of effects in the range of three to five percent would be sufficient to exclude the natural “background” in the system such that effects in excess of that range satisfies the requisite showing. 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. The reader will note that the phrase “material diminishment” has not been used. I have perceived that the phrase “material diminishment” has been a source of confusion in that there has never been a good definition, or even analysis, of what is or is not “material.” For those intent on using the phrase I suggest that it be used in the second scenario above, using the phrase “measurable diminishment” for the first. Both are harms for which a remedy will lie. **Tab 2**, Tr Op., p. 48.

The trial court based its statement of the law in part on language from precedents of this Court. The language in those precedents suggests that uses of water off-tract and out of its source watershed or groundwater aquifer should be treated differently than uses on-tract and in the relevant watershed or aquifer. The difference in treatment is a lower threshold of harm that must occur before a use becomes actionable. Uses that transport water away from the area from which it was obtained

are allowed to impact the shared rights of other water users less than uses that keep water in the area from which it was obtained before they are adjudged to be unreasonable. Drawing such a distinction has always been an important tenet of the common law of water use in the eastern United States. The distinction is based in part on the truism that removals of water away from its source watershed or aquifer have a greater cumulative impact on the correlative rights of other water users because they do not return any water to the source.

The Court of Appeals reversed the trial court's statement of the law and adopted a "reasonable use balancing test" based on Section 850A of the Restatement of Torts:

We agree with the *Maerz* Court's conclusion that a reasonable use balancing test is consistent with the Michigan authorities governing water use. Beginning with *Dumont* and *Schenk* and concluding with *Maerz*, Michigan courts have consistently avoided strict rules that permit one water user to utilize water at the expense of an adjacent user. Instead, while employing various tests, the courts have generally sought to ensure the greatest possible access to water resources for all users while protecting certain traditional water uses. Michigan courts have already recognized the value of the reasonable use balancing test for that purpose. Consequently, in order to recognize the interconnected nature of water sources and fully integrate the law applicable to water disputes, we adopt the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users. *MCWC v Nestlé*, 269 Mich App at 67-68.(citations omitted).

This new "balancing test" draws no firm distinctions between uses in or out of the source watershed or aquifer. Instead, the balancing test lists a number of factors that are to be considered in determining whether a use of water is reasonable:

While the nature of the balancing test requires that the appropriate factors be ascertained on a case-by-case basis, several factors can be discerned that will be relevant to every application of the test. These factors include (1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use[d], and (6) any other factor that may bear on the reasonableness of the use. *Id.*, at 71.

The factors themselves are not listed in any hierarchy of importance. The Restatement gives no "clear guidance as to how the several factors are to be weighed should they all fail to point to a single outcome." Sax, *Legal Controls of Water Resources*, 3d ed, p. 27. One of the considerations

relevant to the first factor listed – the purpose of the use – is whether the water is used on- or off-tract: “water uses that benefit the riparian land or the land from which the groundwater was removed are given preference over water uses that ship the water away or otherwise benefit land unconnected with the location from which the water was extracted.” *MCWC v Nestlé*, 269 Mich App at 72. Unlike traditional riparian rights water law, which gives precedent to whether the use is on- or -off-tract, the balancing test makes this one consideration out of ten³³ that is used to make an *ex post facto* determination of whether that use is reasonable under the balancing test:

While we acknowledge that, at least in the context of riparian rights, prior courts have determined that uses that did not benefit the riparian land were per se unreasonable...we believe that such a per se rule is incompatible with modern use of the balancing test. Instead, we hold that the location of the use is but one of the factors that should be considered in balancing the relative interests. *Id.* at n 49.

The balancing test gives no consideration to whether the use of water is within the source watershed or aquifer or whether the water will be removed from the watershed.

There are a number of questions about the Court of Appeals’ statement of the law on this issue that need answering. The first question is whether the statement has the precedential support the opinion claims for it. The answer is no.

b. Surface Water Cases

The Court of Appeals began its discussion of Michigan water law precedents by asserting that there were two distinct lines under which the law has developed: one line for riparian rights in surface water, and one line for rights in groundwater. For riparian rights in surface water, the court noted three main doctrines: (1) the natural flow doctrine; (2) the reasonable use doctrine; and (3)

³³ These can be paraphrased from the opinion as: (1) Whether the use is for an artificial or natural purpose; (2) whether the use benefits the land from which the water is extracted; (3) the nature of the water source and its attributes; (4) the uses to which the water source is customarily put; (5) economic harms and benefits; (6) social harms and benefits; (7) protection of existing uses; (8) whether the amount or method of use is excessive or unnecessary; (9) whether the amount or method of use harms another’s use; and (10) whether the use can be modified to mitigate or eliminate the harm. *MCWC v Nestlé*, 269 Mich App at 69-74.

the prior appropriation doctrine of the American West. The Court of Appeals relies throughout the opinion on nine pages from a property-law horn book for its descriptions of the various water law doctrines. *See* Stoebuck & Whitman, *The Law of Property* (3d ed), pp. 421-430, attached at **Tab 33** (cited throughout the Court of Appeals' opinion).

The Court of Appeals summarized the natural flow doctrine as having two components: first, that a riparian could not “substantially or materially diminish the quantity or quality of water” in a stream; and second, that a landowner could not transport water “to land beyond the riparian land.” *MCWC v Nestlé*, 269 Mich App at 55.

The Court of Appeals summarized the reasonable use doctrine as allowing “any and all reasonable uses of the water, as long as they do not unreasonably interfere with the other riparian owners’ opportunity for reasonable use.” *Id.* The court further noted that the determination of reasonableness depends “upon the weighing of factors” meant to balance the interests of the riparian owners in conflict, and to “consider all the circumstances that are relevant in a given case.” *Id.* Finally, the court characterized the reasonable use doctrine as having no tract or watershed limitations, though such considerations could be one of the relevant facts and circumstances in determining reasonableness: “while the reasonable use doctrine generally allows water to be transported and used on non-riparian lands, such uses may be disfavored over uses on riparian land.” *Id.* Thus, the Court of Appeals intimated, distinctions based on the tract or watershed of use are an artifact of the natural flow doctrine, and are not a part of the reasonable use doctrine.

Having characterized reasonable use in this way, the Court of Appeals next stated that this Court adopted the reasonable use doctrine for surface water in *Dumont v Kellogg*, 29 Mich 420; 18 Am Rep 102 (1874). In *Dumont*, this Court – through Justice Thomas Cooley – overturned jury instructions based on the natural flow doctrine in a case between two on-tract users. Instead, the Court held, a riparian user of surface water on-tract could use as much water as did not unreasonably interfere with the on-tract use of surface water by another riparian. *Id.* at 423-25.

The Court of Appeals described *Dumont* as having adopted a reasonable use doctrine with the following characteristics: (1) “What constitutes a reasonable use must be determined on a case-by-case basis;” (2) “diversions of water from a lake or stream that do not benefit riparian lands were generally considered per se unreasonable;” (3) “natural water uses are preferred over artificial uses;” and (4) “water disputes between riparian proprietors are resolved by a reasonable use test that balances competing water uses to determine whether one riparian proprietor's water use, which interferes with another's use, is unreasonable under the circumstances.” *MCWC v Nestlé*, 269 Mich App at 58.

The Court of Appeals’ statement of what *Dumont* stands for is at odds with the trial court’s discussion of *Dumont*. The trial court found that *Dumont* did contain language suggesting that a use of surface water off-tract and out of the source watershed had lower legal standing than a use on-tract and in the source watershed. The source of the disagreement between the trial court and the Court of Appeals was their divergent interpretations of the following dicta:

And in considering the case it may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from the proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage. It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters: for this is wholly wrongful, and no question of the reasonableness of his actions in causing the diminution can possibly arise. *Dumont*, 29 Mich at 422.

The trial court interpreted *Dumont* to mean that uses of surface water off-tract or out of the source watershed could be found unlawful without evaluating a list of factors meant to determine reasonableness:

From this dicta the Michigan Supreme Court as early as 1874 is commenting on diversions of streams from their course to the detriment of lower riparians and any diversion by “strangers” being per se wrongful.³⁴

³⁴

Tab 2 at p. 45.

The Court of Appeals stated that the *Dumont* dicta is not about the use of water off-tract or out of the source watershed, but rather about uses of surface water by someone who did not own property that was riparian to the stream:

[T]he Court determined that the jury instructions, which followed the natural flow rule, would have been applicable had the interference been caused by a stranger.

[Fn 33]: This bifurcation of the applicable rule, depending on the status of the party interfering with the riparian owner's water use, is not without precedent. However, the *Dumont* Court's use of the word stranger suggests that the Court was referring to a nonriparian who attempted to exercise riparian water rights. This understanding is consistent with the Restatement approach, which recognizes that a nonriparian who uses the water of a watercourse or lake is liable for interference caused to a riparian by such use without reference to the reasonableness of the use. *MCWC v Nestlé*, 269 Mich App at 56, including n 33 (citations omitted).

There are three problems with the Court of Appeals' assertion that the passage from *Dumont* refers only to the use of water by a non-riparian, and not to a use off-tract or out-of-watershed: (1) this interpretation is not an accurate reading of the language of the passage; (2) it is inconsistent with cases from other eastern states decided around the time of *Dumont*; and (3) it is inconsistent with Michigan cases decided after *Dumont*.

(1) The language of the passage

The first problem with the Court of Appeals' interpretation is the language in the passage itself. The passage in *Dumont* distinguishes the case from two other scenarios, not one: (1) the scenario "in which a stream has been diverted from its natural course and turned away from the proprietor below;" and (2) "the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters." The Court of Appeals' statement that the *Dumont* passage was referring to the use of water by a non-riparian only accounts for scenario (2) in *Dumont*: "interference by a stranger." The Court of Appeals did not account for scenario (1): the diversion of a stream from its natural course and away from lower riparians. Scenario (1) is what suggests a

prohibition on diversion off-tract or out-of-watershed. By failing to recognize the existence of scenario (1), the Court of Appeals fundamentally misreads *Dumont*.

(2) **Cases in other states decided around the time of *Dumont***

The second problem with the Court of Appeals' interpretation of *Dumont* is that it would have meant Michigan followed a rule that was inconsistent with the rules in other riparian jurisdictions at the time. The idea that *Dumont* recognized a prohibition on the use of water by non-riparians, but *not* a tract or watershed limitation, would have put it at odds with the prevailing view in other Eastern water law states – which recognized both a prohibition on use by non-riparians and also a tract or watershed limitation. By way of example, consider these contemporaries of the *Dumont* decision:

Williams v Wadsworth, 51 Conn 277 (1884):

The defendant has no right to divert or use the water, except a right which is incident to and parcel of the [riparian] land * * * If one man may, by purchasing a small parcel upon the bank of a stream, thus acquire the right to divert it to distant points, of course others may do the same thing. The defendant might divert the stream to as many distant points as he might own or control, and thus the stream might be exhausted.³⁵

Lord v Meadville Water Co, 135 Pa 122, 130-31 (1890):

that the rights of a riparian owner would justify the plaintiff in carrying the water for miles out of its channel, to supply the borough of Ashland with water, is a proposition so palpably erroneous that it would be a waste of time to discuss it.³⁶

City of Paterson v East Jersey Water Co, 70 A 472, 488 (NJ 1908):

[T]he uses of the water of a flowing stream, both ordinary and extraordinary, by the riparian owner, must, in order to be reasonable, be connected with the occupation and enjoyment of the riparian lands themselves, and as an incident to such enjoyment, and that the permanent diversion of the waters for nonriparian user and for sale is

³⁵ Defendant's right to divert water was upheld based on prescriptive use, however.

³⁶ The right could be acquired by condemnation, however.

an unlawful use, is the one now generally, if not universally, adopted; and the courts taking this view also agree that, in order to obtain relief against such unlawful or unreasonable use, it is not necessary that the lower riparian owner show any actual damage.

Roberts v Martin, 72 W Va 92; 77 SE 535, 537 (1913):

[T]he diversion of the water by the defendant for the purposes of sale is an infringement of the complainant's right as a lower riparian owner to the continued flow of the stream, and that without proof of any actual or perceptible damage, so far as the establishment of its legal right is concerned, if the diversion is of such a perceptible and sensible amount as not to be excluded under the maxim "de minimis," complainant is entitled to resort to this court for protection, in view of the fact, against defendant's claim of the right to divert and to continue the diversion.³⁷

Stratton v Mt Hermon Boys' School, 216 Mass 83; 103 NE 87, 88-89 (1913):

[T]he use by a riparian owner by virtue of his right as such must be within the watershed of the stream, or at least that the current of the stream shall be returned to its original bed before leaving the land of the user. This is implied in the term "riparian." It arises from the natural incidents of running water. A brook or river, so far as concerns surface indications, is inseparably connected with its watershed and owes the volume of current to its area * * * Abstraction for use elsewhere not only diminishes the flow of the parent stream but also increases that which drains the watershed into which the diversion is made, and may injure thereby riparian rights upon it. Damage thus may be occasioned in a double aspect.

* * *

The governing principle of law in a case like the present is this: A proprietor may make any reasonable use of the water of the stream in connection with his riparian estate and for lawful purposes within the watershed, provided he leave the current diminished by no more than is reasonable, having regard for the like right to enjoy the common property by other riparian owners. If he diverts out of the watershed or upon a disconnected estate the only question is whether there is actual injury to the lower estate for any present or future reasonable use.

To sum up, each of these cases recognizes legal distinctions based on the tract and watershed of use – not just a distinction between use by riparians and use by non-riparians. If *Dumont* really

³⁷ Quoting *City of Patterson, supra*. The case also cites *Dumont* as authority for its holding.

only recognized the latter distinction and not the former, as the Court of Appeals asserted, *Dumont* would have been alone among its contemporaries in doing so.³⁸

(3) Michigan cases decided after *Dumont*

The third problem with the Court of Appeals' interpretation is that it fails to account for the Michigan cases decided after *Dumont* that *do* recognize some form of tract or watershed distinction.

A nice summary of these cases is provided by the Court of Appeals' opinion, at footnote 34:

Hall v Ionia, 38 Mich 493, 500 (1878) (“We think the complainant has a right to an injunction against the threatened proceedings of the defendants to collect and divert the water to purposes foreign to their use and enjoyment of the woolen factory premises, and that the prayer of the bill to that effect should have been granted.”); *Stock v Hillsdale*, 155 Mich 375; 119 NW 435 (1909) (refusing to restrain defendant's withdrawals from lake because defendant proceeded in defiance of plaintiff's rights for more than 20 years)³⁹...*Hoover v Crane*, 362 Mich. 36, 42; 106 NW2d 563 (1960) (“Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed.”); *Thompson v Enz*, 379 Mich 667, 686-687; 154 NW2d 473 (1967) (“Use for an artificial purpose must be (a) only for the benefit of the riparian land and (b) reasonable in light of the correlative rights of the other proprietors.”). (Emphases added). *MCWC v Nestlé*, 269 Mich App at 58, n 34.

While the Court of Appeals noted the language and results of these cases, it nonetheless concluded that Michigan surface water law since *Dumont* does not draw distinctions based on the tract or watershed of use. The disconnect between the cited cases and the Court of Appeals' statement of the rule is inexplicable. *MCWC v Nestlé*, 269 Mich App at 105.⁴⁰

³⁸ Which seems unlikely in light of Justice Cooley's standing as a jurist.

³⁹ The city in *Stock* owned riparian land on the lake but was using the water some distance away; this activity, which the Court said was unlawful under common law principles, was nonetheless allowed because prescriptive rights had vested.

⁴⁰ It is even more inexplicable, given the court's recognition of the importance of riparian ownership as connected to the land.

(4) Conclusion on surface water law

For the reasons outlined above, Michigan common law on surface water has always recognized significant distinctions between uses of water on-tract and within the source watershed and uses of water off-tract and out of the source watershed. The Court of Appeals was mistaken to assert otherwise.

c. Groundwater Cases

The Court of Appeals read the same kinds of distinctions out of the common law on groundwater in Michigan as it read out of the common law on surface water. Again, this was a mistake.

The Court of Appeals began its discussion of groundwater by stating that as with surface water, the law on groundwater had also developed three main doctrines: (1) a rule of absolute ownership, or capture; (2) a “doctrine of reasonable use;” and (3) a “variant of the reasonable use doctrine...often called the correlative rights doctrine.” *MCWC v Nestlé*, 269 Mich App at 58-59. The court described capture as a rule in which one could withdraw unlimited amounts of groundwater with no liability to impacted landowners. It described reasonable use as having two components: (a) a rule of no liability for one withdrawing groundwater for use on the land from which the water was withdrawn; and (b) a rule prohibiting the withdrawal of groundwater for use off the land from which it was withdrawn if the withdrawal causes any injury to others within the aquifer. And the court described correlative rights as a rule of equitable apportionment between landowners who use groundwater on-tract and a rule allowing transport off-tract only if the on-tract users are fully supplied with water.

It is helpful to view these three groundwater doctrines, and the Restatement doctrine the Court of Appeals ultimately adopted as Michigan law, in table form:

	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use, but can use surplus water	water use balanced between users

This table will be used to compare the evolution of the common law on groundwater as the Court of Appeals describes it, and as it actually happened.

(1) Schenk v City of Ann Arbor

The Court of Appeals called *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917), “the seminal case dealing with groundwater rights in Michigan.” *Schenk* was a dispute between an on-tract user of groundwater and a city who planned to pump groundwater off-tract to meet municipal needs. The *Schenk* court stated that the common law rule it adopted:

does not prevent the proper user by any landowner of the percolating waters...although the underground water of neighboring properties may thus be interfered with or diverted; 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 that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow... *Schenk*, 196 Mich at 84, quoting *Meeker v City of East Orange*, 77 NJ Law 623; 74 A 379 (1909).

The Court of Appeals described *Schenk* as adopting the reasonable use rule set forth in the chart above. However, the passage from *Schenk* is actually a statement of correlative rights, the rule the Court of Appeals described as a variant of reasonable use. The off-tract user is not absolutely prohibited from diverting off-tract; instead, the off-tract user can only use as much water as will not interfere with the on-tract use. Stated as it was in *Schenk*, a standard of no “material diminishment”

looks more like a rule that prevents any interference with the on-tract user than it looks like an absolute prohibition.

Further support for the notion that *Schenk* adopted a correlative rights rule was *Schenk's* heavy reliance on *Katz v Walkinshaw*, 141 Cal 116; 70 P 663 (1903). *Katz*, decided 14 years before *Schenk*, is viewed throughout the country as the seminal case on correlative rights. Sax, *supra* at 377-80 (Tab 32); *Stoebuck, supra* at 429, n 9. *Schenk* adopted the following head note from *Katz* as the correct statement of the rule:

Each owner of soil lying in a belt which becomes saturated with percolating water is entitled to a reasonable use thereof on his own land, notwithstanding such reasonable use may interfere with water percolation in his neighbors' soil; but he has no right to injure his neighbors by an unreasonable diversion of the water percolating in the belt for the purpose of sale or carriage to distant lands. 196 Mich at 91.

In other words, a land owner may make use of as much groundwater on-tract as does not unreasonably interfere with another land owner's on-tract use. An off-tract use is prohibited from causing any injury; it is not categorically prohibited. Thus, *Schenk* did not adopt a rule of capture for competing on-tract users any more than it adopted an absolute prohibition on diversion. It adopted a rule of balancing uses between on-tract users, coupled with a rule that an off-tract use could not interfere with an on-tract use. Interestingly, the Court of Appeals in this case did not mention *Schenk's* reliance on *Katz* or even cite *Katz*.

The rule that an off-tract, out-of-watershed use of groundwater may cause no interference to an on-tract user (or may take the surplus only) is consistent with the trial court's "measurable diminishment" standard, which the trial court derived from language in *Schenk*. In *Schenk*, the term "material diminishment" is an expression of the idea that the off-tract user could not cause any interference with a use on-tract. If the uses that may not be interfered with include riparian uses of a surface water body like the Dead Stream, then the standard can be used to link the law of surface water and groundwater as the trial court did.

(2) **Reading tract and watershed distinctions out of Schenk**

In the case at bar, the Court of Appeals seems to contemplate that *Schenk* recognized a distinction between on-tract and off-tract uses (and, correspondingly, between uses within the source aquifer and uses outside it). The Court of Appeals even phrases the concept in language that sounds more like the no-injury rule of correlative rights than the absolute prohibition of pure reasonable use:

Thus, the [*Schenk*] Court adopted the traditional reasonable use rule, which permits withdrawals whose use was not connected with the land from which it was withdrawn, but only to the extent that they do not interfere with an adjacent water user's reasonable use. *MCWC v Nestlé*, 269 Mich App at 61-62.

Having recognized that *Schenk* drew a distinction between on-tract and off-tract uses, the Court of Appeals then argues that the remedy in *Schenk* and two cases following it nonetheless represents a trend away from such distinctions:

After *Schenk*, Michigan courts continued to apply the reasonable use rule stated in *Schenk*, but applied it in a flexible manner to ensure that no one user would be deprived of all beneficial use of their water resources. *Id.*

The *Schenk* Court found that because the plaintiff was able to supply his water needs by lowering his well slightly, there was no interference by the off-tract user requiring an injunction. The court did award damages, however, and reserved an injunctive remedy if the interference became worse. Contrary to the Court of Appeals' interpretation, however, the imposing of a damages remedy instead of an injunction does not change the liability rule – which, again, was no interference with an on-tract use by an off-tract use.

The Court of Appeals argued that the trend away from distinguishing between on-tract and off-tract use continued in *Bernard v City of St. Louis*, 220 Mich 159; 189 NW 891 (1922) and *Hart v D'Agostini*, 7 Mich App 319; 151 NW2d 826 (1967). This assertion is just not supported by the language of those two opinions. Specifically, the court in *Hart* noted the importance of tract or watershed distinctions in both *Schenk* and *Bernard*, and upheld the pumping in *Hart* in part because the water was not being diverted away:

Both cases [*Schenk* and *Bernard*] involved a public water company intentionally removing water from the subterranean supply and transporting it elsewhere for consumption, and in both cases it was held that such removal of the water, which was in fact a partial destruction of the water table, was an unreasonable use of the specific land and unreasonable as to the surrounding lands. The municipalities were liable for the partial destruction of the water table with the resulting damages to the wells on surrounding land. The restricted nature of these holdings was pointed out in the *Schenk* case:

‘This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, Nor does it prevent any reasonable development of his land by mining or the like, Although the underground water of neighboring proprietors may thus be interfered with or diverted; * * *’

In the case before us water was not transported to distant areas for consumption, nor was there any evidence or permanent damage to the subterranean water table. Here, water was merely moved out of the immediate area of the public easement in order to facilitate sewer construction. 7 Mich App at 322 (quoting *Schenk* quoting *Meeker, supra*) (emphasis added).

In light of this language, any suggestion that *Bernard* and *Hart* represent a shift away from *Schenk*’s version of the correlative rights rule is just wrong.

(3) *Maerz v U.S. Steel*

The Court of Appeals in this case stated that tract and watershed distinctions were eliminated, and the pure balancing approach of the Restatement was adopted, in *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982).⁴¹ Again, this is not correct.

Maerz was a case between two on-tract users. The defendant’s pumping of groundwater for a limestone quarry dried up the plaintiff’s well, and plaintiff filed a suit for damages. The defendant argued that under the reasonable use doctrine it had no liability for its on-tract use of groundwater. The Court of Appeals in *Maerz* disagreed, holding that an on-tract user of groundwater could not unreasonably interfere with a neighbor’s on-tract use.

⁴¹ We recognize that *Maerz* is a decision of a lower appellate court, but we believe that the Court of Appeals’ misuse of it to effectively overrule *Schenk* provides insight on why the case needs the Court’s attention.

The result in *Maerz* is not in dispute; the debate is over the implications. According to the Court of Appeals in this case, *Maerz* represents a shift in Michigan groundwater law from the reasonable use doctrine to the doctrine expressed by Section 858 of the Restatement, which balances competing interests regardless of the location where the groundwater is used:

The *Maerz* Court explicitly rejected the traditional reasonable use rule and the English rule as the law applicable to groundwater disputes in Michigan. Instead, it determined that Michigan precedents had departed from the strict application of those rules in favor of a balancing approach to the resolution of groundwater disputes. Based on this, the *Maerz* Court reversed the trial court's determination that the extraction of groundwater in connection with the land is per se not actionable.

Using the table, the Court of Appeals in this case interpreted *Maerz* to shift the law on groundwater from here:

	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use, but can use surplus water	water use balanced between users

to here:

	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use, but can use surplus water	water use balanced between users

In finding that such a shift occurred, the Court of Appeals misinterpreted the holding of *Maerz*. First, as a dispute between two on-tract groundwater users, the farthest *Maerz* could have shifted the common law on groundwater – *if* the law was reasonable use after *Schenk* – is from here:

	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use, but can use surplus water	water use balanced between users

to here:

	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use, but can use surplus water	water use balanced between users

More importantly, the *holding* in *Maerz* actually kept the law on groundwater right where it was – with correlative rights. This interpretation is supported by the following passage in *Maerz* on whether *Schenk* recognized liability for an on-tract use that unreasonably interfered with another on-tract use:

More recently, in the case of *Woodson v Twp of Pemberton*, 172 NJ Sup 489, 503-504; 412 A2d 1064 (1980), the New Jersey court pointed to Meeker's strong approval of a New Hampshire decision which held that:

“[T]he true rule is that the rights of each owner being similar, and their enjoyment dependent upon the action of other landowners, their rights must be correlative and subject to the operation of the maxim *sic utera, &c*, so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property in view of the similar rights of others.”

Woodson concluded that *Meeker* never intended its correlative rights rule be limited to situations of off-premises use of withdrawn subterranean water.

Thus, the view that *Schenk* established a rule permitting unrestricted withdrawal of underground water for on-premises purposes not only relies upon dictum but assumes *Schenk* adopted from *Meeker* a rule that was not there. 116 Mich App at 718-19.

Thus, *Maerz* did not eliminate the doctrine of reasonable use (and its rule of no liability for competing on-tract users) when it held that the defendant’s on-tract use of groundwater could not unreasonably interfere with another on-tract use. Instead, *Maerz* simply recognized that *Schenk* adopted correlative rights as the rule in Michigan for competing groundwater users.⁴² Rather than move the law from reasonable use to the Restatement, *Maerz* kept the law right where *Schenk* put it, which is here:

	Capture	Reasonable Use	Correlative Rights	Restatement
Two uses of water on-tract and in the source aquifer	no liability	no liability	water use balanced between users	water use balanced between users
A use of water off-tract and out of the source aquifer, and a use on-tract	no liability	off-tract use prohibited if on-tract user objects	off-tract use cannot interfere with on-tract use, but can use surplus water	water use balanced between users

Maerz found that the correlative rights doctrine as it already existed in Michigan prevented the defendant from making an on-tract use that unreasonably interfered with another on-tract use.

The Court of Appeals in this case was confused by the dicta in *Maerz* about the Restatement of Torts. The Court of Appeals in this case said *Maerz* adopted the Restatement but mistakenly called it correlative rights:

While the *Maerz* Court correctly summarized the restatement approach, the characterization of the Restatement's rule as a correlative rights rule is unfortunate. As noted above, the phrase "correlative

⁴² Moreover, *Maerz* cannot be read to have made any holding on (a) the use of groundwater that impacts surface water riparian rights; (b) interference with riparian rights in surface water by a non-riparian; or (c) sale of water in places far from the land where it was withdrawn. Each of these issues will be discussed in section B of this argument section.

rights" has been used to describe both the American or reasonable use doctrine and the California modification of that doctrine, but neither of those doctrines employs a strict balancing test. See Restatement, §§ 850A, 858(2). *MCWC v Nestlé*, 269 Mich App at 66, n 39.

This is backwards. What really happened was that *Maerz* recognized that *Schenk* adopted correlative rights but mistakenly said that was the same thing as the Restatement. Recognizing and applying correlative rights was all *Maerz* had the power to do, since *Schenk* was a decision of this Court which the Court of Appeals could not overturn. If *Schenk* adopted correlative rights, *Maerz* had no authority to repudiate it and adopt the Restatement. Since the Court of Appeals in *Maerz* could not (and did not) overrule *Schenk* and repudiate correlative rights in favor of the Restatement, the Court of Appeals should not have done so in this case, either.⁴³

2. A Distinction Between Uses of Water On-Tract and Within the Source Watershed or Aquifer, and Diversions Off-Tract and Out of the Source Watershed or Aquifer, Is Consistent with the Rules of Many Other Eastern States

a. Rulings from Other States

The common law doctrine represented by *Dumont* and *Schenk* – and specifically a distinction that gives uses of water on the land from which it is taken priority over diversions – is also the law of many other eastern states on these issues:

At common law, any use of water on land outside the watershed (the area draining into the water-body) of the source of supply was unreasonable per se and actionable even if it caused no injury. The philosophical premise of the rule is that water courses and lakes exist primarily to benefit the lands through which they flow, rather than to benefit riparian landowners * * * Despite adoption of a reasonable use theory, the majority of states continue to apply this watershed limitation. Getches, *Water Law in a Nutshell* (3d ed), pp. 51-52 (**Tab 35**).

Among the eastern states drawing a distinction based on tract, watershed, or aquifer of use are:
Alabama – *Martin v City of Linden*, 667 So2d 732 (1995) (surface water); Arkansas – *Lingo v City*

⁴³ Even states that have adopted Sec. 858 of the Restatement have retained a distinction between competing groundwater users and off tract or out of watershed sale or uses of water that interfere with riparian rights. See the discussion in the next section of this brief.

of Jacksonville, 258 Ark 63 (1975) (groundwater); Connecticut – *Collens v New Canaan Water Co*, 155 Conn 477; 234 A2d 825 (1967) (groundwater impacting surface water); Florida – *Tequesta v Jupiter Inlet Corp*, 371 So 2d 663 (1979) (groundwater); Kentucky – *United Fuel Gas v Sawyers*, 259 SW2d 466 (1953) (groundwater); Maine – *Maddocks v Giles*, 1999 ME 63 (1999) (groundwater); Maryland – *Finley v Teeter Stone Inc*, 251 Md 428 (1968) (groundwater); New York – *Baumann v City of New York*, 227 NY 25 (1919) (groundwater)⁴⁴; Pennsylvania – *Rothrauff v Sinking Springs Water Co*, 14 A2d 87 (1940) (surface water); Tennessee – *Nashville C & St L Ry v Rickert*, 19 Tenn App 446 (1935) (groundwater); Virginia – *Clinchfield Coal Corp v Compton*, 148 Va 437 (1927) (groundwater); *Town of Gordonsville v Zinn*, 129 Va 542; 106 SE 508 (1921) (surface water); and *Drummond v White Oak Fuel Co*, 104 W Va 368 (1927) (groundwater). Also on this list are Michigan and New Jersey, which were discussed above.

b. The Restatement Approach Is a Minority Rule

As discussed earlier, the Restatement approach for both surface water and for groundwater is to eliminate any firm distinctions based on the tract, watershed or aquifer where the water is used. Restatement (Second) of Torts, §§ 855 and 858. Instead, the Restatement makes the locus of use one factor on a list of factors reviewed to determine whether a use is reasonable. *Id.*, §§ 850A and 858. The Restatement gives no guidance as to how the factors should be weighed when different factors point to different outcomes.

The Restatement’s approach to the locus of use does not represent the weight of authority in the eastern states:

The Restatement (Second) of Torts § 855 rejects the absolute prohibition of non-riparian uses.

* * *

The Restatement approach has been generally followed in a number of states including Georgia, Kansas, Massachusetts, New Hampshire, New York, North Carolina, Oklahoma, Texas, and Vermont. The

⁴⁴ New York appears to draw distinctions based on locus of use for groundwater but not for surface water.

majority of riparian states continue to apply the common law rule limiting uses to riparian lands. Getches, *supra*, pp 52-53 (emphasis added).⁴⁵

The author of Chapter 41 of the Restatement,⁴⁶ which contains the water law sections, agrees his view is in the minority:

Riparian land may extend beyond the watershed of the stream. The greater number of courts have held to the contrary. Restatement (Second) of Torts, Reporter's Notes to § 843, p 8, n 1 (citations omitted).

Thus the Restatement's elimination of distinctions based on locus of use is not an expression of the weight of authority on the issue; it is just a policy preference: "Since development should be encouraged, the Restatement adopts the broader rule." *Id.* Or at least it was a policy preference when Chapter 41 was written almost 30 years ago. To the extent that the Court of Appeals in this case relied on the Restatement to change the common law in Michigan, it should be kept in mind that (1) the Restatement is inconsistent with prior Michigan case law, (2) it is the minority rule in eastern states' water law, and (3) it represents a 30-year old policy preference to encourage development rather than conservation of water resources.

3. Conclusion on Michigan Water Law Precedents

In conclusion, the Court of Appeals in this case took two common law doctrines – reasonable use for surface water and correlative rights for groundwater – and fused them. Under Michigan precedents, both the surface water and groundwater doctrines drew a distinction between uses on-tract and in the source watershed or aquifer and uses off-tract and out of the source watershed or aquifer. Yet the fused doctrine created by the Court of Appeals draws no such distinction, other than mentioning it as one consideration with no particular importance relative to several other considerations.

⁴⁵ Note that three of the states listed – Texas, Oklahoma and Kansas – are hybrid prior appropriation states.

⁴⁶ Frank Trelease.

While it is obvious that the law on surface water and groundwater needs to reflect the hydrological connection between the two, it is not at all obvious that a centuries-old distinction that protects uses that return water to its source over those that do not should be dropped in the process. For the reasons just discussed, the Court of Appeals' elimination of common law distinctions based on the tract, watershed or aquifer of use was not supported by the precedents claimed for it. Not only is the elimination of these distinctions not supported by precedent; it is not a good idea, either. This latter point is discussed in the last section of this brief, on jurisprudential significance.

B. The Court of Appeals Erred in Applying a Balancing Test to a Conflict of Uses Between Plaintiffs, Who Are Riparian to the Stream, and Nestlé, Who Is Not

The Court of Appeals recognized that Plaintiffs were riparian property owners to the Dead Stream, and that their use of the stream for aesthetic and recreational purposes “is a reasonable use worthy of protection.” *MCWC v Nestlé*, 269 Mich App at 74. Where the Court of Appeals erred was in determining that Nestlé was, in effect, also a riparian owner entitled to use the stream by diverting, bottling and selling a significant portion of it. Nestlé is not a riparian owner, and therefore is not entitled to use water from the stream to the detriment of people who are riparian owners.

The Court of Appeals noted the following facts which are relevant to the discussion of this issue:

- Plaintiffs were riparian landowners who exercised riparian rights to use water in connection with their riparian land. *Id.* at 75.
- Nestlé purchased the water rights to the Sanctuary property from Defendants Donald and Nancy Bollman. Nestlé did not purchase the Sanctuary property; the deed for the water rights purported to sever those rights from the fee of the property. *Id.* at 35.
- The pumping of water from the spring on the Sanctuary property removed water that would otherwise have flowed into the Dead Stream. *Id.* at 75. In effect, Nestlé was using riparian surface water.

- The removal of water that otherwise would have been flowing in the Dead Stream had the effect of lowering the stream, narrowing it, and interfering with riparian uses of it, including boating and fishing.⁴⁷ *Id.* at 60.

- “[T]he loss of recreational use and the physical alteration of the Dead Stream will directly and substantially harm the riparian value of the Dead Stream.” *Id.*

The Court of Appeals also recognized that a non-riparian cannot interfere with a riparian’s use of water:

a nonriparian who uses the water of a watercourse or lake is liable for interference caused to a riparian by such use without reference to the reasonableness of the use. *Id.* at n 33, citing Restatement § 857.

Nestlé is a non-riparian. Riparian rights “are not alienable or severable, divisible or assignable apart from the land which includes therein, or is bounded, by a natural water course.” *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967). This includes the corporeal right to the flow of a stream. *Id.* at 677.⁴⁸ Therefore, Nestlé could not obtain riparian rights to the Dead Stream by buying them from the Bollmans. If the Sanctuary property was riparian to the stream (which it is not), Nestlé would have had to buy the property to obtain the water rights; the Bollmans cannot sever the water rights and sell them to Nestlé.

Not only is Nestlé’s use of the water was also unconnected to the land from which it was severed, but it is also used out of the watershed. *Schenk* and a host of other cases from the eastern United States note that the reasonable use doctrine “does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land.” *Schenk, supra*, 196 Mich at 84, quoting *Meeker, supra*; see also *Smith v City of Brooklyn*,

⁴⁷ **Tab 17, photos (Pltf Ex 86E, 89A, 89B).**

⁴⁸ Again, while Michigan is a “reasonable use” state for conflicts between riparians who use water on-tract and in the source watershed, the right to flow is still protected when water is diverted and used in a way that does not benefit the land, this is another reason why *Schenk* recognized that off-tract diversions were unlawful where “streams are materially diminished in flow.” 196 Mich at 83. Some courts have applied reasonable use in cases between riparians, but natural flow or similar limitations as between a riparian and non riparian. Rest, 2d, Torts 10, 41, 3 IN (1979). *Dumont, supra*; *Hoover v Crane, supra*.

52 NY Supp 983 (1898); *aff'd* 160 NY 357; 54 NE 787 (1899); *Collens v New Canaan Water Co*, 155 Conn 477; 234 A2d 825 (1967); *Cline v American Aggregates Corp*, 64 Ohio App 3d 503 (1989); *Hatfield v Lansdale Municipal Authority*, 463 Pa 113 (1961).

Moreover, even if Nestlé were a riparian, it would not have the right to bottle water for sale outside of the watershed. Michigan law recognizes four principal riparian rights: (1) the right to use water for general purposes, such as bathing, domestic use; (2) the right to “wharf out,” (3) the right to access for boating and fishing, or the (4) right of livelihood, and the right to accretions. *Thompson v Enz, supra*, 379 Mich at 686; *Hilt v Weber*, 252 Mich 198, 224-225; 233 NW 159 (1930); Cameron, Michigan Real Property Law, 3d ed, p. 95. Moreover, the private riparian right of access to boat or fish extends to the entire surface of the lake or stream to which they are riparians. *Burt v Munger*, 314 Mich 659, 664; 23 NW2d 117 (1946) (filling of only 7,500 square feet interfered with plaintiff’s ability to fish and boat on the lake); *Kerley v Wolfe*, 349 Mich 350, 357; 84 NW2d 748 (1957). Riparian rights “are property, for the taking ... of which by the State compensation must be made.” *Hilt v Weber*, at 224-225; *see also Bott v Natural Resources Comm’n*, 415 Mich at 45, 77-78; 327 NW2d 838 (1982), and *Peterman v Natural Resources Comm’n*, 446 Mich 177, 191; 521 NW2d 499 (1994).

The Court of Appeals decision treated Nestlé’s non-riparian use of water on a par with Plaintiffs’ riparian property rights to use the entire surface of the stream for the listed purposes. No balancing test should even be applied until the reviewing court has made a threshold determination of whether the diversion of water is by a riparian or a non-riparian. *Burt v Munger, supra*; *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902). If there is an interference with the riparians’ use of the entire surface of the stream for a traditional right connected with the land, then the activity is unreasonable without having to apply any further test. It was error for the Court of Appeals to expand the list of persons or entities with whom riparian rights must be shared to include a non-riparian purporting to exercise rights to divert the water away from the land under a deed that purported to sever them from the land .

II. THE LOWER COURTS APPLIED THE PUBLIC TRUST DOCTRINE TOO NARROWLY

Standard of Review

Questions of law are reviewed *de novo*. *Petty, supra*. The grant of summary disposition is also reviewed *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118, 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, *Beaudrie v Henderson*, 465 Mich 124, 631 NW2d 308 (2001). The purpose of the motion is to determine whether plaintiff has stated a claim upon which relief can be granted. The motion should be granted only if no factual development could possibly justify recovery. *Id.*, at 129-130, 631 NW2d 308.

Summary on Public Trust

The Court of Appeals affirmed the trial court's holding that the public trust doctrine did not apply to the Dead Stream, or to Nestlé's pumping of groundwater that was tributary to the stream. The Court of Appeals held that the only way the public trust doctrine could have applied to the Dead Stream is if the stream could float what the court described as "large mill logs" 20 to 40 feet in length. 269 Mich App at 101. The Court of Appeals rejected Plaintiffs' arguments that the stream's ability to float shingle bolts, which are much smaller but nonetheless commercially valuable, impressed the stream with the public trust. *Id.* The court also rejected Plaintiffs' argument that the existence of a public access point on the stream coupled with the actual use of the stream for public recreation could impress the stream with the public trust.

These holdings by the Court of Appeals were incorrect. The precedents on public trust do not specifically limit the log-float test for navigability to logs at least 20 feet in length; they are expressly flexible on this point. Nor do the precedents limit the exercise of public trust uses to streams that are navigable under the log float test; they say that a public access point provides the public with same the ability to use a lake or stream that a littoral or riparian property owner has. Why the public trust

doctrine would protect the public uses in the log-float situation but not in the public access situation is beyond comprehension.

The reason this is important is because if the public trust attaches to the stream, public trust uses of it are paramount to any private rights. Therefore, even if this Court does not disturb the balancing test adopted by the Court of Appeals for competing private rights to use water, the remedy should nonetheless be modified to ensure that public uses of the stream are given priority over the private interest in diverting groundwater tributary to it.

A. The Public Trust Doctrine Applies to the Dead Stream

1. Evidence on Public Trust

The evidence on public trust,⁴⁹ which must be read in the light most favorable to Plaintiffs, showed the following:

- The Dead Stream has the capacity to float and actually floated commercially viable shingle bolts from the M-20 bridge downstream to the Tri-lakes. There are shingle bolts 18 inches long made of cedar in the bottom of the stream from shipments in logging days. *MCWC v Nestlé*, 269 Mich App 101.

- The Dead Stream is 40 feet wide and an average of two feet deep, although in a few places it was a foot deep.

- M-20 is a State road that provides existing lawful public access to the Dead Stream

- Plaintiffs and others canoe and fish the Dead Stream between Lake Mecosta, Blue Lake, and Round Lake, and the connecting channel.⁵⁰

⁴⁹ **Tab 14**, Second Amended Complaint (portion); **Tab 13**; **Tab 20**; **Tab 24**, pp. 52, 64-66, 73, 74, 82; **Tab 11**, Walter Welsh deposition, pp 65-67, 74-78; **Tab 22**, photo (**Pltf Ex 2E**); **Tab 23**, Alguire report, p. 4.

⁵⁰ No riparians, including Defendant Bollmans, have ever objected to public use as a trespass, and Nestlé, with its limited right as a non riparian to withdraw water from the spring aquifer, likewise has no standing to object to public use.

- Given the long history of public canoeing and fishing on the stream up to the M-20 bridge, the stream has been viewed as public.

2. The Public Trust Applies Because Valuable Timber Was Floated on the Stream in the Form of Shingle Bolts

The two principal cases on the navigability of water bodies in Michigan are *Moore v Sanborne*, 2 Mich 519; 59 Am Dec 209 (1853) and *Bott v Natural Resources Comm'n*, 415 Mich 45; 327 NW2d 838 (1982) .

The Court of Appeals in this case held:

Although the floating of a shingle bolt may demonstrate that the Dead Stream is capable of floating a commercially viable log, *Moore* and *Bott* both require the floating of large mill logs to demonstrate navigability. 269 Mich App at 66.

Neither *Moore* nor *Bott* says this. *Moore* says:

in nearly all the States, this rule has been extended so as to be adapted to the necessities of our trade and commerce, and to embrace all streams upon which in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use, or the extent of such use. 2 Mich at 523 (emphasis in original).

In other words, under *Moore*, capacity for valuable floatage determines navigability under the log-float test, not the size of the logs. There is no doctrinal basis in Michigan law to restricts navigability to the floating of only logs 20 to 40 feet in length. *Moore, supra*; see also *Collins v Gerhardt*, 237Mich 38; 211 NW 115 (1926).⁵¹ The “capacity for valuable floatage” test remains the basis for application of the common law public trust doctrine in Michigan. *Moore, supra*, at 523-524. *Moore* emphasized the “wants of the public and the necessities of trade and commerce” and “rafts and logs.” *Id.* at 523, 526. The scope of the public uses allowed depends on the public need: “if a

⁵¹ While the Court of Appeals discounted the argument by Plaintiffs, it acknowledged that *Bott* involved short, thin streams that would have expanded public access into completely privately owned private lakes – the so-called “dead-end” lake cases. *MCWC v Nestlé*, 269 Mich App at 102. *Bott* could easily be categorized as the rule for small streams that go nowhere except into other’s private property and lakes. *Bott, supra*, 415 Mich at 60-62, 64. The small creeks had been cleared. *Id.* at 58-59.

stream be naturally of sufficient size to float boats, *or mill logs*, the public have a right to its free use *for that purpose*. *Id* at 526 (emphasis in original).

3. The public trust applies because the Dead Stream has public access point and is used for public recreation

Plaintiffs also made public trust claims arising out of the fact that the Dead Stream is actually used for public trust purposes. These claims take note of the fact that the public uses of a lake or stream are protected from interference through the removal of tributary waters. Further, Plaintiffs noted that State has affirmatively asserted its sovereign power to regulate lakes and streams to protect the public trust in the water, as distinguished from the extension of navigability for purposes of public access.⁵² The trial court expressed some regret that it was compelled to dismiss the public trust claims within the Plaintiffs' amended complaint: "Frankly, were the court writing on a clean slate...I would be inclined to a different conclusion."⁵³

The original test for navigability Michigan was broader than the log-float test. *Moore* defined navigable streams as those which could be used by the public for some public purpose:

The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use and hence, in a region where the principal business is lumbering, or the pursuit of any particular branch of manufacturing or trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient. In one instance, perhaps, boats can only be used profitably, from the nature of the product to be transported--whilst, in another they would be utterly useless. Upon many of our streams, although of sufficient capacity for navigation by boats, they are never

⁵² Inland Lakes and Streams Act (Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, *et seq.* ("ILSA")(protects public trust in all streams and lakes, even tiny ones) and Great Lakes Preservation Act ("GLPA"), MCL 324.32701, *et seq.* (Declares water a "public resource held in trust.") This language remains unchanged by recent amendment to GLPA, **Tab 25**, 33 PA 2006 and 37 PA 2006. The package of bills regulate high volume withdrawals over 2 million and 5 million gallons per day, impose a no adverse resource impact standard, and require permits for "new and increased" withdrawals above these high volume limits. The bills expressly state that their provisions do not alter or modify any common law statutory remedies, and do not alter or modify existing law regarding riparian rights and uses.

⁵³ **Tab 8**, Bench Op, p. 15.

seen--whilst rafts of lumber of immense value, and mill logs which are counted by thousands, are annually floated along them to market. Accordingly, we find that a capacity to float rafts and logs in those States where the manufacture of lumber is prosecuted as a branch of trade, is recognized as a criterion of the public right of passage and of use, upon the principle already adverted to, that such right is to be ascertained from the public necessity and occasion for such use. 2 Mich at 525-26.

Moore makes the point again later – if there is a public trust use of a water body, then the water body is impressed with the public trust for that use:

But it is urged that conceding such to be the rule, if a stream be not capable of being used to float mill logs, in an ordinary stage of water, it is not subject to the servitude of the public interests. But we have already attempted to show that a capacity for use to meet the public necessities, furnishes the true test in such cases. *Id* at 526 (emphasis added).

Even *Bott* recognizes other ways of gaining rights of public use:

If there is a public access site then the members of the public who have access to that site have the same right to use the waters as does a littoral owner. 415 Mich at 57, n1 (citation omitted).

The rights referred to in that passage are the rights to use the entire surface of the water for traditional purposes such as swimming, boating and fishing. *Beach v Hayner*, 207 Mich 93; 173 NW 487 (1919); *Burt v Munger, supra.*. This Court recognized that these rights apply to the public on a water body where there is a public access point:

Plaintiffs, in their brief in this Court, state that they have never argued that the general public does not have a right of navigation on the waters of Higgins Lake and that they “take no exception whatsoever” to the Attorney General's argument that the public has a right to navigate and to exercise the incidents of navigation on waters of this state which are capable of being navigated by oar or motor-propelled craft, small craft, so long as members of the public have lawful means of access to such waters.

The Court of Appeals stated: “Assuming lawful access, that portion of the lower court's order which prohibited the defendants from 'bathing, swimming, * * * (temporarily) anchoring boats or similar activities' must be vacated (deletion and addition by the Court of Appeals).”

The public, as plaintiffs acknowledge, may lawfully enter the waters of Higgins Lake from the points where the other streets of the subdivision terminate at the water's edge, and may use the waters in front of plaintiffs' lots, provided they have so or otherwise lawfully

gained access, for bathing, swimming and temporarily anchoring boats.

McCardel v Smolen, 404 Mich 89, 96; 273 NW2d 3 (1978). *McCardel* was the case cited by the *Bott* Court when it referred to the rights of the public being the same as those of a littoral (or riparian) owner.

Insofar as it is capable of ownership, water is owned by the state for the benefit of the public. *Collins v Gerhardt, supra*.⁵⁴ The public's rights to use the water need to be legally protected, whether the public rights are recognized based on a log-float test or because the public accesses the water from public property.

B. The Public Trust Uses of the Dead Stream are Paramount and Cannot be Impaired by Withdrawal of Tributary Waters

The public right in a stream and its waters is paramount and should not be alienated, subordinated, or disposed of for primarily private purposes. *Illinois Central Railroad v Illinois*, 146 US 387; 13 SCt 110; 36 L Ed 1018 (1892); *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); *Collins v Gerhardt, supra*; *Nedtweg v Wallace*, 237 Mich 14, 20; 208 NW51 (1926); see also *People ex rel Scott v Chicago Park District*, 66 Ill 2d 65; 360 NE2d 773 (1976); Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 Mich L Rev 471, 490 (1970).

Tributary waters are the source of flow and level of all Michigan's public lakes and streams. In *National Audubon Society v Superior Court of Alpine County*, 33 Cal 3d 419; 658 P2d 709 (Ca. 1983) (**Tab 21**), the California Supreme Court held that the diversion of water from a non-navigable tributary stream was subject to the public trust doctrine, not for purposes of a public trust servitude or access, but for a cause of action to protect the public trust waters that were impaired or diminished by the diversion of the tributary water.⁵⁵ As acknowledged by the Court of Appeals, an upstream

⁵⁴ "But he Mr. Collins does not own the water, and he does not own the fish. So far as they are capable of ownership the belong to the state for the benefit of the people." 237 Mich at 45.

⁵⁵ The Oklahoma Supreme Court reached a similar conclusion in extending a cause of (continued...)

riparian owner cannot divert and sell water out of the watershed of the water's origin.⁵⁶ *MCWC v Nestlé*, 269 Mich App at 57-58, n 34. The same is true for the diversion of tributary groundwater or spring aquifers that materially diminish a lake or stream and interfere with riparian property rights. *Schenk v City of Ann Arbor, supra*, relying on *Smith v Brooklyn, supra*; see also *Collens v New Canaan Water Co, supra* (see Argument I, A, *supra*). The rule should be no less applicable for the diversion of tributary waters that harm or diminish public trust waters.

The Court of Appeals characterized Plaintiffs public trust arguments as claiming that “all water within Michigan is property held in trust for the people regardless of navigability.”⁵⁷ *MCWC v Nestlé*, 269 Mich App at 104. The Court also noted that “private persons obtain property rights in water on the basis of ownership of land.”⁵⁸ *Id.*, 269 Mich App at 105. Both of these statements are wrong.

From time immemorial, the law has been that private landowners do not own the water, that it is not capable of private ownership,⁵⁹ that the right in water is only usufructuary or a right to use as allowed by the common law. Cooley's Blackstone, Col I, Chpt. 2, p. 16. (“For water is a moveable, wandering thing, and must of necessity continue common by the law of nature”). As this Court explained in *Collins v Gerhardt, supra*, a landowner “does not own the water, and he does not

⁵⁵ (...continued)

action to protect a stream from the removal of tributary groundwater. In *Oklahoma Water Resources Board v Cit of Lawton*, 580 P2d 510 (Okla. 1977), a landowner wanted to tap a spring before it reached the surface and formed a stream. The court held “If it forms a definite stream, it is public water from its inception and may not be diverted for private use” unless it has been appropriated by a riparian.

⁵⁶ See also *Roberts v Martin*, 72 W.Va. 92 (1913); *Cline v Amer Aggregate Corp*, 64 Ohio App 3d 503 (1989); *Hatfield v Lansdale Municipal Authority*, 463 Pa 113 (1961).

⁵⁷ This was wrong. Plaintiffs claimed a cause of action for harm to the public trust waters caused by removal of tributary waters.

⁵⁸ This too was wrong. As noted in *Collins*, 237 Mich at 45, *supra*, a riparian does not own the water or the fish. Oddly, the ownership of land was ignored as to riparian rights when the Court of Appeals erased the “off-tract” or “out of watershed” limitation in riparian law and adopted the “reasonable use balancing test.” Argument I, A and B, *supra*.

⁵⁹ *Collins, supra*, at 45.

own the fish. So far as they are capable of ownership they belong to the state for the common benefit of the people.” 237 Mich at 45. See also *People v Hulbert, supra*. (“Flowing water, as well as light and air, are in one sense ‘publici juris’ [owned by the public]....”); *Arnold v Mundy*, 6 NJL 1, 49 (1821)(“[A]ir, the running water, the sea, the fish ...But in as much the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had ... the wisdom of the law has placed it in the hands of the sovereign power, to be held, protected, and regulated for their common use and benefit.” The right to use flowing water “is qualified by the rights of the others to have a stream substantially preserved in its natural size, flow, and purity, and to protect against material diversion or pollution. This is the common right of all, which must not be interfered with by any”).⁶⁰

The common law public trust provides an actionable claim against the impairment or harm to public trust waters. *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); *People v Broedel*, 365 Mich 201, 112 NW2d 517 (1961).⁶¹ The Court of Appeals’ reference to water as not owned by the public or implying private ownership is wrong and must be corrected to reflect the legal fact that these waters are a public resource – *publici juris* – at least “in so far as capable of ownership” with only a qualified right in landowners or riparian owners to use the water for the benefit of their land consistent with a lawful reasonable use under applicable principles of the public trust doctrine. The Court of Appeals failure to recognize Plaintiffs’ public trust claim to preserve these waters would deny Plaintiffs, other citizens, or the State the right to civil actions to prevent

⁶⁰ See also **Tab 29**, Opinion of Attorney General Michael Cox, OAG 7162, Sept. 23, 2004.

⁶¹ Moreover, the legislature can affirmatively exercised this sovereign power to preserve the public trust in the waters of Michigan’s lakes and streams. The State has exercised its police power over tributary groundwater, noting that the waters of the state are a “public resource” that is “held in trust.” The Courts are bound by the legislative exercise of power to protect these waters as public resources subject to a public trust. Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, *et seq.* (“ILSA”); Great Lakes Preservation Act, MCL 324.32702(c)(“public resources held in trust”). ILSA’s public trust protections apply to tiny lakes (less than 5 acres) and tributary creeks with very volumes of flow. These legislative declarations recognize the public trust in the tributary waters, whether they are non-navigable streams or the spring aquifers that form and sustain them.

harmful removals of tributary waters, whether tributary groundwater or surface water. This ignores the hydrological reality of the direct connection of the tributary waters to the public trust waters and the legal right to preserve them.

If a tributary forms or sustains a stream, then any removal or diversion that significantly diminishes flows or levels and impairs the public trust or public waters or their uses should be subject to a claim under the State's public trust to preserve these waters. As Michigan enters the 21st Century with the rising world water crisis thirsting for its freshwater reserves, it is critical for the Court, as it did in *Glass, supra*, to clarify the power and claims that may be used by citizens and the State to preserve the public trust in the State's waters from harm a the result of the remove of large quantities of water from non-navigable waters.

III. THIS CASE INVOLVES ISSUES OF MAJOR JURISPRUDENTIAL SIGNIFICANCE AND SIGNIFICANT PUBLIC INTEREST

Standard of Review

The relevant grounds upon which the Court should grant leave in this case:

- (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an office of the state or one of its agencies or subdivisions in the officers official capacity.
- (3) the issue involves legal principles of major significance to the state's jurisprudence.
- (5) ... the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. MCR 7.302(B)(2), (3) and (5).

A. Significant Public Interest

*“Si Quaeris Peninsulam Amoenam Circumspice”*⁶²

The “significant public interest” test generally applies only to a case brought by or against the State. However, Plaintiffs submit that the interests in this case are so intertwined with the interests and duties of the State, because of its sovereign powers over and trustee responsibility toward its water,⁶³ that this case should be viewed as satisfying the spirit of MCR 7.302(B)(2). Water defines Michigan – its shape, topography, geology, hydrology, plants and animals, history, heritage, recreational opportunities, agriculture and industry. The public interest in water is enormous.

Maintaining common law preferences for uses that return water to source watersheds and aquifers over diversions is important for property owners, local governments, businesses, and recreational enthusiasts.⁶⁴ The same is true of maintaining the protection of public uses through the public trust doctrine. Municipalities need dependable drinking water supplies. Industries require predictable supplies of water for production of energy, insulation and cooling, to list just a few examples. Farmers need steady long-term water supplies. Shipping depends on constant levels in lakes, rivers and navigation channels. Fish and wildlife need steady supplies of water to maintain stable habitats, temperatures, and chemical balance. Everyone in this State needs healthy supplies of water for both everyday needs and recreation.

As discussed in the first argument section of this brief, the Court of Appeals’ shift of the common law to improve the legal standing of diversions has the potential to undermine the long-term

⁶² “If you seek a pleasant peninsula, look about you.” **Tab 28**, Official Seal of the State of Michigan.

⁶³ See for example, *e.g.*, ILSA, *supra*; GLPA, *supra*; MEPA, *supra*; Mich Const 1963, art 4, § 52; *see* Sec. 32727, 33 PA 2006 (Senate Bill 850) and 37 PA 2006 (Senate Bill 857), which expressly state this new water withdrawal law shall not be construed to affect or alter the common law of riparian or other water rights. The bill also states that it does not affect other common law or statutory remedies. See also, **Tab 29**, Opinion of the Atty. General, September 23, 2004, OAG 7162, pp. 2-4, 7.

⁶⁴ Boating and related water recreation adds \$3 billion a year to the State’s economy. *Michigan Boating Industries Ass’n, Boasting About Michigan Boating* (1997), cited in Shafer, Chris, *Public Rights in Michigan Streams*, 45 Wayne L Rev 9, 14 (1999).

stability of water supplies in a particular aquifer or watershed. If water rights are shared among all users, and some users do not return water to its source, then the users who do return water to the source will have to share equally in potential shortfalls with those who do not. Those who use water in the area from which it was taken now have less protection under the common law than they did before the Court of Appeals' decision.

As discussed in the second argument section of this brief, the State has a special trustee obligation to preserve water and its associated natural resources, in which the State holds title for the benefit of the public. *Glass v Goeckel, supra* (the State holds "title as trustee [sovereign] to preserve the waters;" 473 Mich at 678, 689); *Collins v Gerhardt, supra*, 237 Mich at 45 (water is publicly owned in so in so far as it is capable of ownership). The legal tests for what water bodies are subject to the public trust doctrine, and the importance of holding public trust uses paramount, are issues of utmost public interest and concern.

B. Issues of Major Significance to the State's Jurisprudence

The common law decisions of this Court define the bundle of property rights in this State. One of the questions raised by the Court of Appeals' shift to a balancing test is whether a land owner has a property right to divert water out of its source watershed or aquifer. The flip side of that question is whether a land owner who wishes to use water within its source watershed or aquifer has a property right to be protected against diversions without having to spend the hundreds of thousands of dollars necessary to obtain an *ex post facto* determination based on the application a grab-bag of factors to the evidence in an adversary proceeding. A third question has to do with whether public trust rights in water resources will continue to be found paramount to other uses, or whether these rights must also be balanced against the interest of a diverter. The answers to these questions have implications for well-settled rules of property, and implications relating to larger issues now being debated about the protection of the Great Lakes.

First, by placing those who would transport water away from its source on equal footing with those who would use it in connection with its source, the Court of Appeals' balancing test undermines the property rights of the local users. Further, balancing the right to divert groundwater before it reaches a stream with the right to use water in the stream gives a non-riparian the right to use what is essentially riparian water in ways that were previously prohibited. These changes in the background principles that inhere in a riparian landowner's title make that title less valuable, because they leave the riparian owner's right to use and enjoy the water in connection with the land less protected than it was before.

A shift like this in the bundle of rights related to water disturbs a well-settled "rule of property." *Burt v Munger, supra; Thompson v Enz, supra; Dumont v Kellogg, supra; People v Hulbert, supra; Hoover v Crane, supra.*⁶⁵ This Court has previously expressed reservations about shifting common law rules related to water because of the adverse impacts on private property rights. *Bott v Natural Resources Comm'n, supra*, 415 Mich at 77-78; "Titles should be secure and property rights stable." *Hilt v Weber*, 252 Mich at 223.

On the public trust, any test that purports to balance public trust uses, which are supposed to be paramount, with a private interest in diverting water threatens both the *jus privatum* and *jus publicum* in the waters of the State. It is one thing for the courts to apply existing common law property principles to determine whether a use of water is reasonable. It is quite another thing to read the public trust doctrine in a way that makes it more difficult to preserve public rights in a resource in which all landowners, businesses, and communities have a common interest.⁶⁶

Finally, perhaps the most critical jurisprudential issue relates to questions about the Great Lakes. The notion that the Great Lakes states have the right to decide where and under what

⁶⁵ Most reasonable use and even Restatement Sec. 858 jurisdictions have rejected such a preference, and applied the limitation on removal of tributary groundwater that physically diminishes a lake or stream in violation of riparian rights.

⁶⁶ **Tab 29**, OAG 7162. The State cannot relinquish this duty. *Nedtweg v Wallace*, 237 Mich 14, 17; 208 NW 51 (1926); *Collins, supra* (applying the principles to inland streams and lakes).

circumstances water will be diverted out of the Great Lakes basin arises from the same common law conceptions that were discussed in this brief: that the states are riparian property owners with an exclusive usufructuary rights in the lakes, and that these states should be able to draw a legal distinction between uses that keep water in that watershed and uses that take water outside of it. Preserving the rights of the Great Lakes states to make these decisions is only going to get more important in light of rising demands for water due to scarcity, pollution, and the unpredictable effects of climate change.⁶⁷

If the right to divert water away from its source watershed or aquifer is given the same legal standing at common law as the right to use the water within the watershed, the diversion right will gain increased traction as a stick in the bundle of rights. If that happens, then regulations that limit the use of water to areas within (or “straddling”) the Great Lakes basin become harder to justify as a reflection of existing expectations about property rights to use water.⁶⁸ The protection of the Great Lakes basin thereby becomes more an exercise of the State’s police powers and less a matter of the limitations on property rights inherent in the common law on water use and the public trust.⁶⁹ This would aid the cause of potential diverters, who may soon be arguing that efforts to safeguard the Great Lakes (including Michigan’s share of it)⁷⁰ could be trumped by international trade agreements like

⁶⁷ 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.

⁶⁸ Freyfogle, Eric, T., *Water Rights and the Common Wealth*, 26 *Envtl L* 27, 33-34, 48 (1996).

⁶⁹ **Tab 29**, OAG 7162, pp. 2-4, 7. See also **Tab 30**; 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.

⁷⁰ Draft Implementing Agreements for Annex 2001, Council of Great Lakes Governors, signed by eight Great Lakes Governors and Two Premieres (Dec. 2005), www.michigan.gov/Annex2001Process; See **Tab 25**, Senate Bills 850, 857.

the North American Free Trade Agreement or General Agreement on Tariffs and Trade, as well and the commerce and takings clauses of the U.S. Constitution.⁷¹

Preserving common law distinctions related to watersheds and aquifers in the bundle of private rights to use water is a vital part of defending against those arguments. Defending against those arguments is vital to preserving “our” water – and the jobs, recreation and ecological values that depend on it.⁷²

C. Clear Error and Conflicts with Existing Precedent

For the reasons noted in the arguments themselves, parts of the Court of Appeals’ opinion are contrary to existing precedents. The reasonable use balancing test represents an overruling-by-misreading of *Dumont v Kellogg* and *Schenk v City of Ann Arbor*, and the elimination of distinctions that are central to the common-law water use doctrines adopted by this Court. These include distinctions based on the watershed in which surface water is used; distinctions based on the aquifer in which groundwater is used; and distinctions between a riparian landowner who exercises water rights attached to land and one who attempts to exercise water rights severed from the land, for purposes of sale in distant areas unconnected to the parcel from which it is withdrawn.

⁷¹ Been, *NAFTA’s Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 32 ELR 11001 (Sept. 2002); see also 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 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). **Tab 31**, Press Release, Mike Cox, Attorney General, comments that Annex 2001 Great Lakes Agreement weakens current state authority to limit diversions, Oct. 19, 2004.

⁷² Postel, Sandra, *Pillars of Sand* (Norton 1999), Argument D.1; **Tab 30**, Gleick, Peter, “New Economy of Water: The Risks and Benefits of Globalization and Privatization” (Pacific Institute 2002), www.pacinst.org/reports/new-economy.

The narrowing of the range of waterways protected by the public trust conflicts with the need for flexibility in the doctrine, a need which has been emphasized since *Moore v Sanborne*. It also ignores the reality that all water in a watershed is connected; that navigable waters are necessarily impacted by the removal of water from their sources – whether the sources are navigable or not – by whatever means.

CONCLUSION AND RELIEF REQUESTED

For these reasons, Plaintiffs respectfully urge this Court to grant their Application for Leave. Plaintiffs ask this Court to reverse or modify the decision of the Court of Appeals and re-affirm the limitations imposed by the common law against the diversion of water based on long-standing water law and public trust principles.

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

Chris A. Shafer
Co Counsel for Appellants

By: _____
James M. Olson (P18485)
Christopher M. Bzdok (P53094)
Scott W. Howard (P52028)

By: _____
Chris A. Shafer (P48068)

Date: _____

Date: _____