

STATE OF MICHIGAN
MECOSTA COUNTY CIRCUIT COURT

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

Plaintiffs,

Case N^o: 01-14563-CE

v

GREAT SPRING WATERS OF AMERICA, INC., a
subsidiary of The Perrier Group of
America, Inc., a Delaware corporation; and
DONALD PATRICK BOLLMAN AND NANCY GALE
BOLLMAN, husband and wife, a/k/a Pat
Bollman Enterprises,

Hon. Lawrence C. Root, Circuit Judge

Defendants.

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

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

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

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

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

**PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION
BRIEF IN SUPPORT OF MOTION
NOTICE OF HEARING FOR SUMMARY DISPOSITION
(Tuesday, June 11, 2002, at 10:30 a.m.)**

June 5, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
Introduction.....	1
Statement of Facts.....	3
ARGUMENT.....	6
A. Defendants’ proposed pumping and diversion of spring water violates the common law of riparian rights.....	6
1. Riparian common law prohibits diverting water from the springs, lakes, and streams for the for use off of the riparian land.	7
2. The pumping and diversion of water from springs that form the headwaters of several streams and a lake is subject to the common law of riparian rights	8
B. Perrier’s Proposed Water Withdrawal is Prohibited Under the Reasonable Use Doctrine.....	11
1. The extraction and diversion of groundwater from the land from which it is extracted is unreasonable <i>per se</i>	13
a. Groundwater is commonly held resource	13
b. Michigan case law	15
2. Perrier’s proposed pumping is unlawful because it will materially diminish the outflow to Dead Stream from Osprey Lake and the flow of water in the Dead Stream below the M-20 Bridge	17
C. The Defendants Diversion and Sale of Water from the Dead Stream Violates the Public Trust Doctrine	18
Relief Requested.....	20

TABLE OF AUTHORITIES

CASES:

<i>Arco Industries Corp v American Motorists Ins Cos</i> , 232 Mich App 146; 594 NW2d 61 (1999)	13
<i>Bernard v City of St. Louis</i> , 220 Mich 159; 189 NW 891 (1922).....	12, 15
<i>Bunting v Hicks</i> , (1894) 70 L.T. 455; 10 T.L.R. 360, C.A.	9
<i>California v US</i> , 438 US 645; 98 S Ct 2985 (1978).....	1
<i>City of Battle Creek v Goguac Resort Ass'n</i> , 181 Mich 241; 141 NW 441 (1914).....	7
<i>Collins v Gerhardt</i> , 237 Mich 38; 211 NW 115 (1926).....	19
<i>Dudden v The Guardians of the Poor</i> , (1857) 1 H.&N.627	9
<i>Hart v D'Agostini</i> , 7 Mich App 319; 151 NW2d 826 (1967).....	12, 15, 16
<i>Hudson Cnty v McCarter</i> , 209 US 349, 78 S Ct 529 (1908)	2, 15
<i>Illinois Central in Obrecht v National Gypsum</i> , 361 Mich 399; 105 NW2d 143 (1960) ...	19
<i>Illinois Central R Co v Illinois</i> , 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892), <i>aff'd by US v Illinois Central R Co</i> , 154 US 225; 14 S Ct 1015; 38 L Ed 971 (1894).....	19
<i>Katz v Walkinshaw</i> , 141 Cal 116; 70 Pac 663	16
<i>Kelly v Nagle</i> ,132 A 587 (Md. 1926); <i>Slattery v Dout</i> , 237 NW 301 (Neb. 1931)	9
<i>Lorman v Benson</i> , 8 Mich 18 (1860)	8
<i>Maerz v United States Steel Corporation</i> , 116 Mich App 710, 523 NW2d 524 (1982) 9, 12,16, 19, 20	
<i>Meeker v City of East Orange</i> , 74 A 379 (1909)	10, 12, 17

<i>Obrecht; Netdweg v Wallace</i> , 237 Mich 14; 208 NW 51 (1926)	19
<i>Oklahoma Water Resources Board v City of Lawton</i> , 580 P2d 510 (Okla 1978)	9
<i>People ex rel Scott v Chicago Park Dist</i> , 66 Ill 2d 65, 360 NE2d 773 (1976)	19
<i>Ranson v City of Boulder</i> , 424 P2d 122 (Colo. 1967)	9
<i>Rogocki v City of Muskegon</i> , __ Mich App __; 309 NW2d 718 (1981)	8
<i>Rugby Joint Water Board v Walters</i> , [1967]	9
<i>Schenk v City of Ann Arbor</i> , 196 Mich 75; 163 NW 109 (1917)	12, 15, 17
<i>Slattery v Dout</i> , 237 NW 301 (Neb. 1931)	9
<i>Stock v City of Hillsdale</i> , 155 Mich 375; 119 Mich 435 (1897)	7
<i>Stock v Jefferson Twp</i> , 114 Mich 357(1897)	7
<i>Thompson v Enz</i> , 379 Mich 667; 154 NW2d 473(1967)	7
<i>Upjohn v New Hampshire Ins Co</i> , 178 Mich App 706, 444 NW2d 813 (1989)	13
<i>US Aviex v Travelers Ins Co</i> , 125 Mich App 579; 336 NW2d 838 (1983)	13
<i>Wood v Waud</i> , 3 Exch. 748 (1849)	9

CONSTITUTIONS, STATUTES AND RULES:

MCL 324.3101	14
MCL 324.32501	20
MCL 324.30101	20

MISCELLANEOUS:

21 CFR 165.10 4

Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich L Rev 471 (1970). 19

Cameron, Michigan Real Property Law 7

Mich Const 1963, art 4, § 52 14

Introduction

The importance of this issue and the decision by this Court will have profound effect on the future of Michigan and its citizens. While Michigan's leaders, both in the executive branch and legislature, seek a conservation and use standard for all of Michigan's water resources, including the Great Lakes, inland lakes and streams, and groundwater, no one has directly raised the fundamental question regarding the nature of the ownership of the groundwater, particularly in this case where it is tributary to springs and streams. That question has been raised now before this Court by the Plaintiffs.

Under the holding of *California v US*, 438 US 645; 98 S Ct 2985 (1978), a state has the right to define the nature and extent of its property under the common law, including rights and interests in water, without worry from interference by the dormant interstate commerce clause. However, once water, such as the groundwater here, is reduced to private ownership it becomes a commodity and is protected under the commerce clause. Any subsequent regulation by the state (as distinct from the assertion of state property power or power over the public domain) is subject to the anti-discrimination principles of the dormant commerce clause. So to allow under the guise of the reasonable use of groundwater a private landowner to reduce the groundwater which he or she does not own, as a commodity for off-tract distribution and sale, would give the landowner or his or her assignee a huge private windfall at the expense of those, including the interests of the State of Michigan, who hold it in common. Such a private interest or franchise in the state's water should only be granted by legislature as provided by law and the Michigan Constitution.

For example, if Perrier, a wholly owned subsidiary of the international conglomerate Nestlé, has the right to sever and claim groundwater for itself to sell for private profit, wholly disconnected from the land or for that matter the State of Michigan, then nothing will stand in the way of the private exploitation or privatization of Michigan's water resources by others. At that point the commerce clause or international trade agreements, like Chapter 11 of NAFTA

or Section 10 of the World Trade Organization agreement, will chill or deprive the State of Michigan and citizens of any public ownership or control, subjecting the State to untold exorbitant losses. The State will not be able to assure that the public good is served, or if the public good and environment values are served, it will lose enormous revenues and public benefits. Moreover, unless State ownership or interest in and public control over its public domain, including its lakes, streams, and groundwater, is preserved under a proper interpretation of the common law of groundwater, the State will never again be able to assert its interest except under its police power.

The police power is only regulatory, where an interest in or control over the public domain in groundwater falls under the exercise of the State's property power. The former is subject to constitutional challenge, including taking claims, or compensation claims under international trade agreements. In practical terms, it means in circumstances like those presented in this case that large foreign or domestic corporations, with the financial assets to artificially pump and exploit Michigan groundwater, can acquire land or the right to withdraw water from a landowner and receive billions in dollars of revenues for the payment of application fees of a few hundred dollars.¹ It means if the State should later choose to assert ownership or public control over groundwater, it would be prevented from doing so. It could only ensure its police power, having given up its leverage to protect the public through ownership and licensing of the sale of groundwater, if it chooses to do so. Like the State of New Jersey in *Hudson Cnty v McCarter*, 209 US 349, 78 SCt 529, 531 (1908), Michigan courts and the legislature now have the opportunity to determine whether Michigan's vast underground waters which feed its streams and inland lakes and the Great Lakes, are "a great public good...[that]...it may keep and give no one a reason for its will." This is not to say that Michigan should or would be selfish in the exercise of this will, but that it will have the power to exercise the will for the greatest common public good in Michigan and elsewhere. It is to

¹ Perrier has paid \$85 per well to the State of Michigan for its four water well permits under the Safe Drinking Water Act.

say that Michigan, and perhaps the Country, will not be held hostage by private claims on the State's interest in its groundwater and connected lakes, streams, and the Great Lakes.

Plaintiffs submit that this Court has the authority to rule that the water pumped by Perrier has been and is part of Michigan's public domain, and that under the State's common law the water is not capable of privatization or exploitation as a commodity for sale without the consent of its citizens expressed through their elected representatives in the Lansing. The billions of gallons of water under the Sanctuary property that will be sucked away for sale as bottled water is no more a commodity, diverted and sold off forever apart from the unique natural system that underlies the region or State, than the water of a Michigan lake or stream. Defendants have neither obtained legislative authority nor license from the State of Michigan to privatize, divert and sell this great natural treasure. Moreover, Defendant's purpose is not public, but a private one.

Therefore, Defendants diversion of water for distribution, sale, and private gain is unlawful, and an injunction should issue prohibiting the diversion until such time as the Defendants have gone to the legislature and obtained its consent or a license to sell the State's groundwater in accordance with law.

Statement of Facts²

Defendant Great Springs Waters of America or Perrier ("Perrier") has an agreement with Defendant Bollmans to withdraw water for 99 years from beneath Bollman's land, an

² This Statement of Facts is based on the Statement and Findings of Fact that has been filed with respect to Plaintiffs' Motion for Preliminary Injunction and this Motion for Summary Disposition. This Statement of Facts is based entirely on the volume entitled **Exhibits To Plaintiffs Statement of Facts for Preliminary Injunction and Summary Disposition** simultaneously filed with both motions.

approximately 800 acre private deer hunting reserve known as the Sanctuary. A diverse and unique system of wetlands, knolls, springs, and creeks straddle the south end of the Sanctuary where the property surrounds Osprey Lake Impoundment.

Perrier has received a permit from the DEQ to withdraw 400 gallons per minute (“gpm”) of water from an aquifer that is directly connected to a system of springs, and streams, and lakes. The aquifer and springs feed the Dead Stream, either through outfall from Osprey Lake or by flowing directly to the stream. This connection to the springs that feed the lakes and streams in the area form the basis for Perrier to label the water it wants to divert from the springs, lake, and Dead Stream as “spring water.” 21 CFR 165.10(a)(2)(vi).³ The Perrier pumping and water withdrawal will divert a significant amount of water from a public stream, and measurable amounts from other creeks and public lakes. The aquifer and springs from which Perrier will withdraw water directly feed and are hydrologically part of and connected to the waters of the Dead Stream and other nearby creeks.

The Dead Stream flows to the Tri-Lakes, which flows over a control dam into the Little Muskegon River, which joins the Muskegon, which flows into Lake Michigan. The pumping will divert between 347 and 365 gallons per minute of water from the Dead Stream. This means that in period of low flows thirty-five to thirty-seven percent of the water that normally goes to the Dead Stream will be diverted or diminished. Using average flows of the stream, there will be a diversion or diminishment of approximately twenty percent. It will also divert water that would otherwise flow to Cole Creek or Round Lake and Gilbert Creek. Finally, the pumping will likely diminish or reduce the water level in a large wetland area by up to an inch per day, which over time is likely to cause the wetland to dry up.

³ “Spring water” is “the name of water derived from an underground formation from which water flows naturally to the surface of the earth.” See 23CFR 165.10, **Ex 7**. There must be a “measurable hydraulic connection” between the well bore hole and the spring. In this case, Perrier established a substantial hydraulic connection between the well site, the springs, lake, Dead Stream, and Gilbert and Cole creeks.

The water that will be diverted from these streams and lakes will be piped about 12 miles to Perrier's plant in Stanwood. There the water will be bottled or place in other containers and distributed, merchandised, and sold for private profit in Michigan and throughout the Midwestern United States. Perrier's withdrawal, diversion, and sale of water is a private venture, done for a private purpose. Perrier has not received any license or authorization from the Michigan legislature or any agency for ownership of the water, relying entirely on its agreement to acquire it from Defendant Bollmans.

The Dead Stream is a public stream based on evidence of historical logging in the area, and the remains of saw logs in the stream and the Tri-Lakes. It is approximately 20 to 25 feet wide and has an average depth of 2 feet. The stream has the capacity to float logs. The Tri-lakes are public lakes and, together with M-20, provide public access to the stream. The Dead Stream is widely used by the public for boating, canoeing, and fishing. Riparians and members of the public run boats from the Tri-Lakes up the Dead Stream.

In addition, Plaintiffs Doyles and Sapps are riparian owners on the Dead Stream. Conversely, Perrier is not a riparian owner of land, and is not the owner of the land over the aquifer. The aquifer is much larger than Bollmans' land, extending under the entire area of land and system of wetlands, streams, and lakes. It only has an agreement with the Bollmans to withdraw water from their land. Perrier will withdraw the water from the aquifer and divert or reduce the amount that flows to the riparian downstream owners, or the stream itself, for sale to customers who live mostly outside of the watershed, and, for that matter, outside of Michigan or the Great Lakes basin. The Perrier pumping and withdrawal will divert or significantly diminish the flow of water from the Dead Stream and use and enjoyment by Plaintiffs.

There is no dispute that the water will be used off-tract of the land from which it is taken, and off-tract of adjacent lands that overlay the aquifer. There is no dispute that the intended *sale* of the water by Perrier is not a *use* in connection with any riparian use or use of the estate by Bollmans, or by Plaintiffs Doyles and Sapps.

LEGAL ARGUMENT

A. Defendants' proposed pumping and diversion of spring water violates the common law of riparian rights

Perrier wants to merchandise up to 560 million gallons of water a year from a natural system of springs that form the Dead Stream, Cole Creek, and Osprey Lake Impoundment, which flow into the Tri-Lakes and the Little Muskegon River. Perrier plans to pump and divert and bottle the water for sale, distribution and private profit, the use of which is entirely disconnected from the Sanctuary property. The springs along the north shore of Osprey Lake run in small channels, as to other springs on the Sanctuary, to Osprey Lake, which in turn flows into the Dead Stream. Other springs form and run in small channels forming the headwaters of nearby Cole Creek. Some of the percolating water that is tributary to the springs and surface waters also feeds the streams directly. The percolating water from which Perrier wants to pump is spring water that forms the basis of an extensive riparian system of streams and lakes. Based on Perrier's own expert computer modeling and conclusions, Perrier will reduce the outfall from the lake to the Dead Stream by over 50 percent, and the diminish the flow of the Dead Stream at the M-20 Bridge, over three-fourths a mile downstream from the lake, by 18 to 36 percent (depending on base flow on any given day).⁴

The common law of riparian rights prohibits exactly the type of off-tract diversion and use of water that Perrier is planning. Plaintiffs believe that this direct hydrological connection established by Perrier's own reports and studies indicates that the water in question is a part of the lakes and streams in the area. Indeed, by Perrier's own admission, they plan to pump, market and sell "spring water" that feeds several lakes and streams in the area. The common law of riparian rights prohibits exactly this type of water withdrawal and use off of the riparian property.

⁴ The flow of water in the upper reaches of Cole Creek will be measurably diminished. Exhibit 7 to Hyndman Dep, **Ex 16**.

1. Riparian common law prohibits diverting water from the springs, lakes, and streams for the for use off of the riparian land.

A private riparian owner cannot alienate, divert, or sell water and apply it to non riparian land or disconnect it from any riparian land or the watershed. *Stock v City of Hillsdale*, 155 Mich 375; 119 Mich 435 (1897); *City of Battle Creek v Goguc Resort Ass'n*, 181 Mich 241; 141 NW 441 (1914); *Thompson v Enz*, 379 Mich 667; 154 NW2d 473, 483 (1967). The Michigan industrial user can consume water only on riparian lands, but not divert it for use on non riparian land. Cameron, Michigan Real Property Law, § 3.8, p 91.

Stock v City of Hillsdale held that the city did not have a right as an upper riparian owner to divert water for residents and businesses within the city. 155 Mich at 379. In *Stock v Jefferson Twp*, 114 Mich 357, 361 (1897), the Court prohibited the diversion of water by the defendant that interfered with a mill owner's use of water downstream, even though the defendant argued it was a municipality and had spent a considerable amount of money. In *City of Battle Creek, supra*, the Court ruled that a City did not have the right to divert the waters of a lake to sell to its residents through a municipal water system. The city had been doing so for some time, and filed suit to stop the Defendant and guests from excessive use of the lake because of an alleged threat to the quality of the water. The Court denied the city's claim because it did not have the right to withdraw the water from the lake to begin with, noting that the city had not acted under the available statute that would have authorized it to do so. A city or anyone for that matter must have statutory authority in order to sell riparian water off-tract or disconnected from the land where the water is withdrawn.⁵

⁵ Compare *Schenk v Ann Arbor*, 196 Mich 75, 91; 163 NW 109 (1917), and *Bernard v City of St. Louis*, 220 Mich 129; 189 NW 891 (1922). In both cases, the cities had been authorized to divert water by the legislature, but were nonetheless subject to the reasonable user rule of groundwater law. There is no statute in Michigan that has authorized private landowners to sell water to the public except through the formation of a water company that serves a land development or local community. Note, a city can only do so with statutory authority, *Schenk* at 75, citing Act 331, Local Acts of 1889, and Act 658, Local Acts of 1907, acknowledged as well by the dissent. *Schenk*, 196 Mich at 92.

In *Thompson v Enz*, the Supreme Court held:

We hold that riparian rights are not alienable, severable, divisible, or assignable apart from the land which includes therein or is bounded by a natural water course. 154 NW2d at 483.

The Defendant Bollmans own the Sanctuary which is riparian to Osprey Lake and the Dead Stream. They have assigned their rights to sever the water table that feeds the springs and streams (and the lake because of the dam) to Perrier for extraction, diversion and sale or use disconnected from the riparian land, or any land for that matter. Under the common law of riparian rights, Defendant Bollmans are prohibited from selling the water for use on non riparian lands or non riparian uses away from the Sanctuary Springs, streams and lake, and Perrier is prohibited from diverting for sale or use on non riparian land.

2. The pumping and diversion of water from springs that form the headwaters of several streams and a lake is subject to the common law of riparian rights

The springs that Perrier plans to pump its water from are the source of Sanctuary Lake, the Dead Stream, Cole Creek and Gilbert Creek. The springs and associated aquifer also flow into the tri-lakes. Because of the hydrological connection between these riparian water resources and the springs, Plaintiffs submit that use of the springs is controlled by the rules governing use of riparian waters. In other words, there is no practical or legal difference whether Perrier pumps directly from a stream, or whether it pumps from the springs and aquifer that create the stream.

Michigan has not had occasion to decide the question of whether spring water that forms a lake or stream is subject to riparian law. However, in the absence of direct precedent, Michigan follows the English common law. *Rogocki v City of Muskegon*, __ Mich App __; 309 NW2d 718 (1981)(“the English common law, so far as it is not repugnant to Federal and state constitutions and statute, remains in full force and effect”). The Michigan Supreme Court has specifically held this to be this case in water related issues. See *Lorman v Benson*, 8 Mich 18 (1860)(“We are of opinion that questions of property, not clearly excepted from it, must be

determined by the [English] common law, modified only by such circumstances as render it inapplicable to our local affairs”).

Under English common law, spring water that is the source of a lake or stream is considered part of the stream or lake that it forms. Water that is tributary and directly connected to spring water that forms a stream or river is subject to the common law of riparians.⁶ *Rugby Joint Water Board v Walters*, [1967] Ch. 397; *Bunting v Hicks*, (1894) 70 L.T. 455; 10 T.L.R. 360, C.A.; *Dudden v The Guardians of the Poor*, (1857) 1 H.&N.627. Several courts in the United States have followed this tributary-groundwater-spring-water and stream rule in both riparian and appropriation doctrine states. *Ranson v City of Boulder*, 424 P2d 122 (Colo. 1967) (Groundwater tributary to a stream held to be part of the stream); *Kelly v Nagle*, 132 A 587 (Md. 1926); *Slattery v Dout*, 237 NW 301 (Neb. 1931) (owner of springs that form a creek enjoyed reasonable use under riparian law); *Oklahoma Water Resources Board v City of Lawton*, 580 P2d 510 (Okla 1978) (natural spring water forming a definite stream classified as stream water). Thus, groundwater that is tributary to a spring and stream system is properly subject to riparian law.

A conveyance of land upon which a perpetual spring is the fountainhead of a stream, flowing naturally in a well-defined channel in the course of drainage through other lands, grants riparian rights in the waters of the stream, but not absolute ownership. *Slattery*, 237 NW.

The English common law around the time Michigan began to report its first decisions in the 1850s followed the rule that spring water which forms the headwaters of a stream or watercourse is subject to riparian and not groundwater law. *Dudden v The Guardians of the Poor*, (1857) 1 H.&N.627; *Wood v Waud*, 3 Exch. 748 (1849) (holding that 5% reduction of water was actionable).

⁶ This tributary groundwater-spring-stream exception to the general English common law does not apply to mere waters that run free or diffusely over the land surface, such as in a swamp or marsh, into a stream. *Broadbent v Ramsbotham*, (1856) 11 Exch. 602.

The modern science of hydrogeology has erased any mystique over underground aquifers and their relationship to springs, streams, and lakes. *Schenk, infra; Maerz v United States Steel Corporation*,⁷ 116 Mich App 710, 523 NW2d 524 (1982), citing *Schenk* which quoted from *Meeker v City of East Orange*, 74 A 379 (1909). By comparison the English common law and the several state court decisions noted above have treated springs and their tributary groundwater that form streams to be part of the riparian stream, because the direct connection is so readily observable. As noted in *Meeker* and quoted by the Court in *Schenk*,
Again, the denial of the applicability to underground waters of the general principles of law that obtain with respect to waters upon the surface of the earth is in part placed upon the difficulty of proving the facts respecting water that is concealed from view. But experience has demonstrated in a multitude of cases that this difficulty is often readily solved. When it is solved in a given case, by the production of satisfactory proof, this reason for the rule at once vanishes. *Schenk*, 196 Mich at 83-84.

Likewise, with the advent of the modern science, like that employed by Perrier and its consultant Malcolm Pirnie, Inc. at the Sanctuary site, there is no dispute that the spring water that will be pumped is connected to riparian resources. The extensive monitoring of springs, lakes, and streams during the several pump tests very clearly demonstrate an immediate and direct hydrological connection between the water pumped and the springs, lake, and streams. Indeed, the MPI September 2000 MPI Report established a direct observable relationship between the rapidly falling water table and the draw down of the springs, the confined channels of water to the lake, and the Dead Stream. The small channel of water from the springs to Osprey Lake practically dried up during the pumping, the outflow of the lake dropped by over 50 percent, and the Dead Stream dropped by over 50 percent. The report even indicated that water from the lake was pulled back into the water table, which is why

⁷ In *Maerz* the court departed from the English rule under *Acton* that the extraction of groundwater for a purpose connected with land is, *per se*, not actionable. The case did not involve spring water and streams, but nonetheless demonstrates the relationship between clear artificially induced hydrogeological facts, such as the direct observations of the pumping and drawdown of the springs and the Dead Stream or lake, and the application of the proper rules of law.

the well field was moved to the north for the permitted wells.. The MPI 2001 Report evaluating the effects of pumping at 400 gpm also demonstrated this same direct connection.

Perrier has chosen to extract spring water that feeds streams, because it wants to label its containers and bottles as "spring water."⁸ In order for Perrier to sell spring water it necessarily must extract water from an aquifer that directly feeds a spring and The water it plans to pump is undisputedly spring water that forms the small streams that in turn make up the Dead Stream and because of the impoundment Osprey Lake. Therefore, the spring water that Perrier seeks to divert, distribute and sell disconnected from the land is riparian water. And, as explained in the previous section, Perrier is prohibited from extraction, diversion and sale or use of the water disconnected from the riparian land.

B. Perrier's Proposed Water Withdrawal is Prohibited Under the Reasonable Use Doctrine

It is anticipated that Perrier will take the position that the water it intends to withdraw is groundwater rather than spring water, and is subject to the doctrine of "reasonable use." However, even if the Court does not agree with Plaintiffs that the common law rules preventing off-tract diversion of riparian water apply to this case, the Court still should find that Perrier's proposed conduct violates the common law of water rights. Assuming that the water resources in question are considered "groundwater," Perrier's proposed pumping still constitutes an unreasonable use of the water resources.

Justice Cooley, a leading 19th Century Michigan jurist, observed the difference between water and other natural resources in the state:

For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I have a temporary, transient, usufruct property therein...

* * *

⁸ FDA Regulations, 40 CFR 165.10.

Not but the particular names of things are equally sufficient to pass them, except in the instance of water; by the grant of which, nothing passes but a right of fishing...⁹

Groundwater is tied to the land, and then only to the extent that it can be reasonably used to benefit land as the water moves through it. Groundwater is not owned by anyone, like iron ore, coal, gravel, or other minerals, which are things in place and not passing through it. Recognizing the unique nature of this resource, Michigan has adopted the “reasonable use” doctrine, but it is premised on the principle that the right of reasonable use is “in common” with other owners and the State. *Schenk, supra*. The private sale of water disconnected from any use “in common” is very different than a use on the land in connection with other users or a statutorily authorized diversion and sale by a municipality as in *Schenk* and *Bernard* or the *Meeker* and New York cases relied on in *Schenk*.

Despite adopting the reasonable use doctrine for groundwater, Michigan’s appellate courts have decided only four groundwater cases in the state’s history. The Michigan Supreme Court has decided two: *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917), and *Bernard v City of St. Louis*, 220 Mich 159; 189 NW 891 (1922). The Court of Appeals has decided two: *Hart v D’Agostini*, 7 Mich App 319; 151 NW2d 826 (1967); *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982).

But none of the four Michigan cases addressed the question of the lawfulness of a private landowner’s pumping and diversion of large quantities of groundwater to be severed and distributed off-tract for sale or use elsewhere. Plaintiffs submit that a private person’s or corporation’s off-tract diversion for distribution and sale in distant markets, totally disconnected to the land, is unreasonable *per se*; i.e., it falls outside the scope of a legally permitted *use* under the American Rule of groundwater. In the alternative, Plaintiffs submit

⁹ “Or the right to use the water....” F(5), Cooley’s Blackstone, Corporeal Herediments, Vol. I, Chap. 2, p. 16. See also F(4) “But strictly speaking he has no property in the water itself, but a simple use of it when it passes along.”

that a person cannot pump and distribute for sale or use disconnected from the land if it will or does "materially diminish a stream." *Schenk, supra*.

1. The extraction and diversion of groundwater from the land from which it is extracted is unreasonable *per se*

Because of water's unique character recognized by the above quote from Justice Cooley, groundwater is held in common as part of the waters and natural resources of the state. Landowners have the right to *use* the water under the land in connection with their property, but they do not own the water. Use of water is tied to the land, and then only to the extent that it can be reasonably used to benefit land as the water moves through it.

Both the "American rule" of reasonable use and the case law in Michigan do not authorize or allow withdrawal of groundwater for private distribution, sale, and profit. This is especially the case since the "use" of this water has no connection whatsoever to the property from which it will be pumped.¹⁰

a. Groundwater is a commonly held resource

Under Michigan's common law, groundwater is not the property of the landowner, but is held in common and subject to the declared interest of the state. The courts have declared that the law surrounding water "clearly indicates the state's interest in its natural resources." *US Aviox v Travelers Ins Co*, 125 Mich App 579; 336 NW2d 838 (1983), and that groundwater does not belong to the owner of the land, but to the state "because of its independent interest,

¹⁰ This is in accord with the American Rule of groundwater which limits the private "reasonable use" of groundwater to the land to which the use is connected. "Thus, as with surface water, the courts generally hold that water withdrawn must be used on the overlying land and not . . . elsewhere. . . .", Sax, *Water Law Planning and Policy* (Bobbs-Merrill (1968), p 462. This arises from Justice Cooley's perception that water is always moving, and that the landowner has a usufruct in the water because it is held in common. Michigan case law authorizes a municipality to divert and sell water because it is authorized by statute and is implicitly impressed with a public interest, purpose, or use. Michigan under *Schenk* and *Maerz* is considered an American Rule state. As such, the prohibition against private diversions for off-tract sale or use applies to this case.

behind the titles of its citizens, in all the air and earth (i.e. its natural resources) within its domain." *Upjohn v New Hampshire Ins Co*, 178 Mich App 706, 444 NW2d 813 (1989). See also *Arco Industries Corp v American Motorists Ins Cos*, 232 Mich App 146; 594 NW2d 61 (1999).¹¹

The Mich Const 1963, art 4, § 52, declares that: "The conservation and development of the natural resources of the state are hereby declared to be of paramount concern in the interest of the health, safety, and general welfare of the people." Michigan's primary water protection statute, Part 31, NREPA (formerly the Water Resources Commission Act), defines "waters of the state" to mean "groundwaters, lakes, rivers, and streams and all other water courses" MCL 324.3101(i).

The groundwater of Michigan is not the property of the landowner, but is held in common as part of the waters and natural resources of the state. Private individuals or corporations cannot lay claim to Michigan's groundwater and sell it throughout the country, or for that matter the world, without the consent of the people of Michigan through proper legislation. No corporation under the guise of the reasonable use of groundwater can claim ownership of the groundwater merely because it is moving under and through its land. It is undisputed, based on Defendant Perrier's own statements and actions, that it will (indeed, it has already started) withdraw, divert, distribute and sell water elsewhere, totally disconnected from the Sanctuary property and well site. Defendant have not obtained any statutory authority from Michigan's legislature to acquire or obtain a license to divert and sell the groundwater for private gain.

¹¹ In these cases groundwater was held to belong to the state or subject to a superceding public interest in the groundwater and natural resources of the state so as to exclude groundwater as property of the insured under standard CGL insurance policies. See also *Anderson Development Co v Travelers Indemnity Co*, 49 F3d 1128, 1134 (CA 6, 1995).

Defendant Perrier and Bollmans have launched an effort to claim ownership to Michigan's groundwater for private distribution, sale, and profit anywhere, without statutory grant or public purpose. Their conduct is unreasonable *per se*, and should be prohibited by this Court. Moreover, even if the Defendants' privatization of Michigan's groundwater is not unreasonable *per se*, it is a use that is not reasonable because it has no constitutional or legislative support, is for a purely private purpose and convenience, and is outweighed by the superceding public interest in the waters and natural resources of the state.

As stated by Justice Holmes in the United States Supreme Court in *Hudson Cnty Water Co v McCarter*, *supra*, forbidding a private diversion of water from a stream by a company under contract to sell water to the City of New York without the consent of the state:

We are of the opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.... and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will. *Id.* at 356-357.

The groundwater of Michigan may be reasonably used by a private landowner, or one leasing the right to use groundwater from a landowner, to benefit the land or aid any reasonable and beneficial use of the land. But the waters cannot be severed and merchandised in distant lands by a private person or corporation unless authorized by the legislature. In this case, there has been no such authorization.

2. Michigan case law

As mention above, Michigan appellate courts have addressed groundwater withdrawal in four separate cases: *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917); *Bernard v City of St. Louis*, 220 Mich 159; 189 NW 891 (1922); *Hart v D'Agostini*, 7 Mich App 319; 151 NW2d 826 (1967); *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982).

Schenk and *Bernard* involved common law limitations on a city, acting under statutory authority to acquire land and sink wells, to divert, distribute and sell water to its residents for public use and purpose. In each case, the Supreme Court held that the right to use groundwater by the cities was limited by the common law of “reasonable user,” holding that groundwater is held in common and not owned by the surface owner, and that the cities could not divert and sell the water for even a public purpose if it (1) interfered with a neighbor’s reasonable use of groundwater **or** (2) materially diminished the flow of a stream. *Schenk*, 163 NW at 90. And, as stated in *Smith v City of Brooklyn*, as quoted in *Schenk*, 196 NW at 113-114, any measurable interference is material because a stream is for the benefit of riparian owners, not one who seeks to remove groundwater, a non riparian use, and divert and sell it disconnected with any riparian land.

The verdict sustained the contention of plaintiff ... upon the ground that the water of a natural surface stream is for the benefit of all the riparian owners, and that ***to divert or to diminish its flow in any way is an interference*** with a natural right, which gives rise to an action for the injury.

Hart and *Maerz* addressed only the common law limitations on a landowner or his or her contractors to use groundwater in connection with physical activities that occur on their land. In both instances, the Court of Appeals held that the landowner had only a “reasonable use” of groundwater to benefit a use of his or her land in relation to the neighbor’s reasonable use of groundwater. In *Hart*, the court held that defendant’s pumping of groundwater and draining of wetlands was a reasonable use because the interference with plaintiff’s well was only temporary, resulting from the short term construction of a public sewer line. In *Maerz*, the court reversed the trial court’s summary judgment in favor of defendant, and held that plaintiff had stated a cause of action for interference with the reasonable use of groundwater because the defendant’s quarry operation and expelling of water interfered with plaintiff’s potable water supply.

Importantly, all of these cases either explicitly or implicitly recognize the American rule’s restriction on off-tract sale and use of water. See *Schenk*, 196 Mich at 91 (quoting *Katz v Walkinshaw*, 141 Cal 116; 70 Pac 663, for the proposition that a landowner “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”); *Hart*, 7 Mich App at 322 (“In the case before us water was not transported to distant areas for consumption”).

2. Perrier’s proposed pumping is unlawful because it will materially diminish the outflow to Dead Stream from Osprey Lake and the flow of water in the Dead Stream below the M-20 Bridge

It is not disputed that Perrier’s purpose is primarily private,¹² and that based on Perrier’s own studies by MPI, the pumping will intercept groundwater that feeds the springs which flow in channels to Osprey Lake,¹³ or which directly feeds the Dead Stream and Cole Creek; nor is it disputed that this will diminish the outflow from Osprey Lake to Dead Stream by over 50%, and reduce or diminish the flow of the Dead Stream itself at the M-20 Bridge by up to 36% at 400 gpm, and proportionately by as much as 18% at 200 gpm. Perrier’s manager for Michigan has stated the bottling plant will need 200 to 250 gpm of water from the Sanctuary wells for 2002, and that this is “on the average.”¹⁴

Under *Schenk* the established rule in Michigan, relying on *Meeker* and *Smith v City of Brooklyn*, is that a landowner, or corporation or person claiming a right to use groundwater under agreement with the landowner, cannot divert, distribute and sell water disconnected from the land for sale or use elsewhere where “streams are thereby materially diminished in flow.” 196 Mich at 84. In

¹² Decision on Motion to Compel, Hearing Transcript, April 5, 2002, p 44-46.

¹³ O’Rourke Dep II, p 83, **Ex 5**; McDonald;, p 135, **Ex 15**

¹⁴ O’Rourke stated at his continued deposition on May 7, 2002, that “on average” is determined by a denominator of one year, and that Perrier will pump at 400 gpm as the demand requires. (Transcript ordered.)

Schenk, the City of Ann Arbor could not divert and distribute water for its residents unreasonable as to the adjoining land through interference with wells, but it also held that such a diversion can not materially diminish a stream.

We therefore adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters subjacent to is soil in agriculture, manufacturing, or 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; **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**

* * *

..., but in *Smith v City of Brooklyn* [citation omitted], it was held that ... he may not divert and diminish the natural flow of a surface stream by preventing its usual and natural supply, thereby causing, through suction or other methods, a subsidence of its waters. * * * ... ***that the water if a natural stream is for the benefit of all the riparian owners, and that to divert or to diminish its flow in any way is an interference with its natural right, which gives rise to an action for injury.*** *Schenk* at 84-85 [emphasis added].

Applying the other part of the *Schenk* “reasonable user” test to the Dead Stream, the Defendants’ conduct is unlawful because it will undisputedly materially diminish the flow of the Dead Stream that runs through Plaintiffs Doyles’ and Sapps’ properties, and the property of other members of Plaintiff MCWC.

Defendants’ interception and diversion of water for private distribution and profit in the form of convenience bottles (“Ice Mountain” or whatever it might be labeled) will not only materially, but substantially diminish the flow of the outfall from Osprey Lake to Dead Stream and the flow of the Dead Stream. It is unreasonable and contrary to law, and should be prohibited by this Court.

C. **The Defendants Diversion and Sale of Water from the Dead Stream Violates the Public Trust Doctrine.**

The Dead Stream once flowed much like Cole and Gilbert Creeks from the springs on the Sanctuary property and under what is now Osprey Lake Impoundment. Before the construction of the Osprey Lake dam in 1953, portions of the Dead Stream were used to float saw logs downstream to a railroad bridge where they were loaded on a train for shipment. A beaver dam formed a large marsh in the 1940s that stretches outside of the main channel of the stream, but the upper portion was still used for floating the saw logs to the railroad bridge. Welsh dep. **Ex 23**. In any event, even today the Stream is wide with an average depth of 1 foot to 3 feet in the main channel. Although difficult in a few isolated sections, such as near the beaver dam, the stream has the *capacity* to float logs today.

The stream is also navigable by boats and canoes, and has been and continues to be fished and used by the public for boating and fishing, including brook trout in some of the streams cooler pools, before and after the impoundment. Doyle dep., p 64, **Ex 20**; Sapp dep., pp 13-14, 33, 35, **Ex 21**. The stream is accessed by the public from the Tri-Lakes and M-20. It is also accessed by owners and their guests on land riparian to the Stream, including Plaintiffs Sapps and Doyles. Despite the human activities, the stream was rated by Defendants' stream ecologist on the high-side of acceptable for streams under a DEQ scoring procedure. Cozad Report, pp 6-7, **Ex 17**.

The public trust doctrine holds that Michigan's navigable and public rivers and lakes are held and managed in trust by the State as trustee for its citizens as beneficiaries. The citizens' rights in the trust are protected "by a high, solemn, and perpetual trust, which is the duty of the state to forever maintain". *Collins v Gerhardt*, 237 Mich 38, 49; 211 NW 115 (1926). The purpose of the public trust is to protect as inviolate the public's right to fish, swim, boat and recreate in these rivers and lakes. Public rights in Michigan's rivers are paramount to the rights of riparians and any other non riparian or non trust uses. *Collins v Gerhardt*, *supra*.

The trust doctrine protects the public's uses and interest in Michigan's rivers and lakes from undue exploitation or impairment by private parties for primarily private purposes.

Illinois Central R Co v Illinois, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892), *aff'd by US v Illinois Central R Co*, 154 US 225; 14 S Ct 1015; 38 L Ed 971 (1894); *Collins, supra*. Michigan adopted *Illinois Central* in *Obrecht v National Gypsum*, 361 Mich 399, 412; 105 NW2d 143 (1960):

[A] title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. *Illinois Central, supra*, 146 US at 452.

The private diversion or sale of public trust waters or natural resources requires the consent of the legislature, and even then must be for a primarily public purpose. *Obrecht; Netdweg v Wallace*, 237 Mich 14; 208 NW 51 (1926); accord *People ex rel Scott v Chicago Park Dist*, 66 Ill 2d 65, 360 NE2d 773 (1976); See also, Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970).

In this case, Perrier's diversion and sale of the water which will diminish the Dead Stream violates the public trust doctrine. Under *Illinois Central* and public trust law, a public trust resource cannot be diverted, leased, disposed, alienated, or sold unless there is express legislative authority to do so. The legislature has authorized the disposition, leasing, diversion, diminishment, or use of public trust bottomlands and waters under the Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, *et seq.* ("ILSA"), and the Great Lakes Submerged Lands Act, MCL 324.32501, *et seq.* If the project does not fall within these two statutes, there is no other legislative statute that comes close to authorizing a diversion or diminishment of a public trust stream like the Dead Stream. Until Defendants have obtained that authority, they have no right to diminish or divert the public trust at all.

Relief Requested

The Plaintiffs request this Court to grant partial summary disposition and enter judgment with appropriate injunctive relief for Plaintiffs on the following grounds:

- Count I: Find that the spring water is part of the riparian Stream, and that the diversion and sale by Defendants, either upper riparians or non riparians, to non riparian land or non riparian uses is unlawful.
- Count II: Find that the private diversion and sale of ground water off-tract or out of the “in common” use of the water is unreasonable *per se*; or, alternatively, that it is unreasonable because it will diminish the flow of a stream.
- Count III: Find that the Dead Stream is subject to the public trust doctrine, and that diminishment of the flow of a public trust stream for diversion and sale by a private person for private profit is unlawful in the absence of state legislative authority.

The Michigan rule is that courts will grant equitable and injunctive relief to restrain an unlawful diversion of water for sale or use entirely disconnected with any reasonable use of the land from which the water is severed. The exceptions to the rule are where the defendant is a city and has acquired a prescriptive right or has diverted the water for a public use under its charter or applicable law, in which case the remedy is damages, *Schenk, Meeker, Smith, supra*, or where the action is between landowners as to the reasonable use of water to benefit their land. *Maerz, supra*, which involved a damage claim based on nuisance, negligence, and strict liability arising out of the activities of a stone quarry operation.

OLSON & BZDOK, P.C.
Attorneys for Plaintiffs

Date: June 5, 2002

By: James M. Olson (P18485)

G:\WPFILES\Ra\MM C W C\5099.07 Water Rts Lit\Pleadings\5099.07 05-20-02 MSD Brief (FINAL VERSION w corrected paged).wpd