

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

APPEAL FROM THE MICHIGAN COURT OF APPEALS  
Murphy, P.J., and Smolenski and White, JJ.

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**MICHIGAN CITIZENS FOR WATER  
CONSERVATION**, a Michigan nonprofit  
corporation,

Plaintiff-Appellant,

v

**NESTLÉ WATERS NORTH AMERICA  
INC.**,

Defendant-Appellee.

Supreme Court  
Docket No. 130802

Court of Appeals  
Case Nos. 254202 & 256153

Mecosta County Circuit Court  
Case No. 01-14563-CE  
Hon. Lawrence C. Root

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**APPELLEE'S BRIEF**

**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

	<u>Page</u>
<b>INDEX OF AUTHORITIES</b> .....	iii–v
<b>ORDER APPEALED FROM AND RELIEF SOUGHT</b> .....	1
<b>COUNTER-STATEMENT OF THE QUESTIONS PRESENTED</b> .....	2
<b>INTRODUCTION</b> .....	3–4
<b>COUNTER-STATEMENT OF MATERIAL FACTS</b> .....	5–13
I.    Background .....	5–6
II.   The Complaint And Pre-Trial Proceedings .....	6–8
III.  The Trial Court’s Ruling .....	8–9
IV.   The Court of Appeals’ Decision .....	9–12
A.    Groundwater Claim .....	10–11
B.    Public Trust Doctrine Claim .....	11–12
V.    Proceedings Following the Court of Appeals Decision .....	12–13
<b>ARGUMENT</b> .....	14–33
I. <b>IN APPLYING THE REASONABLE-USE TEST, THE COURT OF APPEALS           ADHERED TO THE LONG-STANDING PRECEDENTS OF THIS COURT           AND THE COURT OF APPEALS</b> .....	14–27
A.    The Court Of Appeals Followed Precedents Of This Court Dating Back Over A Century .....	14–17
B.    The Court Of Appeals Adhered To Its Own 25-Year-Old Precedent In <i>Maerz</i> .....	17–18
C.    Because The Court Of Appeals’ Decision Is Fully Consistent With Long-Standing Michigan Precedent, The Court Did Not Commit Clear Error In Applying The Reasonable-Use Balancing Test To The Parties’ Dispute .....	18–19
D.    The Legal Principles Advanced By Plaintiff Are Not Now And Never Have Been The Law In Michigan .....	20–27

1.	Plaintiff Grossly Misinterprets Michigan Precedent In A Misguided Attempt To Demonstrate Clear Error And Conflict With The Precedents Of This Court.....	21–25
2.	Plaintiff’s Out-of-State Authority Is Inapposite. ....	25–27
3.	Nestlé Has A Lawful Property Right To Use The Groundwater From Its Land.....	27
II.	IN AFFIRMING THE TRIAL COURT’S DISMISSAL OF PLAINTIFF’S PUBLIC TRUST CLAIM, THE COURT OF APPEALS SIMPLY ADHERED TO THE LONG-STANDING PRECEDENTS OF THIS COURT IN <i>MOORE</i> AND <i>BOTT</i> . ....	27–
A.	The Court Of Appeals Followed The 150-Year-Old Log-Flotation Test Established By This Court In <i>Moore</i> And Emphatically Re-Affirmed In <i>Bott</i> In Reaching Its Public Trust Holding.....	28–29
B	The Public Trust Principles Proffered By Plaintiff Are Not Now And Never Have Been The Law In Michigan. ....	29–31
C.	Even If The Dead Stream Were Subject To The Public Trust Doctrine, The Groundwater Nestlé Is Withdrawing Is Not. ....	32–33
	<b>CONCLUSION</b> .....	34

## INDEX OF AUTHORITIES

### **MICHIGAN SUPREME COURT CASES**

<i>Bernard v St. Louis</i> , 220 Mich 159 (1922) .....	17, 22, 34
<i>Bott v Comm'n of Natural Resources</i> , 415 Mich 45 (1982) ..	4, 8, 11, 12, 27, 28, 29, 30, 31, 33, 34
<i>Burroughs v Whitwam</i> , 59 Mich 279 (1886) .....	30, 31
<i>Collins v Gerhardt</i> , 237 Mich 38 (1926) .....	33
<i>Dumont v Kellogg</i> , 29 Mich 420 (1874) .....	3, 10, 14, 15, 19, 21, 22, 34
<i>McCardel v Smolen</i> , 404 Mich 89 (1978) .....	30
<i>Moore v Sanborne</i> , 2 Mich 519 (1853) .....	4, 11, 27, 28, 29, 33
<i>Nedtweg v Wallace</i> , 237 Mich 14 (1926) .....	33
<i>People v Hulbert</i> , 131 Mich 156 (1902) .....	15
<i>Schenk v City of Ann Arbor</i> , 196 Mich 75 (1917) .....	3, 10, 14, 16, 17, 19, 20, 22, 23, 24, 34
<i>Thies v Howland</i> , 424 Mich 282 (1985) .....	30
<i>Thompson v Enz</i> , 379 Mich 667 (1967) .....	15, 19, 25

### **MICHIGAN COURT OF APPEALS CASES**

<i>Hart v D'Agostini</i> , 7 Mich App 319 (1967) .....	24, 25
<i>Little v Kin</i> , 249 Mich App 502 (2002) .....	23
<i>Maerz v United States Steel Corp</i> , 116 Mich App 710 (1982) ..	10, 17, 18, 22, 23, 24, 34
<i>Mich. Citizens for Water Conservation v Nestlé Waters NAm Inc</i> , 269 Mich App 25 (2005) .....	1
<i>Mich Conference Ass'n of Seventh-Day Adventists v Comm'n of Natural Resources</i> , 70 Mich App 85 (1976) .....	30, 31

**MICHIGAN STATUTORY PROVISIONS**

MCL 324.1701 .....6  
MCL 324.30101 .....9  
MCL 324.30106.....33  
MCL 324.30301 .....9

**MICHIGAN COURT RULES**

MCR 2.116(C)(8).....7  
MCR 2.116(I)(2).....7

**OTHER COURTS**

*Collens v New Canaan Water Co*, 155 Conn 477, 483-84 (1967) .....26  
*Gehlen v Knorr*, 101 Iowa 700 (1897).....15  
*Katz v Walkinshaw*, 141 Cal 116 (1903) .....23  
*Maddocks v Giles*, 728 A2d 150 (Me 1999).....23, 26  
*Martin v City of Linden*, 667 Sold 732 (Ala 1995).....26  
*McNamara v City of Rittman*, 107 Ohio St 3d 243 (Ohio 2005).....22, 26  
*Nat’l Audubon Soc’y v Superior Court of Alpine Co*, 33 Cal 3d 419 (1983) .....32  
*Portage Co Bd of Comm’rs v City of Akron*, 109 Ohio St 3d 106 (Ohio 2006) .....22, 26  
*Rothrauff v Sinking Spring Water Co*, 339 Pa 129 (1940) .....26  
*Santa Teresa Citizen Action Group v City of San Jose*, 114 Cal App 4th 689 (2003) .....32

**REGULATIONS**

21 CFR 165.110(a)(2)(vi) (2004) .....6

**OTHER AUTHORITIES**

78 Am Jur 2d Waters § 213 .....26

3 Beck, ed, *Waters and Water Rights* (1991 ed, 2003 repl vol) .....23

Restatement 2d of Torts § 858 .....18, 25, 29

## ORDERS APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellant Michigan Citizens for Water Conservation, Inc. (“MCWC”) appeals the following decisions and orders:

1. The Opinion Following Bench Trial (Judgment/Order) filed by the Mecosta County Circuit Court on November 25, 2003;
2. The decision issued by the Court of Appeals, *Mich Citizens for Water Conservation v Nestlé Waters N Am Inc*, 269 Mich App 25; 709 NW2d 174 (2005) and Remand Order, both filed on November 29, 2005;
3. The Court of Appeals’ order denying Plaintiff’s Motion for Reconsideration, filed on January 26, 2006; and
4. The Order disposing of the matter after remand, filed February 14, 2006, and incorporating the Circuit Court’s Stipulated Remand Order.

Nestlé respectfully requests that the Court affirm the Court of Appeals on the issues Plaintiff raises in its appeal.

## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err when it applied longstanding Michigan precedent adopting a reasonable-use balancing test for disputes between water users?

Nestlé answers: No.

Plaintiff answers: Yes.

2. Did the Court of Appeals err by limiting the public trust doctrine to bodies of water with the capacity to float large mill logs (or sustain commercial shipping)?

Nestlé answers: No.

Plaintiff answers: Yes.

## INTRODUCTION

This case involves an application of well-established Michigan law to the inter-relationship between two property rights—Plaintiff’s riparian right to the reasonable use of the Dead Stream, and Nestlé’s right to the reasonable use of groundwater from the land it owns in fee simple. The case does present complicated factual permutations, but the legal rules are simple and well-established. Both types of property rights have long been recognized by this Court. See *Dumont v Kellogg*,<sup>1</sup> and *Schenk v City of Ann Arbor*.<sup>2</sup> And, since *Dumont* and *Schenk*, this Court has applied a flexible, reasonable-use balancing test to govern disputes between two riparian users and between two groundwater users.

In this case, the Court of Appeals applied the very same test to a dispute between a groundwater user and riparian users.

The Court of Appeals’ routine application of such settled legal principles was not error, and this Court should affirm. Moreover, the Court’s review of these issues must take into account that the Michigan Legislature very recently established public policy with respect to water withdrawals by enacting—after years of careful study and extensive debate—a comprehensive regulatory regime. Plaintiff’s arguments represent nothing less than an invitation for this Court to usurp the policymaking role that the Michigan Constitution reserves to the Legislature. Nestlé respectfully submits that the real reason Plaintiff is seeking review from this Court is not to clarify the rules in an important and unsettled area of the law, but rather is an effort to change the law by judicial fiat to fit its social, economic, and political views of proper water law.

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<sup>1</sup> 29 Mich 420 (1874).

<sup>2</sup> 196 Mich 75; 163 NW 109 (1917).

The Court of Appeals' public trust holding likewise represents simple application of long-standing Michigan precedent. The court below relied on and applied this Court's decision in *Bott v Commission of Natural Resources*,<sup>3</sup> which emphatically re-affirmed the log-flotation test for determining navigability, which was first set forth over 100 years earlier in *Moore v Sanborne*.<sup>4</sup> There is no reasonable dispute about the holdings in these cases, or about application of those holdings in this case. Rather, the Plaintiff seeks to replace the long-established rule of law. If and when the Michigan Legislature concludes that a new rule is necessary, it will no doubt enact one. Until then, property owners and water users in Michigan have the right to rely on the 153-year-old rule, and the courts of this State have the obligation to enforce it, as the Court of Appeals properly did.

In sum, there is no basis for reversing the Court of Appeals' decisions, and this Court should affirm.

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<sup>3</sup> 415 Mich 45; 327 NW2d 838 (1982).

<sup>4</sup> 2 Mich 519 (1853).

## COUNTER-STATEMENT OF MATERIAL FACTS

### I. Background.

In 1999, Nestlé identified as a potential source for Ice Mountain spring water an aquifer underneath the “Sanctuary,” an 850-acre deer preserve in Mecosta County owned by Donald and Nancy Bollman (“Bollmans”). Groundwater emerges from the aquifer in a series of springs located along the northern shoreline of Osprey Lake Impoundment (“OLI” or the “Impoundment”) as well as under and along the upper reaches of the Dead Stream. The man-made OLI was created when the Dead Stream was dammed in 1953; a replacement dam, enlarging OLI, was built around 1980. OLI discharges southeasterly into the Dead Stream via a 24-inch culvert in the earthen replacement dam as well as through and around the dam.

The Dead Stream winds its way southeast from the Impoundment until it joins with Gilbert Creek and then turns south into the Blue Lake-Lake Mecosta connecting channel. Blue Lake and Lake Mecosta, along with Round Lake, are collectively known as the “Tri-Lakes.” The Tri-Lakes are connected bodies whose water levels are maintained at an artificially high level by the Tri-Lakes Dam. The artificially elevated lake level influences the width and stage (level) of the Dead Stream.

By a deed dated January 23, 2002, Nestlé purchased from the Bollmans the subsurface ground beneath approximately 139 acres of the Sanctuary (the “Property”) from a depth of two feet to one thousand feet below the surface, which includes the source aquifer. Nestlé also obtained “all water rights in and under the Property,” and the right “to develop, use, extract, remove, pump and/or consume water from any and all water sources thereon.” In addition, the Bollmans leased to Nestlé the surface of the Property and granted Nestlé easements of ingress

and egress to, from, and across the Property.

Nestlé subsequently filed with the Michigan Department of Environmental Quality (“MDEQ”) an application for permits for Type IIa public water supply wells. After reviewing Nestlé’s application for compliance with applicable statutes and holding a public hearing, the MDEQ approved Nestlé’s permits under the Safe Drinking Water Act at a total maximum pumping capacity of 400 gallons per minute (“gpm”). Nestlé since has operated consistently with its permits and applicable law and in compliance with all judicial orders. The groundwater qualifies as “spring water” under federal Food and Drug Administration regulations.<sup>5</sup>

Nestlé commenced construction of its bottling plant in June 2001, and began commercial pumping operations in April 2002. Nestlé withdraws groundwater via four production wells installed at the Sanctuary. In conjunction with its withdrawals from the Sanctuary, Nestlé also constructed a bottling plant, located in Mecosta Township and connected to the well field by a 12-mile pipeline.

MCWC is a non-profit corporation organized in December 2000 and claims a membership of over 1,300 persons, many of whom are riparian landowners. MCWC, through its attorneys, intervened in opposition to the issuance of the permits, appeared at the public hearing, and filed written comments and three expert reports.

## **II. The Complaint And Pre-Trial Proceedings.**

On June 15, 2001, MCWC filed a complaint in the Circuit Court of Mecosta County against Nestlé, seeking an injunction only under the Michigan Environmental Protection Act (“MEPA”)<sup>6</sup>. The Second Amended Complaint, filed on November 12, 2001, sought injunctive relief relating to five causes of action: violation of Plaintiff’s riparian rights, violation of

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<sup>5</sup> See 21 CFR 165.110(a)(2)(vi) (2004).

<sup>6</sup> MCL 324.1701 *et seq.*

Plaintiff's groundwater rights, violation of the public trust doctrine, appropriation of the public domain, and violation of MEPA.

On May 17, 2002, Plaintiff moved for summary disposition on the grounds that, *inter alia*, "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." Nestlé opposed Plaintiff's motion, asserting that the public trust doctrine did not apply because the Dead Stream was not navigable under the commercial shipping/log-flotation test. Nestlé also argued that, even if the Dead Stream were subject to the public trust, groundwater is not subject to the public trust.

The trial court reviewed the substantial factual record presented to it on this motion and found no genuine issue of material fact as to whether the Dead Stream was navigable under Michigan law.<sup>7</sup> The court reasoned that Plaintiff had not argued for application of any test of navigability other than the log-flotation test, and they had failed to present evidence that the Dead Stream, in its natural state, was capable of floating a number of large logs. The undisputed evidence established that the Dead Stream in its *natural* state was even narrower and shallower than its present condition, artificially elevated because of the construction of the dam to create the OLI. The court denied Plaintiff's motion for summary disposition and granted summary disposition to Nestlé on the issue of navigability under MCR 2.116(I)(2).

Immediately following the entry of the appropriate order on October 11, 2002, Plaintiff filed a motion for reconsideration, rehearing, or clarification. Plaintiff claimed their motion for summary disposition had been limited to whether the Dead Stream was navigable due to its

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<sup>7</sup> Plaintiff's suggestion that this issue was decided under MCR 2.116(C)(8) on the legal sufficiency of the complaint is erroneous, as is their statement of the applicable standard of review.

capacity to float shingle bolts and that therefore they were entitled to prove navigability by other means, as well as offer proof that a public trust was created by virtue of other uses and by “long-standing public access.” Meanwhile, Nestlé filed a motion for summary disposition as to the remainder of Plaintiff’s public trust claim.

On October 29, 2002, the trial court indicated it would grant Plaintiff’s motion for reconsideration and, upon reconsideration, the court re-affirmed the grant of summary disposition to Nestlé.

The court repeated its finding that there was no genuine issue of material fact as to whether the Dead Stream was navigable under the *Bott* log-flotation test. Moreover, with respect to Plaintiff’s other claimed bases for impressing the Dead Stream with a public trust, the court ruled that Nestlé was entitled to summary disposition because, other than the commercial shipping test (which Plaintiff did not at any time invoke), Michigan law recognizes only the log-flotation test. Therefore, the court indicated it would grant Nestlé’s motion for summary disposition as to the remainder of Plaintiff’s public trust claim. On November 18, 2002, the trial court entered an order to this effect.

The remainder of Plaintiff’s claims also were dismissed on summary disposition, except for the groundwater claim (which the trial court subsequently held also encompassed the claimed interference with Plaintiff’s riparian rights) and the MEPA claim.

### **III. The Trial Court’s Ruling.**

The bench trial on these claims occurred intermittently between May 5 and July 3, 2003. In its November 25, 2003 Opinion, the trial court determined that the only body of water subject to the groundwater analysis was the Dead Stream. After noting that the case involved a dispute between a groundwater user and riparian users, the court, without citing any authority, concluded

that riparian uses were superior to groundwater uses and invented a two-step standard for determining a violation of the common law of groundwater. The first step provided that “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.” Under the second step, the groundwater use cannot have “measurable and proven negative impacts on the riparian body/bodies,” regardless of whether the proposed use is on- or off-tract. The court then found that Nestlé’s withdrawals ran afoul of both parts of the standard, and, being “unable” to identify a pumping rate that “in this complex system, will not have actionable adverse effects on these Plaintiff,” it ordered Nestlé to cease all pumping operations at the site.

As to the MEPA claim, the court determined that MEPA allowed it to adopt the standards in the Inland Lakes and Streams Act (“ILSA”)<sup>8</sup>, and the Wetlands Protection Act (“WPA”)<sup>9</sup>, which are permitting statutes, as appropriate MEPA standards.

Based on its groundwater and MEPA holdings, the trial court entered a permanent injunction that ordered the termination of all water withdrawals by the Defendant from the well field and the Sanctuary Springs within 21 days. On December 16, 2003, however, the Court of Appeals granted Nestlé’s motion for a stay of the injunction pending appeal, on the condition (suggested by Nestlé) that its groundwater withdrawals not exceed 250 gpm (which was the average pumping rate at the time).

#### **IV. The Court of Appeals’ Decision.**

Nestlé timely appealed the trial court’s Opinion and New Trial Opinion on March 4, 2004, alleging, *inter alia*, that the court misapplied Michigan law in reaching its conclusions regarding Plaintiff’s groundwater and MEPA claims. Plaintiff cross-appealed the court’s denial

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<sup>8</sup> MCL 324.30101 *et seq.*

<sup>9</sup> MCL 324.30301 *et seq.*

of their motion for summary disposition, and granting of summary disposition in favor of Nestlé, on the public trust doctrine. After hearing oral argument, the Court of Appeals issued its written opinion on November 29, 2005.

**A. Groundwater Claim.**

As to Plaintiff's groundwater claim, the Court of Appeals conducted a detailed and thorough analysis of the development of both riparian and groundwater law in Michigan. The court recognized that long-standing Michigan precedent established a reasonable-use balancing test for determining disputes between water users. In doing so, the court simply adhered to its previous decision in *Maerz v United States Steel Corp.*,<sup>10</sup> which affirmed the reasonable use principles first set forth by this Court in *Dumont v Kellogg*,<sup>11</sup> and *Schenk v City of Ann Arbor*.<sup>12</sup> The court properly acknowledged that, for well over 100 years, "Michigan courts have consistently avoided strict rules that permit one water user to utilize water at the expense of an adjacent user." Rather, Michigan courts have sought to ensure "the greatest possible access to water resources for all users while protecting certain traditional water uses" and "have already recognized the value of the reasonable use balancing test for that purpose." Thus, "in order to recognize the interconnected nature of water sources and fully integrate the law applicable to water disputes," the court adopted "the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users."

According to the court, this reasonable use test required a "fair participation" in the use of water resources for the greatest number of users. Reasonable uses of water would be protected, and only unreasonable uses would result in redress. To determine what constituted a "fair participation" in water resources, the court looked to various factors, including the purpose of the

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<sup>10</sup> 116 Mich App 710; 323 NW2d 900 (1982).

<sup>11</sup> 29 Mich 420 (1874).

<sup>12</sup> 196 Mich 75; 163 NW 109 (1917).

challenged water use, the suitability of the use to the location, the extent and amount of harm caused by the use, the benefits of the use, the necessity of the amount and manner of the use, and any other factor that might bear on the reasonableness of the use.

Because the trial court's hybrid rule was contrary to established Michigan law concerning competing water uses, the Court of Appeals expressly disapproved it. Applying the reasonable-use standard to the facts found by the trial court, the Court of Appeals held that if Nestlé were to pump at the maximum permitted rate of 400 gpm, such use would fail the reasonable-use balancing test. The court then remanded the case to the trial court for a modification of the injunction to permit Nestlé to pump at the maximum rate that would satisfy the reasonable-use standard.

**B. Public Trust Doctrine Claim.**

In affirming the trial court's grant of summary disposition to Nestlé on Plaintiff's public trust claim, the Court of Appeals adhered to this Court's landmark decision in *Bott v Commission of Natural Resources*.<sup>13</sup> As *Bott* recognized, the public trust doctrine does not apply to all waters of the state, but only to navigable waters.<sup>14</sup> Furthermore, *Bott* had emphatically re-affirmed the commercial shipping / log-flotation test for determining navigability first set forth over 100 years earlier in *Moore v Sanborne*,<sup>15</sup> and explicitly rejected overtures to adopt other standards for determining navigability.<sup>16</sup>

Applying this precedent to the facts before it, the court concluded that floating a 16- to 18-inch shingle bolt did not satisfy *Bott* and *Moore*'s requirement of floating large mill logs, which the undisputed record showed were historically 20 to 40 feet in length, to demonstrate

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<sup>13</sup> 415 Mich 45; 327 NW2d 838 (1982).

<sup>14</sup> *Id.*

<sup>15</sup> 2 Mich 519 (1853).

<sup>16</sup> *Bott*, at 99-100.

navigability. No evidence existed to establish that the Dead Stream had ever been used to float mill logs. Moreover, at its shallowest point, the Dead Stream has a depth of only six inches, too shallow under *Bott* to permit the flotation of logs. The court also held that public access alone does not render an otherwise non-navigable stream subject to the public trust doctrine. Finally, the court rejected Plaintiff's argument that the State owns all waters subject to the public trust, regardless of navigability. Thus, the Court of Appeals affirmed the trial court's grant of summary disposition in favor of Nestlé on Plaintiff's public trust claim.

The court also held that the trial court erred in concluding that Plaintiff had established a *prima facie* MEPA violation. The court first concluded that ILSA and WPA, the two statutes adopted by the trial court as MEPA standards, were not pollution control standards, and a violation of these statutes therefore could not constitute a *prima facie* case under MEPA. Moreover, because the trial court had relied solely on ILSA and WPA to find a MEPA violation, and had not made the necessary findings of impairment to otherwise establish a *prima facie* case, the trial court's finding of a MEPA violation was erroneous and had to be vacated. The court thus remanded the issue for determination by the trial court. Plaintiff has not appealed this part of the court's decision.

#### **V. Proceedings Following the Court of Appeals Decision.**

On December 30, 2005, Plaintiff moved the Court of Appeals for reconsideration of certain aspects of its decision, including the court's re-affirmance of Michigan's reasonable-use balancing test for determining disputes between water users and the court's application of the public trust doctrine. The Court of Appeals denied Plaintiff's motion on January 26, 2006.

Following the entry of the Court of Appeals opinion, but prior to the trial court hearing on the remanded issues, the parties agreed to a stipulation, which was entered by the trial court

on January 25, 2006. The stipulation specified the rates at which Nestlé could pump groundwater from its Sanctuary wells throughout the year, pending the appeal to this Court. The parties stipulated that Nestlé's use of the groundwater at the stipulated rates was deemed reasonable under the groundwater standard adopted by the Court of Appeals, and was further deemed not to constitute impairment under MEPA. Finally, the stipulation allowed the parties to appeal the Court of Appeals decision to this Court. On February 14, 2006, the Court of Appeals entered an order finding all pending issues resolved, deeming the appeals concluded, and relinquishing jurisdiction.

## ARGUMENT

### **I. THE COURT OF APPEALS' DECISION REGARDING PLAINTIFF'S GROUNDWATER CLAIMS WAS NEITHER CLEARLY ERRONEOUS NOR IN CONFLICT WITH ANY PRIOR DECISION OF ANY MICHIGAN COURT.**

Plaintiff claims that the Court of Appeals clearly erred in “shifting” Michigan groundwater law by applying the reasonable-use balancing test, the adoption of which purportedly overrules this Court’s decisions in *Dumont* and *Schenk*. Plaintiff’s arguments are erroneous. In fact, the Court of Appeals simply adhered to and applied long-standing Michigan precedent. Indeed, contrary to Plaintiff’s suggestion that it departed from *Dumont*, the Court of Appeals expressly “adopt[ed] the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users.”<sup>17</sup> Thus, it is Plaintiff that seeks to “shift” water law in this state by urging this Court to adopt a rigid water law standard that is not, and never has been, the law in Michigan.

#### **A. The Court Of Appeals Followed Precedents Of This Court Dating Back Over A Century.**

In reaching its holding on Plaintiff’s groundwater claim, the Court of Appeals recognized that Michigan courts have been applying a flexible reasonable-use test to conflicts between water users since this Court’s 1874 decision in *Dumont v Kellogg*. In *Dumont*, defendant constructed a dam across a stream, which retained the waters of the stream and caused injury to plaintiff, a lower riparian owner who operated a mill downstream.<sup>18</sup> The trial court instructed the jury based on the natural flow rule for determining conflicts over water use, but this Court reversed.<sup>19</sup> Justice Cooley determined that the proper question was “whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment

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<sup>17</sup> 269 Mich App at 68.

<sup>18</sup> 29 Mich at 420.

<sup>19</sup> *Id.* at 421.

of right by the other.”<sup>20</sup> “There may be and there must be allowed of that which is common to all a reasonable use by each.”<sup>21</sup> Justice Cooley therefore adopted the flexible reasonable use rule for determining conflicts between water users which has been the law in Michigan ever since, holding that:

“It is ... not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress.”<sup>22</sup>

After *Dumont*, Michigan courts have recognized the decision as establishing a flexible balancing test in disputes between water users, weighing numerous factors in determining whether a party’s use of water resources is a reasonable one. As this Court acknowledged in

*People v Hulbert*:

“No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use.”<sup>23</sup>

These considerations again were set out by this Court in *Thompson v Enz*.<sup>24</sup> There, the Court found three factors relevant in determining whether a water use was reasonable. First, “attention should be given to the watercourse and its attributes, including its size, character and natural state.”<sup>25</sup> Second, the court “should examine the use itself as to its type, extent, necessity, effect on the quantity, quality and level of the water, and the purposes of the users.”<sup>26</sup> Finally, “it

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<sup>20</sup> *Id.* at 424.

<sup>21</sup> *Id.* at 425.

<sup>22</sup> *Id.*

<sup>23</sup> 131 Mich 156; 91 NW 211 (1902),170 (quoting *Gehlen v Knorr*, 101 Iowa 700; 70 NW 757 (1897)).

<sup>24</sup> 379 Mich 667; 154 NW2d 473 (1967)

<sup>25</sup> *Id.* at 688.

<sup>26</sup> *Id.*

is necessary to examine the proposed artificial use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interests of the State, including fishing, navigation, and conservation.”<sup>27</sup>

The Court of Appeals specifically cited all of this long-standing authority in reiterating the reasonable use test in its decision here. The court’s standard is thus fully consistent with long-established Michigan precedent regarding conflicts between competing riparian water users.

The reasonable use test has also been applied to conflicting groundwater uses in this state for nearly a century. In *Schenk v City of Ann Arbor, supra*, the city purchased land, drilled wells, and was withdrawing more than 3.7 million gallons per day of water for transportation to the city and use by its inhabitants.<sup>28</sup> Plaintiff, who owned property near the land on which the city installed the wells, alleged that the city’s pumping caused his wells to go dry, that flowing wells in the area had slowed or also gone dry, and that agricultural productiveness and land values were harmed.<sup>29</sup> After surveying (and quoting at length) the law in England and various states, this Court adopted the “rule of reasonable use” for solving the dispute.<sup>30</sup> Specifically, the Court held that the city could “reasonably make use, for the purpose intended, of a large volume of water from this land,” and it therefore refused to reverse the trial court’s rejection of an injunction.<sup>31</sup> The Court explicitly noted that the city did not use the water “upon, or for the benefit of, the land from which it takes it,”<sup>32</sup> implicitly rejecting versions of the reasonable-use rule that imposed a limitation based on the place of groundwater use.<sup>33</sup>

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<sup>27</sup> *Id.* at 689.

<sup>28</sup> 196 Mich at 77-78.

<sup>29</sup> *Id.* at 78-79.

<sup>30</sup> *Id.* at 91.

<sup>31</sup> *Id.* at 92.

<sup>32</sup> *Id.* at 81.

<sup>33</sup> *Id.* at 84, 87.

Similarly, in *Bernard, supra*, Plaintiff's hotel operated as a sanitarium adjacent to land owned by the City of St. Louis. For 50 years, water from a well had flowed into the hotel, where it was used for its supposed curative properties. After the city installed wells on its adjoining land to provide water to its inhabitants, the flow of water into the hotel slowed substantially.<sup>34</sup>

In denying Plaintiff's request for an injunction, and ruling that Plaintiff was entitled to reimbursement for the expenses incurred as a result of the city's wells, the Court applied the reasonable-use rule articulated in *Schenk*.<sup>35</sup> Specifically, the Court noted that "if the city makes a reasonable use of the percolating waters, and the Plaintiff does not permit it to go to waste, there will . . . nearly all of the time be an ample supply for the needs of both."<sup>36</sup> Thus, the Court of Appeals' decision is fully consistent with the long-standing precedents of this Court concerning disputes between groundwater users, which also adopt the reasonable-use test.

**B. The Court Of Appeals Adhered To Its Own 25-Year-Old Precedent In *Maerz*.**

Not only did the Court of Appeals apply over 100 years of precedent from this Court in making its determination, but it also relied on its own 25-year-old precedent in *Maerz v United States Steel Corp, supra*. In *Maerz*, defendant operated a quarry and removed large quantities of water via pumps.<sup>37</sup> Plaintiffs alleged that the removal of the groundwater dried up their wells.<sup>38</sup> The Court of Appeals reversed the trial court's grant of summary disposition for defendants, concluding that the court had erred in failing to evaluate defendants' use of groundwater under Michigan's reasonableness standard, instead foreclosing such an analysis based on the on-site location of defendants' use.<sup>39</sup> *Maerz* explicitly rejected a water use rule that employed a rigid on-

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<sup>34</sup> 220 Mich at 160-62.

<sup>35</sup> *Id.* at 165.

<sup>36</sup> *Id.* at 163.

<sup>37</sup> 116 Mich App 710 (1982).

<sup>38</sup> *Id.* at 712.

<sup>39</sup> *Id.* at 720.

site/off-site distinction, and recognized that Michigan’s reasonableness standard does not distinguish between on-tract and off-tract users.<sup>40</sup> The court concluded that the principles set forth in the Restatement, 2d, Torts § 858 were fully consistent with Michigan’s reasonable-use test and less arbitrary than the old American rule applied in certain other states. Plaintiff erroneously asserts that the Court of Appeals in this case interpreted *Maerz* as adopting the Restatement standard. To the contrary, while recognizing *Maerz*’s belief that the principles set forth in the Restatement should be followed in Michigan, the Court of Appeals expressly rejected Nestlé’s contention that *Maerz* had made a sweeping adoption of the entire Restatement approach.<sup>41</sup> Thus, in applying the flexible, reasonable-use test to the situation before it, the Court of Appeals in this case was simply following the precedent it had established in *Maerz* nearly 25 years earlier.

**C. Because The Court Of Appeals’ Decision Is Fully Consistent With Long-Standing Michigan Precedent, The Court Did Not Commit Clear Error In Applying The Reasonable-Use Balancing Test To The Parties’ Dispute.**

The Court of Appeals expressly relied on the above precedent in applying the flexible, reasonable-use balancing test to the situation before it. The court recognized that Michigan’s reasonable use test is designed to ensure a “fair participation” in the use of water by the greatest number of users.<sup>42</sup> In reiterating the factors used to determine whether a water use is reasonable, the Court of Appeals restated principles that have been expressed in Michigan case law for over a century. First, the court must determine the purpose of the use.<sup>43</sup> In doing so, the court should determine whether the use is for natural or artificial purposes, with natural uses entitled to

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<sup>40</sup> *Id.* at 714-20.

<sup>41</sup> 269 Mich App at 67 n42.

<sup>42</sup> 269 Mich App at 69.

<sup>43</sup> *Id.* at 71.

preference.<sup>44</sup> Another consideration is whether the water use benefits the land from which the water is being removed or will benefit land unconnected with the location from which the water is extracted.<sup>45</sup> Second, the court should consider the suitability of the use to the location, taking into account the nature of the water source and its attributes.<sup>46</sup> Third, the extent and amount of the harm should be assessed. *Id.* at 71, 73. Fourth, the court should weigh the benefits of the challenged use.<sup>47</sup> Fifth, the court should analyze the amount and manner of the water use.<sup>48</sup> Finally, the court may consider any other factor bearing on the reasonableness of the use.<sup>49</sup> These considerations have found expression in the decisions of this Court for more than a century.

To be sure, this is the first reported case in Michigan explicitly involving a conflict between a *groundwater* user and a *riparian* user. But Michigan applies its flexible reasonable-use test to disputes between competing riparian users, *Dumont, supra*, and between competing groundwater users, *Schenk, supra*. There is no support in either Michigan law or logic for departing from the reasonable-use test when the dispute is between groundwater and riparian users. After all, it is universally recognized that groundwater and surface water comprise a single, inter-connected resource in this State.

In sum, the Court of Appeals carefully reviewed and applied long-standing Michigan precedent in reiterating the flexible reasonable-use balancing test that has been the law of this

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<sup>44</sup> Natural purposes are “all those uses necessary to the existence of the user and his or her family, including the use of the water for drinking and household needs.” 269 Mich App at 71-72. Artificial uses, on the other hand, “are those uses which merely increase one’s comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation.” *Id.* at 72 (quoting *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967)).

<sup>45</sup> *Id.* at 72.

<sup>46</sup> *Id.* at 71-72.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 74.

State for over a century. There is thus no clear error in the court's ruling.

**D. The Legal Principles Advanced By Plaintiff Are Not Now And Never Have Been The Law In Michigan.**

Although Plaintiff claims that the Court of Appeals “shifted” Michigan law regarding water use disputes, it is in fact Plaintiff that is seeking to shift Michigan law. Indeed, although American courts have been deciding groundwater cases since the middle of the nineteenth century, the trial-court standard advocated by Plaintiff has never been adopted by any other court anywhere in the nation. Thus, contrary to Plaintiff’s erroneous and disingenuous assertions, the principles it espouses have never been the law in Michigan and find no support in the precedents of this Court.<sup>50</sup>

**1. Plaintiff Grossly Misinterprets Michigan Precedent In A Misguided Attempt To Demonstrate Clear Error And Conflict With The Precedents Of This Court.**

As the Court of Appeals correctly explained, Michigan courts have “consistently avoided strict rules” that grant preferences to one class of water users over another.<sup>51</sup> Instead, Michigan courts have adopted a flexible reasonable-use balancing test that takes into account a wide range of factors, *including* whether the water being withdrawn is used on- or off-tract, in achieving a “fair participation” for all water users in the resource.<sup>52</sup> Plaintiff, however, seeks to elevate *one* factor, whether the use is on- or off-tract, *above* all other factors and make it determinative. Because Michigan courts have historically rejected such rigid formulations, Plaintiff is forced to significantly distort the precedents of this Court in an attempt to justify the purported standard, which has never been the law in Michigan.

Plaintiff erroneously claims that the precedents of this Court suggest that uses of water

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<sup>50</sup> The trial court itself recognized as much when it conceded that its groundwater standard “has not been announced by any reported Michigan case to date.” Op., p 47.

<sup>51</sup> 269 Mich App at 67.

<sup>52</sup> *Id* at 69.

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. Plaintiff attempts to find such a standard in dictum in *Dumont*. In *Dumont*, the Court distinguished the facts of that case from two other scenarios involving conduct it thought actionable:

[This case] differs essentially from [1] a case in which a stream has been diverted from its natural course and turned away from a proprietor below... . It differs, also, from [2] the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters...<sup>53</sup>  
Claiming that the Court of Appeals ignored the first scenario referred to in the above

quote from *Dumont*, Plaintiff argues that this language “suggests a prohibition on diversion off-tract or out-of-watershed.”

To begin with, to the extent the Court of Appeals “did not account for” the first *Dumont* scenario it is because Plaintiff argued below that the second *Dumont* scenario, and *only* the second scenario, provided the basis for its diversion argument. Prior to its appeal to this Court, Plaintiff never claimed the first scenario as the source of its diversion argument.

In any event, Plaintiff’s interpretation simply cannot be extrapolated from the language of the dictum itself. The *Dumont* Court, in its first scenario, was clearly envisioning a circumstance where a riparian owner physically changed the direction of the stream and thereby deprived a lower riparian owner of any stream at all. The Court was distinguishing such a situation from a mere use of stream water by the upper riparian owner, which of course is precisely analogous to Nestlé’s actions here. In addition, the *Dumont* dictum says nothing about *where* the diverted water is used. Water from a stream diverted from its natural course might be used on the tract in question (e.g., to irrigate crops) or it might be used off-tract (e.g., pumped to a city miles away to be used for municipal purposes). The *Dumont* dictum would apply in both circumstances, and

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<sup>53</sup> *Id.* at 422.

therefore it does not make the situs of use definitive in resolving water use disputes.

The second scenario referred to in the *Dumont* dictum is unhelpful to Plaintiff because it simply states that a stranger cannot diminish the flow of riparian waters.<sup>54</sup> Nestlé is not a stranger, but has a lawful property-based right to extract the groundwater in question.<sup>55</sup> As between two holders of property rights, *Dumont* applies the reasonable use rule.<sup>56</sup>

Plaintiff next argues that, from the tie of *Schenk*, Michigan courts have applied a correlative rights rule, “balancing uses between on-tract users, coupled with a rule that an off-tract use could not interfere with an on-tract use.” According to Plaintiff, this correlative rights rule was re-affirmed by the Court of Appeals in *Maerz*. Plaintiff’s interpretation of Michigan groundwater law is manifestly incorrect.

First, as demonstrated above, *Schenk* and *Maerz* both adopted a reasonable-use rule for groundwater disputes that did not distinguish based on whether the water was being used on- or off-tract. In *Schenk*, plaintiff alleged that his wells had been depleted by the City of Ann Arbor’s withdrawals of groundwater for municipal use.<sup>57</sup> Little, if any, of the groundwater pumped by the city was used on-tract, because the water was pumped several miles away to be sold and used in Ann Arbor.<sup>58</sup> This Court nevertheless applied the reasonable-use test and not the correlative rights theory proffered by Plaintiff here.<sup>59</sup> Moreover, this Court refused to enjoin the off-tract use of the water at issue. Likewise, in *Bernard* this Court also refused to enjoin off-tract use of groundwater.

Plaintiff bases its assertion that *Schenk* adopted a correlative rights rule on the Court’s

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<sup>54</sup> 29 Mich at 422.

<sup>55</sup> See *McNamara v City of Rittman*, 107 Ohio St 3d 243, 246-47; 838 NE2d 640 (Ohio 2005); see also *Portage Co Bd of Comm’rs v City of Akron*, 109 Ohio St 3d 106; 846 NE2d 478 (Ohio 2006).

<sup>56</sup> 29 Mich at 425.

<sup>57</sup> 196 Mich at 78-79.

<sup>58</sup> *Id.* at 81.

<sup>59</sup> *Id.* at 91.

“heavy reliance” on *Katz v Walkinshaw*,<sup>60</sup> a California correlative rights decision. But rather than relying heavily on *Katz*, the Court merely quoted the decision as part of a canvassing of out-of-state authorities. Such quotation does not establish approval of the quoted language.<sup>61</sup> Tellingly, not a *single* Michigan case besides *Schenk* has cited *Katz*, a decision Plaintiff refers to as “the seminal case on correlative rights.”

The Court of Appeals adhered to this reasoning in *Maerz*, where it specifically rejected the on-site/off-site distinction embodied in an archaic formulation of the reasonable-use rule adopted in certain other states, but never in Michigan.<sup>62</sup> The Court of Appeals did not interpret *Maerz* as a “shift” in Michigan groundwater law, as Plaintiff erroneously contends. Rather, as the Court of Appeals properly recognized, *Maerz* expressly stated that the reasonable use principles found in § 858 of the Restatement were consistent with prior Michigan law.

There is simply no precedent in this state that can be read as adopting a correlative rights theory. Under the correlative rights rule, “landowners’ rights are coequal and proportionate to their overlying ownership.”<sup>63</sup> Thus, “even if the water being pumped is used beneficially on the user’s land, the user cannot exceed the proportionate share, because this would infringe on the proportionate rights of the other overlying landowners.”<sup>64</sup>

Such concern for the proportionality of the use—the hallmark of the correlative rights rule—is found nowhere in *Schenk*, *Maerz*, or any other Michigan case.

Although plaintiff now claims that correlative rights has been the rule in Michigan for

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<sup>60</sup> 141 Cal 116; 70 P 766 (1903).

<sup>61</sup> See *Little v Kin*, 249 Mich App 502, 510 n4; 644 NW2d 375 (2002), aff’d, 468 Mich 699; 664 NW2d 749 (2003).

<sup>62</sup> As the Court of Appeals recognized, *Maerz* unfortunately mislabeled the reasonable-use test as involving “correlative rights.” 269 Mich App at 65 n39. However, courts of other states and commentators alike have recognized that *Maerz* applied the reasonable-use rule. See, e.g., *Maddocks v Giles*, 728 A2d 150, 153 (Me 1999); 3 Beck, ed, *Waters and Water Rights* (1991 ed, 2003 repl vol), p 19-47.

<sup>63</sup> 3 Beck, ed, *Waters and Water Rights* (1991 ed, 2003 repl vol), p 19-45

<sup>64</sup> *Id.*

nearly 100 years, in all its pleadings and briefing before the trial court and the Court of Appeals, Plaintiff never once maintained that Michigan is a correlative rights state, nor did it introduce any proofs at trial relevant to the application of that doctrine. Indeed, Plaintiff specifically asserted before both the Court of Appeals and the trial court that “Michigan is not a correlative rights state.” Plaintiff’s confusion on this issue continues in its appeal to this Court. Although strenuously arguing that the Court of Appeals erred in failing to recognize that both *Schenk* and *Maerz* applied a correlative rights rule, Plaintiff earlier in its appeal argues that the Court of Appeals’ balancing test shifts Michigan water law from a reasonable-use rule to what they refer to as a rule of allocation. Thus, as the precedents of this Court firmly establish, and Plaintiff has conceded, Michigan has never applied the correlative rights rule advocated by Plaintiff.

Finally, while Michigan courts have stated that the situs of use should be taken into account as a factor in analyzing the reasonableness of the use, this State’s courts have never made this factor determinative. In Plaintiff’s own words “[o]ne of the considerations relevant to the first factor” of the Court of Appeals’ balancing test “is whether the water is used on- or off-tract.” Not satisfied with simply allowing a court to factor this consideration into the reasonable-use equation, Plaintiff stubbornly insists that whether the water is used on- or off-tract must be determinative. Plaintiff also laments that none of the factors identified by the Court of Appeals are “listed in any hierarchy of importance.” But, as has been shown above, Michigan has long eschewed such rigid formulations, instead adopting a reasonable-use test allowing courts to “consider all the circumstances that are relevant in a given case”<sup>65</sup> in order to protect the environment, while at the same time promoting socially and economically beneficial water uses. Thus, the courts of this State have long weighed the location of use in determining reasonableness, but refused to hold this factor determinative. For example, in *Hart v*

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<sup>65</sup> 269 Mich App at 55.

*D'Agostini*,<sup>66</sup> the Court of Appeals held that defendants' installation of a sewer trunk line near Plaintiff's property, which temporarily lowered the water table and caused Plaintiff's wells to go dry, was reasonable. Among the factors influencing the court's reasonableness determination was the fact that the water was not being transported to distant premises for consumption, that the interference with Plaintiff's water supply was only temporary; that the dewatering was essential to the construction of the sewer; and that the sewer benefited the entire area.<sup>67</sup>

Similarly, in *Thompson v Enz*, *supra*, this Court, while noting in passing that use of surface water for an artificial purpose must ordinarily be only for the benefit of the riparian land,<sup>68</sup> also relied on numerous other factors in determining reasonableness. Among them were the size, character, and natural state of the waterway; the type, extent, necessity, and effect of the use; and a weighing of the harms and benefits of the use on other riparian proprietors. Again, *Hart* and *Thompson* considered *all* relevant factors in deciding whether a water use was reasonable and found no one factor determinative. Simply put, Plaintiff's position is not now and has never been the law of Michigan and cannot provide a basis for this Court to hear Plaintiff's appeal.

## **2. Plaintiff's Out-of-State Authority Is Inapposite.**

Unable to find support for their position in Michigan law, Plaintiff relies heavily on cases decided in other states, and insists that the law in Michigan must be similar. The fundamental problem with Plaintiff's argument is that none of these jurisdictions adopted Michigan's flexible version of the reasonable-use test. Rather, each case applied state law markedly different from Michigan's—either the rigid and archaic “American rule,” which is really a modification of the

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<sup>66</sup> 7 Mich App 319, 321-323; 151 NW2d 826 (1967).

<sup>67</sup> *Id.*; see also *Maerz*, *supra*, at 719-20.

<sup>68</sup> 379 Mich at 686-689.

discarded rule of capture, and which was applied in several eastern states,<sup>69</sup> or a standard that is not based on reasonableness at all.<sup>70</sup> Water law principles from other states cannot rationally be mixed and matched as Plaintiff suggests. Because Michigan has never followed the harsh, antiquated tests adopted by these states, such authority cannot be used to superimpose distinctions onto Michigan's reasonable-use test which have never been placed there by Michigan law.

### **3. Nestlé Has A Lawful Property Right To Use The Groundwater From Its Land.**

Plaintiff's argument that "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" should be dismissed out-of-hand. In an attempt to cast Nestlé as a stranger who is usurping the legitimate rights of a property owner, Plaintiff asserts that Nestlé merely "purchased the water rights to the Sanctuary property" from the Bollmans. However, Plaintiff ignores the fact that Nestlé also leased the surface land and purchased outright the subsurface ground at the Sanctuary, from a depth of two feet to 1000 feet below the surface. This is the very ground that overlies and contains the source aquifer. This fee simple property ownership provides Nestlé with a property right to use the groundwater, a right just as valid and enforceable as are Plaintiff's riparian rights to use the Dead Stream.<sup>71</sup> As the Ohio Supreme Court recently explained, based on groundwater law indistinguishable from Michigan's, "[t]he title to property includes the right to use the groundwater beneath that property... That right is one of the fundamental attributes of property ownership."<sup>72</sup> Similarly, in *Portage County Board of Commissioners v City of Akron*,<sup>73</sup> the Ohio

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<sup>69</sup> See, e.g., *Martin v City of Linden*, 667 So2d 732, 734 (Ala 1995); *Rothrauff v Sinking Spring Water Co*, 339 Pa 129, 134; 14 A2d 87 (1940).

<sup>70</sup> See, e.g., *Collens v New Canaan Water Co*, 155 Conn 477, 483-84; 234 A2d 825 (1967); *Maddocks v Giles*, 728 A2d 150 (Me 1999).

<sup>71</sup> See Restatement, 2d, Torts § 858, cmt b, p 259; 78 Am Jur 2d Waters § 213.

<sup>72</sup> *McNamara v City of Rittman*, 107 Ohio St 3d 243, 246-47; 838 NE2d 640 (Ohio 2005).

<sup>73</sup> 109 Ohio St 3d 106; 846 NE2d 478 (2006).

Supreme Court, citing *Rittman*, re-affirmed that a party owning the land at a well field has a property interest in the groundwater underlying the land. At the same time, the court rejected the City of Akron's claim that it had an ownership interest in the groundwater because the groundwater eventually found its way to the Cuyahoga River, to which the city had riparian rights. Thus, contrary to Plaintiff's claims, this is a water use dispute between two sets of property owners exercising their lawful property rights. Because Nestlé had a lawful property right to use the groundwater, Plaintiff's conclusion that Nestlé had no such right because it was not a riparian is patently erroneous.

## **II. THE COURT OF APPEALS DID NOT ERR BY AFFIRMING THE TRIAL COURT'S DECISION TO DISMISS PLAINTIFF'S PUBLIC TRUST CLAIMS BASED ON LONG-STANDING PRECEDENTS OF THIS COURT.**

The Court of Appeals concluded that The Dead Stream was not impressed with a public trust because it did not satisfy the log-flotation test for determining navigability first set out by this Court in *Moore* and later affirmed in *Bott*.<sup>74</sup> Plaintiff argues that this holding constitutes clear error because of the Dead Stream's capacity to float 16- to 18-inch chunks of wood known as 'shingle bolts', as well as the existence of an alleged public access point on the stream. According to Plaintiff, this purported "narrowing of the range of waterways protected by the public trust" conflicts with this Court's decision in *Moore, supra*. Contrary to Plaintiff's claims, the Court of Appeals correctly applied over 150 years of precedent from this Court in affirming the trial court's dismissal of Plaintiff's public trust claim. As with the theory Plaintiff advanced for groundwater rights, it is Plaintiff that is advocating a theory that has never been the law in Michigan.

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<sup>74</sup> 269 Mich App at 106.

**A. The Court Of Appeals Complied With The 150-Year-Old Log Flotation Test Established By This Court In *Moore* And Emphatically Re-Affirmed In *Bott* In Reaching Its Public Trust Holding.**

More than 150 years ago, this Court held in *Moore v Sanborne*, that a waterway is navigable, and therefore subject to the public trust doctrine, if it will sustain commercial shipping or if in its natural state it has the capacity to float mill logs.<sup>75</sup> The public trust doctrine is limited to *navigable* waters—it does not apply in any manner to other waters of the state.<sup>76</sup>

In *Bott*, this Court explicitly rejected an alternative recreational-boating test for determining navigability and expressly re-affirmed the log-flotation test initially adopted in *Moore*. First, the Court recognized that the log-flotation test was still governing law in Michigan: “The established law of this state is that the title of a riparian or littoral owner includes the bed to the thread or midpoint of the water, subject to a servitude for commercial navigation of ships and logs...”<sup>77</sup> The Court also observed that, “[s]ince *Moore*, the navigational servitude has only extended to waters meeting the commercial-shipping or log-flotation tests.”<sup>78</sup> The Court stated that “a number of large logs” must be able to float down the stream in question.<sup>79</sup> The Court then applied this long-standing legal principle to the facts before it. Noting that the depths of the two streams at issue were, at one point, six inches and eight inches respectively, the Court explained:

In the instant cases, it appears that the creeks connecting the smaller with the larger lakes are too shallow to permit the flotation of logs. The creeks are, therefore, not navigable under the law as it has heretofore been stated, and only the littoral owners have a right to use the lakes.<sup>80</sup>

Thus, the streams at issue were not subject to the public trust doctrine.

Applying this Court’s long-standing precedents, the Court of Appeals correctly

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<sup>75</sup> 2 Mich at 526.

<sup>76</sup> *Bott, supra*, at 71.

<sup>77</sup> *Bott, supra*, at 60 (citing *Moore*) (footnotes omitted).

<sup>78</sup> *Id.* at 79.

<sup>79</sup> *Id.* at 72 n27.

<sup>80</sup> *Id.* at 60 (footnote omitted).

determined that the Dead Stream was not subject to the public trust. Noting that the undisputed testimony in the summary disposition record established that mill logs customarily ran from 20 to 40 feet in length, the Court of Appeals found no evidence that the Dead Stream had ever been used to float such logs.<sup>81</sup> Moreover, the undisputed evidence indicated that the Dead Stream is only *six inches deep* at its shallowest point, exactly the depth *Bott* determined, as a matter of law, was too shallow to permit the flotation of logs.<sup>82</sup> The court also had before it undisputed evidence that the Dead Stream had historically, in its natural state, been even shallower and narrower than its current dimensions. The Court of Appeals thus correctly applied this Court's precedents in *Moore* and *Bott* in determining that the Dead Stream was not navigable under the log-flotation test, and therefore not subject to the public trust. There was no error in the court's affirmance of the trial court's dismissal of this claim.

**B. The Public Trust Principles Proffered By Plaintiff Are Not Now And Never Have Been The Law In Michigan.**

Firmly foreclosed from establishing navigability via the log-flotation test, Plaintiff is forced to assert that it can establish navigability by other means. But none of the principles Plaintiff espouses have any support in Michigan law. First, relying on language in *Moore* referring to a stream's "capacity for valuable floatage,"<sup>83</sup> Plaintiff insists that navigability can be established by showing the flotation of 16- to 18-inch chunks of wood known as "shingle bolts" or by public access. But even a cursory reading of *Moore* reveals that the "valuable floatage" to which the Court refers is commercial shipping, which Plaintiff has never alleged existed on the Dead Stream, or log-flotation.<sup>84</sup> Plaintiff claims that the Dead Stream is navigable because it has the capacity to float and actually floated shingle bolts. However, Plaintiff cites no authority for

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<sup>81</sup> 269 Mich App at 101.

<sup>82</sup> *Id.* at 101-02.

<sup>83</sup> 2 Mich at 523-24.

<sup>84</sup> *Id.* at 524-26.

this novel proposition, and no Michigan case has ever found a stream navigable based on its ability to float shingle bolts. *Bott* explicitly called for the floating of large logs in order to demonstrate navigability. Indeed, the only decision of this Court to even mention shingle bolts rejected Plaintiff's theory. In *Burroughs v Whitwam*,<sup>85</sup> this Court found the stream at issue non-navigable even though the dissent noted that the stream was capable of floating shingle bolts.<sup>86</sup>

Plaintiff's argument that the public trust can be established by public access is equally unavailing. Plaintiff claims that navigability can be established by the public's "lawful" access to the Dead Stream via the M-20 bridge, which crosses the Dead Stream, and via the Tri-Lakes. It also insists that *Bott* "recognizes" such a test for determining navigability. But, as the Court of Appeals explained,<sup>87</sup> *Bott* does no more than acknowledge that if there is a public access site to a waterway, the members of the public who have access to the site have the same rights to use the water as a littoral or riparian owner.<sup>88</sup> This principle provides no support to Plaintiff, for it confuses public access with the public trust doctrine. Neither *Bott*, *McCardel*, nor any other case has held that public access to a lake or stream automatically renders it subject to the public trust doctrine. Indeed, the Court of Appeals held to the contrary in *Michigan Conference Association of Seventh-Day Adventists v Commission of Natural Resources*.<sup>89</sup> In that case, plaintiff sought a declaratory judgment that, *inter alia*, a portion of Shellenbarger Creek was non-navigable and private, even though M-72 intersected the creek via a bridge. The court rejected the claim that "the availability of access by water, or from a highway" requires a finding "that the lake is open

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<sup>85</sup> 59 Mich 279; 26 NW 491 (1886).

<sup>86</sup> *Id.* at 285 (Champlin, J., dissenting).

<sup>87</sup> 269 Mich App at 102 n73.

<sup>88</sup> *Bott*, *supra*, at 58 nl (citing *McCardel v Smolen*, 404 Mich 89, 96; 273 NW2d 3 (1978); *McCardel* involved an undeveloped road "dedicated to the use of the public," which abutted a navigable lake. 404 Mich at 92-93. It held that the right of the public to access a waterway turned on "the scope of the dedication" of the land at issue by the owner who dedicated the roadway to the public, not the public trust doctrine. *Id.* at 97; see also *Thies v Howland*, 424 Mich 282, 289; 380 NW2d 463 (1985).

<sup>89</sup> 70 Mich App 85; 245 NW2d 412 (1976).

to public use and in that sense navigable.” The court thus found the creek non-navigable due to the absence of any prior logging history, even though M-72 provided public access to the creek.

**C. Even If The Dead Stream Were Subject To The Public Trust Doctrine, The Groundwater Nestlé Is Withdrawing Is Not.**

Nestlé is not withdrawing water from the Dead Stream. Rather, it is pumping water from an aquifer that is the source of springs that feed the Dead Stream. Groundwater obviously cannot be used for commercial navigation or to float logs. Under ordinary public trust principles, therefore, the doctrine does not apply to Nestlé’s withdrawals. Plaintiff, however, claims that “[i]f a tributary forms or sustains a stream, then any removal or diversion that significantly diminishes flows or levels or 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.” Plaintiff’s attempted expansion of the public trust doctrine should be summarily rejected.

*Bott* clearly states that the public trust doctrine applies only to navigable waters and not to all waters of the state.<sup>90</sup> Moreover, numerous Michigan cases have rejected application of the public trust doctrine to non-navigable waters that contribute to a navigable body of water. For instance, in *Burroughs, supra*, the Thread River was found non-navigable and therefore not subject to the public trust doctrine, even though the waters from the stream flowed into the navigable waters of the Great Lakes, the St. Lawrence River, and beyond. This Court found that whether “the waters of the Thread eventually find their way through the Lakes to the St. Lawrence can have no bearing upon the question of its navigability.”<sup>91</sup> The public trust doctrine does not extend to “every little rill or brook, whose waters finally reached these great rivers.”<sup>92</sup>

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<sup>90</sup> 415 Mich at 71.

<sup>91</sup> 59 Mich at 283.

<sup>92</sup> *Id.*; see also *Mich Conference Assn of Seventh-Day Adventists, supra*, at 86 (finding that a 103.7-acre private lake was non-navigable, even though it had an outlet flowing into the navigable AuSable River).

Michigan precedent, therefore, clearly belies Plaintiff's claim that a public trust is imposed on otherwise non-navigable waters merely because they are connected with or eventually flow into navigable waters that are subject to the trust.

Lacking authority under Michigan law, Plaintiff relies on a California decision, *Nat'l Audubon Soc'y v Superior Court of Alpine Co.*<sup>93</sup> This decision does not reflect Michigan law and is readily distinguishable. The California Supreme Court held in that case that the public trust doctrine must be considered when a court or regulatory agency examines diversions of non-navigable tributary streams. But the California court's extension of the public trust doctrine was based entirely on the "collision course" between existing public trust principles and that state's "prior appropriation" doctrine of water regulation. This doctrinal conflict would never arise in Michigan because this Court's precedents have adopted the reasonable-use rule, not California's prior appropriation rule. Had the reasonable-use standard been applied in California, there would have been no need to resort to the public trust doctrine, because that standard would have mediated the competing interests in the use of the water. For this reason, there is no need in this State to regulate tributary waters via the public trust doctrine. And not even California has gone so far as to apply the public trust doctrine to groundwater such as Nestlé is withdrawing here. The non-navigable tributary waters at issue in the *Nat'l Audubon Soc'y* case were five freshwater streams. A subsequent California case held that "the [public trust] doctrine has no direct application to groundwater sources."<sup>94</sup>

Finally, Plaintiff erroneously asserts that all water in the state is publicly owned, regardless of navigability. Thus, it contends, "[t]he 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

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<sup>93</sup> 33 Cal 3d 419; 658 P2d 709; 189 Cal Rptr 346 (1983).

<sup>94</sup> *Santa Teresa Citizen Action Group v City of San Jose*, 114 Cal App 4th 689, 709; 7 Cal Rptr 3d 868 (2003).

legal fact that these waters are a public resource.” Contrary to Plaintiff’s argument, all waters of the state are *not* publicly owned. In Michigan, the public trust doctrine imposes a public easement over navigable waters, the beds of which remain under the private ownership of the riparian or littoral holder.<sup>95</sup> *Bott* re-affirmed that only *navigable* waterways, and not all waters of the state, are subject to the public trust.<sup>96</sup> Because the public trust doctrine recognizes that riparian owners maintain their title, subject only to a public easement, it does not equate public trust with public ownership. Since *Bott* holds that many waters of the state are not subject even to the more limited public trust doctrine, *a fortiori* the state does not publicly own all waters. Indeed, if all waters of the state were publicly owned, the public trust doctrine would not be needed in the first place; if the public already owned the water, it would not need an easement over that very same water.

The authority cited by Plaintiff in support of its proposition is inapposite. *Collins v Gerhardt*,<sup>97</sup> held only that the public has the right to fish in waterways otherwise navigable under the rule of *Moore*. Similarly, reference to “public trust or riparian rights” in the permitting provisions of the Inland Lakes and Streams Act<sup>98</sup> does not establish public ownership of inland lakes and streams. Thus, the Court of Appeals correctly concluded that water, “while a resource common to all Michigan citizens, is neither owned by the state nor subject to the public trust absent a determination that the body of water in question is navigable.”<sup>99</sup>

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<sup>95</sup> *Nedtweg v Wallace*, 237 Mich 14, 16-17; 208 NW 51 (1926).

<sup>96</sup> 415 Mich at 71.

<sup>97</sup> 237 Mich 38; 211 NW 115 (1926).

<sup>98</sup> MCL 324.30106.

<sup>99</sup> 269 Mich App at 105.

## CONCLUSION

The Court of Appeals correctly applied settled Michigan law, by applying the flexible reasonable-use balancing test to disputes between a riparian user and groundwater user, consistent with this Court's prior decisions in *Dumont*, *Schenk*, and *Bernard*, and the Court of Appeals' own prior decision in *Maerz*, and by applying the clear holding of this Court in *Bott* to reject Plaintiff's radical public trust argument. Thus, for the foregoing reasons, Nestlé respectfully requests that this Court peremptorily affirm the Court of Appeals on the issues Plaintiff raises in its Appeal.

Respectfully submitted,

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