

STATE OF MICHIGAN

SUPREME 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,  
Appellants,

v

NESTLÉ WATERS NORTH AMERICA INC., a Delaware corporation,  
Appellee,

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

Supreme Court Docket N° 130802

COA Docket N° 254202

Mecosta County Circuit Court  
Case N° 01-14563-CE  
Hon. Lawrence C. Root, Circuit Judge

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,  
Appellants,

v

NESTLÉ WATERS NORTH AMERICA INC., a Delaware corporation,  
Appellee,

COA Docket N° 256153

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Hon. Lawrence C. Root, Circuit Judge

*130802  
reply*  
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**PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANT-APPELLEE NESTLÉ WATERS' OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL**

May 5, 2006

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In its attempt to dissuade this Court from granting leave to appeal, Defendant-Appellee Nestlé Waters North America Inc.'s ("Nestlé" or "Defendant") argues that the Legislature has recently addressed the issue with water withdrawal legislation, and also that the Court of Appeals adoption of a new "reasonable use balancing test" is not really anything new – that somehow this state has already been following the balancing test prior to this case. However, neither of these arguments have merit nor undermine the importance of this Court's review of this case.

First, the Legislature's recent water withdrawal law expressly incorporates riparian and related common law issues. In doing so, the Legislature has expressly provided that there is still an important role for the courts in determining whether water withdrawal schemes like Nestlé's are lawful and appropriate.

Second, the Defendant makes completely unsupported assertions that Michigan has always followed an all purpose "reasonable use balancing test" and that protection of riparian rights from diversions that diminish the flow or level of watercourses has "never been the law in Michigan."<sup>1</sup> However, not even the Court of Appeals agrees with this outlandish assertion. The Court of Appeals recognized that "a non-riparian ... is liable for interference caused to a riparian owner by such use without reference to the reasonableness of the use." *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 56-58, n 33, n 34; 709 NW2d 174 (2005). Restatement of Torts, 2d, Sec. 858(2) specifically states that groundwater rules in Sec. 858 are subject to the riparian rules in Secs. 850 to 857.<sup>2</sup>

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<sup>1</sup> "... Michigan applies its flexible reasonable-use test to disputes between competing riparian users, *Dumont v Kellogg*, 29 Mich 420; 18 Am Rep 102 (1874), and between competing groundwater users, *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917). 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." Defendant Appellees' Opposition to Plaintiffs-Appellants' Application for Leave, pp. 23-24 ("Nestlé's Opposition").

<sup>2</sup> See also Trial Court Opinion discussing *Dumont* and *Schenk*, found at Tab 2, Pltf's Application Appx, 44-47; 269 Mich App at 56-58, 61-62 and n 38; *Thompson v Enz*, 379 Mich 667, 668; 154 NW2d 473 (1967), cited by the Court of Appeals, 269 Mich App at 72; *Hoover v Crane*, 362 Mich 36; 106 NW2d 563 (1960); cited by the Court of Appeals, 269 Mich App at 57, n 34, Plft's Application Appx, Tab 1; Plaintiffs' Application, pp. 15, 19-24.

Moreover, both Defendant's position and the Court of Appeals decision violate "established rules of property" pertaining to riparian ownership and underscore the major jurisprudential issues presented by the Plaintiffs' Application for Leave. An all purpose "reasonable-use balancing test" will not work given the matrix of private riparian rights, ownership, and public trust issues that arise in a water dispute that involves a large-scale removal of water for sale which significantly interferes with riparian property or public trust rights to the surface of a lake or stream. Indeed, the Court of Appeals' all purpose reasonable use balancing test bears a remarkable resemblance to the principles of the Restatement of Torts 2d, Sec. 858.<sup>3</sup> Both the "balancing test" and Sec. 858 grant non-riparian off-tract or out-of-watershed tributary groundwater withdrawals equal to, if not preferred, to the riparian rights in a stream or lake.<sup>4</sup> Such a radical departure of common law rules associated with the rights and uses of riparians or the public to the lakes and streams of Michigan will substantively relegate riparian and public trust rights to a common denominator with those who extract tributary groundwater for export or sale.

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<sup>3</sup> [W]e find that ... the reasonable use balancing test is similar to the Restatement rule." 269 Mich App at 53. While labeling this approach a "reasonable use balancing test," the Court of Appeals adopted the an almost identical approach to the Restatement: "[W]e hold that *the location of the use is but one of the factors* that should be considered in balancing ..." *Id.* at 72-73, n 49. This conflicted with the court's own concession that under "reasonable use" law "water uses that benefit the riparian land or the land from which the groundwater was removed are given preference over water uses that ship the water away ..." *Id.* at 72.

<sup>4</sup> Even though the extractor has no riparian rights in common with the riparian owners to the stream or lakes. As noted by the Court of Appeals *Dumont's* "reasonable use" balancing test applied only "as between riparian owners," 269 Mich App at 55, 57, or "between two competing groundwater users." *Id.* at 65 [describing *Maerz*] and 61-62 [*Schenk*]. All groundwater cases have involved two competing groundwater users. *Id.* at 61-66. However, note that the Sec. 858 groundwater balancing test "is governed by the principles of Sec. 850 to 857 [riparian limitations are preserved]." Sec. 858(2). State common law limitations of states that protect riparian rights are preserved.

**I. Defendant Attempt to Block the Resolution of Major Jurisprudential Questions of the Common Law of Water Is Contradicted by the Express Language of the Water Withdrawal Legislation**

Nestlé argues for a distorted application of separation of powers doctrine because of a new law regulating water withdrawals.<sup>5</sup> However, the Legislature expressly preserved riparian and common law rights and the protection of natural resources:

This part *shall not be construed as affecting, intending to affect, or in any way altering or interfering with common law water rights* or the applicability of other laws providing for the protection of natural resources or the environment. [MCL 324.32728]

Before the State may approve any water withdrawal it must be demonstrated that:

(d) The proposed use is *reasonable under common law principles of water law in Michigan*. [MCL 324.32723(6)(d)]

As to withdrawals for bottled water, it must be shown that, “(c) The withdrawal will be conducted in such a manner as to *protect riparian rights as defined by Michigan common law*.” MCL 325.1017(3)(c).<sup>6</sup>

Ironically, Nestlé ignores the real separation of powers problem in this case by asking this Court to let stand the Court of Appeals’ adoption of an all purpose balancing test similar to Sec. 858 that violates the “established rules of property.”<sup>7</sup> The Michigan Legislature enacted Public Acts 33 and 37 of 2006 to regulate large withdrawals, but it did not adopt Sec. 858 of the Restatement or a “reasonable use balancing test” in place of the *common law*. In *Maddocks v Elbridge Giles*, 1999

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<sup>5</sup> Nestlé’s Opposition, p. 16; 2006 PA 33 (S.B. 850); 2006 PA 37 (S.B. 857), Pltfs’ Application Appx, Tab 25.

<sup>6</sup> See also Sec. 17(3)(b) which requires compliance with the common law.

<sup>7</sup> *Bott v Natural Resources Comm’n*, 415 Mich 45, 77-78, 84; 327 NW2d 838 (1982). Nestlé acknowledges such an “established rule of property.” This also invokes constitutional protections against the taking of private riparian property rights. *Hilt v Weber*, 252 Mich 198, 223; 233 NW 159 (1930). Too, unlike *Bott*, the private riparian and public trust rights in this case are aligned with each other against a diversion of water for sale. This of course is what distinguishes this case from the general groundwater rules applicable to withdrawals of water from a common aquifer as between competing groundwater users.

ME 63;728 A2d 150; 199 Me Lexis 71 (1999) (attached to Nestlé's Opposition, Appx. Vol II, Tab S [P12] - [P13]), Maine Supreme Court recently rejected Sec. 858 of the Restatement:

... we are not persuaded that we, as opposed to the Legislature, should be weighing the heavy policy considerations involved in this issue, not the least of which is [sic] the reliance of land owners on the present property laws. ... We conclude that at this time the question of whether to depart [adopt Sec. 858] from our common law on groundwater is best left to the Legislature.

\* \* \*

... the Legislature chose to leave the common law as it currently stands.

The Court of Appeals decision flies in the face of established riparian law and the express directives in the newly enacted Legislation, and thus implicates both separation of powers and takings provisions.<sup>8</sup> These major water issues beg for resolution under MCR 7.302(B)(3). If not, the fundamental underpinning of Michigan's riparian and public trust law will collapse in the face of newly gained access to Michigan's water by national and global demands for water.

**II. Michigan Law Has Always Recognized an Off-Tract and/or out of Watershed Limitation, Particularly Where Such a Diversion or Transfer Is Made by a Non-Riparian for a Wholly Artificial Purpose That Diminishes or Impairs a Lake or Stream**

Nestlé claims that the Court Appeals "specifically rejected the on-site/off-site distinction of the reasonable-use rule,"<sup>9</sup> and that Michigan law has never actually recognized such a distinction. However, it is simply not true that Michigan has "never" imposed or recognized limitations on off-tract or out of watershed transfers of water. *Schenk* expressly recognized such limitation even where groundwater was diverted for off-tract sale. *Schnek v Ann Arbor*, 196 Mich at 82-84. If the Court of Appeals did reject the established substantive limitation for all water disputes, then it has created

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<sup>8</sup> Mich Const 1963, art 3, § 2; Mich Const 1963, art 10, § 2; US Const, Am V & XIV; *Hilt v Weber*, *supra*, 252 Mich at 223.

<sup>9</sup> Nestlé's Opposition, p. 24. Nestlé also mistakenly asserts that Plaintiffs' counsel has confused reasonable and correlative rights. Nestlé's Opposition, n 15, p. 28. Plaintiffs' counsel treat "reasonable user" or the "American Rule" and "correlative rights" as "similar" because both doctrines impose liability for off-tract or out-of-watershed removals. The Court of Appeals did the same. 269 Mich App at p. 53, n 39, pp. 65-66.

the potential for a free-for-all rush for liquid gold to export the State's water.<sup>10</sup> Riparian rights that used to be only "common" in relation to other riparian landowners would be subject to the rights of all other landowners who could remove and sell the springs or tributary groundwater.<sup>11</sup> The cardinal principle that riparian waters and rights cannot be severed or transferred off-site but must benefit the land<sup>12</sup> or that riparian water may not be removed for use out of a watershed where it diminishes or impairs a stream,<sup>13</sup> would be ignored.

Defendant has tried to wedge its way under the umbrella of all groundwater users,<sup>14</sup> despite the fact that "[t]his is not a case presenting a dispute between water users who are *in pari materia* ... equal standing." Tr Ct Op, p. 41, Pltfs' Application, Appx, Tab 2. Plaintiffs do not seek to prevent the diversion of any of the state's groundwater.<sup>15</sup> This case was brought to resolve the conflict between riparian rights and the extraction and diversion of water from a spring aquifer.

Oddly, Nestlé contradicts its reliance on the rules regulating competing groundwater users by acknowledging the instant appeal involves an "unusual context" of water law.<sup>16</sup> The specific circumstances presented by this appeal require great care to make sure that private riparian property rights or public trust rights are not destroyed or impaired by trying to apply an amorphous all purpose

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<sup>10</sup> Global consumption of bottled water alone reached 41 billion gallons in 2004. Arnold, Emily, Bottled Water: Pouring Resources Down the Drain (Earth Policy Institute, Feb. 2, 2006-1), [www.earth-policy.org/Updates/2006/Update51\\_printable.htm](http://www.earth-policy.org/Updates/2006/Update51_printable.htm).

<sup>11</sup> In *Dumont v Kellogg*, Justice Cooley recognized that a riparian right to use a lake or stream is "common to all," referring to all *riparian owners* on the watercourse. 29 Mich at 425.

<sup>12</sup> *Thompson v Enz*, 379 Mich at 686-87.

<sup>13</sup> Court of Appeals decision, 269 Mich App at 56-57, n 33, n 34.

<sup>14</sup> Nestlé's Opposition, n 8, p. 14. *Amici* filed briefs in support of Plaintiffs-Appellants as well, which highlight the significance of the jurisprudential issues in this case.

<sup>15</sup> Nestlé's Opposition, p. 17.

<sup>16</sup> Nestlé Opposition, p. 14; "[T]his is the first reported case in Michigan explicitly involving a conflict between a groundwater user and riparian user." *Id.*, at p. 23.

St 3d 243; 2005 Ohio 6433; 838 NE2d 640 (2005), the court ruled that groundwater was a property right within the takings clause in an action for groundwater depletion against the city as a result of its diversion of water for the city's residents. The court noted that reasonable use liability in a dispute between a property owner and diverter "greatly expanded," 838 NE2d at 644, water rights protection, "rather than limiting them." *Id.*

**III. Even Applying the Court of Appeals' All Purpose "Balancing Test," an Interference with Plaintiffs' Traditional Riparian Property Rights Should Be Given Greater Weight than an Artificial Use by a Non-Riparian for Private Diversion and Sale of Water That Does Not Benefit the Land and Is Beyond the Watershed**

There are four principal riparian rights: the right to use water for general purposes, such as bathing, domestic use; the right to "wharf out," the right to access for boating and fishing, or the right of livelihood, and the right to accretions. *Thompson v Enz, supra*, at 379 Mich at 686; *Hilt v Weber, supra*, 252 Mich at 224-225; Cameron, Michigan Real Property Law, 3d Ed, p 95, and also the corporeal right to the flow of a stream. *Thompson v Enz, supra*, at 677.<sup>21</sup> The private riparian right of access to boat or fish extends to the *entire surface* of the lake or stream to which they are riparians. *Burt v Munger*, 314 Mich 659, 664; 23 NW2d 117 (1946) (filling of only 7,500 square feet interfered with plaintiff's ability to fish and boat on the lake); *Kerley v Wolfe*, 349 Mich 350, 357; 84 NW2d 748 (1957). Riparian rights "are property, for the taking ... of which by the State compensation must be made." *Hilt v Weber*, 252 Mich at 224-225. Under *Thompson v Enz*, 379 Mich at 686, riparian rights "are not alienable or severable, divisible or assignable apart from the land which includes therein, or is bounded, by a natural water course." The interference with these riparian property rights should not have been balanced by the Court of Appeals with an artificial use

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<sup>21</sup> While Michigan is a "reasonable use" state, the right to flow is still protected when water is diverted off-tract for sale or use elsewhere; that is, it does not benefit the land, which is why the Supreme Court in *Schenk v Ann Arbor, supra*, recognized that off-tract diversions were unlawful where "*streams are materially diminished in flow.*" 196 Mich at 83. "Some courts have applied the reasonable use theory in cases between riparians and the natural flow theory in cases between a riparian and non riparian." Restatement of Torts, 2d, Sec. 850A, p 212; *Dumont v Kellogg, supra*, 29 Mich at 421; *Hoover v Crane, supra*, 362 Mich at 42; *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902).

“balancing test.”<sup>17</sup> It is crucial to protect established riparian rights that prevent harm, impairment, or interference due to the diminishment of the flow of a stream. Riparian use and enjoyment of the surface of a lake or stream depend on a stable flow and level of water; that is, their surface use has no impact on flow, level, or quantity.<sup>18</sup> Reasonable use law has always protected riparians from the reality of interference or harm due to off-tract or out of watershed severance or diversion of water for sale. If groundwater extractions for sale elsewhere were viewed on par or in common with riparian rights, then the entire underpinnings of riparian property rights and reasonable use in common between riparian users would collapse.

Nestlé relies on an argument that *Schenk v City of Ann Arbor* tracked *Dumont’s* “flexible balancing test.” However, *Schenk* simply modified the English common law rule of no liability in such a case, by imposing liability on a city where it diverts and sells water to its residents and interferes with an adjacent landowner’s on-tract well.<sup>19</sup> And as for disputes between a groundwater user and riparian landowner, *Schenk* expressly recognized the rule of no “material diminishment” of the flow of a stream, following *Meeker v City of Orange*.<sup>20</sup>

Defendant fails to recognize that the courts impose liability to protect, not limit, riparian and groundwater property rights against off-tract diversions. In *McNamara v City of Rittman*, 107 Ohio

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<sup>17</sup> Moreover, private riparian property rights or public rights which have existed since statehood should not be sacrificed by an overly broad test that requires an individual property owner to suffer significant individualized harm because of a greater “social or economic benefit.” This Court has guarded private property against such exactions under principles of takings law. *Hilt v Weber, supra*, n 10. The constitution does not permit the use of governmental power that transfers or shifts private property rights from one property owner to another in the name of effusive public or societal benefits. *Wayne County v Hathcock*, 471 Mich 44; 684 NW2d 765 (2004).

<sup>18</sup> This is not to argue for “natural flow” theory, as represented in Nestlé’s Opposition, but a recognition that flow is essential for common use by all riparians. Michigan is a riparian state that depends on protection of flows and levels under reasonable use law.

<sup>19</sup> Regardless how Defendant may label the test, this aspect of *Schenk* closely parallels a variant of the reasonable use doctrine ... often called the correlative rights doctrine.” Court of Appeals, 269 Mich App at 58-59; Plaintiffs’ Application, p. 20.

<sup>20</sup> *Schenk, supra*, 196 Mich at 82-84, recognized by the Court of Appeals, Application Appx, Tab 1, 269 Mich App at 61, including n 38; see also n 40, at 65-66.

undertaken by a non-riparian for private diversion and sale of water that does *not* benefit the land, *Thompson v Enz, supra; Burt v Munger, supra*, 314 Mich at 664.

It is undisputed that Defendant Nestlé’s pumping and diversion, even at levels as low as 150 to 170 gpm, of water for sale has resulted in substantial harm to and interference with Plaintiffs riparian rights and values. 269 Mich App at 79. In some places, such as near the Doyle’s residence, the stream is no longer passable. 269 Mich App at n 59, pp. 79-80 (“lasting changes”).<sup>22</sup>

Defendant’s large-scale water removal has interfered with the flow, level, and surface of the stream and deprived Plaintiffs’ of their riparian use to the surface of the watercourse. See *Burt* and *Kerley, supra*. *Schenk* recognized that there cannot be an interference with or diminishment to riparian flows. 196 Mich at 82-84. The Court of Appeals “balancing test” is therefore inconsistent with *Schenk* and failed to apply the *Kerley* and *Burt* test for interference with riparian right to use and enjoyment of the surface of lake or stream. The Court of Appeals’ sweeping “balancing test” for all water disputes should not apply to the special circumstance where a non-riparian diverts the water off-tract and interferes with the uses of riparians. *Burt, supra, Thompson, supra; Dumont, supra*, 29 Mich at 421 (1874); *People v Hulbert, supra; Hoover v Crane, supra*, 362 Mich at 42.<sup>23</sup>

#### **IV. The Public Trust Doctrine Imposes Judicial Limitation on Withdrawals of Water from Non-Public Trust Tributaries that Harm Public Trust Waters and Public Uses**

The public trust under *Moore v Sanborne*, 2 Mich 519, 523-524; 59 Am Dec 209 (1853), does not require a showing that “large logs” have been or could be floated on the stream.<sup>24</sup> When the “capacity for valuable floatage” test from *Moore* is applied to the undisputed fact that commercial shingle bolts can be floated on the stream, the public trust doctrine applies. At the very

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<sup>22</sup> For public and riparian use and history of floating logs, see Pltfs’ Application Appx., Tabs 11-13, 23, 24.

<sup>23</sup> Such a dramatic shift in riparian rights (an “established rule of property”) with all its social and economic consequences would require legislation and just compensation. *Bott v Natural Resources Comm’n, supra*, 415 Mich at 77-78; see also *Hilt v Weber, supra*, 252 Mich at 223, n 6 (“Titles should be secure and property rights stable”).

<sup>24</sup> Plaintiffs’ Application, pp. 36-38. Nowhere in *Moore* does the Court define logs as 20 to 40 feet or “large.” The public trust turns on a log’s capacity for valuable floatage.

least, Plaintiffs raised a substantial and disputed question of fact regarding the size and nature of the stream and its historical and present ability to float logs.<sup>25</sup>

Further, *Bott* recognized public access as a means for the public to enjoy waters of the state. M-20 and the Tri-Lakes and connecting channels, including the lower reaches of the Dead Stream, provide public access from a highway and admittedly public trust waters. It is inconsistent to say that the public has access, and has used the waters of the Dead Stream to the M-20 Bridge (the area effected by Nestlé's removal) but does not have the right to protect that public access or use.

Defendant fails to recognize that the instant appeal is not a dispute between private riparians and public rights.<sup>26</sup> The Court of Appeals decision has grossly altered water law principles that protect streams and lakes from harm caused by removal and diversion of water for sale. It would arbitrarily ignore the singular connection between tributary waters and public trust waters to deny a cause of action to either a riparian or member of the public for harm to a lake or stream. To be sure, this question is one of first impression in Michigan. But this Court is not without precedent. In *National Audubon v Superior Court of Alpine County*, 33 Cal 3d 419; 658 P2d 709 (1983), the California Supreme court rejected the arbitrariness of denying a cause of action under the public trust doctrine simply because the diversion of water was from a tributary to public trust waters. It is the impairment to the public trust that is at the core of the cause of action for protection from harm of the public trust. With the variable lake levels in Michigan's Great Lakes and lakes and streams and uncertain effects of climate change,<sup>27</sup> Michigan can ill afford to put its head in the sand by

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<sup>25</sup> See Plfts' Application Appx., Tabs 11, 12, 13, 22, 23, 24; Plaintiffs' Motion for Reconsideration, Rehearing or Clarification of Order Granting Defendant's Motion for Summary Disposition of the Public Trust Doctrine to the Extent of Navigability and Brief in Support, October 11, 2002.

<sup>26</sup> Here the *jus privatum* and *jus publicum* are aligned against a non-riparian's harm to private and public waters. See *Glass v Goeckel*, 473 Mich 667; 703 NW2d 58 (2005); *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926).

<sup>27</sup> See Time Magazine, *Special Report: Global Warming*, April 3, 2006.

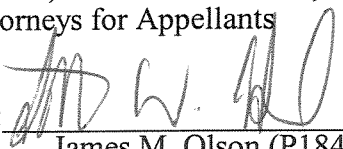
capriciously refusing to recognize a remedy for diversions of water that harm the public trust in our waters.

Finally, the Court of Appeals decision must be corrected for characterizing Plaintiffs' public trust claims as extending "all groundwater of the state," 269 Mich App at 104, and that "water...is not owned by the state." *Id.*, at 105. These issues represent major questions which were not directly presented to the Court of Appeals, and this Court should reverse or clarify these errors before they severely disrupt the law applied by lower courts over such critical issues as those raised on this Application for Leave.

### Conclusion and Requested Relief

Defendant Nestlé actually highlights the fact that this is a unique and precedential case for Michigan's water law jurisprudence, supporting judicial review of the significant issues raised by this Application. Accordingly, Plaintiffs-Appellants request this Court to grant leave on all questions presented pursuant to MCR 7.302(B)(3). The Court of Appeals misconstrued riparian and groundwater property rights in adopting an all purpose balancing test for all water disputes in Michigan. In doing so, the court committed clear error under MCR 7.302(B)(5). Finally, Plaintiffs have acknowledged the State is not a party for purposes of MCR 7.302(B)(2), but the public interest presented by the issues in the Application demonstrates the sweeping magnitude of the questions presented. MCR 7.302(B)(3).

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