

An Overview of Existing Water Law in Michigan Related to Irrigation Water Use and Riparian Considerations

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The Michigan Right to Farm Act (P.A. 93 of 1981, as amended) provides Michigan farmers with limited protection from nuisance suits. The statute authorized the Michigan Commission of Agriculture to develop and adopt Generally Accepted Agricultural and Management Practices (GAAMPs) for farm operations. Adherence to the GAAMPs does not provide a complete barrier against lawsuits, but it does give protection from nuisance litigation in many circumstances. The act defines a “Farm operation” as including:

The operation of machinery and equipment necessary for a farm including, but not limited to, *irrigation* and drainage systems and *pumps* ... (emphasis added)
[286.472, Sec. 2 (b) (iii)]

It also states that:

A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices ... [286.473, Sec. 3 (1)]

A farm or farm operation that is in conformance with subsection (1) shall not be found to be a public or private nuisance as the result of any of the following:

- (a) A change in ownership or size.
- (b) Temporary cessation or interruption of farming.
- (c) Enrollment in government programs.
- (d) *Adoption of new technology* (emphasis added).
- (e) A change in type of farm product being produced.

[286.473, Sec. 3 (3)]

Sec. 3 (3) means that a farm operation conforming to GAAMPs may install a new irrigation system without becoming a public or private nuisance.

A key question is: what constitutes a nuisance suit relating to irrigation from which the Michigan Right to Farm Act provides protection? The answer to this question is uncertain because as of December, 2002 no litigation on this point has been adjudicated, but examples may include:

- A neighbor sues over the noise of the irrigation pump(s) running.
- A neighbor sues because the wind caused some of the spray irrigation water to drift onto their property.

The Michigan Right to Farm Act, however, does **NOT** provide any protection regarding water use conflicts, since these are a matter of common law that Act 93 cannot preempt.

Groundwater Rights

The basis for Michigan groundwater law is the bundle of real property rights that attach to the waters subjacent to the land. Water rights in Michigan, and in the eastern United States in general, are subject to the *reasonable use doctrine* and the *correlative rights rule*. The reasonable use doctrine permits a landowner to make use of groundwater beneath their property so long as such use does not 1) unreasonably interfere with the rights of neighboring landowners to reasonable use groundwater from beneath their property; 2) decrease the value of the neighboring land for legitimate uses; and 3) unreasonably impair the quality of the groundwater. The correlative rights principle holds that in addition to being reasonable, water use during times of shortage must also be prorated among all users.

The reasonable use rule in Michigan common law dates from 1917 with the *Schenk v. City of Ann Arbor* case [196 Mich 75, 163 NW 109 (1917)]. In this case, the Michigan Supreme Court held that the City of Ann Arbor had no greater rights to use groundwater than a private landowner. The plaintiffs were awarded damages for the cost of digging their well deeper. The

reasonable use rule was restated as the “Michigan rule” by the Court of Appeals in *United States Aviex Co. v. Travelers Insurance Company* [125 Mich App 579, 339 NW2d 838 (1983)].

From an irrigation point of view, the 1922 Michigan Supreme Court case *Bernard v. City of St. Louis* [220 Mich 159, 189 NW2d 891 (1922)] is of particular note because it required the defendant to stop interfering with an adequate supply of water for the plaintiff’s reasonable use and it awarded damages in the form of compensation for pumping equipment that the plaintiff had to install.

In 1982, the Michigan Court of Appeals reaffirmed the outcome of *Bernard*, but interpreted the issue of groundwater use in the particulars of *Maerz v. U.S. Steel Corp.*[116 Mich App 710 (1982)] to be subject to the correlative rights rule, rather than the reasonable use doctrine. In *Maerz*, after it was shown that the defendant’s uses of groundwater caused the loss of the plaintiff’s well (their only source for water supply), the court held that U.S. Steel could not continue in its use of groundwater.

As summarized by Ryan and Leighty (1987), the law in Michigan concerning “reasonableness” has been case law:

The experience in Michigan has been to produce “facts” at trials to determine whether a particular use (in that specific situation or set of circumstances) is “reasonable” or “unreasonable.” There are two balancing processes involved. After the facts are presented, the trial judge (or jury) must determine the reasonableness of the use in that narrow context. This first process is sometimes called “balancing the interests.” Under the “reasonable use rule,” the interests to be balanced are the rights of each landowner to use the waters of an underlying aquifer in a reasonable and ordinary manner, with the understanding that all neighbors have the same rights and expectations of land use and water use. If the “balancing the interests” process indicates that the use is “unreasonable,” then, by definition, an unlawful “nuisance” has been established. (If the use is “found” to be “reasonable”, the case ends without further deliberation.) However, once a nuisance has been established, the next procedural step in the case is the second process. Here the finder-of-facts (judge and/or jury) determines what remedy to apply against the defendant water user – money damages to pay for losses and/or an injunction to stop the excessive use or to modify its impact and application. This second process is sometimes called “balancing-the-equities.”

Until the passage of PAs 33 - 37 of 2006, there were no Michigan statutes that regulated the removal of any quantity of groundwater from an aquifer. In the absence of statutory regulation prior to 2006, a simple definition of reasonable use for Michigan irrigators had been stated as “a use which will keep your neighbors out of court” (Bralts and Leighty, no date). These authors also offer this advice: “Thus if a neighbor complains that your irrigation pumping is causing their well to go dry, a prudent response would be to offer to deepen their well and consider it an irrigation expense.”

On November 29, 2005, the State of Michigan Court of Appeals published its appellate review and ruling in the case of *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, which had been initially adjudicated in Mecosta Circuit Court (docket numbers 256153 and 254202). This document provided a very thorough review of Michigan Water Law in sections **III. Groundwater Claim, B. Michigan Water Law**, pp. 13 – 21 and **C. Application of the Law, 1. The Reasonable Use Balancing Test**, pp. 22 – 25. These sections of the appellate review and ruling are included as Appendix A of this document.

Recent Legislative Activity

PA 33 of 2006, which amended 1994 PA 451, defined in law several key terms and concepts that relate to irrigation in Michigan:

- “water withdrawal” means the removal of water from its source for any purpose
- “adverse resource impact” means either of the following:
 - * Decreasing the flow of a stream by part of the index flow such that the stream’s ability to support characteristic fish populations is functionally impaired.
 - * Decreasing the level of a body of surface water such that the body of surface water’s ability to support characteristic fish populations is functionally impaired.”
- “Index flow” means the 50% exceedance flow for the lowest flow month of the flow regime, for the applicable stream reach, as determined over the period of record or extrapolated from analyses of the United States geological survey stream flow gauges in Michigan.
- “Large quantity withdrawal” means 1 or more cumulative total withdrawals of over 100,000 gallons of water per day average in any consecutive 30-day period that supply a common distribution system.
- “New or increased large quantity withdrawal” means a new water withdrawal of over 100,000 gallons of water per day average in any consecutive 30-day period or an increase of over

100,000 gallons of water per day average in any consecutive 30-day period beyond the baseline capacity of a withdrawal.

- “New or increased withdrawal capacity” means new or additional water withdrawal capacity to supply a common distribution system that is an increase from the person’s baseline capacity. New or increased capacity does not include maintenance or replacement of existing withdrawal capacity.

PA 33 of 2006, which took effect on February 28, 2006, stipulated that:

- A person shall not make a new or increased large quantity withdrawal from the waters of the state that causes an adverse resource impact to a designated trout stream.
- Beginning 2 years after the effective date of the amendatory act that added this section [i.e., February 28, 2008], a person shall not make a new or increased large quantity withdrawal from the waters of the state that causes an adverse resource impact.
- This section does not apply to the baseline capacity of a large quantity withdrawal or a well capable of making a large quantity withdrawal that existed on the effective date of the amendatory act that added this section.
- This section does not apply to a withdrawal that is utilized solely for fire suppression.
- Until a water withdrawal assessment tool becomes effective upon legislative enactment pursuant to the recommendations of the groundwater conservation advisory council under section 32803, there is a rebuttable presumption that a new or increased large quantity withdrawal will not cause an adverse resource impact ... under either of the following circumstances:
 - (a) The location of the withdrawal is more than 1,320 feet from the banks of a designated trout stream.
 - (b) The withdrawal depth of the well is at least 150 feet.
- A presumption under subsection (1) may be rebutted by a preponderance of evidence that a new or increased large quantity withdrawal from the waters of the state has caused or is likely to cause an adverse resource impact.
- Except as authorized by the public health code, 1978 PA 368, MCL 333.1101 to 333.25211, a local unit of government shall not enact or enforce an ordinance that regulates a large quantity withdrawal. This section is not intended to diminish or create any existing authority of municipalities to require persons to connect to municipal water supply systems as authorized by law.
- Except as provided in subsection (10), the following persons shall obtain a water withdrawal permit prior to making the withdrawal:
 - (a) A person who develops withdrawal capacity to make a new withdrawal of over 2,000,000 gallons of water per day from the waters of the state, other than the Great Lakes and their connecting waterways, to supply a common distribution system.
 - (b) A person who develops increased withdrawal capacity beyond baseline capacity of more than 2,000,000 gallons of water per day from the waters of the state, other than the Great Lakes and their connecting waterways, to supply a common distribution system.

(c) A person who develops withdrawal capacity to make a new withdrawal of more than 5,000,000 gallons of water per day from the Great Lakes and their connecting waterways to supply a common distribution system.

(d) A person who develops increased withdrawal capacity beyond baseline capacity of more than 5,000,000 gallons of water per day from the Great Lakes and their connecting waterways to supply a common distribution system.

Subsection 10 - The following are not required to obtain a permit under this section:

(a) A community supply owned by a political subdivision that holds a permit under the safe drinking water act, 1976 PA 399, MCL 325.1001 to 325.1023.

(b) A person who makes seasonal withdrawals of not more than 2,000,000 gallons of water per day average in any consecutive 90-day period to supply a common distribution system.

(c) A person engaged in producing bottled drinking water who receives approval by the department under a water source review conducted under section 17 of the safe drinking water act, 1976 PA 399, MCL 325.1017.

PA 35 of 2006, which took effect on February 28, 2006, stipulated that:

- Except as otherwise provided in this section, the owner of real property who intends to develop capacity on that property to make a new or increased large quantity withdrawal from the waters of this state shall register the withdrawal with the department after using the assessment tool, if required under this part, and prior to beginning that withdrawal. A registration under this section may be made using the online registration process.

The following persons are not required to register under this section:

(a) Subject to subdivision (c), a person who has previously registered for that property under this part or the owner of real property containing the capacity to make a withdrawal that was previously requested under this part, unless the property owner develops new or increased withdrawal capacity on the property of an additional 100,000 gallons of water per day from the waters of the state.

(b) A community supply required to obtain a permit under the safe drinking water act, 1976 PA 399, MCL 325.1001 to 325.1023.

(c) A person required to obtain a permit under section 32723.

(d) The owner of a noncommercial well located on the following residential property:

(i) Single-family residential property unless that well is a lake augmentation well.

(ii) Multifamily residential property not exceeding 4 residential units and not more than 3 acres in size unless that well is a lake augmentation well.

- Subsection (1) does not limit a property owner's ability to withdraw water from a test well prior to registration if the test well is constructed in association with the development of new or increased withdrawal capacity and used only to evaluate the development of new or increased withdrawal capacity.
- Unless a property owner develops the capacity to make the new or increased large quantity withdrawal within 18 months after the property owner registers under subsection (1), the registration is no longer valid.

PA 37 of 2006, which took effect on February 28, 2006, stipulated that:

- A person engaged in producing bottled drinking water shall utilize a water source meeting the requirements of this section and the requirements otherwise provided in this act. Bottling or packaging facilities and their operation shall remain under the supervision of the department of agriculture as provided for in the food law of 2000, 2000 PA 92, MCL 289.1101 to 289.8111.
- A person who proposes to engage in producing bottled drinking water from a new or increased large quantity withdrawal of more than 200,000 gallons of water per day from the waters of the state or that will result in an intrabasin transfer of more than 100,000 gallons per day average over any 90-day period shall submit an application to the department in a form required by the department containing an evaluation of environmental, hydrological, and hydrogeological conditions that exist and the predicted effects of the intended withdrawal that provides a reasonable basis for the determination under this section to be made.
- The department shall only approve an application under subsection (3) if the department determines both of the following:
 - (a) The proposed use will meet the applicable standard provided in section 32723 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.32723.
 - (b) The person will undertake activities, if needed, to address hydrologic impacts commensurate with the nature and extent of the withdrawal. These activities may include those related to the stream flow regime, water quality, and aquifer protection.

PA 185 of 2008, which took effect on July 9, 2008, defined or redefined several key terms and concepts that relate to irrigation in Michigan:

- "Adverse resource impact" means any of the following:
 - (i) Until February 1, 2009, decreasing the flow of a river or stream by part of the index flow such that the river's or stream's ability to support characteristic fish populations is functionally impaired.
 - (ii) Beginning February 1, 2009, subject to subparagraph (vi), decreasing the flow of a specific stream and river systems by part of their index flow as stipulated in Act 451 of 1994, Part 327, Sec. 32701, ii - vii

- "Flow-based safety factor" means a protective measure of the assessment tool that reduces the portion of index flow available for a withdrawal to 1/2 of the index flow for the purpose of minimizing the risk of adverse resource impacts caused by statistical uncertainty.
- "Index flow" means the 50% exceedance flow for the lowest summer flow month of the flow regime, for the applicable stream reach, as determined over the period of record or extrapolated from analyses of the United States geological survey flow gauges in Michigan. Beginning on October 1, 2008, index flow shall be calculated as of that date.
- "Large quantity withdrawal" means 1 or more cumulative total withdrawals of over 100,000 gallons of water per day average in any consecutive 30-day period that supply a common distribution system.
- "New or increased large quantity withdrawal" means a new water withdrawal of over 100,000 gallons of water per day average in any consecutive 30-day period or an increase of over 100,000 gallons of water per day average in any consecutive 30-day period beyond the baseline capacity of a withdrawal.
- "New or increased withdrawal capacity" means new or additional water withdrawal capacity to supply a common distribution system that is an increase from the person's baseline capacity. New or increased capacity does not include maintenance or replacement of existing withdrawal capacity.
- "Waters of the state" means groundwater, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the territorial boundaries of the state. Waters of the state do not include drainage ways and ponds designed and constructed solely for wastewater conveyance, treatment, or control.

PA 180 of 2008 stipulated that:

- Except as otherwise provided in this section, the owner of real property who intends to develop capacity on that property to make a new or increased large quantity withdrawal from the waters of this state shall register the withdrawal with the department after using the assessment tool, if required under this part, and prior to beginning that withdrawal. A registration under this section may be made using the online registration process.
- Not later than 1 year [*i.e.*, July 9, 2009] after the effective date of the amendatory act that amended this section, the department shall develop and implement an internet-based online registration process that may be used for registrations under section 32705. The online registration process shall be designed to work in conjunction with the assessment tool.

PA 185 of 2008 stipulated that:

- Beginning on the effective date of the implementation of the assessment tool, prior to registering a new or increased large quantity withdrawal from a stream or river, or from groundwater, the property owner proposing to make the withdrawal shall utilize the assessment tool by entering the data related to the proposed withdrawal into the assessment tool.

- If the assessment tool designates a proposed withdrawal as a zone B withdrawal in a cold-transitional river system, or a zone C or zone D withdrawal, the property owner shall not register the withdrawal or make the withdrawal.
- This part shall not be construed as affecting, intending to affect, or in any way altering or interfering with common law water rights or property rights or the applicability of other laws providing for the protection of natural resources or the environment or limit, waive, cede, or grant any rights or interest that the state possesses as sovereign for the people of the state in the waters or natural resources of the state.
- This part does not limit the right of a person whose interests have been or will be adversely affected to institute proceedings in circuit court against any person to protect such interests.
- Except as specifically authorized under this part, this part does not authorize the promulgation of rules.

PA 181 of 2008 stipulated that:

- If the assessment tool determines that a proposed withdrawal is a zone B withdrawal in a cold-transitional river system, or a zone C or zone D withdrawal, the property owner shall submit to the department a request for a site-specific review.
- The department shall complete its site-specific review within 10 working days of submittal of a request for a site-specific review. If the department determines, based upon a site-specific review, that the proposed withdrawal is a zone A or a zone B withdrawal, the department shall provide written notification to the property owner and the property owner may register the withdrawal and may proceed with the withdrawal.

PA 183 of 2008 stipulated that:

- A person shall not make a new or increased large quantity withdrawal from the waters of the state that causes an adverse resource impact. This section does not apply to the baseline capacity of a large quantity withdrawal or a well capable of making a large quantity withdrawal that existed on February 28, 2006.
- A person who developed the capacity to make a new or increased large quantity withdrawal on or after February 28, 2006 and prior to February 1, 2009 or who received a determination under former section 32724 during that period is subject to the definition of adverse resource impact that existed on February 28, 2006.

PA 190 of 2008 stipulated that:

- Except as specifically provided in this part, water withdrawals originating within this state shall be regulated exclusively under this part.
- The 2008 amendments to this part, the 2008 amendments to part 328, and the 2008 amendments to sections 4 and 17 of the safe drinking water act, 1976 PA 399, MCL 325.1004 and 325.1017, are intended to fully implement the compact in this state.

Surface Water Rights

Compiled in December, 2002 by
Michael Gregg
Michigan Department of Agriculture

In Michigan approximately 34 percent of the total volume of irrigation water comes from inland surface waters plus another 2 percent from the Great Lakes. Michigan practices the common-law riparian rights doctrine for surface water use. Properties that are bounded or traversed by a river, stream, lake, spring or other natural body of water have riparian rights. “Riparian” is from the Latin root for the bank of a river or stream and denotes an interest in a body of water. Riparian rights pass with the ownership of land bordering on water. They are not alienable, severable, divisible or assignable apart from the land that is bounded by a natural body of water (Deems).

Reasonable Use Doctrine for Surface Waters

Riparian properties have a right to use the normal flow or supply of water for domestic and household purposes, watering livestock, navigation, generation of power, fishing and recreational purposes (except hunting) and for other non-consumptive uses. The doctrine of reasonable use comes into play to limit this use. Like its application in groundwater, “reasonableness” must be established on a case by case basis with the specifics of that stream flow, rainfall, location and people being considered for that point in time. For the purposes of equity, Michigan appears to be headed to the next step in resolving conflicting water uses, which are correlative rights. Correlative rights mean that in addition to a use being reasonable your use in times of shortage must be prorated among all other reasonable users. (Leighty and Pollard, 1977)

Irrigation of crops is not included as a riparian right under the strict interpretation of the riparian doctrine (Barlowe, 1980). As modified by the reasonable use rule, agricultural irrigation is similar to other so-called “extraordinary or artificial” uses such as recreational, municipal or industrial (Bralts and Leighty, no date) Unfortunately, there are very few cases that have been

litigated to provide a solid basis of understanding of the reasonableness of water use for crop irrigation or other related agricultural practices. One of the few such cases in Michigan is *Hoover v. Crane* (362 Mich 36, 42; 106 NW2d 563 [1960]) which arose in Allegan County between Hoover and other cottage owners and Crane a riparian fruit farmer on the same lake. During a drought Crane irrigated 50 acres of pear trees from the lake. Lake levels receded during the drought limiting recreational uses and the cottage owners sought to restrain Crane from irrigating. The Circuit Court decided that when the lake was low enough to not flow out the outlet that Crane would be restricted to using no more than a metered one-fourth inch from the lake. Hoover and the property owners appealed to the Supreme Court and they decided in favor of the farmer and let stand the Circuit Courts decree. The Court cited a statement by Supreme Court Justice Cooley made in 1874 (*Dumont v. Kellogg*, 29 Mich 420 [1874]) and found that Crane's use of one-fourth of an inch of water from the lake was "reasonable." "In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress." (Leighty and Pollard, 1977).

Properties that have artificial water bodies, such as a man-made canal or drainage ditch, do not have riparian rights (*Thompson v. Enz*, 379 Mich 667, 154 N.W. 2d 473 [1967]). Artificial (man-made) lakes and ponds on a person's property fall under absolute ownership. A person can do as they wish with such waters, since no riparian rights attach (Leighty and Pollard, 1977).

Severance Rule

The severance rule states that, once a tract of riparian land is subdivided into smaller parcels the riparian rights previously attached to parcels no longer bordering the lake or stream are lost forever. The land that is still bordering the water body is not affected only the separated portion. Further, riparian rights cannot be reestablished if they are reunited with the original parent parcel. Water from a riparian parcel therefore cannot be used to irrigate land that is a non-riparian parcel regardless of whether it was originally part of the riparian parcel. When researching the chain of title and land divisions to determine the applicability of the severance rule it must be traced back to 1837 when Michigan became a state.

Watershed “Rule”

In addition to the requirement that the ability to use of surface waters is permitted by riparian land, that land must also be within the watershed of the body of water. The watershed is the topographic boundary of the land surface towards which water flows by gravity to the body of water. If a part of a riparian tract of land extends beyond the watershed boundary, that portion lying outside the watershed cannot be irrigated from that body of water.

Other Laws & Permits

Regardless of legal access to a body of water, several statutory laws and their promulgated rules could come into play in the physical ability to withdraw water from surface water bodies in Michigan. The Michigan Environmental Protection Act, MCL 324.1701 *et seq.* [part 17 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*] granted standing to any citizen to sue anyone who is or is likely to pollute, impair or destroy a resource. It would appear that irrigators who might interfere with the quantity or quality of natural flow required for aesthetics, recreation, fishery or wildlife benefits could be subject to suit. However, in their ruling in *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, (November 29, 2005), the State of Michigan Court of Appeals found:

... to the extent that it confers standing broader than the limits imposed by Michigan’s constitution, as determined by *Lee v Macomb Co Bd of Comm’rs*, 464 Mich 726; 629 NW2d 900 (2001) and *Nat’l Wildlife Federation v Cleveland Cliffs Iron, Co*, 471 Mich 608, 612; 684 NW2d 800 (2004), MCL 324.1701(1) is unconstitutional.

Environmental laws have been enacted that grant jurisdiction to the Michigan Department of Environmental Quality to issue permits for certain types of activities related to agricultural irrigation. Perhaps the most likely regulations are under Part 301 of the Natural Resources and Environmental Protection Act (P.A. 451 of 1994, as amended) (NREPA), which requires a permit for placement of any structure or excavation below the ordinary high water mark of a lake or stream. Activities such as the excavation of a sump or placement of a pump house and intake

pipes requiring earthwork in or next to a water body will require a permit. Similarly the provisions of Part 31 for flood plain regulation may also be required in some situations. The simple act of laying a hose or pipe on top of the ground and into the water as a temporary access to an upland pumping or distribution system would not require a permit.

If a weir or dam greater than 6 feet in height and impounding greater than 5 acres of water is going to be constructed, a permit under the provisions of Part 315 Dam Safety of NREPA will be needed. Compliance with Part 91, Soil Erosion and Sedimentation Controls will also be required if there is earthwork within 500 feet of a lake or stream. Part 91 is administered by the county or local enforcing agent and varies from county to county.

The Natural Rivers Act, Part 305 of NREPA requires a permit for irrigation regardless of any of the above requirements, if withdrawing from any one of the designated rivers or streams.

Irrigators should consult the nearest DEQ district office for further information regarding any questions about applicable NREPA requirements for the type and location of proposed withdraw that they are considering. Beginning in 2006, Part 327, PA 451 of 1994 (as amended) began regulating proposed large quantity withdrawals (i.e., pump capacities of 70 gpm or more) from both groundwater and surface water.

If the water body is a designated county or inter-county drain and there will be any structural or excavation work within right of way, written permission of the county drain commissioner or inter-county drainage board will be required in addition to requirements of the MDEQ under NREPA. If the withdraw will also be below the ordinary high water mark of the Great Lakes, jurisdiction by the U.S. Army Corps of Engineers may also come into consideration and permits may be required of them in addition to those from MDEQ.

Irrigation Districts

The Irrigation Districts Act, Part 341 of NREPA is available to allow the establishment of a special assessment district to provide water for irrigation and related agricultural production. The

source of the water must be the Great Lakes. A landowner petition is submitted to the county drain commissioner who serves as chair of an irrigation board comprised of the chair of the soil conservation district and a representative of the Michigan Department of Agriculture. If proposed consumptive uses will exceed 5 million gallons per day on a 30 day average “prior notice and consultation” will be required by the Great Lakes Charter with notification of all Great Lakes states and Canadian Provinces.

To date, only one irrigation district has been formed in Michigan. The Mud Creek Irrigation District was created in Huron County and began pumping water in 1996. This district is permitted to consume up to 14 million gallon per day to irrigate 2,500 acres.

References

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Appendix A

STATE OF MICHIGAN
COURT OF APPEALS

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

Plaintiffs-Appellees/Cross-
Appellants,

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,

Defendant-Appellant/Cross-
Appellee,

and

DONALD PATRICK BOLLMAN and NANCY
GALE BOLLMAN, a/k/a PAT BOLLMAN
ENTERPRISES,

Defendants.

FOR PUBLICATION
November 29, 2005
9:00 a.m.

No. 254202
Mecosta Circuit Court
LC No. 01-014563-CE

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

Plaintiffs-Appellees,

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,

Defendant-Appellant,

No. 256153
Mecosta Circuit Court
LC No. 01-014563-CE

and

DONALD PATRICK BOLLMAN and NANCY
GALE BOLLMAN, a/k/a PAT BOLLMAN
ENTERPRISES,

Defendants.

Before: Murphy, P.J., and White and Smolenski, JJ.

SMOLENSKI, J.

In docket number 254202, defendant Nestlé Waters North America, Inc. (Nestlé) appeals as of right from the trial court's imposition of an injunction barring it from withdrawing any groundwater from property owned by Donald Patrick Bollman and Nancy Gale Bollman, a/k/a Pat Bollman Enterprises (the Bollmans).¹ Plaintiffs cross-appeal the trial court's earlier decision to grant defendant partial summary disposition on their public trust claim. In docket number 256153, defendant Nestlé appeals as of right the trial court's grant of costs to plaintiffs.² We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

The events leading to this appeal began when Nestlé's predecessor in interest, Great Spring Waters of America, Inc., a subsidiary of Perrier Group of America, Inc.,³ began taking steps to construct a spring water bottling plant in Mecosta County. In December of 2000, defendant purchased the groundwater rights to the Bollmans' property located north of Osprey impoundment and referred to as Sanctuary Springs.⁴ Osprey impoundment is a manmade body of water created by the damming of the Dead Stream.⁵ The Dead Stream originates from springs

¹ The Bollmans did not take part in this appeal.

² The appeals in docket numbers 256153 and 254202 were consolidated on January 27, 2005.

³ During the course of the litigation, Great Spring Waters of America, Inc. changed its name to Nestlé Waters North America, Inc. Hereinafter, "defendant" will be used to refer interchangeably to defendant Nestlé, Great Spring Waters of America, Inc., and Perrier.

⁴ Defendant selected the Sanctuary Springs location in order to withdraw water that met the federal requirements to market it as spring water. In order to do this, defendant must obtain the water from a source with a direct hydrological and geochemical relationship to a spring. 21 CFR 165.110(a)(2)(vi).

⁵ The Dead Stream was originally dammed in 1953 by the Sapp family. After purchasing the property, the Bollmans enlarged the impoundment with a new dam built sometime around 1980.

evidence, it has not proven that merely having new information would forward the controlling inquiries.

Because the trial court made its ruling based on valid considerations of finality and the limited probative value of the data, we cannot conclude that the trial court was without justification or excuse in refusing to reopen the proofs. *McSwain, supra* at 685. Therefore, the trial court did not abuse its discretion.

D. Conclusions

While one might disagree with the specific findings made by the trial court, they are adequately and plausibly supported by the testimony and documentary evidence in the record. *Beason, supra* at 803. Because the factual findings are supported in the record, we cannot say that we are left with the definite and firm conviction that the trial court made a mistake. *Alan Custom Homes, Inc, supra* at 512. Likewise, given the limited value of the additional data and the inconvenience that further presentations of data would entail, the trial court did not abuse its discretion by refusing to reopen the proofs. Because the trial court did not clearly err in making its findings and did not abuse its discretion in denying defendants' motion to reopen the proofs, a new trial is not warranted on these grounds.

III. Groundwater Claim

Defendant argues the trial court erred when it determined that defendant's pumping unlawfully interfered with plaintiffs' riparian rights to the Dead Stream²⁹ based on a hybrid rule of its own making rather than the balancing test stated in 4 Restatement Torts, 2d, § 858, which, defendant contends, was adopted in *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982). While we disagree with defendant's contention that *Maerz* made a wholesale adoption of the Restatement's rule, we also reject the trial court's hybrid rule as contrary to the principles established by Michigan authorities dealing with competing water uses. Instead, we find these authorities establish a reasonable use balancing test similar to the Restatement's rule.

A. Standard of Review

This Court reviews de novo, as a question of law, the proper scope and application of the common law. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

B. Michigan Water Law

In order to provide some much needed perspective on the applicable law, we shall engage in a discussion of the doctrines historically applied to water disputes and trace the origin and

²⁹ As already noted, the trial court determined that plaintiffs' claims against defendant were not based on a strict application of riparian law, and, consequently, dismissed plaintiffs' riparian law claim (count II). Plaintiffs have not appealed that dismissal. However, the trial court did state that riparian principles may apply to plaintiffs' groundwater claim. See *supra*, n 13.

development of water law in Michigan. Traditionally, water law has developed along two distinct lines: (1) the law applicable to water use by riparian owners, and (2) the law applicable to groundwater uses.

1. Riparian Water Rights

Under the common law, three main doctrines have developed for dealing with riparian water rights: the English common law rule, also known as the “natural flow” doctrine, the reasonable use doctrine, and the appropriation or prior use doctrine. Stoebuck & Whitman, *The Law of Property* (3rd ed), § 7.4, p 422-425. Of these doctrines, the natural flow doctrine and the reasonable use doctrine are relevant to the development of water law in Michigan.³⁰

Under the natural flow doctrine, each riparian proprietor of a watercourse has a right “to have the body of water flow as it is wont to flow in nature,” qualified only by the right of other riparian proprietors to make limited use of the water. See Restatement, Introductory Note to § 850, p 210.

The doctrine permits every owner to consume as much water as needed for “domestic” purposes, which generally means for personal human consumption, drinking, bathing, etc., and for watering domestic animals. Beyond this, the owner may use the water for “reasonable” artificial or commercial purposes, subject to the very large proviso that he may not substantially or materially diminish the quantity or quality of water. Certainly no water may be transported to land beyond the riparian land. [Stoebuck, *supra* at 422.]

Under the reasonable use doctrine, a riparian owner “may make any and all reasonable uses of the water, as long [as] they do not unreasonably interfere with the other riparian owners’ opportunity for reasonable use.” *Id.* at 423. “Whether and to what extent a given use shall be allowed under the reasonable use doctrine depends upon the weighing of factors on the would-be user’s side and balancing them against similar factors on the side of other riparian owners. No list of factors is exhaustive, because the court will consider all the circumstances that are relevant in a given case.” *Id.* While in theory no single factor is conclusive, “[d]omestic uses are so favored that they will generally prevail over other uses.” *Id.* Furthermore, while the reasonable use doctrine generally allows water to be transported and used on non-riparian lands, such uses may be disfavored over uses on riparian land. *Id.* at 423-424; see also Restatement, Introductory Note to § 850, p 211-212.

In *Dumont v Kellogg*, 29 Mich 420 (1874), our Supreme Court adopted the reasonable use doctrine for competing riparian owners. The plaintiff in *Dumont*, a mill proprietor downstream from the defendant’s mill, had filed suit complaining that the defendant had

³⁰ The statutory “appropriation” or “prior use” doctrine prevails in arid states. Under this doctrine, one who makes prior use of water for some “beneficial” purpose, even if not a riparian owner, may gain the right to continue doing so. Stoebuck, *supra* at 424. See also Restatement, Introductory Note to § 850, p 213-214.

unlawfully interfered with his riparian rights by diminishing the flow of water to the stream below. *Id.* at 420. The plaintiff prevailed in the lower court and the defendant appealed, assigning error to the jury instructions.³¹ *Id.* at 420. In reviewing the instructions presented to the jury, the Court rejected the notion that prior appropriation gave the plaintiff any superior rights to the stream. *Id.* at 421. The Court also stated,

And in considering the case it may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from a proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage. It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters; for this also is wholly wrongful, and no question of the reasonableness of his action in causing the diminution can possibly arise. And had the instructions which are excepted to been given with reference to a case of diversion, or of obstruction by a stranger, the broad terms in which the responsibility of defendant was laid down to the jury might have found abundant justification in the authorities. [*Id.* at 421-422.]

Thus, the Court determined that the jury instructions, which followed the natural flow rule, would have been applicable had the interference been caused by a stranger.³²

After discussing the exceptions where the natural flow rule might still apply, the Court went on to hold that, as between two riparian owners, the strict application of the natural flow rule did not apply because “it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.” *Id.* at 422. The Court concluded,

It is therefore 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

³¹ The jury instructions summarized the law as preventing the defendant from materially diminishing the natural flow of the stream. *Dumont, supra* at 420-421.

³² This bifurcation of the applicable rule, depending on the status of the party interfering with the riparian owner’s water use, is not without precedent. See Restatement Torts, 2d, Appendix (1982), § 850, p 23-24; *Bollinger v Henry*, 375 SW2d 161 (Mo. 1964); *Pabst v Finmand*, 190 Cal 124, 132; 211 P 11 (1922) (“Obviously, there is no question of reasonable use in the sense in which that term is applied to the rights of respective riparian owners, since a riparian owner, as against a nonriparian owner, is entitled to the full flow of the stream without the slightest diminution.”). However, the *Dumont* Court’s use of the word stranger suggests that the Court was referring to a nonriparian who attempted to exercise riparian water rights. This understanding is consistent with the Restatement approach, which recognizes that a nonriparian who uses the water of a watercourse or lake is liable for interference caused to a riparian by such use without reference to the reasonableness of the use. See Restatement, § 857.

equality of right in others, that which can be 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. [*Id.* at 424.]

Because the instructions did not properly state the reasonable use rule applicable to competing riparian owners, the Court reversed the judgment and ordered a new trial. *Id.* at 425.

What constitutes a reasonable use must be determined on a case-by-case basis. *People v Hulbert*, 131 Mich 156, 170; 91 NW 211 (1902). However, diversions of water from a lake or stream that do not benefit riparian lands were generally considered per se unreasonable.³³ In addition, natural water uses are preferred over artificial uses. *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967) (plurality opinion). Hence, under Michigan's riparian authorities, water disputes between riparian proprietors are resolved by a reasonable use test that balances competing water uses to determine whether one riparian proprietor's water use, which interferes with another's use, is unreasonable under the circumstances.

2. Groundwater Water Law

As with riparian water law, there are three main common law doctrines applicable to groundwater disputes. Stoebuck, *supra* at 427.³⁴ The first doctrine is referred to as the English rule or the "absolute ownership" rule, which was first stated in *Acton v Blundell*, 12 Mees & W 324; 152 Eng Rep 1223 (Exch 1843). Stoebuck, *supra*, § 7.5, p 427-428. Under this rule, "a possessor of land may withdraw as much groundwater as he wishes, for whatever purposes he wishes, and let his neighbors look elsewhere than the law for relief. *Id.* at 428.³⁵

³³ See *Hall v Ionia*, 38 Mich 493, 500 (1878) ("We think the complainant has a right to an injunction against the threatened proceedings of the defendants to collect and divert the water to purposes foreign to their use and enjoyment of the woolen factory premises, and that the prayer of the bill to that effect should have been granted."); *Stock v Hillsdale*, 155 Mich 375; 119 NW 435 (1909) (refusing to restrain defendant's withdrawals from lake because defendant proceeded in defiance of plaintiff's rights for more than 20 years); *Kennedy v Niles Water Supply Co*, 173 Mich 474, 475-477; 139 NW 241 (1913) (noting that the defendant's withdrawal of water to supply the city of Niles would be impermissible if it were not for the prescriptive rights obtained by the defendant); *Hoover v Crane*, 362 Mich 36, 42; 106 NW2d 563 (1960) ("Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed."); *Thompson v Enz*, 379 Mich 667, 686-687; 154 NW2d 473 (1967) ("Use for an artificial purpose must be (a) only for the benefit of the riparian land and (b) reasonable in light of the correlative rights of the other proprietors.").

³⁴ Under traditional principles of groundwater law, if the underground water flows in a defined underground stream, that water will be subject to the rules applicable to interference with riparian water rights. Stoebuck, *supra* at 427; Restatement, introductory note to § 858, p 257.

³⁵ The absolute ownership rule is still the law in a minority of states. See *Sipriano v Great Spring Waters of America*, 42 Tex Sup Ct J 629; 1 SW 3d 75 (1999); *Maddocks v Giles*, 728 A2d 150, 153 (Me 1999).

In America, the most prevalent rule applicable to groundwater disputes is the doctrine of reasonable use, which is also called the American doctrine or the doctrine of correlative rights. *Id.* However, the doctrine of reasonable use is not actually dependent upon the reasonableness of the use, but rather

[a]s the doctrine has developed, it has generally been held that all uses of water upon the land from which it is extracted are “reasonable,” even if they more or less deplete the supply to the harm of neighbors, unless the purpose is malicious or the water simply wasted. But . . . when the question is whether water may be transported off that land for use elsewhere, this is usually found “unreasonable,” though it has sometimes been permitted. Authorities are not all agreed, but a principle that seems to harmonize the decisions is that water may be extracted for use elsewhere only up to the point that it begins to injure owners within the aquifer. [*Id.* at 428-429.]

The last doctrine is a variant of the reasonable use doctrine developed in California, which is often called the correlative rights doctrine. Stoebuck, *supra* at 429. Under this doctrine,

Owners of land within an aquifer are viewed as having equal rights to put the water to beneficial uses upon those lands. However, an owner’s rights do not extend to depleting his neighbor’s supply, at least not seriously so, for in the event of a water shortage, a court may apportion the supply that is available among all the owners. It is sometimes said that this is the application of the reasonable use doctrine of flowing streams to underground water. . . . As to uses outside the land from which the water is drawn, for municipal and other uses, the rule is similar to that under the ordinary reasonable use doctrine: water may be transported only if the overlying owners have been fully supplied. [*Id.*]

a. *Schenk*

The seminal case dealing with groundwater rights in Michigan is *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917).³⁶ In *Schenk*, the City of Ann Arbor purchased land outside the city, upon which it planned to build a pumping station, and began pumping tests that drew approximately 3.8 million gallons of water daily for several weeks. *Id.* at 77-78. Numerous persons commenced actions seeking to restrain the city from pumping, including the plaintiff, because of harms allegedly caused by the pumping. *Id.* at 78-80. However, because the plaintiff in *Schenk* had successfully restored his water supply by lowering his well three feet, the trial court denied the plaintiff’s request for an injunction, but granted damages for the actual harm already suffered. *Id.* at 80.

³⁶ Before *Schenk*, Michigan might have followed the English rule of absolute capture. See *Upjohn v Richland Twp*, 46 Mich 542, 549 (1881) (noting “the rule of law has become established that owners of the soil have no rights in sub-surface waters . . . as against their neighbors who may withdraw them by wells or other excavations.”).

Before making its decision, the Court noted the parties were not riparian owners and the underground waters were percolating waters rather than waters running in a defined underground channel. *Id.* at 81. The Court also noted the city planned to pipe the water away from the lands from which it was drawn. *Id.* The Court then recited the rule of absolute ownership and the authorities for that rule, stating “while this is the rule applied, and to be applied, in respect to most of the ordinary uses of land, and the ordinary operations carried on upon and in land, there is other doctrine, apparently, but not strictly, a modification of the early common-law doctrine referred to, which is sometimes called the doctrine of reasonable user, and which was introduced by equity to the law.” *Id.* at 82. The Court then adopted the “rule of reasonable user” for the reasons stated by the court in *Meeker v City of East Orange*, 77 NJ Law 623; 74 A 379 (1909). *Schenk, supra* at 82-83.

This [rule] does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring properties may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate uses. [*Id.* at 84, quoting *Meeker, supra* at 385.]³⁷

Although the city was extracting the water for use off the property from which it was extracted, and therefore was subject to the limitations of the reasonable use rule, the Court determined that the plaintiff was not entitled to an injunction because he had lowered his well and regained a supply of water and no other harm was demonstrated entitling him to equitable relief. *Id.* at 92. However, the Court left open the possibility of a future injunction based on a new harm. *Id.* Thus, the Court adopted the traditional reasonable use rule, which permits withdrawals whose use was not connected with the land from which it was withdrawn, but only to the extent that they do not interfere with an adjacent water user’s reasonable use. *Id.* at 84.

b. Post *Schenk*

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

³⁷ The language quoted from *Meeker* suggests that the reasonable use rule would apply to groundwater users whose use interfered with riparian water rights. This is consistent with the application of the reasonable use rule in some jurisdictions. See Anno: *Subterranean and percolating waters; springs; wells*, 55 ALR 1385, 1418-1420.

In *Bernard v St. Louis*, 220 Mich 159; 189 NW 891 (1922), our Supreme Court was again confronted with a large municipal water user whose extraction of groundwater for use off-tract impaired a local user's groundwater use. The plaintiffs owned a hotel that was used as a sanitarium. The hotel property had a mineral spring whose waters were pumped to the roof of the hotel for storage and eventual distribution to the guests and patients of the hotel. *Id.* at 160-161. The defendant owned land adjacent to the hotel upon which it had sunk five wells to service the water needs of its citizens. *Id.* at 161. When the defendant resumed using the wells after a period of disuse, the plaintiffs sued for and received an injunction barring the defendant's use of the wells to the extent that the use diminished the flow or pressure of the water flowing from plaintiffs' well. *Id.* at 161-162. In deciding whether the injunction was appropriately granted, our Supreme Court stated,

We are not satisfied, however, that if the city makes reasonable use of the percolating waters and the plaintiffs do not permit it to go to waste that there will not nearly all of the time be an ample supply for the needs of both. If there should not be then the plaintiffs should not be deprived of a supply of water sufficient for their reasonable use without compensation, nor should they be required to install new machinery without compensation. [*Id.* at 163.]

The Court approvingly cited *Schenk* and determined that the defendant should not be enjoined from all use of the wells, but rather should only be required "not to interfere with an adequate supply of water for the plaintiffs' reasonable use. . . ." *Id.* at 165. In addition, the Court modified the decree to require the defendant to compensate the plaintiffs for any machinery or appliances that the plaintiffs may have to install to maintain an adequate supply of water. *Id.*

While the *Bernard* Court did not state that it was employing a balancing test, its approach to solving the water dispute before it bears the hallmarks of a balancing test. The Court explicitly rejected an outright injunction against defendant's off-tract water use simply because it diminished the flow and pressure of plaintiffs' wells. Instead, the Court ensured that both parties would be able to utilize the water supply by compelling the defendant to limit its pumping activities to a level that did not interfere with an adequate supply of water for plaintiffs' reasonable use. Notably, the Court did not attempt to protect the plaintiffs' water supply as it existed before the defendant began pumping, but rather only protected the plaintiffs' *adequate* supply of water and then only to the extent that the use was itself reasonable. The Court also determined that the defendant ought to compensate the plaintiff for any expenses incurred to maintain an adequate supply. Although still protecting on-tract uses over off-tract uses, the Court actually struck a balance between the two uses that attempted to ensure that both parties would have reasonable access to the common water supply.

In *Hart v D'Agostini*, 7 Mich App 319; 151 NW2d 826 (1967), the Court continued the trend towards applying a balancing test to groundwater disputes rather than a strict application of the traditional reasonable use rule. The plaintiffs complained that the defendants interfered with their groundwater supply when they pumped water out of a construction zone while laying a sewer. *Id.* at 321. In examining the applicable rule, the Court stated "the liability for interference with the subterranean water supply of a neighbor has been expressed, depending on whether the causative activity (1) if intentional, was unreasonable, or (2) if unintentional, was negligent." *Id.* at 322, citing Restatement, Torts § 822, p 226. After determining that the defendants' actions were intentional, the Court turned to *Schenk*, *supra* and *Bernard*, *supra* for

guidance. “Both cases involved a public water company intentionally removing water from the subterranean supply and transporting it elsewhere for consumption, and in both cases it was held that such removal of the water . . . was an unreasonable use of the specific land and unreasonable as to the surrounding lands.” *Id.* at 322. The Court quoted the section of the *Schenk* case that quoted *Meeker* and stood for the proposition that the reasonable use rule does not impose liability when the interference is based on groundwater use in connection with the land from which the extraction occurred or caused by the reasonable development of that land. *Id.* at 322. The *Hart* Court then noted that the defendants’ excavations did not involve the transport of water to distant lands for consumption, did not cause permanent damage, involved the reasonable development of a public easement, and benefited the surrounding homes. *Id.* at 323. From this, the *Hart* Court concluded that the defendants’ interference with the plaintiffs’ water supply was not unreasonable and, therefore, reversed the trial court’s ruling in favor of the plaintiffs. *Id.* Although the *Hart* Court could have applied the strict English rule to the facts before it, which *Schenk* implied was still applicable to disputes involving two on-tract groundwater users, the Court instead examined the relevant factors and determined whether the defendants’ use was reasonable in light of those factors and the harm caused.

This shift from the strict application of the reasonable use rule, which preserves the English rule for on-tract water disputes, to a balancing approach was explicitly endorsed by the Court in *Maerz, supra*. In *Maerz*, the Court was presented with a case involving two competing groundwater users. The plaintiffs filed a complaint against the defendant quarry alleging that the defendant’s dewatering of the quarry caused the loss of plaintiffs’ groundwater supply. *Id.* at 712. The issue before the Court was whether defendant’s use of the groundwater in connection with the property from which it was extracted (i.e. on-tract) was per se reasonable. *Id.* at 713. In attempting to ascertain the applicable standard, the *Maerz* Court surveyed the development of groundwater law in America beginning with the English rule of *Acton, supra*, but noted that most American courts had rejected this rule in favor of modified versions. *Id.* at 713-714. The *Maerz* Court then discussed what it called the “correlative rights” rule, which it stated was adopted by the American Law Institute, as set forth in Restatement, § 858. *Id.* at 714-715.³⁸ “Under this rule a landowner is unrestricted in his right to extract underground waters from his property up to, but not beyond, the point the exercise of such right unreasonably interferes with the similar, or correlative right, of his neighbor.” *Id.* at 714. The *Maerz* Court then noted that there was also a reasonable use rule, which retained the English rule for water extraction used on the land from which it is extracted, but employed a correlative rights rule for water used on distant lands. *Id.* at 715.³⁹

³⁸ While the *Maerz* Court correctly summarized the restatement approach, the characterization of the Restatement’s rule as a correlative rights rule is unfortunate. As noted above, the phrase “correlative rights” has been used to describe both the American or reasonable use doctrine and the California modification of that doctrine, but neither of those doctrines employs a strict balancing test. See Restatement, §§ 850A, 858(2).

³⁹ This is a mischaracterization of the traditional reasonable use doctrine. This doctrine does not employ a balancing test for water used on land other than the land from which the water was extracted. Instead, it permits water extraction for use off-tract up to the point where it interferes
(continued...)

After this survey, the *Maerz* Court analyzed the decision in *Schenk, supra*. The *Maerz* Court concluded that the *Schenk* Court adopted a correlative rights balancing test for groundwater extraction used on distant lands. *Maerz, supra* at 717. The *Maerz* Court also disregarded as dicta the *Schenk* Court’s determination that the English rule governed extractions used in connection with the land from which it was extracted. *Id.* at 717. The *Maerz* Court then analyzed the progeny of *Meeker*⁴⁰ and *Bernard, supra* and *Hart, supra*, after which it concluded “our analysis of these cases leads us to conclude that they do not establish as the law of Michigan that extraction of underground water for a purpose connected with the land from which it is withdrawn is, per se, not actionable.” *Maerz, supra* at 720. The Court continued, “We further hold that the principles expressed in Restatement Torts, 2d, § 858, p 258 are consistent with the Michigan adjudications on the subject and the general trend of decisions in other states, are less harsh and arbitrary and more fair and just than the English rule or lesser modifications of the English rule, and should be followed in Michigan.” *Id.*

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

3. Conclusion

We agree with the *Maerz* Court’s conclusion that a reasonable use balancing test is consistent with the Michigan authorities governing water use.⁴¹ Beginning with *Dumont* and *Schenk* and concluding with *Maerz*, Michigan courts have consistently avoided strict rules that permit one water user to utilize water at the expense of an adjacent user. Instead, while employing various tests, the courts have generally sought to ensure the greatest possible access to water resources for all users while protecting certain traditional water uses. See *Dumont, supra* at 423-424. Michigan courts have already recognized the value of the reasonable use balancing test for that purpose. See *Maerz, supra*; *Hart, supra*; *Dumont, supra*. Consequently, in order to recognize the interconnected nature of water sources and fully integrate the law applicable to water disputes, we adopt the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users.

(...continued)

with the groundwater rights of adjacent water users. *Stoebuck, supra* at 428-429.

⁴⁰ The *Maerz* Court examined the progeny of *Meeker* in an effort to demonstrate that the *Meeker* Court’s holding adopted a reasonable use rule similar to the Restatement’s approach for both on-tract and off-tract groundwater use. *Maerz, supra* at 718.

⁴¹ However, we do not agree with defendants’ contention that the *Maerz* Court intended to make a sweeping adoption of the entire Restatement approach to the resolution of water disputes. Instead, we note that the *Maerz* Court only held that “the *principles* expressed in the Restatement . . . should be followed in Michigan.” *Maerz, supra* at 720 (emphasis added). Even if the *Maerz* Court had made a sweeping adoption of the Restatement’s rule, we would reject it as not binding. See MCR 7.215(J)(1).

C. Application of the Law

In its opinion and order, the trial court applied a hybrid rule of its own making to plaintiffs' groundwater claim.⁴² This hybrid rule is not consistent with the reasonable use balancing test we have determined to be applicable to this case. Therefore, the trial court erred in applying it. However, although the trial court applied the wrong law to the facts of this case, because the record on appeal and the trial court's findings are sufficient for our determination of this issue, we shall proceed to apply the balancing test to the facts of this case. See, e.g., *Thompson, supra* at 688 (declining to decide the issue because the record was insufficient to determine the reasonableness of the use); *West Mich Env't'l Action Council v Natural Res Comm*, 405 Mich 741, 754; 275 NW2d 538 (1979) (declining to remand because the record was sufficient to decide whether MEPA had been violated).

1. The Reasonable Use Balancing Test

The Court in *Hart, supra* at 321, observed, “[i]n our increasingly complex and crowded society, people of necessity interfere with each other to a greater or lesser extent.” For this reason, the “right to [the] enjoyment of . . . water . . . cannot be stated in terms of an absolute right.” *Id.* at 321. The reasonable use balancing test is best adapted to this reality. It recognizes that virtually every water use will have some adverse effect on the availability of this common resource. For this reason, it is not merely whether one suffers harm by his neighbor's water use, nor whether the quantity of water available is diminished, “but whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment of the right by the other.” *Dumont, supra* at 423.

While the balancing test is a case specific inquiry, there are three underlying principles that govern the process of balancing competing water uses. First, the law seeks to ensure a “fair participation” in the use of water for the greatest number of users. *Id.* at 423. Hence, the balancing court should attempt to strike a proper balance between protecting the rights of the complaining party and preserving as many beneficial uses of the common resource as feasible under the circumstances. Second, the law will only protect a use that is itself reasonable. *Hulbert, supra* at 173 (protecting “reasonable and ordinary” uses); *Dumont, supra* at 423-424; *Bernard, supra* at 165 (protecting “an adequate supply of water for the plaintiffs' reasonable

⁴² The trial court stated its rule as follows:

In cases where there is a groundwater use that is from a water source underground that is shown to have a hydrological connection to a surface water body to which riparian rights attach, the groundwater use is of inferior legal standing than the riparian rights. In such cases, as here, if the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body. . . . The next step in the rule is in cases where, again as here, the groundwater use is shown to have measurable and proven negative impacts on the riparian body/bodies, with the analysis not having any component regarding whether the use is off-tract/out of watershed.

use. . .”). A plaintiff whose water use has little value or is excessive or harmful will be entitled to no protection. Third, the law will not address every harm, no matter how small, but rather will only redress unreasonable harms. *Dumont, supra* at 423-424; *Thompson, supra* at 688. Therefore, a plaintiff must be able to demonstrate, not only that the defendant’s use of the water has interfered with the plaintiff’s own reasonable use,⁴³ but also that the interference was substantial.⁴⁴

Having noted these underlying principles, we now turn to the factors to be balanced when determining whether the harm caused by the defendant’s use is unreasonable under the circumstances. In *Hulbert, supra* at 170, the Court stated,

“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.” [quoting *Gehlen Bros. v Knorr*, 101 Iowa 700; 70 NW 757 (1897).]

In *Thompson, supra* at 688, a plurality of the Court determined that the trial court should have applied a reasonable use balancing test to determine whether the defendant’s proposed use of the lake was reasonable under the circumstances. Because the trial court did not make the necessary findings, the Court remanded the case, with the following guidance on the factors to be considered:

First, attention should be given to the water course and its attributes, including its size, character and natural state. In determining the reasonableness of the use in the case at bar, it should be considered that Gun lake is not a large lake, that it is used primarily for recreational purposes, and that the defendants are changing its natural state

Second, the trial 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. . . .

Third, it 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

⁴³ Where one proprietor makes no use of the water, that proprietor may not complain of another’s otherwise lawful water use. See *Stock, supra* at 382. However, the value conferred by a stream or lake on riparian land is a use that courts will protect. See Restatement, § 850, cmt b, p 217-218.

⁴⁴ See also Restatement § 850, cmt g, p 226-227.

also on the interests of the State, including fishing, navigation, and conservation.
[*Id.* at 688-689.]

While the nature of the balancing test requires that the appropriate factors be ascertained on a case-by-case basis, *Hulbert, supra* at 170, in examining *Hulbert* and *Thompson*, several factors can be discerned that will be relevant to every application of the test. These factors include: (1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use, and (6) any other factor that may bear on the reasonableness of the use.⁴⁵

When determining the purpose of the use, the court should consider whether the use is for an artificial or natural purpose and whether the use benefits the land from which the water is extracted. Natural purposes include 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. *Thompson, supra* at 686.⁴⁶ “Artificial uses are those which merely increase one’s comfort and prosperity and do not rank as essential to his existence, such as commercial profit and recreation.” *Id.* Because “[u]sers for natural purposes enjoy a preferred nonproratable position with respect to all other users rather than a correlative one,” where an artificial use interferes with a natural use, the natural use will prevail.⁴⁷ *Id.* Further, in order to ensure that the needs of local water users are met first, water uses that benefit the riparian land or the land from which the groundwater was removed are given preference over water uses that ship the water away or otherwise benefit land unconnected with the location from which the water was extracted. *Schenk, supra* at 84; *Thompson, supra* at 686-687.⁴⁸

In assessing the suitability of the use to the location, the court should examine the nature of the water source and its attributes. *Hulbert, supra* at 170; *Thompson, supra* at 688. A particularly large aquifer, stream, or lake may be unaffected even by extensive water withdrawals, whereas a marginal water resource may be unduly strained even by relatively modest withdrawals. See Restatement, § 850A, cmt d, pp 224-225. Likewise, the uses for which a particular water source are customarily put are relevant to a determination of whether a new use is suitable to the area. *Thompson, supra* at 688 (noting that the lake involved was primarily used for recreational purposes); Restatement, § 850A, cmt d, p 225 (“The use must fit into the pattern of other uses so as to cause as little disruption as possible.”).

⁴⁵ While these factors are drawn from Michigan authorities, we recognize that the factors listed in Restatement, § 850A, have many similarities. Because of these similarities, we shall resort to the Restatement as an aid to understanding the role of these factors in the balancing test.

⁴⁶ See also Restatement, § 850A, cmt a, p 223-224.

⁴⁷ See also Restatement, § 850A, cmt c, p 223-224.

⁴⁸ While we acknowledge that, at least in the context of riparian rights, prior courts have determined that uses that did not benefit the riparian land were per se unreasonable, see *supra* n 33, we believe that such a per se rule is incompatible with modern use of the balancing test. Instead, we hold that the location of the use is but one of the factors that should be considered in balancing the relative interests.

In assessing the harm and benefits, the court should examine not only the economic harm and benefits to the parties, but should also examine the social benefits and costs of the use, such as its effect on fishing, navigation, and conservation. *Thompson, supra* at 689. Negative social effects should weigh against the use, see Restatement, § 850A, cmt f, p 226, and positive social effects should weigh in favor of a determination of reasonableness. *Hart, supra* at 323 (noting that the sewer line benefited the area). The traditional use employed in the locality where the resource resides will often be a guide to what the community considers reasonable in this context. *Dumont, supra* at 424. Likewise, because society benefits from predictability, the protection of existing water uses should be an important consideration in the balancing of competing water uses. See *Hulbert, supra* at 165, quoting *Strobel v Salt Co*, 164 NY 303; 58 NE 142 (1900); Restatement, § 850A, cmt k, p 233-235.

The balancing court should also examine the extent, duration, necessity, and application of the use, including any effects on the quantity, quality and level of the water. *Hulbert, supra* at 170; *Thompson, supra* at 688-689.⁴⁹ Where the amount or method of water use is excessive or unnecessary and harms another's use, it will be unreasonable. See Restatement, § 850A, cmts h and i, p 227. Furthermore, where the harm caused by a water use can be readily modified to mitigate or eliminate the harm, the failure to take such steps may make the particular use unreasonable. See *Id.*, cmt h, p 227. Finally, the balancing court should consider any other factor relevant under the circumstances applicable to the case before it. *Hulbert, supra* at 170.

2. Application to the Facts

In the present case, plaintiffs alleged defendant's groundwater withdrawals interfered with their riparian rights in the Dead Stream,⁵⁰ including their right to utilize the stream for recreational boating, wildlife observation, swimming, fishing, as well as diminishing the aesthetic value of their riparian lands. While some courts have questioned the reasonableness of recreational water uses such as these, see Restatement, § 850A, cmt b, p 223, a plurality of our Supreme Court has determined that recreational uses, including the use of riparian waters as a restful retreat, constitute a reasonable use. *Thompson, supra* at 689. In addition, we recognize that individuals often seek out and invest in riparian property for aesthetic reasons even though they may not partake of recreational activities involving the physical use of the water.⁵¹ Therefore, plaintiffs' use of the stream is a reasonable use worthy of protection.

⁴⁹ Even extensive interruptions in a party's water supply may be reasonable under some circumstances. See *Hart, supra* at 323.

⁵⁰ The trial court determined that, as a matter of law, plaintiffs' groundwater claim only applied to the effects on the Dead Stream, which were caused by defendant's use. Because plaintiffs have not appealed this part of the trial court's ruling, we shall limit our analysis accordingly.

⁵¹ See e.g., *Bott v Natural Resources Comm*, 415 Mich 45, 78-79; 327 NW2d 838 (1982) (refusing to expand the definition of navigability because such an expansion would render riparian property unfit as a refuge or retreat and, therefore, diminish property values.).