ATTORNEY WRITES

WITHER ICE MOUNTAIN?

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A few months ago, Mecosta County Circuit Court Judge Lawrence Root issued his landmark decision in the case involving various riparian property owners versus Perrier/ Nestlé, the bottlers of Ice Mountain spring water. The decision is currently on appeal. Some riparians throughout Michigan have shown little interest in this case since they assume it is simply a well-water case. Riparians should be aware that the decision of the Michigan appellate courts in this case could have a profound impact upon riparian property rights in a variety of different contexts in the future.

Interestingly, despite popular misconceptions, this is not a standard well-water case. Rather, the bottler intercepted water from an unconfined aquifer before the water could reach the surface. The groundwater involved supplied a creek, some wetlands, and several lakes. The company admitted that at times, its pumping from the ground would show a measurable water level drop in the creek and at least one lake. The amount of water level droppage, causation and whether any harm occurred due to the pumping was in dispute at the trial. Therefore, it can be argued that this case is more analogous to where someone pumps large quantities of water from a lake or stream (for example, a golf course or ski resort snow making operation) as opposed to deep well-water users (such as a municipal water system, individual home wells or agricultural irrigation from wells).

This case has two general overarching issues. First, there is the issue of water being removed or diverted from the watershed involved. Second, the case also examines competing riparian interests. This article addresses only the second issue.

Given the length of Judge Root's written opinion (67 pages), I will concentrate only on the portion of the opinion which will likely have a direct impact upon the riparian reasonable use doctrine in the future. I will also not address the portions of the court opinion dealing with the Michigan Environmental Protection Act, the Wetlands Protection Act, the Inland Lakes and Stream Act, or other statutory issues. Judge Root pointed out that there is no appellate case law in Michigan directly on point regarding the common law riparian issues in this case. Accordingly, he had to analogize to and extrapolate from existing appellate decisions.

As Judge Root noted, the existing case law normally deals with two competing parties in more or less equal positions—for example, two different well-water users or two different surface riparians. Judge Root held as a preliminary matter that the rights of riparians as to existing natural lakes and streams on the earth's surface is generally superior to the rights of property owners (or their lessees or easement holders) to pump or intercept water out of the ground which would directly impact the surface bodies of water. The Judge then went on to hold that the "reasonable use" doctrine also generally applies to such disputes. Four appellate court cases were cited. First, the case of *John B Dumont* v *John G Kellogg*, 29 Mich 420 (1874), involved a dispute between two commercial riparians to a stream regarding one property owner's interference with the flow of the stream to the detriment of the other property owner. Both parties were of roughly equal standing. The Michigan Supreme Court held that the reasonable use doctrine applied. The next common law case cited by Judge Root was *Schenk* v *City of Ann Arbor*, 196 Mich 76 (1916). That case involved two competing well-water claims. The Supreme Court held that one property owner cannot utilize a well in such ways that it would materially diminish the flow to a well of an adjoining property owner. The next case is *Hoover* v *Crane*, 362 Mich 36 (1960), which was a dispute between riparian property owners wherein one of the riparians was utilizing water from the lake for irrigation purposes for his fruit orchard. The last of the common law riparian rights cases mentioned was *Maerz* v *US Steel Corp*, 116 Mich App 710 (1982). In that case, the Michigan Court of Appeals dealt with a situation where a quarry operator was making use of groundwater in a way that adversely affected area water wells.

Ultimately, Judge Root held that where a ground user negatively impacts riparian bodies of water on the surface, the following is applicable:

Distilling (I long ago gave up trying to avoid aquatic analogies and metaphors) all of this discussion to a rational, and enforceable, rule of law, I have reached the following conclusion. In cases where there is a groundwater use that is from a water source underground that is shown to have a hydrological connection to a surface water body to which riparian rights attach, the groundwater use is of inferior legal standing than the riparian rights. In such cases, as here, if the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body. This is not a pure *per se* rule in that it does require a showing that the flow to/in the surface water body has been affected to a degree that there is a level of confidence that the effect(s) are not part of the natural forces at work on the surface water(s). I accept Plaintiffs' counsel's suggestion that, in this case, a showing of effects in the range of three to five percent would be sufficient to exclude the natural 'background' in the system such that effects in excess of that range satisfies the requisite showing. The next step in the rule is in cases where, again as here, the groundwater use is shown to have measurable and proven negative impacts on the riparian body/bodies, with the analysis not having any component regarding whether the use is off-tract/out of watershed. The reader will note that the phrase 'material diminishment' has not been used. I have perceived that the phrase 'material diminishment' has been a source of confusion in that there has never been a good definition, or even analysis, of what is

or is not ‘material.’ For those intent on using the phrase I suggest that it be used in the second scenario above, using the phrase ‘measurable diminishment’ for the first. Both are harms for which a remedy will lie. This is not inconsistent with my rulings before trial in that I reserved ruling on the question of whether what then was being referred to as material diminishment, but really a request that I find as a matter of law that a certain measurable level of loss of low and/or stage, was enough to warrant relief to the Plaintiffs.

Page 48 of Judge Root’s decision.

As this case proceeds through the appellate courts, the *Riparian* will keep its readers apprised of developments.