



**GET
OFF THE
BOTTLE**

CITIZEN-LED EFFORTS • SCIENTIFIC AND LEGAL FACTS

NESTLÉ: STOPPING THE GROUNDWATER GRAB

**A ONE-HOUR WEBINAR WITH
MICHIGAN CITIZENS FOR WATER CONSERVATION
AND FLOW (FOR LOVE OF WATER)**

**WATER IS LIFE
NOT
FOR SALE**



Mission

To protect Michigan's surface and ground waters from pollution, plunder, and privatization through education, advocacy, and action.



Mission

To safeguard the Great Lakes by advancing public trust solutions and cutting-edge policy work and ensure access to clean, safe, and affordable drinking water for all.

Meet Our Panelists:

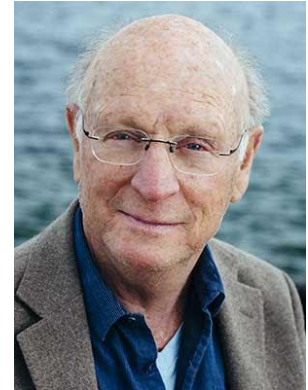


Peggy Case, President, MCWC

Peggy Case is a Michigan environmental and social justice activist, community organizer, editor, writer, and former teacher for many years.

Jim Olson, Founder & Legal Advisor, FLOW

Jim Olson has over 40 years of experience as an environmental, water, and public interest law advocate and champion, dedicated to protecting waters and ecosystems in the Great Lakes Basin.





MCWC's Terry Swier and FLOW's Jim Olson



Tributary to Chippewa Creek coming from spring



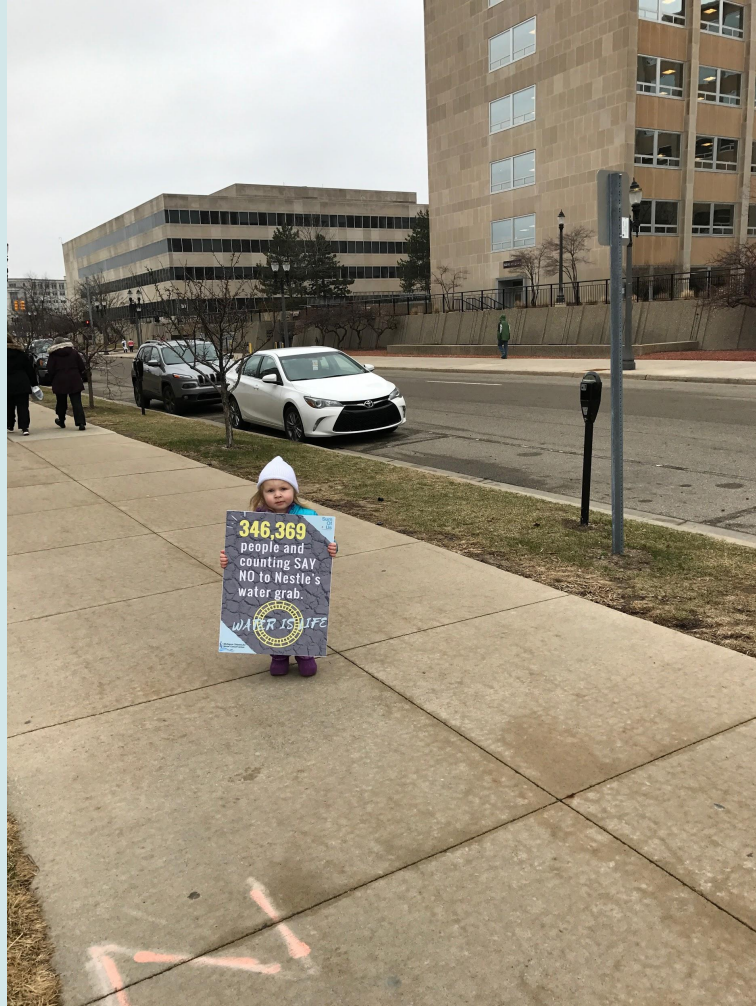
90 gallons per minute flow reported by Nestlé



Headwaters of Twin Creek below well



Mud flats in Chippewa Creek



346,369 petition signatures opposing Nestlé permit in Lansing



Demonstration at circuit court hearing



Culvert used to document the historical high water mark



Diversion and Sale of Public Water: ***MCWC v. Dept. of EGLE & Nestlé Waters***

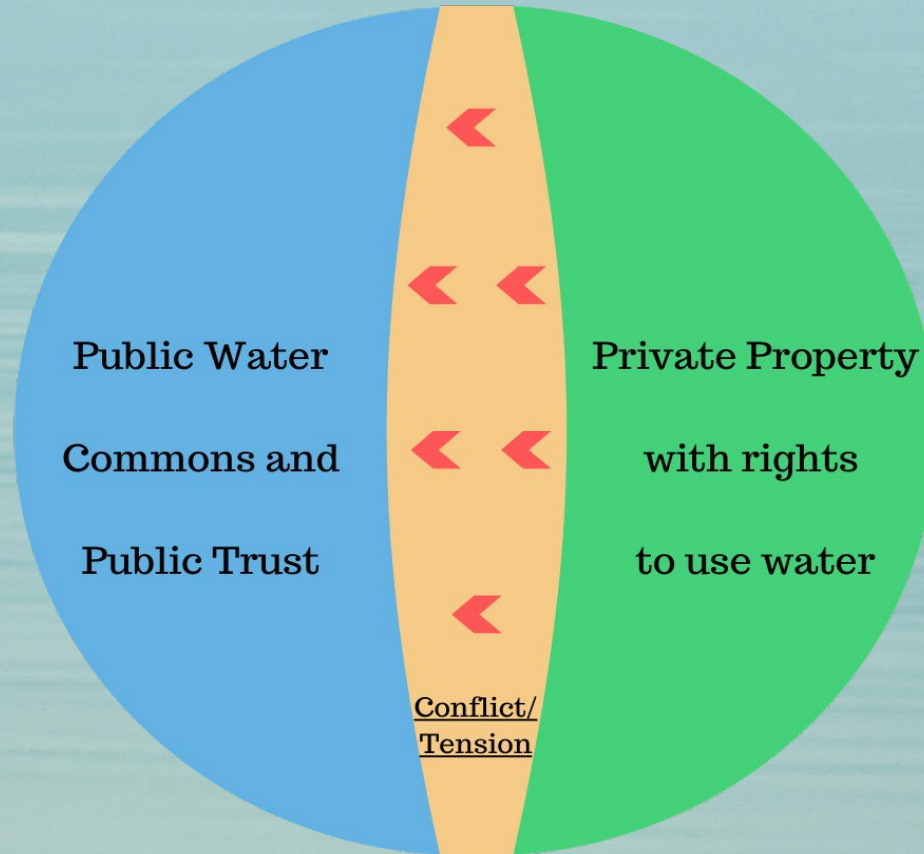
Jim Olson, President & Founder

June 17, 2020

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Public Water Commons and Private Use



Arnold v Mundy (NJ 1821)

- State holds some public common property like water for the benefit of its citizens to fish, navigate, and the right to sustenance: “maintaining someone in existence or life; food and drink, necessities of life.”
 - Merriam Webster Dictionary

The Public Trust Doctrine

Illinois Central R. R. Co. v. Illinois

(U.S. Sup. Ct. 1892)

- “The State can no more abdicate its trust over property in which the whole people are interested, *like* navigable waters and soils under them, than it can abdicate its ... powers of government.”
- State has an affirmative duty to protect these waters, their tributary waters, and the public trust uses of navigation, fishing, sustenance, and drinking water from subordination or impairment.

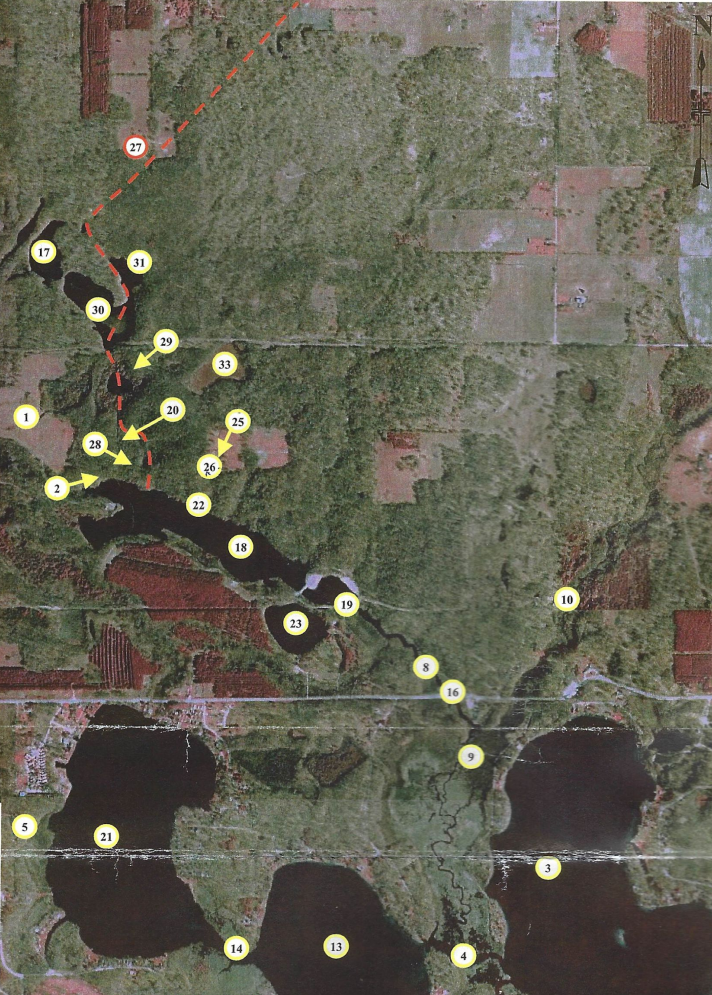
The Reasonable Use of Water

- As between landowners on a lake or stream, they enjoy a right to reasonable use of water to benefit the riparian land.
- As between landowners overlying groundwater, they enjoy a right of reasonable use to benefit the land.

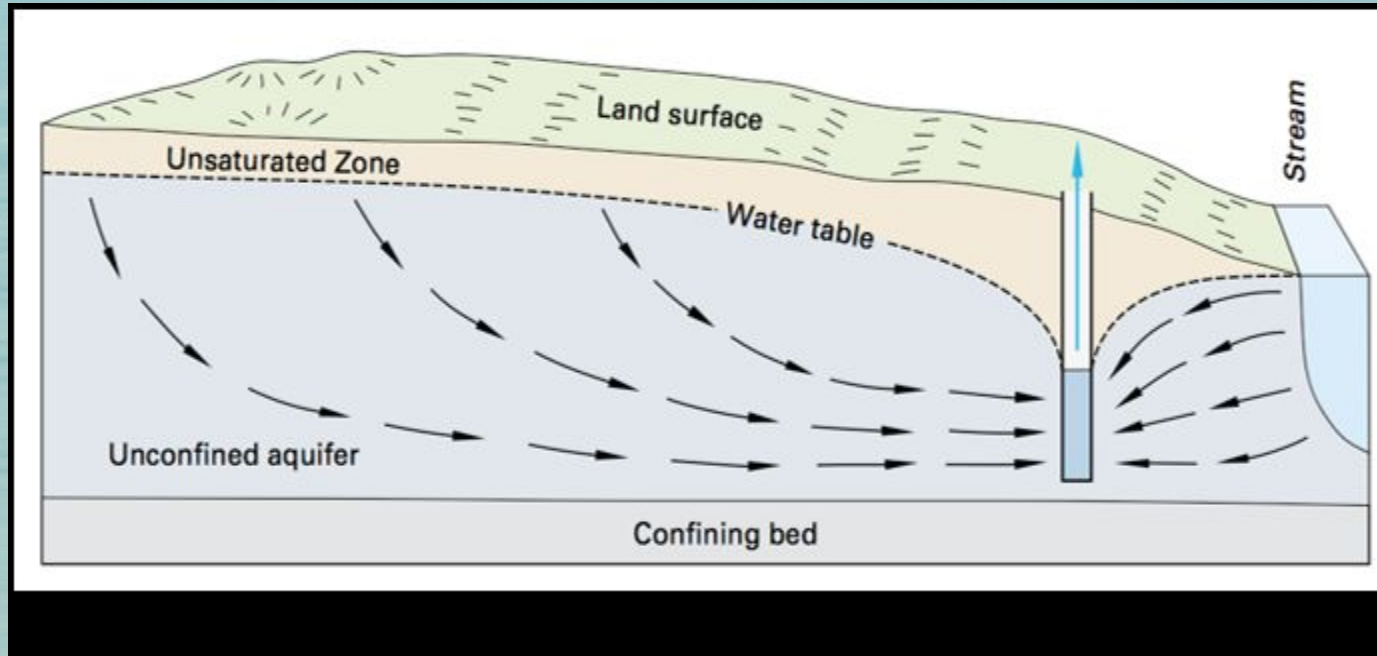
A Diversion of a Stream, Lake, or Groundwater Is Restricted

- However, a riparian cannot divert water off-tract or out of a watershed if it diminishes the flow or level of a lake, stream, wetland, or spring. *Schenk v City of Ann Arbor* (Mich Supreme Court 1917)/
- Under the reasonable use balancing test in *MCWC v Nestle, Court of Appeals (2005)*, a landowner can withdraw groundwater and divert from land and out of a watershed under a balancing of factors so long as adequate water remains in the lake or stream.

The Sanctuary Springs Case: 2001-2009 *Michigan Citizens v Nestlé Waters*



Hydrology: The Diversion of Groundwater from Lakes and Streams





Trial Court Findings Based on Existing Data and Conditions

- “... hydrologic effects on Dead Stream can [calculated] to estimate effects... by simple arithmetic calculations.
- “As such, Dead stream will lose from its base flow 28.75 percent of that flow to Nestle’s 400 gpm...by 2 to 6 inches.

Calculations and Existing Conditions

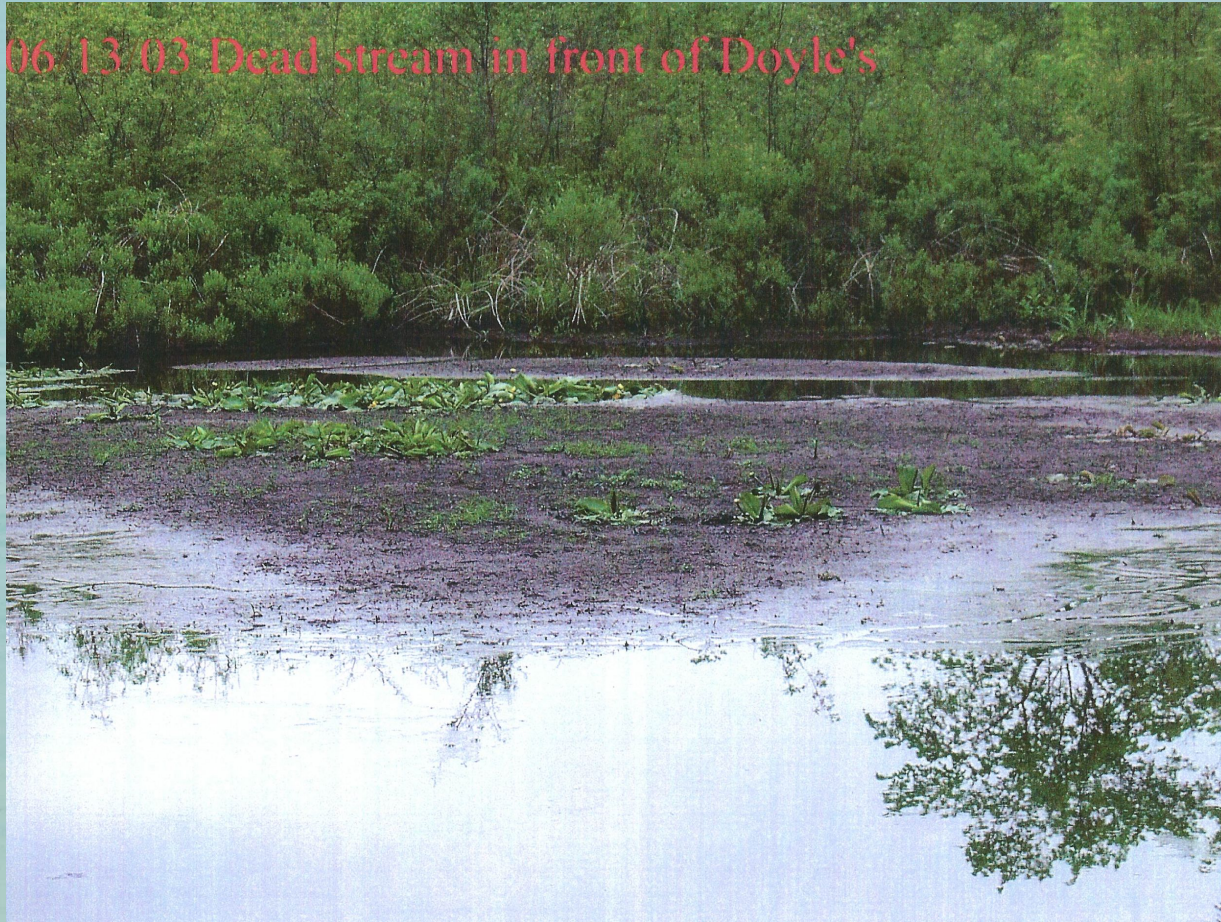
Verify Models

- “... where there is much collected data to gauge a model against in that he [Dr. Hyndman] uses models to analyze a given “problem” ... rather than trying to force the model to answer all questions.”

Insistence on Model Rejected

- “Dr. Andrew’s ... attempt to model this... complex hydrogeologic environment to explain the entire database is not considered reasonable...”
- “The old truism regarding computers applies... ‘garbage in equals garbage out.’”

06/13/03 Dead stream in front of Doyle's



DEQ (DEGLE) Approvals at PW 101

White Springs 2016-2020

- (1) 2001 Permit approved under former Safe Drinking Water Act (“SWDA”) for 150 GPM; 2007 permit for 150 gpm approved under Sec. 32723 of the Groundwater Withdrawal Act (“GWA”)
- (2) 2015 Registration Approved 100 gpm under the GWA (Sec. 32724 repealed by 2008 amendments to GWA; never approved under SWDA)
- (3) 2016 registration for 250 gpm increase, totaling 400 gpm rejected because of “adverse resource impacts.” Site-specific review under GWA noticed for approval in Fall, 2016.
- (4) FLOW, MCWC, others objected on grounds that 250 gpm, total 400 gpm, was all subject to Sec. 1017 of SWDA bottled water > 200,000 gpm.
- (5) 2018 Permit allowed 250 gpm, approved increase of 150 gpm, for total of 400 gpm subject to more information and data.

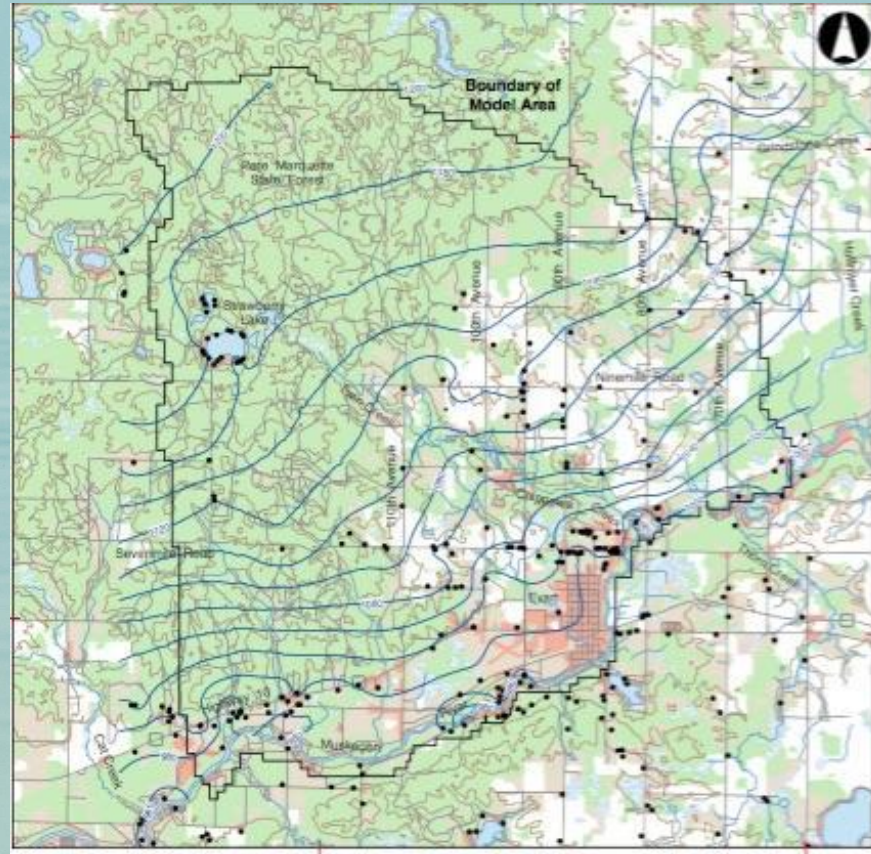
Safe Drinking Water Act Requirements for Individual Permits

- If a proposed well for bottled water is more than 200,000 gpd, must obtain permit under Sec. 17, SWDA
- Sec. 17(3) SWDA and Sec. 32723 GWA prohibits a permit unless there is a “reasonable basis for determination” based on “existing hydrologic, geologic, and environmental conditions” for predicted effects.
- Sec. 17(3) requires compliance with the standards Sec. 32723 GWA.
- Sec. 17(4) also prohibits a permit unless (a) the department determines it complies with the applicable standards under Section 32723 of the GWA; and (b) addresses hydrological impacts commensurate with the extent of the withdrawal.
- Sec. 17(5) requires consultation with local officials and interested community members.
- Sec. 17(6) provides that if an applicant does not have a previous permit approved under the SWDA and Section 17(4), it must submit an application under Section 17(4) permit under Section 17(3) and (17(4)).

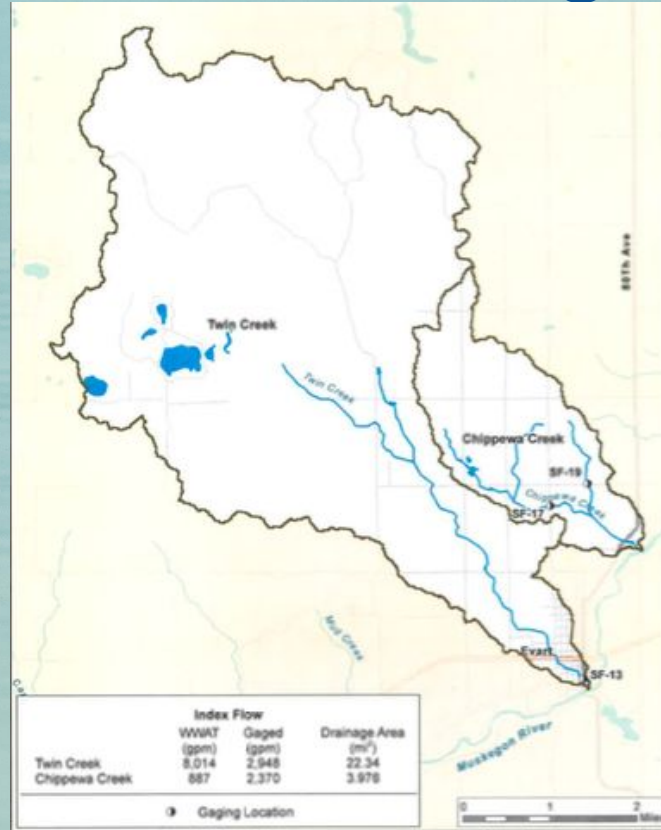
Additional Requirements under Sec. 32723 of the GWA

- Sec. 32723(1) requires individual application and permit.
- Sec. 32723(2) requires an evaluation of existing hydrological and hydrogeological conditions.
- Sec. 32723(5) requires compliance with the following conditions:
 - All water less consumptive use must be returned to watershed.
 - The proposal will result in no individual and cumulative impacts.
 - Comply with all applicable local, state, and federal laws.
 - The use is reasonable based on common law principles (reasonable use and qualified diversion for riparian and groundwater law).
 - The proposal will not violate public rights and limitations imposed by Michigan water law or other common law duties (public trust doctrine).
 - Diminish the effect of the withdrawal and stream flows and temperature regime.

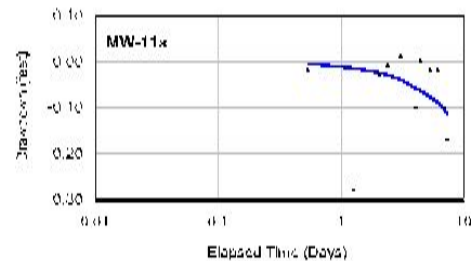
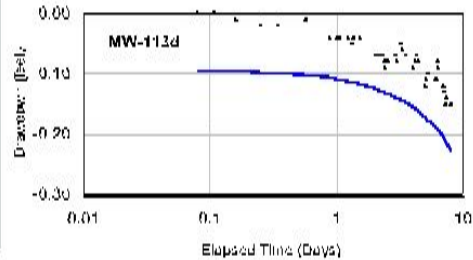
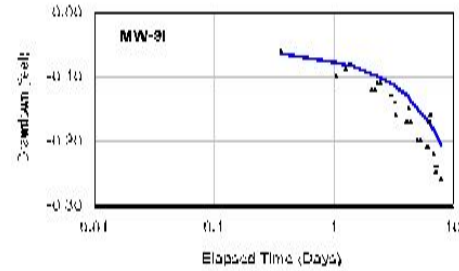
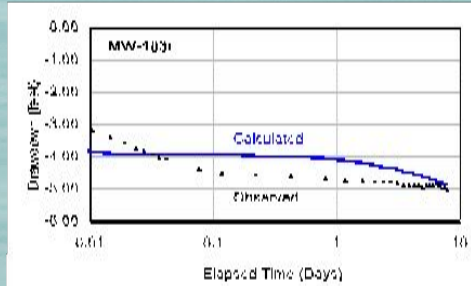
Regional Setting: Ewart, Osceola County, MI



Twin Creek & Chippewa Creek Surface Water Drainage Basins



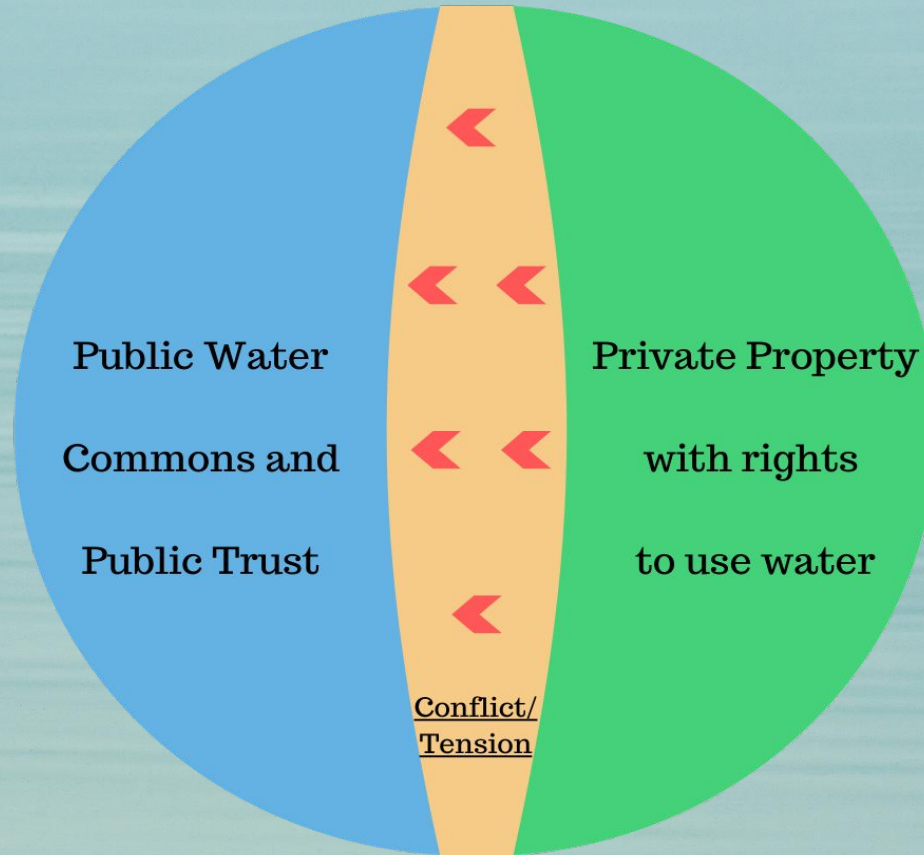
Rating Curves from Calculated and Observed Drawdowns PW-1 Pumped for 8 days



MCWC Exceptions to Administrative Judge's Proposal for Decision

- The Administrative Law Judge (“ALJ”) affirmed the DEQ permitted increase to 400 gpm.
- The ALJ refused to nullify the 2001 permit for 150 gpm and 2015 Water Withdrawal Assessment Tool registration for 100 gpm, even though (a) the 2001 permit was not properly issued for bottled water production; and (b) the 150 and 100 gpm were not permitted under Sec. 17 of the SWDA and Sec. 32723 of the GWA.
- Reliance on Nestle’s—Dr. Andrew’s model failed to demonstrate a “reasonable basis for determination” because it used only selective data and did not calculate effects based on “existing hydrological hydrogeological, environmental conditions” to verify predicted effects.”
- “I believe that it is highly likely that adverse resource impacts will occur at a 400 gpm pumping level, and that conditions will arise that will lead to those conditions persisting for months to years. I note that this opinion is based on extrapolating from the results presented in reviewed reports because the modeling work conducted for Nestlé is inadequate to determine whether those impacts will occur.” Dr. David Hyndman
- The ALJ used the wrong “adverse resource impacts” standard for the Water Assessment Tool for the determinations of effects and individual and cumulative impacts for a permit under Sec. 17 of the SWDA and Sec. 32723 of the GWA.
- The ALJ decided Nestle complied with the common law and applicable statutes, like the MEPA and WPA, and the rights of the Grand Traverse Band under the Treaty of 1836,

Public Water Commons and Private Use



Caution:

Hidden Privatization in the Common Law

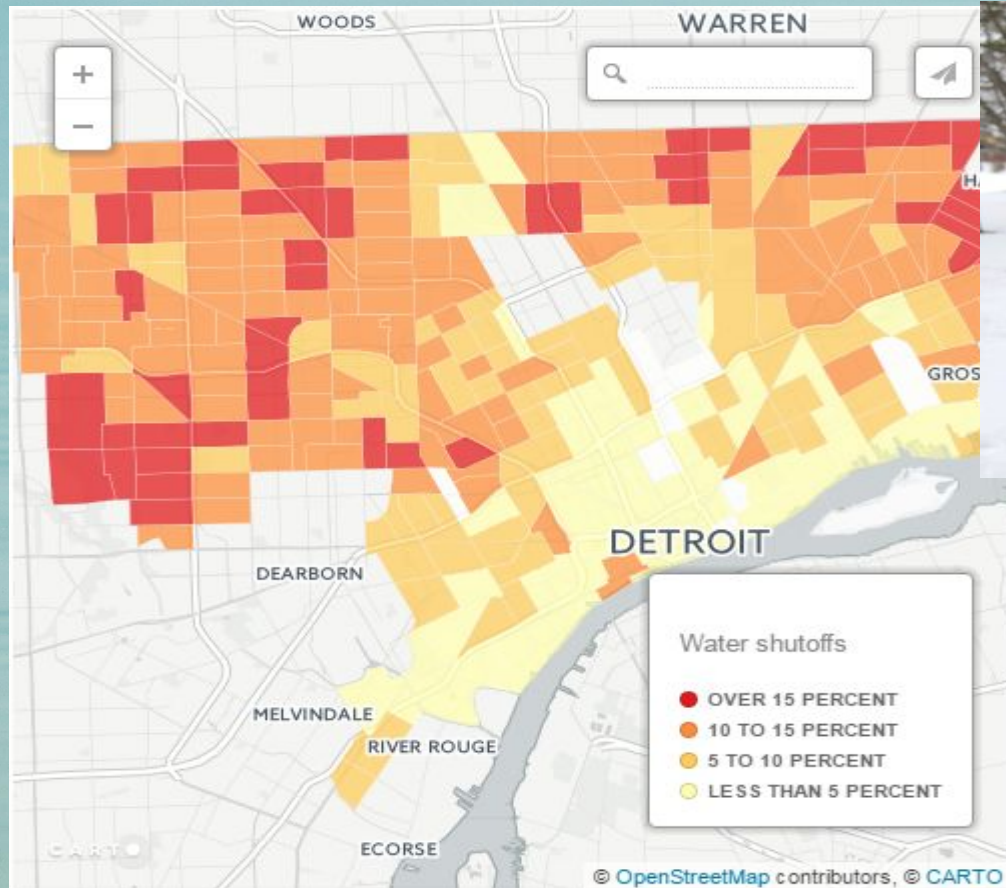
- Trial Court: “[f] the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body.”
- Michigan Supreme Court: *Schenk v City of Ann Arbor* (1917) “no off-tract diversion for sale if it materially diminishes flows or levels of wetland, lake, pond, or stream
- Appellate Court: “We adopt the reasonable use balancing test.”
 - Balanced harm versus public and private benefits
 - Shifted water law from right to use to the right to sell without authority of state on behalf of the commons
 - Erased the diversion “non material diminishment” test.

Public or Private?

- Shifts in the common law or statutory standards—*MCWC v Nestle* Ct of Appeals (2005)
- Michigan does not authorize the sale of water, so, Nestle and other bottled water companies are subsidized without a license or fair royalty or compensation.
- 3Ps- Public Private Partnerships
- Private investment and gain
- Private financing, interest, and foreclosure.
- Leasing for long term possession, profit, and gain.
- Outsourcing management, expertise, and capital improvement contracts with flat fee and bonus, not percentage of profits. E.g. Veolia Indianapolis (\$40 million year);
- Nonprofit water trusts (Indianapolis Citizens Water– Charitable Trust) and Great Lakes Water Authority.
- **WHY? INTERNATIONAL TRADE LAWS AND COMMERCE CLAUSE**

Trends in Public Trust Law

- Groundwater is part of a single hydrological cycle, so, is subject to the public trust doctrine.
- Tributary non-navigable streams and groundwater are subject to public trust claims if the withdrawal or diversion effects a lake or a stream.
- The State as trustee has an affirmative duty to interpret water laws strictly to assure protection of the paramount rights of the public protected by the public trust doctrine.



Source: Detroit Water and Sewerage Department, Bridge analysis

Water and Health: The Eye of the Storm– Climate Change and Human Action (Inaction)

Hurricanes
Flooding
Drought
Disease
Contamination
Food
Infrastructure
Wetlands
Floodplains
Habitat

Adaptation and Resilience

Questions for Our Panel?

Please enter your questions in the:

- **Zoom chat box**
- **FLOW's Facebook Live comments**



Take Action!

(Note: See Zoom chat box or Facebook Live comments for these hyperlinks.)

Take Action – Tell the State of Michigan to Stop the Nestlé Groundwater

Grab:

- [With MCWC's Action Alert](#)
- [With FLOW's Take Action email template](#)



Resources:

- [April 24, 2020, Proposal for Decision \(PFD\) in the Nestle' contested case](#)
- [2020-05-15 Petitioners' Exceptions to PFD on Nestle'](#)
- [April 21, 2017 FLOW Comments to the MDEQ re: Nestle Appr](#)

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Thank You for Joining Us!

Contacting Our Panelists



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