Wisconsin Strives to Minimize Conflicts Over the Uses of Ground Water

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COMMENTS

WISCONSIN STRIVES TO MINIMIZE CONFLICTS OVER THE USE OF WATER*

INTRODUCTION

Wisconsin's development and growth is inextricably tied to the abundance of her water resources. Recently, however, the increasing demands placed upon that resource base by industry, municipalities and recreational users have resulted in inevitable conflicts. In an effort to minimize these conflicts, the laws which affect the use of disposition of water in Wisconsin have changed dramatically in the past few years. These common law and statutory changes have had and will have a profound impact on shaping Wisconsin's development and growth. Representative of that change are two recent decisions of the Wisconsin Supreme Court which fashioned new rules of law pertaining to the use and disposition of ground water and diffused surface water. This article will explore the court's rationale and add some perspective on the impact of the court's holdings.

* Material for this article forms a portion of a much larger report which is entitled WATER LAW IN SOUTHEASTERN WISCONSIN, TECHNICAL REPORT #2 (2nd ed.), which is being published by the Southeastern Wisconsin Regional Planning Commission. The author gratefully acknowledges the financial assistance provided by the Commission and its permission to publish segments of that report.

1. Cf. Wis. Stat. § 147.01 et seq. (1973) which requires a permit system for all pollutant discharges into the state waters; §§ 144.26, 59.971 and 87.30 which require the zoning of shorelands and floodplains; and §§ 15.347(8), 20.285(1), 20.3705(e) and (em) and ch. 33, which authorize a program to rehabilitate Wisconsin's inland lakes. Also see the Wisconsin Supreme Court decisions of Just v. Marinette, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) which upheld the state's right under the public trust doctrine to regulate development in the floodplains, and Omernik v. State, 64 Wis. 2d 6, 218 N.W.2d 734 (1974), where the court held that diversions from non-navigable streams required a permit under Wis. Stat. § 30.18 (1973). Moreover, the federal government has also taken great strides in this area to regulate certain activities which may impact on the nation's waters. See, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. (Supp. III, 1973), the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (Supp. III, 1973), the Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq. (Supp. III, 1973); the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4001 et seq. (Supp. III, 1973), and the Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (Supp. I, 1975).
I. CONFRONTATION WITH AN ARCHAIC RULE FOR GROUND WATER: THE SETTING

In the case of State v. Michels Pipeline Construction Inc,\(^3\) (henceforth Michels) the supreme court was confronted with an old rule of law established in the much criticized case of Huber v. Merkel,\(^4\) which permitted the possessor of land to use with impunity the captured waters found beneath the surface.\(^5\) The challenge to that doctrine and the election by the court to afford specific protection to certain users of ground water arose over the following circumstances.

Michels Pipeline Construction Inc. had contracted with the Metropolitan Sewage Commission of Milwaukee to install a five foot diameter sewer line beneath the Root River Parkway, Greenfield, Wisconsin. The county had granted a twenty foot construction easement to the Sewerage Commission for the specific purpose of constructing the sewer line. All three parties were joined as defendants in the action brought by the State.\(^6\)

Constructing or installing sewer lines such as that involved in Michels necessitates tunneling, sometimes at rather substantial depths. In this instance the depth was forty feet. A frequent result of such tunneling is pressure or inward push of groundwater which attempts to fill the new void. Consequently, a practice known as dewatering occurs during the construction period. This involves lowering the groundwater level by pumping water from wells. The problem of water inflow is eliminated, thereby hastening the trenching and installation process, and reducing the costs of construction. The effects of this dewatering process, however, are not confined to the waters immediately along the course of the tunnel. There is also

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2. The following discussion is directed at percolating ground water and not to underground streams in definable channels. Percolating waters are defined as "those which ooze, seep, filter, or percolate through the ground under the surface, without a definite channel, or in a course that is uncertain or unknown," 56 Am. Jur. Waters § 111 (1956). However, the presumption as to the nature of underground waters is that they are percolating and the burden of establishing that a permanent channel exists falls on the persons asserting it. 93 C.J.S., Waters § 87 (1956).

3. 63 Wis. 2d 278, 217 N.W.2d 339 and 219 N.W.2d 308 (1974).

4. 117 Wis. 355, 94 N.W.2d 354 (1953).

5. Although the court in Huber did not distinguish between percolating and artesian waters, this is not the general rule. Cf. 93 C.J.S. Waters § 92 (1956), which states that the rule vesting the ownership of percolating waters in the owner of the land does not apply to the waters of an artesian basin underlying the lands of several owners.

6. They were joined in addition by the Metropolitan Sewerage District of the County of Milwaukee and Sewerage Commission of the City of Milwaukee.
a drawdown in adjacent wells in the surrounding area which may cause dry wells, or a decrease in capacity or quality of water, and in some instances the result may be a subsidence of soil.

In the *Michels* case the State alleged that a number of citizens in the area had in fact suffered these injuries as a direct result of defendant Michels Pipeline pumping ground water at a rate of 5,500 gallons per minute to dewater the soil to a depth sufficient for tunneling. The relief sought by the State, however, was not abatement of the project, but rather diminution of the injuries. The State’s argument was that there would be costs generated regardless of the course of action pursued by the defendants, and that higher costs resulting from different construction techniques should be absorbed by all persons benefiting from the system, rather than the present practice which effectively placed the costs upon a few adjacent landowners.

The trial court, adhering to the existing rule of law enunciated in *Huber*, found that the State of Wisconsin’s complaint did not state sufficient facts to constitute a cause of action.\(^7\) Thus, the court dismissed the complaint on the grounds that “there was no cause of action on the part of an injured person concerning his water table.”\(^8\)

The State appealed from the lower court’s dismissal, and the Supreme Court of Wisconsin addressed two substantive issues. The first concerned whether a public nuisance in fact existed. If none did, the supreme court would sustain the lower court’s decision. The respondents argued that on the basis of the nature and scope of conduct and its consequences no public nuisance existed.\(^9\) The supreme court felt otherwise. It reiterated the statements of *State v. H. Samuels Co.*, stating:

> . . . [I]f the public is injured in its civil or property rights or privileges or in respect to public health to any degree that is sufficient to constitute a public nuisance; the degree of

\(^7\) 63 Wis. 2d at 282, 217 N.W.2d at 340. The defendants had demurred to the complaint and the demurrer was granted.

\(^8\) Id. The doctrine found in *Huber* had been reaffirmed in the companion cases of *Fond du Lac v. Empire*, 273 Wis. 333, 77 N.W.2d 699 (1956), and *Menne v. Fond du Lac*, 273 Wis. 341, 77 N.W.2d 703 (1956).

\(^9\) In Brief for Respondent at 10, it was pointed out that from the State’s complaint it could not be determined whether the injury alleged impacted on 2,200 or 24,000 people.
harm goes to whether or not the nuisance should be enjoined.\textsuperscript{10} The court added that "The public does not have to include all the persons of the community but only a sufficiently large number of persons, as alleged here."\textsuperscript{11} Thus, the court found the requirements for a public nuisance satisfied by the allegation that the neighborhood surrounding the sewer project had been adversely affected by the dewatering.

Having resolved that issue, the court addressed the major issue of the case—whether the facts were adequate to constitute a cause of action. Acceptance of the State's position would necessitate overruling \textit{Huber}. In weighing the consequences of such a decision, the court examined the rationale of the \textit{Huber} doctrine.

The basis of the English or common law rule that gives absolute ownership to the captor of percolating ground water was that the forces controlling the movement of underground water were too mysterious and unpredictable. As a result, it was much easier and more practical to fashion a rule of absolute possession with no liability for injury, rather than attempt to regulate an unknown entity. The effect was to preclude a cause of action for interference with ground water.

But in \textit{Michels}, the court took judicial notice of the fact that advancements in the scientific community, specifically in the field of hydrology, had rendered the \textit{Huber} position archaic. The court emphasized that water systems are interdependent and that sophisticated means are available to measure the impact of drawing upon underground water and the effect it has on the water table.\textsuperscript{12} Moreover, it added, there is little justification for considering rights in ground water absolute, while rights in surface streams are subject to a doctrine of reasonable use.\textsuperscript{13} As a result, the court felt compelled to overrule \textit{Huber}.\textsuperscript{14}

\textsuperscript{10} 60 Wis. 2d 631, 638, 211 N.W.2d 417, 420 (1973) and 63 Wis. 2d at 288, 217 N.W.2d at 343.
11. 63 Wis. 2d at 288, 217 N.W.2d at 343.
12. \textit{Id.} at 292, 217 N.W.2d at 345.
13. \textit{Id.}
14. \textit{Id.} Establishing that a scientific base did in fact exist, the court also addressed the issue of stare decisis, but found that it was "not an inflexible restraint, but merely a cautionary rule." \textit{Id.} at 294, 217 N.W.2d 346; and specifically it found no law requiring that the doctrine "must be adhered to wherever a change would affect property rights." (emphasis in original) \textit{Id.} at 298, 217 N.W.2d at 347. And, in deflating the
The supreme court analyzed several doctrines as potential replacements for the *Huber* rule. To better understand the American Rule, which was finally adopted, it is helpful to follow the court's analysis and balancing of the respective merits of each against what it felt were interests of Wisconsin.

A. The English Rule or Common-Law Rule of Absolute Ownership

Under this doctrine the landowner has complete freedom to draw upon the underground water at will, and the owner need not apportion the water among competing users, or use it beneficially. The rule of law is stated as follows:

It is based on the premise that ground water is the absolute property of the owner of the freehold, like the rocks, soil and minerals which compose it, so that he is free to withdraw it at will and to do with it as he pleases, regardless of the effect the withdrawal may have upon his neighbors.\(^5\) The only exception to the rule is liability if withdrawal was motivated by malicious intent.

B. Reasonable Use Doctrine

In *Corpus Juris Secundum*, from which the court quoted directly, the reasonable use doctrine is defined as follows:

. . . limiting the right of a landowner to percolating water in his land to such an amount of water as may be necessary for some useful or beneficial purpose in connection with the land from which it is taken, not restricting his right to use the water for any useful purpose on his own land, and not restricting his right to use it elsewhere in the absence of proof of injury to adjoining landowners.\(^6\)

The term reasonable as used in this context, however, has a

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\(^5\) 5. *RESTATEMENT (SECOND) OF TORTS*, Explanatory Notes § 858A, at 153 (Tent. Draft No. 17, 1971), which also states that the landowner overlying the groundwater may sell and grant his right to withdraw the water to others; and 93 *C.J.S. Waters* § 93(c)(3) (1956).

\(^6\) 6. 63 Wis. 2d at 299, 217 N.W.2d at 349; 93 *C.J.S. Waters* § 93(c)(3).
very limited meaning.\textsuperscript{17} If the water withdrawn is used in connection with the overlying land it is a reasonable use, even if harm is caused. Only a wasteful use of water that actually causes harm is unreasonable. Furthermore, the transporting of water for beneficial use on lands other than that overlying the source is unreasonable only if it causes harm.\textsuperscript{18} The practical effect of the rule, as pointed out by the court in \textit{Michels}, is that it:

\ldots only affords protection from cities withdrawing large quantities of water for municipal utilities. \ldots However, under the rule there is no apportionment of water as between adjoining landowners, [therefore] \ldots the rule gives partial protection to small wells against cities or water companies, but not protection from a large factory or apartment building on the neighboring land.\textsuperscript{19}

\textbf{C. Correlative Rights Doctrine}

This doctrine provides apportionment of underground water. Each owner's share is determined by the amount of water available that may be reasonably used under the circumstances. It differs from the reasonable use doctrine in that the landowner is only entitled to a reasonable share if there is not enough to supply all.\textsuperscript{20} The doctrine is summarized in \textit{Corpus Juris Secundum} as follows:

Those rights of all landowners over a common basin saturated strata, or underground reservoir are coequal or correlative, and one cannot extract more than his share of the water, even for use on his own land, where others' rights are injured thereby.\textsuperscript{21}

The Wisconsin Supreme Court found such a rule not appropriate for two reasons. First, water conditions within Wisconsin are not so limited as to require the apportionment. Secondly, the administrative machinery is not available to adequately

\begin{itemize}
\item \textbf{17.} \textit{Restatement (Second) of Torts, supra} note 15, at 153.
\item \textbf{18.} The court provided an example where "[o]ne may sink a well for domestic use or other use on his land without liability to his neighbors for effects on their wells as long as he acts without malice and is not wasting water to their detriment." 63 Wis. 2d at 301, 217 N.W.2d at 350.
\item \textbf{19.} \textit{Id.}, and see \textit{Ellis, Water-Use and Administration in Wisconsin} § 5.04 at 91 (1970).
\item \textbf{20.} 93 \textit{C.J.S. Waters} § 93(c)(4) (1956).
\item \textbf{21.} \textit{Id.}
\end{itemize}
apportion the resource. The court, not satisfied with the three doctrines discussed above, adopted instead the rule found in the *Restatement (Second) of Torts.*

**D. The American Rule**

In adopting this principle, the supreme court reiterated the Reporter's analysis. It is important to note the distinction between the new rule and the reasonable use doctrine. The *Michels* rule broadens and extends the protections of the old rule against harm caused by large withdrawals for operations on overlying lands as well as water used elsewhere. The *Restatement (Second) of Torts* section reads as follows:

**SEC. 858A. NON-LIABILITY FOR USE OF GROUND WATER—EXCEPTIONS.**

A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

(a) the withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure,
(b) the ground water forms an underground stream, in which case the rules stated in secs. 850A to 857 are applicable, or
(c) the withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake, in which case the rules stated in secs. 850A to 857 are applicable.

The presumption of the rule, therefore, is that ground water remains plentiful and that a privilege exists to use the waters beneath the land. But this privilege does not represent an unqualified property right in ground waters. The focus then

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22. 63 Wis. 2d at 300, 217 N.W.2d at 349.
27. The court's position has been reaffirmed in the more recent case of *Village of Sussex v. Dept. of Natural Resources,* 68 Wis. 2d 187, 197, 228 N.W.2d 173, 179 (1975). There the court upheld the D.N.R.'s authority to order the village to cap certain contaminated wells and construct a public water supply under Wis. Stat. § 144.025(2)(r) (1973). It found that denying the use of potentially contaminated wells to the owners did not constitute a "taking" since the denial was exercised under the police power and not eminent domain.
shifts to the problem of allocating costs when injury occurs, e.g., deepening prior wells, installing pumps, paying increased pumping costs, etc.\textsuperscript{28} Under the common law of \textit{Huber}, these added costs were borne by each user, while under the reasonable use rule and its narrow interpretation, persons using existing wells were protected only if the water was taken off the land for use at another location. Application of the newly adopted rule follows the reasonable use doctrine which applies to surface streams, that is the traditional meaning of reasonable use in determining who shall bear the burden of costs. Comments by the Reporter of \textit{Restatement (Second) of Torts} indicate:

\begin{quote}
\ldots it is usually reasonable to give equal treatment to persons similarly situated and to subject each to similar burdens. \ldots The choice of where to place the burden may depend upon the relative position of the parties and their capacity to bear the burden. Later users with superior economic capacities should not be allowed to impose costs upon smaller water users that are beyond their economic reach.\textsuperscript{29}
\end{quote}

An example supplied by the \textit{Restatement (Second) of Torts} and the court illustrating the mechanics of the process is where a farmer sinks a well which initially is sufficient for irrigation but subsequently becomes inadequate because other farmers are using ground water from the same source for irrigation. The cost for deepening the first farmer's well (i.e., the prior user) under the new rule would be assumed by the first farmer, since in this instance all the farmers are in a similar situation. On the other hand, a municipality's use of the ground water for domestic purposes, or another farmer using it for stock watering, may well constitute an unreasonable use, thereby placing the liability on them as subsequent users. Thus, the utilization of underground water for wholly new purposes will subject the new user to liability if the prior users suffer injury.

Although not specifically addressed in the case, the Reporter of the \textit{Restatement (Second) of Torts} indicates that a corresponding liability will attach to the new user if the magnitude of withdrawal appreciably differs from that of the prior user.\textsuperscript{30}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{28} 63 Wis. 2d at 303, 217 N.W.2d at 351.
\item \textsuperscript{29} \textit{Restatement (Second) of Torts} § 858A comment \textit{d} at 158 (Tent. Draft No. 17, 1971) and also quoted in \textit{Michels}, 63 Wis. 2d at 302, 217 N.W.2d at 350.
\item \textsuperscript{30} \textit{Restatement (Second) of Torts}, \textit{supra} note 29, at 159.
\end{enumerate}
\end{footnotesize}
On a motion for rehearing it was decided that the American Rule would be applied prospectively except as to the parties in Michels and a companion case. Thus, liability for actions arising under the new rule would commence as of May 7, 1974.

E. Perspective

Given the paucity during the past seventy years of legal actions involving situations such as that presented in Michels (only three cases including this one reached the supreme court), the decision to expressly overrule Huber is significant. It may have been a much more simplified process if the private nuisance action had been allowed and the state had not been involved (the private parties involved in Michels were readily identifiable and their injuries were relatively easy to discern). Instead, it is apparent the Wisconsin Supreme Court, as in other recent decisions, has shown a willingness to initiate or actively support efforts that seek to protect one of the state’s most valuable resources.

A result of the decision may be a dampening effect on improvements of this type. But, if the result is greater precautions and adequate planning initiated prior to construction (such as providing an alternative source of water), then it will be a notable achievement. Internalizing the costs will result in higher construction costs, but with proper calculations, there will be a more equitable sharing of the costs by those who actually benefit from the improvements.

An important caveat to the new American Rule should be recognized. The court’s rejection of the correlative rights doctrine and apportionment, on the basis that ground water conditions in Wisconsin are adequate, may be rather short sighted if current patterns prevail. While it is true that apportionment of water is a practice found for the most part only in the arid western states, increasing demands for water, especially in southeastern Wisconsin, may substantially tax the existing supply beyond its recharge capacity. Increased consumption by industry, nuclear power plants in the cooling processes, and domestic water use contribute heavily to this depletion. The

31. 63 Wis. 2d at 303a-303b, 219 N.W.2d at 309.
32. See materials cited, supra note 1 and also Village of Sussex v. Dept. of Natural Resources, 68 Wis. 2d 187, 228 N.W.2d 175 (1975), where the court reaffirmed its position in Michels.
American Rule is designed to compensate for such uses if they are deviants from the norm, but when the source for all practical purposes is no longer available a totally different problem, not covered by the rule, emerges. Also, users similarly situated will not receive compensation. The cumulative effect of many small users, all for the same purpose, may have the same result as the major consumers, but in this situation compensation will not be forthcoming. Regulations and restrictions on use supplemented with allocation programs according to some defined criteria may well be the only answer, and present law does not meet that possibility.

II. DIFFUSED SURFACE WATER LAW: THE ABANDONMENT OF THE COMMON ENEMY DOCTRINE

Another recent decision of the Wisconsin Supreme Court follows and solidifies the court’s position in Michels on the importance of the state’s water resources base. This second opinion deals specifically with diffused surface water law, and attempts to minimize the conflicts that arise over the use of those waters.33 This area of water law has assumed added significance as increased developmental activity changes and re-shapes the natural terrain. In Wisconsin, extensive residential development and new commercial districts such as shopping centers dramatically influence local drainage patterns. The construction of storm water drainage and flood control facilities designed to serve and protect these new developments have also had a marked effect. Consequently, an understanding of the new rule adopted by the Wisconsin Supreme Court is imperative.

33. The Wisconsin court has defined different surface waters (more commonly known as “storm waters”) as: “...waters from rains, springs, or melting snow which lie or flow on the surface of the earth but which do not form part of a watercourse or lake.” Thompson v. Public Service Comm., 241 Wis. 243, 248, 5 N.W.2d 769, 771 (1942). The definition was quoted by the court from the Restatement of Torts § 846, comment b (1939). A ravine which was usually dry except in times of heavy rains or spring freshets was held by the court not to be a watercourse, and the water in it was held to be diffused surface water. Hoyt v. City of Hudson, 27 Wis. 656 (1871). Riparian law which is addressed to allocation of water for use from lakes, streams, or ponds does not apply to diffused surface water. Instead, the law that does apply deals with conflicts, not about water use, but about attempts to get rid of water. However where diffused waters which flow into a watercourse and become a part of that watercourse lose their original character and become subject to the riparian doctrine. Conversely, waters which overflow a watercourse and “permanently escape” from that watercourse become diffused surface waters not subject to the riparian doctrine.
A. Reflecting On An Old Doctrine

Until late 1974 Wisconsin had followed the common enemy doctrine in determining the propriety of interfering with diffused surface waters. Basically, that rule permitted private landowners who were seeking to improve their land to fight as a common enemy the diffused surface water in a particular drainage shed. Such action could be carried out regardless of the harm caused to others as long as it did not involve tapping a new drainage shed. The doctrine developed in the mid-nineteenth and early-twentieth centuries primarily to facilitate the expansionist policy of this country’s development. These practices caused injury to many unfortunate landowners who were subject to new drainage patterns, with the absence of recovery compounding the injury.

It is questionable that the common enemy doctrine had merit even during the nation’s developing years, and the Wisconsin Supreme Court decided it is not a realistic rule for contemporary times. Thus in State v. Deetz, the court elected to abandon the doctrine in favor of the American Law Institute’s reasonable use rule. The most significant aspect of this decision is the reiteration of the present court’s determination to harmonize the common law with present societal needs.

B. The Specific Conduct in Question

In Deetz the State of Wisconsin brought an action against a property developer and others to enjoin the defendants from

34. Manteufel v. Wetzel, 133 Wis. 619, 114 N.W. 91 (1907); Watters v. National Drive-In, 286 Wis. 432, 63 N.W.2d 708 (1954).
36. Shaw v. Ward, 131 Wis. 646, 658, 111 N.W. 671, 675 (1907). The court here found that in defending against surface waters the landowners may rid their land of surface water by natural or artificial means “[i]f consequential damages, from the exercise of such right, occur . . . [to others], they are remediless except by the exercise of the same right, so far as conditions render that feasible, upon their own premises.”
37. 66 Wis. 2d 1, 224 N.W.2d 407 (1974). The “reasonable use” rule is found in RESTATEMENT (SECOND) OF TORTS § 822 et seq. (Tent. Draft No. 17, 1971). RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 18, 1972), presented to the A.L.I. in May, 1972, reported that the material in No. 17 had been approved in principle.
permitting the deposit of material on an adjacent road and in Lake Wisconsin. The state also sought forfeitures from the defendants under Wisconsin Statute sections 30.15(1) and 30.15(3) which provide for penalties for unlawful obstruction of navigable waters.\(^{39}\)

The Deetz’s and other individuals had purchased lands on a bluff overlooking Lake Wisconsin, and had developed the lands for residential use. Prior to this development, the lands had been primarily used for agricultural purposes, with minimal erosion and runoff. The residential development, however, created a substantial increase in the amount of soil carried from the bluff by diffused surface waters. The result, according to testimony at the trial, was that sand deltas of 6,000 square feet and 8,000 square feet were formed in the lake, and the road at the base of the bluff was covered by sand, at some points up to eight inches deep.

Evidence produced at the trial also showed that the public was no longer able to use the lake for boating, fishing, or swimming, and that vegetation had commenced growing in the silted areas. Furthermore, the evidence firmly established a direct link between the construction of the roads at the new residential development on top of the bluff and the subsequent increase in surface water runoff and formation of the deltas in the lake.

The property owners who lived at the base of the bluff had complained to Deetz about the runoff and siltation, but he stated that there was nothing he could do about the problem. Consequently, the State of Wisconsin brought a public nuisance action to abate the disposal of surface waters.\(^{40}\)

C. The Subsidiary Issues

In addition to public nuisance, the State also argued in a separate action that the results of the development activity were violative of the statutes previously mentioned, as well as Wisconsin Statute section 29.29(3). The latter prohibits the deposit of deleterious substances on ice or waters within the state.\(^{41}\)

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39. Wis. Stat. § 30.15 (1973) provides for a $50 forfeiture for every offense, with each day being considered a separate violation.

40. The action was brought under Wis. Stat. § 280.02 (1975), which provides that an injunction may be brought by the Attorney General.

41. In addition to the forfeiture, Wis. Stat. § 30.15(4) (1973), provides:
The trial judge dismissed the State's complaint, however, concluding that the statutes were irrelevant. The court's rationale was that the defendant had not "deposited" material into the lake, but rather the deposit resulted from the flow of surface water. And, since the damage resulted from the property owner's exercise of a legally sanctioned right to fight surface water, recovery was not allowed.

On appeal the supreme court addressed the application of these statutes to the specific facts of the case. The court, in interpreting the intent of the statutes, affirmed the trial court's conclusion of irrelevancy.42

Prior to discussing the major issue involved in the *Deetz* case, two further points made by the Wisconsin court pertaining to the statutes discussed above should be noted. The first

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(4) **Obstructions are public nuisances.** Every obstruction constructed or maintained in or over any navigable waters of the State in violation of the chapter and every violation of § 30.12 or 30.13 is declared to be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or any citizen thereof.

The State in its brief to the court, attempted to have the court read the statutes liberally, wherever an ambiguity may have existed. By so doing, it was argued, the injury suffered here would constitute violation of the statute. The State based its argument for a liberal interpretation from the court's decision in *Reuter v. DNR*, 43 Wis. 2d 272, 168 N.W.2d 860 (1969), which found that ch. 30 of the Wisconsin Statutes (1973) should be read in light of the legislative intent when it enacted ch. 144. The Attorney General felt that the legislature "clearly recognized the possibility that misuse of natural drainage systems can cause pollution," and therefore if the court should again analyze and read ch. 30 with the intent and purpose encompassed in ch. 144, the violations of each of the statutes could be established. Reply Brief for State of Wisconsin at 5, *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

42. With respect to § 30.12, which regulates the structures and deposits in navigable waters, the critical element missing from Deetz's conduct was that he did not deliberately fill in Lake Wisconsin. The interpretation of the statute by the court is that it only prohibits "deliberate fills" and that indirect or unintentional deposits are not violations of the statute. 66 Wis. 2d at 22, 224 N.W.2d at 418.

The State in its arguments at trial indicated in addition that the defendants had violated § 29.29(3) which prohibits the depositing of deleterious substances in the waters of the state. The supreme court, however, found that the actions of Deetz and the other defendants were distinguishable from those found precluded by this section of the statutes. The court found that the statute was concerned only with "the discharge into navigable waters and the control of refuse arising from manufacturing activities." 66 Wis. 2d at 23, 224 N.W.2d at 418. The court placed great reliance on the fact that the legislature had denominated the types of contamination which constituted "deleterious substances" and that discharges of diffused surface waters into a navigable stream was not one of the prohibited items. The court did point out, however, that the State was correct in concluding that the statute did not require willfullness on the part of the violator, and that negligence may bring the conduct within the proscriptions of the statute.
is that if the defendants’ continuous course of conduct had in fact violated either one or both of the statutes, then “the repeated violations of the criminal statutes (would have) constituted per se a public nuisance.”43 Since Deetz’s actions were not covered by these statutes, however, the rule was not applicable. The other matter was the means by which the state may effectively curb indirect pollution. It felt that other methods, such as zoning and subdivision controls, were available to prevent the degradation of the waters.44 Specifically, the court mentioned Wisconsin Statute section 144.26 as one such mechanism. But the court refused to use criminal statutes to cover indirect pollution.45

D. Fashioning Relief from Discharges of Diffused Surface Water

The process leading directly to the decision to overturn the common enemy doctrine focused on nuisance law in Wisconsin and the public trust doctrine.

As indicated above, one of the causes of action was for an injunction to abate a public nuisance under Wisconsin Statute section 280.02.46 It was established at trial that damages had been sustained and were continuing from the deposit of sand both in the lake and on the road. But the supreme court found that the trial court judge was correct in his application of the common enemy rule. The property owners, Deetz and the other defendants, were exercising a legally sanctioned right in fighting surface waters, and therefore a nuisance action could not

43. 66 Wis. 2d at 21, 224 N.W.2d at 417. The court was reiterating a rule previously handed down in State v. H. Samuels Co., 60 Wis. 2d 631, 637, 211 N.W.2d 417, 420 (1973).

44. The supreme court made reference to an article by Jon Kusler, Water Quality Protection for Inland Lands in Wisconsin: A Comprehensive Approach to Water Pollution, 1970 Wis. L. Rev. 35, which discusses the use of local flood plain and shoreland zoning ordinances to cope with indirect sources of pollution. 66 Wis. 2d at 23, 224 N.W.2d at 418.

45. The State did not allege in its complaint or on appeal of the Deetz case that regulations adopted under § 144.26 were at issue.

46. This statute is strictly construed as to who may bring such actions. The interpretative commentary on § 280.01 discussing nuisance states:

The act of omission which is the basis of either a public or private nuisance is:
(1) an intentional tort, (2) negligence or (3) an act of omission for which there is absolute liability. A public nuisance is an offense against the state, while a private nuisance is a tort to a private person. The same act may constitute both a private and a public nuisance.
be maintained.\textsuperscript{47} In an effort to circumvent this bar to its complaint, the State argued that there was a cause of action per se arising from the public trust doctrine. Basically, the State's reasoning was that the interference with navigable waters, here the formation of sand deltas, was a violation of the public's legal rights in the waters, thereby meeting the requisite elements for a cause of action. The Wisconsin court did not agree, concluding that the public trust doctrine merely gives the state standing as trustee to vindicate any rights that are infringed upon by existing law.\textsuperscript{48} In other words, the State would be a proper party to bring such an action as alleged here, but merely gaining access to the court was not enough. Legal liability for unlawful acts arising out of either the statutes or case law must also be established, and since the common enemy rule still governed, a cause of action could not be maintained.

As a last resort in this many faceted argument, the State placed in issue the usefulness of the common enemy doctrine itself. The Wisconsin Supreme Court, finding that the doctrine no longer comported with the realities of contemporary society, agreed.

\textbf{E. Adopting the "Reasonable Use" Rule for Diffused Surface Waters}

Having decided to overrule the common enemy rule, the court, as it had in \textit{Michels}, went to the \textit{Restatement (Second) of Torts} for the new reasonable use rule.\textsuperscript{49} Section 822 of the \textit{Tentative Draft Number 18} incorporates damages occasioned by surface waters, and the language adopted by the court reads as follows:

\begin{quote}
One is subject to liability as a result of the non-trespassory invasion when the invasion is either
\end{quote}

47. On the appeal the supreme court pointed out:
Although the defendants do not dispute that a public nuisance would have been created if the disposal of the surface waters constituted a tortious act, their argument is that they committed no wrong because they were acting within the rights of a landowner seeking to cope with surface water.

66 Wis. 2d at 8, 224 N.W.2d at 411.

48. \textit{Id.} at 11, 224 N.W.2d at 412. The court did, however, provide a short synopsis on the doctrine indicating its great flexibility, pointing out, for example, that it may be used both by citizens and by the State either to limit certain state action or else to prevent it from taking place. It may also be used affirmatively as where the doctrine formed the cornerstone in the legislative enactment to regulate the shorelands and floodplains of the state.

49. \textit{Restatement (Second) of Torts} § 822 (Tent. Draft No. 17, 1971).
(a) intentional and unreasonable, or
(b) unintentional and otherwise actionable under the principles controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.50

The Wisconsin Supreme Court emphasized that the new rule would apply to public and private nuisances.51

The critical determination of fact centers on the unreasonableness of the intentional act. The methodology in making that determination is set out below.

F. The Process of Determining the Unreasonableness of Invasion

The Restatement (Second) of Torts provides for the following:

SEC. 826 UNREASONABLENESS OF INVASION
An intentional invasion of another's interest in the use and enjoyment of land is unreasonable under the rule stated in sec. 822,52 if

50. Id. Intentional invasions are defined in § 825 of the Restatement of Torts (1939):
An invasion of another's interest in the use and enjoyment of land is intentional when the actor:
(a) acts for the purpose of causing it; or
(b) knows that it is resulting or is substantially certain to result from his conduct.
The reporters of the Restatement of Torts indicate that it is the mere knowledge which goes to proving intent; the invasion need not be inspired by malice. See comment a to § 825.

In distinguishing § 822(a) from § 822(b), the reporters point out that in determining the reasonableness of unintentional invasions "it is the risk of harm which makes the conduct unreasonable." When the harm is intended, on the other hand, it is necessary to look only at the gravity of the harm which was suffered. Restatement (Second) of Torts § 822, comment k at 2 (Tent. Draft No. 18, 1972).

51. 66 Wis. 2d at 16, 224 N.W.2d at 415, and found in comment a to § 822 of the Restatement (Second) of Torts (Tent. Draft No. 17, 1971).

52. The reporters in Tentative Draft No. 17 envision the following broad test in the analysis of whether actions are unreasonable:
The question is not whether a reasonable person in the plaintiff's or defendant's position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Regard must be had not only for the interests of the person harmed but also for the interests of the actor and for the interests of the community as a whole. Restatement (Second) of Torts § 826, comment c at 34 (Tent. Draft No. 17, 1971).

§§ 827 and 828 discussed in the main text provide the factors for this deliberation.
(a) the gravity of the harm outweighs the utility of the actor's conduct, or
(b) the harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct. 53

The factors involved of weighing the gravity of the harm versus the utility of the actor's conduct, as found in section 826(a), are charted as follows:

THE EQUATION FOR DETERMINING WHETHER THE GRAVITY OF HARM EXCEEDS THE UTILITY OF CONDUCT

Factors Involved in Determining the Gravity of Harm: Sec. 827

(a) the extent of the harm involved; 55
(b) the character of the harm involved; 57
(c) the social value which the law attaches to the type of use of enjoyment invaded; 58

53. The reporters make the following distinction as between (a) and (b): "... the formula which referred to social utility of the conduct in general, was regarded as appropriate in a suit for injunction, but not in a damage action, which does not require that the conduct be discontinued." Tent. Draft No. 18, supra note 50, at 3. It was a result of this apparent dichotomy that (b) was added and further enumerated in § 829A of the Tent. Draft No. 18 (1972), which provides that although there is utility derived from the conduct and it should not be enjoined, the substantial harm which results from the invasion is entitled to some compensation.

54. The Wisconsin Court in State v. Deetz, 66 Wis. 2d at 17, 18, 224 N.W.2d at 415, 416, quoted these factors as developed in RESTATEMENT (SECOND) OF TORTS §§ 826, 827, 828 (Tent. Draft No. 18, 1972).

55. The list of factors here is not meant to be exhaustive according to the reporters and the relative weight of each will vary depending upon the facts. RESTATEMENT (SECOND) OF TORTS § 827 (Tent. Draft No. 17, 1971) (Hereinafter cited § 827).

56. Comments on this clause indicate that consideration may be given to risks of other harms that might be incurred by the complaining party. § 827, comment c at 38.

57. It was felt here that if physical damage resulted the gravity of harm would be treated as great even though the extent of harm was small, but where the invasion involved personal discomfort the harm is regarded as slight unless the invasion is substantial and continuing. § 827, comment d at 39.

58. Here the test is: "How much social value a particular type of use has in common with other types of use depends upon the extent to which that type of use advances or protects the general public good." § 827, comment e at 39.
Factors Involved in Determining the Utility of Conduct: Sec. 828

In determining the utility of conduct which causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) the social value which the law attaches to the primary purpose of the conduct;
(b) the suitability of the conduct to the character of the locality;
(c) whether it is impracticable to prevent or avoid the invasion, if the activity is maintained;
(d) whether it is impracticable to maintain the activity if it is required to bear the cost of compensation for the invasion.

59. The suitability of the particular use is determined as of the time of the invasion and not when the use began, the rationale being that the character of the locality may have significantly changed in the interval. § 827, comment f at 40.

60. The intent of this clause is “[t]hat persons living in society must make a reasonable effort to adjust their uses of land to those of their fellow men before complaining that they are being unreasonably interfered with.” § 827, comment g at 41.

61. The standards in measuring the utility of conduct are those present in the community at the time and place of the conduct and in addition what the courts themselves have regarded as the social value for certain types of human activity. It is very important to note that: “It is only when the conduct has utility from the standpoint of all factors that its merit is ever sufficient to outweigh the gravity of harm it causes.” Restatement (Second) of Torts § 828, comment b at 42 (Tent. Draft No. 17, 1971) (Hereinafter cited § 828).

62. Primary purpose refers to the main objective of the actor in doing the act. § 828, comment c at 42.

63. I.e., the type of activity which predominates within the community. § 828, comment f at 45.

64. An invasion would be practicably avoidable if the actor, by some means, can substantially reduce the harm without incurring prohibitive expense or hardship. § 828, comment g at 46.

65. The court in considering this factor must not only consider the compensation for harm in the suit before it but also potential compensation to others who may also be injured. In this situation the reporters indicate the review is much stricter, i.e., corresponding to that in a suit for an injunction. § 828, comment h at 47.
G. Application of the Rule to Deetz

In applying the new rule to the conduct of Deetz, the supreme court concluded that the land development activity on the bluff overlooking Lake Wisconsin had in fact caused damage to the public trust. Furthermore, since Deetz continued the development project after having knowledge of the consequences, the element of an intentional invasion was met. The next step was to evaluate the evidence from the trial record in light of the factors in section 827. The language and qualitative nature of the factors to be used in the weighing and balancing process makes this a difficult task, particularly where precedent is lacking. Its useful, therefore, to illustrate the court's findings in order to provide some indication of the court’s understanding of what they believe is encompassed by each of the factors.

On the evidence contained within the record, the justices felt that the following was shown:

(a) the extent of the harm involved: Extensive deltas have been formed, the erosion is continuing, and as the result of the erosion and the consequent silting, portions of the lakefront and the adjacent waters can no longer be used for swimming, fishing, and boating.
(b) the character of the harm involved: The physical damage to the lake, to the roadway, and to the below-bluff lands:
(c) the social value which the law attaches to the type of use or enjoyment invaded: Substantial portions of the lake dedicated to the public for recreational and navigational purposes, uses on which the State of Wisconsin places a high priority, have been impaired.

66. 66 Wis. 2d at 19, 224 N.W.2d at 416.
67. Id. For a definition of an intentional invasion which was not discussed by the court except impliedly. See note 50, supra.
68. An indication of this difficulty is the fact that the Wisconsin court went to a New Hampshire case over a century old to show where similar factors were used in evaluating the reasonableness of conduct. But, the Wisconsin court doesn't seem to have narrowed the focus nor does it incorporate greater specificity. The decision in Sweet v. Cutts, 50 N.H. 439, 496 (1870) held as follows:

In determining this question all the circumstances of the case would of course be considered, and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen.

66 Wis. 2d at 18, 224 N.W.2d at 416.
(e) the burden on the person harmed of avoiding the harm: The burden on the injured parties, the State of Wisconsin, as the trustee of the public trust, and on the private landowners to avoid the harm occasioned by the erosion is substantial.\textsuperscript{69}

This evaluation, however, forms only one side of the equation in the process of ascertaining whether Deetz's actions were reasonable. While the evidence supported the State's case that substantial harm had occurred, no evidence was available to measure the social utility of the action because the case had been dismissed at the trial level. Consequently, Deetz had not been required to come forward with evidence that might establish the merits of the residential development project he had undertaken. In recognition of this fact, the supreme court remanded the case to the lower court.\textsuperscript{70}

In remanding, the supreme court expounded on their interpretation of the reasonable use rule. They indicated that land development activity would still be a high priority in any evaluative process, as under the common enemy doctrine, but this policy and its economic ramifications would not be given the great weight that it had during the nineteenth century.\textsuperscript{71}

\textbf{H. Considerations on Prospective Application of the "Reasonable Use" Rule}\textsuperscript{72}

The distinctions made by the court place a heavy burden on the individual arguing a private nuisance action. Although dicta, it is a limitation on the new rule if this reasoning is adhered to. The presumptions in favor of the social utility of land development would weigh heavily against the injured party's attempts for an injunction or compensation.\textsuperscript{73}

\begin{itemize}
  \item \textsuperscript{69} Id. at 19, 20.
  \item \textsuperscript{70} As of the time of this writing the proceeding had not taken place.
  \item \textsuperscript{71} The court here specifically mentioned the case of Just v. Marinette, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) to reaffirm the public policies that it recognized as being of such importance to the state and its citizens. 66 Wis. 2d at 20, 21, 224 N.W.2d at 417.
  \item \textsuperscript{72} It should not be inferred from the following discussion that land development per se is bad. Rather, the concern here is with the type and location of development, neither of which may be effectively analyzed if only local norms or customs are the guiding criteria as envisioned by this process. Also, the presumption in favor of such action prior to even involving the evaluation process weakens it even more.
  \item \textsuperscript{73} The question of compensation emerges from \textit{RESTATEMENT (SECOND) OF TORTS} § 828, comment h at 46-7 (Tent. Draft No. 17, 1971): "Whether it is impracticable to maintain the activity if it is required to bear the cost of compensation for the invasion." If land development has utility, as it seemingly must given the presumption in favor
\end{itemize}
It should be emphasized at this point that although the
decision arrived at in *Deetz* has the effect of removing the
substantive defense that the common enemy doctrine had pro-
vided, it does not remove other procedural or substantive de-
fenses that may exist. With this caveat in mind, the following
hypothetical situations are presented which alter the fact situ-
ation found in *Deetz*, and which raise certain questions con-
cerning its prospective application.

What happens, for instance, when a development is under-
taken whose primary purpose is directed to benefit the public
(for example, in the construction of a building for use by the
public which may affect the flow of surface water)? It can be
assumed that the social utility in these instances would rate
very high under normal circumstances using the present
scheme of evaluation adopted in *Deetz*. But what if the public
interest is injured as in *Deetz*? Following the rationale as set
out by the court in *Deetz*, private citizens, the state, or local

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74. *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) removed the gov-
ernmental immunity for tortious acts by the state or any of the local units of govern-
ment, but the court was careful to point out that a suit brought against the state for
such acts must still meet the procedural requirements set out in the statutes. The
common law in Wisconsin has been quite explicit in not allowing damages where a
municipality was involved in constructing streets, sewers and gutters, going beyond
even the "common enemy" doctrine by allowing the municipality to tap new wat-
ersheds, which affect the flow of surface waters. *Cf.* Peck v. Baraboo, 141 Wis. 48, 56,
122 N.W. 740 (1909) where the court said:

> *A* municipal corporation cannot be held in damages by a landowner for
> changing the natural flow of and increasing the volume of surface water by the
> construction of streets and gutters, nor because the sewer was inadequate by
> reason of negligence in adopting plans in the first place, or by reason of negli-
> gently failing to maintain the sewer in good working order thereafter, to carry
> off the surface water so accumulating as fast as it accumulated.

And in *Tiedman v. Middleton*, 25 Wis. 2d 443, 452, 130 N.W.2d 783, 788 (1964), it said:

> "By constructing streets and gutters within its limits, a city may change the natural
> watercourse so as to increase the flow of water upon private land."

75. For example, the reporters, in commenting on clause (a) of § 828, would rate
actions with direct public benefit higher on social value than those primarily benefit-
ting the individual. § 828, comment e at 44.
units of government could challenge the action under the public trust doctrine in conjunction with the reasonable use rule. In that event, the equation for weighing the harm versus utility of the reasonableness of the conduct may approach its most equal balance, since the analysis would be of actions designed to benefit the public directly versus the injury to the public interest.

And what happens if the reverse of Deetz occurs? Where would the heaviest burden lie? That is, where the land development's major purpose was for the public which subsequently causes injury only to private interests. The implication of the reasonable use rule would seem to clearly favor the public enterprise. The social utility of the public development would conceivably be rated at the upper end of the scale, but the invasion of private interests, without the support of the public trust arguments, would be in a weak position in attempting to obtain injunctive relief.

As awareness continues to increase over the short and long term effects of private and public development, the situations posed above can be expected to become more prevalent. The necessity of having accurate projections based on reliable data will become even more crucial if the newly adopted process encompassed within the reasonable use rule is to work. One further observation about the new rule should be noted. The factors of social utility are basically a function of the predominating activities or community norms. This emphasis in favor of non-deviant action prevails for the first two factors in section 828, "(a) Social Value which the law attaches to the primary purpose of the conduct," and "(b) Suitability of the conduct to the character of the locality." On its face this would

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76. See note 48 supra, which discusses the court's documenting of the various parties who may use the "trust" doctrine in fostering or precluding particular actions affecting the public trust in waters.

77. That possibility almost presented itself in Deetz as the Town of DeKorra was named in the complaint as a defendant, but the cause of action was dismissed from the lawsuit when parties on both sides agreed that the town was not at fault in causing the siltation. The issue therefore was never reached.

78. Other alternatives may be available to the party seeking redress for the damages where, for example, the injury may be so severe as to create an inverse condemnation situation, and establishing that fact would entitle the injured party to receive compensation.

79. They say, for example: "On the whole, the activities which are customary and usual in the community have relatively greater social value than those which are not." § 828, comment e at 44.
seem to be a sensible policy of maintaining the integrity of an existing community. It may well lead, however, to continued local entrenchment and fractionalized thinking towards development activity. If so, this policy will only serve to exacerbate current problems where local decision making has so often failed to account for the external costs that accompany such enterprises. Only in this instance it would be receiving encouragement from members of another branch of government—the judiciary.

The reasonable use rule may prove difficult to apply as new fact situations arise in the future. The variable factors encompassed in the new rule, while reflecting some time honored concepts of the law, tend to be quite soft when taken on a collective basis and subjected to a probing analysis. Hopefully, greater reliance will be placed on economic indicators, where possible, to give additional clarity to the effects of altering diffused surface water patterns. And where information is available showing the spin-off effects of the development, both in benefits and costs to outlying communities, it should be incorporated as a matter of course. Obviously, not all the elements of determining the social utility of conduct or the harm of an invasion are quantifiable, but total reliance on the present indicators or factors heavily influenced towards the status quo may prove to be very misleading and costly.

**CONCLUSION**

Although neither the *Michels* nor *Deetz* decisions solve the numerous problems which plague the areas of ground water and diffused surface water law, they do provide an indication that the Wisconsin Supreme Court is willing to address some very complex issues concerning one of the states most precious resources.

Invariably, judicial opinion which sets new precedent as these decisions invokes much criticism and some praise. With respect to the critics, the usual arguments are that the court has taken the wrong tack, or that it has gone too far, or not far enough, and while this commentary leans to the latter view it becomes tempered with the realization that *Michels* and *Deetz* form a portion of a much larger and significant precedent in Wisconsin’s water law. That precedent is based on a judicial concern for maintaining the integrity of the state’s water resources and minimizing the conflicts over their use. The con-
cern assumes greater clarity if the Michels and Deetz decisions are read together and in light of other recent decisions. One can only hope that the court will continue to pursue this course.

Peter V. McAvoy

80. Just v. Marinette, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); Omernik v. State, 64 Wis. 2d 6, 218 N.W.2d 734 (1974).