

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 17
Issue 1 *Fall 2009*

Article 9

2009

It's Called Manufacturing: A Closer Look at Missouri's Groundwater Law. *Citizens for Ground Water Protection v. Porter*

Brian Hamilton

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Brian Hamilton, *It's Called Manufacturing: A Closer Look at Missouri's Groundwater Law. Citizens for Ground Water Protection v. Porter*, 17 Mo. Envtl. L. & Pol'y Rev. 215 (2009)

Available at: <https://scholarship.law.missouri.edu/jesl/vol17/iss1/9>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

**It's called Manufacturing:
A Closer Look at Missouri's Groundwater Law**

*Citizens for Ground Water Protection v. Porter*¹

I. INTRODUCTION

One word can really make a big difference. In 2008, the word *manufacturing* was used to describe an exception to the *Higday v. Nickolaus* (hereinafter “*Higday*”) rule concerning reasonable use in the extraction of groundwater in Missouri.² After the *Higday* ruling, it seemed that it would be fairly easy in the future to apply the *manufacturing* exception to almost anything. To better demonstrate this, we turn to the instant case, *Citizens for Ground Water Protection v. Porter*, (hereinafter “*Porter*”) where the court illustrated exactly how far it was willing to push the broad definition of *manufacturing* under *Higday*. By following the *Higday* rule, any change to extracted groundwater could now be considered *manufacturing*. For example, any use of machinery to make groundwater suitable for use would meet the *manufacturing* requirement. It will be interesting to see how other courts will interpret the broadened *Higday* exception in the future. This note will explore the court's holding and analysis of *Porter*, compare the court's interpretation of *Higday* to the instant case, and comment on the potential environmental and developmental effects of the holding.

II. FACTS AND HOLDING

In August 2006, Gulfstream Bioflex Energy, L.L.C. (hereinafter “Gulfstream”) contracted with William Larry Porter, Linda Jo Porter, Robert Porter, Mary Porter, and Jeff Porter, property owners of adjacent tracts of land in Webster County, for an opportunity “to purchase a total of 252 acres for the purpose of constructing and operating an ethanol

¹ 275 S.W.3d 329 (Mo. Ct. App. 2008).

² See *id.* at 350 (citing 469 S.W.2d 859 (Mo. Ct. App. 1971)); see also *infra* text accompanying note 77.

manufacturing plant.”³ Before Gulfstream was able to acquire the contracts, it had to obtain the necessary documentation from the government, including permits and test drilling, to make certain that sufficient water was available to satisfy the needs of the operation.⁴

In late August 2006, Gulfstream announced its intentions to invest 165 million dollars for the construction of its plant.⁵ “In order to evaluate the suitability of the site for the plant’s proposed operations, Gulfstream first required the drilling of a test well in order to measure the volume of water available and determine the water’s characteristics.”⁶ Once suitability was determined, Gulfstream anticipated drilling several more wells to meet the need for the maximum capacity that the plant would require.⁷

Webster County had no planning and zoning ordinances; therefore, the Webster County Commission ordered the formation of the Webster County Groundwater Impact Committee.⁸ The aim of the Webster County Groundwater Impact Committee was to “investigate any possible impact of the proposed plant on the environment.”⁹

Citizens for Ground Water Protection (hereinafter “Citizens”), a non-profit corporation incorporated on September 22, 2006, opposed the test drilling and construction of the ethanol *manufacturing* plant. Citizens subsequently filed a petition for preliminary and permanent injunction on October 2, 2006, against the Porters and Gulfstream (collectively,

³ *Id.* at 333.

⁴ *Id.* at 333-34. “The site was selected for its access to highway and rail transportation, in order to provide ease of transportation of corn and the finished product, and its close proximity to a natural gas pipeline. There is a convenience store, a baseball park, and a used-car lot situated east of the site. Situated directly west of the site is an automotive junkyard, west of which is an industrial park. The property north of the site is used predominately for agricultural purposes, including cattle and horse operations. The surrounding area is sparsely populated.” *Id.* at 334.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* The additional wells will be to a depth of approximately 1,600 feet and cased to a depth of approximately 650 feet. *Id.*

⁸ *Id.*

⁹ *Id.*

hereinafter “Defendants”).¹⁰ On October 5, 2006, Citizens petitioned for a temporary restraining order seeking to enjoin Gulfstream from any drilling activities for fifteen days.¹¹ Citizens asserted that the report issued by the Webster County Groundwater Impact Committee stated that the use of the wells would result in “immediate and irreparable injury, loss and/or damage to Plaintiff and its members[.]”¹²

On October 5, 2006, the Circuit Court of Webster County issued a temporary restraining order, enjoining Gulfstream “from drilling a deep well on the Porter property for fifteen days[.]” and set the bond amount at \$25,000.¹³ Defendants filed a motion to dismiss Citizens’ petition and, in response, Citizens filed an amended petition, which added various other plaintiffs¹⁴ (Citizens and these additional plaintiffs are collectively, hereinafter “Plaintiffs”).¹⁵

On March 6 and 7, 2007, the trial court found that Plaintiffs’ experts offered no credible scientific evidence to support the Plaintiffs’ allegations; however, the court found credible the Defendants’ experts testimony, “as well as the exhibits displaying the abundance of water in the Ozark Aquifer in Webster County.”¹⁶ Therefore, the trial court concluded that the proposed plant would have little impact on the individual Plaintiffs.¹⁷

Furthermore, the trial court found that Defendants’ testimony on the issue of dangers posed from discharged water at the site was

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (alteration in original) (internal quotation marks omitted).

¹³ *Id.* (alteration in original) (internal quotation marks omitted). On October 13, 2006, Citizens deposited \$25,000 cash with the circuit clerk, and the trial court entered an order approving that deposit as satisfying the bond requirement in the TRO. *Id.*

¹⁴ *Id.* at 334-35. These plaintiffs included Gary Rogers, Carol Alberty, Harry Coambes, Susan Tolliver, Rancel Clark, and Ronnie Williams, directors of Citizens and Webster County residents. *Id.* at 335.

¹⁵ *Id.*

¹⁶ *Id.* at 340-41 (internal quotation marks omitted).

¹⁷ *Id.* at 341.

credible.¹⁸ According to the trial court, “Plaintiffs have presented no credible evidence that the proposed ethanol plant will fail to comply with water quality regulations and requirements for the State of Missouri.”¹⁹

The trial court found that Plaintiffs failed to carry their burden to establish and prove their pleaded claims and therefore, entered judgment for Defendants on both counts of Plaintiffs’ petition and ordered the “[b]ond of \$25,000.00 discharged and same ordered returned to Plaintiffs.”²⁰ Plaintiffs appealed the court’s denial of any relief on their petition, and Defendants appealed the court’s release of the bond.²¹

Upon appeal, the Missouri Court of Appeals for the Southern District incorporated the trial court’s findings and conclusions without any further evaluations.²² The appellate court reversed and remanded with directions to the trial court to discharge and return the \$25,000 bond to Plaintiffs.²³ The judgment in all other respects was affirmed.²⁴

III. LEGAL BACKGROUND

Appellate courts generally affirm a trial court’s decision unless the decision is against the weight of the evidence, there is insufficient evidence, or it erroneously declares or applies the law.²⁵ Therefore, a court will set aside a trial court’s decision only when firmly convinced that the judgment is wrong.²⁶

¹⁸ *Id.* at 342 (“The trial court noted Hamilton’s experience as a water treatment and discharge engineer and the fact that Hamilton inspected the site and employed accepted scientific and engineering principles, ‘neither of which was done by Mr. Aley.’”).

¹⁹ *Id.* (internal quotation marks omitted).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 336.

²³ *Id.* at 353 (internal quotation marks omitted).

²⁴ *Id.*

²⁵ *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976) (en banc).

²⁶ *Landwersiek v. Dunivan*, 147 S.W.3d 141, 146 (Mo. Ct. App. 2004).

A. *The Reasonable Use Doctrine in America*

American courts through the mid-nineteenth century generally followed the English law rule related to percolating groundwater.²⁷ The English law rule permits a municipality that owns land to collect underlying percolating water and use it to supply its inhabitants despite the effect it might have on adjoining landowners.²⁸ One of the first cases to announce the English rule of absolute ownership was *Acton v. Blundell* (hereinafter "*Acton*").²⁹ In *Acton*, a mining company pumped water on its property, which dried up water wells on neighboring property owned by a cotton spinner.³⁰ The cotton spinner sued for damages, alleging that property rights in percolating groundwater were entitled to the same protections as those afforded to riparian rights in surface streams.³¹ The court refused to extend the riparian rights to percolating groundwater and it offered several reasons for its decision.³²

First, the court held that riparian rights were unbecoming for resolving groundwater debates.³³ The court rationalized that riparian rights rules were impossible to apply simply because there was no way the public could have knowledge of the mutual uses of surface water by adjoining landowners and the origin and course of such water.³⁴ The court also reasoned that commercial development would be impeded if neighboring landowners were accorded correlative rights to groundwater.³⁵ Among these impediments was the example given that even if someone wanted to put the water to better use, once rights to groundwater were fixed by prior use laws, those rights could not be

²⁷ Higday v. Nickolaus, 469 S.W.2d 859, 865 (Mo. Ct. App. 1971).

²⁸ *Id.*

²⁹ See (1843) 152 Eng. Rep. 1223 (Ex. Ct.).

³⁰ Eric Behrens & Matthew G. Dore, *Rights of Landowners to Percolating Groundwater in Texas*, 32 S. TEX. L. REV. 185, 188 (1991).

³¹ *Id.*

³² *Id.* (citing *Acton*, 152 Eng. Rep. at 1232-35).

³³ *Id.* (citing *Acton*, 152 Eng. Rep. at 1233).

³⁴ *Id.* (citing *Acton*, 152 Eng. Rep. at 1233).

³⁵ *Id.* (citing *Acton*, 152 Eng. Rep. at 1234).

disturbed.³⁶ The court also held that there would be no way to define the scope of liability for one who violates the riparian rights approach.³⁷ It would be difficult to ascertain the liability of a landowner who uses more than his share of the water because of the unknown extent of the groundwater flow.³⁸

Finally, the "Roman law, the only available precedent, did not impose liability where a landowner intercepted groundwater that flowed beneath his neighbor's land."³⁹ Based on that reasoning, the *Acton* court adopted what amounted to a rule of capture with respect to groundwater, now known as the absolute ownership rule or English rule.⁴⁰

About twenty years later, American courts started to break-away from the absolute ownership rule.⁴¹ Among these courts, *Bassett v. Salisbury Manufacturing Co.* (hereinafter "*Bassett*") was in the forefront of American water rights when the New Hampshire Supreme Court rejected the English rule of absolute ownership and adopted instead what has been variously labeled as the rule of reasonable use or correlative rights.⁴² In *Bassett*, the court held that the owners of a dam, which obstructed the natural drainage of water from the land of another, that caused actual injury, were liable to that landowner, unless such obstruction was reasonable in regards to their own land.⁴³

Bassett inexplicitly addressed some issues with the English rule. For one, the *Bassett* court did not see a sufficient foundation for the doctrine of absolute ownership due to the difficulty of determining the direction and extent of percolation and drainage.⁴⁴ The *Bassett* court felt that no difficulty existed in most cases and that the injured party can be provided for in accordance with settled legal principles.⁴⁵ The *Bassett*

³⁶ *Id.* (citing *Acton*, 152 Eng. Rep. at 1234).

³⁷ *Id.* at 188-89 (citing *Acton*, 152 Eng. Rep. at 1234).

³⁸ *Id.* at 189.

³⁹ *Id.* (citing *Acton*, 152 Eng. Rep. at 1234-35).

⁴⁰ *Id.* (citing *Acton*, 152 Eng. Rep. at 1235).

⁴¹ *Id.* at 190.

⁴² Behrens & Dore, *supra* note 29, at 190 (citing 43 N.H. 569 (1862)).

⁴³ *Bassett*, 43 N.H. at 569.

⁴⁴ *Id.* at 574.

⁴⁵ *Id.*

court ultimately held that the English rule left no room for remedies for malicious acts in relation to the interference by each landowner with his own land.⁴⁶ The *Bassett* court explicitly acknowledged *Acton* in one paragraph, but decided not to address the reasoning conflicts that existed with the conclusion it adopted.⁴⁷ The *Bassett* court held that it was unable to assent to the reasoning by which *Acton* had been reached.⁴⁸

Since *Bassett*, there have been a number of states that adopted the reasonable use rule. For example, in 1896, the court in *Cabot v. Kingman* held that the defendants, sewer commissioners, could be held liable for subsidence damage to the adjoining land, where the pumping of water from the sewer trench caused water from the adjoining land to run into the trench.⁴⁹ Additionally, in 1919, the court in *Chicago City Railway Co. v. Rothschild & Co.* held that a landowner who withdrew underground water from wells that caused a loss of support under the adjoining street railway tracks, because of the consequent removal of water under the wells, was liable for the subsidence caused on the ground that adjoining landowners have the right to support their land.⁵⁰ Furthermore, in 1958, the court in *New York Central Railway Co. v. Marinucci Bros. & Co.*, (hereinafter "*Marinucci Bros.*") held that a landowner owes a duty to the adjoining landowner to use reasonable care in excavating so that the lateral support of the adjoining land is not removed.⁵¹ In *Marinucci Bros.*, a construction company was liable for negligently causing subsidence to adjoining land because it failed to use sufficient sheathing to support the adjoining land and to prevent water from the adjoining land from flowing into the excavation site.⁵²

Based on the aforementioned cases, a new rule was formed. The American rule or reasonable use rule, allows the use of groundwater by landowners as long as it is reasonable in the view of others.⁵³ However,

⁴⁶ *Id.*

⁴⁷ *Id.* at 576.

⁴⁸ *Id.*

⁴⁹ 44 N.E. 344, 345 (Mass. 1896).

⁵⁰ 213 Ill. App. 178 (1919).

⁵¹ 149 N.E.2d 680, 682 (1958).

⁵² *Id.*

⁵³ Behrens & Dore, *supra* note 29, at 190.

what is reasonable use is not always clear.⁵⁴ All of the pertinent factors including the parties involved, climatic conditions, the comparative value of their uses of the groundwater and their relative positions must be evaluated by the court on a case-by-case basis to determine reasonable use.⁵⁵ For that reason, the majority of American courts that have addressed groundwater issues are in favor of the American rule because the correlative rights approach produces more equitable results and is better suited to climatic conditions in the United States.⁵⁶

B. Reasonable Use in Missouri

By the turn of the century, Missouri courts also became dissatisfied with the English common law rule and began applying the reasonable use rule.⁵⁷ Deriving from the ruling of *Bassett* in 1862, many American courts rejected the doctrine of absolute ownership and adopted a rule of reciprocal reasonable use, and Missouri soon followed suit.⁵⁸

Generally, the rule of reasonable use means "that one must use his own property in a way that does not injure another."⁵⁹ Missouri is somewhat significant for the fact that it has almost no statutory law concerning rights of individuals and the public dealing with watercourses.⁶⁰ Despite this, Missouri adopted the reasonable use rule in 1895 when the St. Louis Court of Appeals decided *Springfield Waterworks Co. v. Jenkins* (hereinafter "*Springfield*").⁶¹ In *Springfield*, the plaintiff owned land where a spring was located and the water from this spring was forced into a reservoir, stored there, and eventually sold to the City of Springfield.⁶² On an adjoining tract, the defendants had dammed the flow of several springs into a pond, draining the pond

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Higday v. Nickolaus*, 469 S.W.2d 859, 865 (Mo. Ct. App. 1971).

⁵⁸ *Id.* n.4 (citing *Bassett v. Salisbury Manufacturing Co.*, 43 N.H. 569, 573 (1862)).

⁵⁹ *Id.* at 866.

⁶⁰ *Id.* at 870 (citing *Bollinger v. Henry*, 375 S.W.2d 161, 165 (Mo. 1964)).

⁶¹ *See* 62 Mo. App. 74 (1895).

⁶² *Higday*, 469 S.W.2d at 867.

frequently during periods of drought, thereby diminishing the flow of the plaintiff's spring.⁶³ The plaintiff alleged that the defendants acted maliciously and for the sole purpose of injuring the plaintiff and sought to enjoin the defendants from interfering with his groundwater supply.⁶⁴

The trial court in *Springfield* held that “[percolating] water is regarded as a part of the soil and to which an adjoining proprietor has no absolute or natural right. It belongs to the owner of the land, and its diversion and appropriation by him for the improvement or benefit of his estate [cannot] be made the basis for complaint against him by anyone, however grievous the resulting injury may be.”⁶⁵

In spite of the trial court's holding, the appellate court held that the defendants acted with the sole purpose of injuring the plaintiff because the defendants invariably selected the periods of drought to drain the water.⁶⁶ The court held that the repairs, which caused the drainage, could have been made when there were no droughts, which wouldn't have resulted in any harm to the plaintiff.⁶⁷ The *Springfield* court ultimately held that the plaintiff was entitled to some relief and protection against the repetition of such conduct.⁶⁸

The above rule is illustrated in *Higday*.⁶⁹ The issue at hand in *Higday* was “whether the averments of the petition entitle[d] plaintiffs, to a judicial declaration of their rights to the percolating waters underlying their lands, and if so, whether defendant's, City of Columbia's, threatened use of the percolating waters is such an infringement of those rights as will be enjoined by equity.”⁷⁰

The facts in *Higday* are as follows: the appellants were the owners of 6000 acres of farmland overlying a water basin in known as the

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 868 (alteration in original) (internal quotation marks omitted) (quoting *Springfield*, 62 Mo. App. at 80).

⁶⁶ *Springfield*, 62 Mo. App. at 84-85.

⁶⁷ *Id.* at 83.

⁶⁸ *Id.* at 84.

⁶⁹ See *Higday v. Nickolaus*, 469 S.W.2d 859 (Mo. Ct. App. 1971).

⁷⁰ *Id.* at 861.

McBaine Bottom.⁷¹ The appellants used their underground water for consumption, livestock, and for the future irrigation of their crops.⁷² The respondent planned for the withdrawal of water by shallow wells from beneath appellants' farms to transport the water to the City some twelve miles away for sale to customers within and maybe around the City.⁷³ The appellants filed a petition stating that respondent had embarked upon a course of action that would ultimately culminate in damage to the appellants by the permanent lowering of the water throughout the basin resulting in the impoverishment of the appellants' lands.⁷⁴

The trial court granted the respondents' motion to dismiss, which alleged the appellants' petition, failed to plead a claim upon which relief could be granted.⁷⁵ The respondents alleged that Missouri followed the common law rule "that a landowner has absolute ownership to the waters under his land and, therefore, may without liability, withdraw any quantity of water for any purpose even though the result is to drain all water from beneath his neighbors' land[]." ⁷⁶ The court in *Higday* rejected the common law rule in favor of the rule of reasonable use.⁷⁷ The court articulated this rule as follows:

As it applies to percolating groundwater, the rule of reasonable use recognizes that the overlying owner has a proprietary interest in the water under his lands, but his incidents of ownership are restricted. It recognizes that the nature of the property right is usufructuary rather than absolute as under the English rule. Under the rule of reasonable use, the overlying owner may use the subjacent groundwater freely, and without liability to an adjoining owner, *but only* if his use is for purposes incident to the

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 861-62.

⁷⁴ *Id.* at 863.

⁷⁵ *Id.* at 861.

⁷⁶ *Id.* at 863.

⁷⁷ *Id.* at 869.

beneficial enjoyment of the land from which the water was taken. This rule does not prevent the consumption of such groundwater for agriculture, manufacturing, irrigation, mining or any purpose by which a landowner might legitimately use and enjoy his land, even though in doing so he may divert or drain the groundwater of his neighbor.⁷⁸

The *Higday* court further stated that “an overlying owner, including a municipality, may not withdraw percolating water and transport it for sale or other use away from the land from which it was taken if the result is to impair the supply of an adjoining landowner to his injury.”⁷⁹ This use would be considered unreasonable because it is non-beneficial and it “is not for a ‘lawful purpose’” within the general rule concerning percolating waters.⁸⁰ Finally, the plaintiff usually bears the burden of proving their allegation that defendant’s use is unreasonable.⁸¹

While the *Higday* court reaffirmed the American rule, it also laid down law that appeared to have language that is analogous with the common law rule, stating that a landowner may divert or drain groundwater of his neighbor as long as the use is for manufacturing.⁸²

IV. INSTANT DECISION

On appeal, Plaintiffs alleged that the trial court erred in finding that Defendants’ proposed use of groundwater was reasonable.⁸³ In general, Plaintiffs’ experts testified that Defendants’ proposed use would have an unreasonable impact upon Plaintiffs, while Defendants’ experts testified that Defendants’ proposed use would have very little, if any, impact upon

⁷⁸ *Id.* at 866 (emphasis added).

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting *Bristor v. Cheatham*, 255 P.2d 178, 178 (Ariz. 1953)).

⁸¹ *Sur-Gro Fin., Inc. v. Smith*, 755 S.W.2d 439, 442 (Mo. Ct. App. 1988) (citing *Shaffer v. Terrydale Mgmt. Corp.*, 648 S.W.2d 595, 609 (Mo. Ct. App. 1983)).

⁸² *Higday*, 469 S.W.2d at 866.

⁸³ *Citizens for Ground Water Protection v. Porter*, 275 S.W.3d 329, 342 (Mo. Ct. App. 2008).

Plaintiffs, therefore, making the proposed use reasonable.⁸⁴ The trial court made the decision of which witnesses to believe; and the appellate court upheld the trial court's decision to believe the Defendants' witnesses.⁸⁵

Furthermore, the court was of the opinion that Plaintiffs interpreted the *Higday* rule much too narrowly.⁸⁶ The court held that under the *Higday* rule, there is no *per se* prohibition on the taking of groundwater from land for *manufacturing* purposes.⁸⁷ Plaintiffs did not suggest that Defendants had no legal right to enjoy the use of their land for manufacturing, but simply objected to the taking of the groundwater to Plaintiffs' detriment.⁸⁸ In addition, *Higday's* reasonable-use rule prohibits sale only "if the adjoining landowner is thereby deprived of water necessary for the beneficial enjoyment of his land," and that the reasonable taking of groundwater from the land for *manufacturing* is allowed.⁸⁹ The court upheld the trial court's finding that the proposed use of groundwater would have little, if any, impact on Plaintiffs.⁹⁰ For the above reasons, the court held that "Plaintiffs' failed to carry their burden of proving that Defendants' intended use of groundwater was unreasonable"⁹¹

V. COMMENT

A. *Missouri's Combination of the English Rule and Reasonable Use*

It has been noted above that since *Bassett*, many American courts started preferring the reasonable use rule.⁹² Some notable cases, also

⁸⁴ *Id.* at 347-48.

⁸⁵ *Id.* at 348, 353.

⁸⁶ *See id.* at 350-51.

⁸⁷ *Id.* at 350.

⁸⁸ *Id.*

⁸⁹ *Id.* at 351 (internal quotation marks omitted) (quoting *Higday v. Nickolaus*, 469 S.W.2d 859, 870 (Mo. Ct. App. 1971)).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See supra* text accompanying notes 52-55.

discussed above, were *Cabot v Kingman*,⁹³ *Chicago City Railway Co. v Rothschild & Co.*,⁹⁴ and *Marinucci Bros.*,⁹⁵ just to name a few. These cases rejected the English rule and used the reasonable use rule, without much explanation of why.

Porter followed in the footsteps of these other cases upholding the reasonable use doctrine. However, *Porter* had a little help from *Acton* when it decided to follow *Higday*. Basically, since *Bassett* left so many questions unanswered when it decided to switch from the English rule to the reasonable use rule, there was a lot left to ponder. An important issue was the fact that the court in *Acton* felt that the English rule would better protect the rights of commercial development from being impeded from collecting groundwater if a reasonable use rule was in place.⁹⁶ This was a very important issue because the *Acton* court reasoned that once rights to groundwater were fixed by prior use, even those who would put the water to better use could not disturb those rights.⁹⁷ Missouri seemed to have noticed this issue when it decided *Porter*.

The *Porter* court followed *Higday*'s exception to the reasonable use rule. The *Higday* case was a groundbreaking decision. The *Higday* court felt that commercial development had a higher right to access groundwater despite the injury to adjoining landowners.⁹⁸ The decision in *Higday* single handedly changed the course of water rights in Missouri. Now, the reasonable use rule does not prevent the consumption of groundwater for *manufacturing* even though doing so may divert or drain the groundwater of a neighbor.⁹⁹ This decision unmistakably legitimized the biggest issues in the *Acton* case regarding the right to disturb fixed groundwater rights when the commercial users put the water to better use.

While *Higday* and *Porter* did not say this explicitly, nevertheless, it was quite apparent from the rulings. So now, the *Porter* court, armed

⁹³ 44 N.E. 344 (Mass. 1896); see also *supra* text accompanying note 48.

⁹⁴ 213 Ill. App. 178 (1919); see also *supra* text accompanying note 49.

⁹⁵ 149 N.E.2d 680 (Mass. 1958); see also *supra* text accompanying notes 50-51.

⁹⁶ *Acton v. Blundell*, (1843) 152 Eng. Rep. 1223, 1234 (Ex. Ct.).

⁹⁷ *Id.*

⁹⁸ *Higday v. Nickolaus*, 469 S.W.2d 859, 866 (Mo. Ct. App. 1971).

⁹⁹ *Citizens for Ground Water Prot. v. Porter*, 275 S.W.3d 329, 350 (Mo. Ct. App. 2008) (quoting *Higday*, 469 S.W.2d at 866).

with the *Higday* ruling, seems to have created a combination of the reasonable use and the English rule doctrines. This combination helped create an exception that will probably have a lasting effect on future groundwater cases in the United States.

With such a big change in policy, it was surprising that *Porter* never explicitly stated the rationale behind the exception to the reasonable use rule. One could argue that the need for alternative fuel sources played a major role in the court's decision. It seems that the *Porter* court had to make a choice between protecting the adjoining landowner's water rights and protecting a potential new fuel alternative. It would seem that the lesser of the two evils was protecting a potential new fuel alternative. As Americans, we rely a great deal on gasoline to survive in this fast pace world we have created for ourselves. However, most of the gasoline we consume comes from other countries, and within the last few years' gasoline has become very expensive. With that in mind, having an alternative fuel source here in America is a very important option. Some gas stations now sell ethanol mixed fuel that is generally cheaper than regular unleaded gasoline. So when the *Porter* court had to choose between an adjoining landowner's water rights, who arguably was not injured by the groundwater taking, and a potential alternative fuel for America, it seems that the court chose the bigger picture.

As for the other rationalizations in *Acton*, each no longer necessarily applied, thanks to technology. With the technology of the twenty-first century, experts have the ability to know what the mutual uses of water by adjoining landowners will be, and experts are in a better position to define the scope of liability for violators.¹⁰⁰ For example, the court in *Porter* was able to come to a conclusion based on credible testimony and scientific calculations of the Defendants' witnesses as well as the exhibits displaying the abundance of water in the Ozark Aquifer in Webster County,¹⁰¹ which lead to the finding that the use of the groundwater for *manufacturing* was not an unreasonable use.

¹⁰⁰ Cf. *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569, 574 (1862).

¹⁰¹ *Citizens*, 275 S.W.3d at 340-41.

B. *What is Manufacturing Exactly?*

Following the ruling in *Porter*, it appears that it will almost always be a losing case for a plaintiff who alleges unreasonable use of groundwater against a commercial developer. It seems that it would be fairly easy in the future to apply *manufacturing* to almost any type of labor. There is no definition given for *manufacturing* in either *Higday* or *Porter*. Therefore, turning to the general use of the word, *Black's Law Dictionary* defines manufacture as “[a] thing that is made or built by a human being, as distinguished from something that is a product of nature; esp. any material form produced by a machine from an unshaped composition of matter.”¹⁰² This is a very broad definition because almost anything manmade would be considered manufacture. It appears that the *Porter* court followed this broad definition of *manufacturing* when it held that the drainage of groundwater to make ethanol was considered *manufacturing* under the *Higday* rule.

What does *Higday's* broad definition of *manufacturing* mean to noncommercial landowners? By following such a definition suggested by *Black's Law Dictionary*, any change to collected water would be considered manufacturing. Groundwater could be considered raw material and therefore, by using machinery to make it suitable for use, it appears to meet the requirement of *manufacturing* set by the *Porter* court.

C. *Possible Future Implications from the Citizens' Ruling*

With such a broad definition of the *Higday* rule, the *Porter* court has opened a mighty wide door for commercial developers' use of groundwater. The *Porter* court resolved the issue at hand very efficiently by the use of expert testimony and because there was no apparent injury to Plaintiffs. In spite of this, it failed to provide unambiguous guidance for other circumstances in which landowners may wish to use the groundwater below their land. There seems to be a great need for legislative action in resolving and settling groundwater disputes. A

¹⁰² BLACK'S LAW DICTIONARY 984 (8th ed. 2004).

possible reason why the legislature is reluctant to provide a bright-line rule is because of the difficulty in harmonizing the facts in groundwater cases. This has led courts to evaluate all of the pertinent factors including the parties involved, climatic conditions, the comparative value of their uses of the groundwater and their relative positions on a case-by-case basis to determine reasonable use.¹⁰³

The legislature could act more quickly to remedy groundwater disputes rather than relying on the courts to do so. For example, if the legislature defined such terms as *manufacturing*, it would be quite simple for the courts to rule on an issue similar to the one in the *Porter* case. The legislature could also better determine whether or not commercial developers should be given differential treatment over adjoining landowners in groundwater disputes. However, even with a bright-line rule, the courts will still most likely have to rely heavily on expert testimony on the technical aspects and the consequences of certain usage on the adjoining landowner. So despite bright-line rules, experts will continue to play an important role in determining the outcome of a groundwater usage case.

VI. CONCLUSION

The *Porter* court affirmed the trial court's decision by adopting the *Higday* exception to the reasonable use rule. By defining *Higday* so broadly, the court might have set a precedent that would make it virtually impossible for future plaintiffs to win a groundwater removal case against a commercial developer. Thus, there is a clear need for legislative assistance in this arena because most landowners are ill equipped to battle big companies which impose such a threat. Though the ruling seems to be correct on its face, based on the evidence presented and the *Higday* rule, the broadened rule still suggests a dim future for landowners. It will be interesting to see how the new rule plays out in the legislature. Will the legislature adopt *Porter's* ruling or will it adopt something new? Only time will tell, but for now, it appears that commercial users of

¹⁰³ Behrens & Dore, *supra* note 29, at 190.

groundwater could possibly have unfettered usage rights despite the harm it might cause to their neighbors.

BRIAN HAMILTON