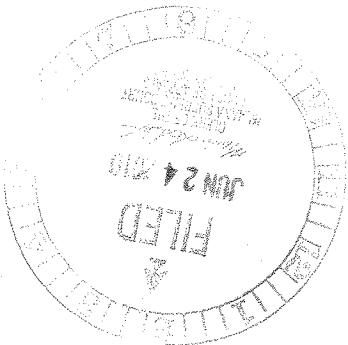


IN THE  
INDIANA COURT OF APPEALS

No. 32A05-1003-PL-149



THE TOWN OF AVON, INDIANA,

Appellant (Defendant below),

v.

WEST CENTRAL CONSERVANCY DISTRICT,

WASHINGTON TOWNSHIP, and

RONNIE AUSTIN, in his official

capacity as Trustee and Park Governor,

Appellees (Plaintiffs below).

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BRIEF OF APPELLANT

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This is an appeal from the trial court's grant of summary judgment to Washington Township and WCCD, and the corresponding denial of summary judgment to Avon (except with respect to Count V of WCCD's Complaint). This case raises the question of whether a

### **Nature of Case**

## **STATEMENT OF CASE**

of that water cannot be curtailed or regulated by government bodies?

III. Does ownership of underground water beneath one's property mean that the use

authority to regulate groundwater?

reasonable regulations of general applicability, and no state agency has been granted exclusive

authority to regulate groundwater, Indiana law provides that political subdivisions are subject to

II. Does the Ordinance violate the Home Rule Act where Avon possesses statutory

jurisdictions have found that aquifers are watercourses or bodies of water?

authority to regulate groundwater in other states, and (3) experts as well as case law from other

includes "any other body of water;" (2) the General Assembly has explicitly referenced a town's

groundwater when (1) regulatory authority exists over watercourses, which is a defined term that

I. Does a town have the statutory authority to regulate the withdrawal of

## **STATEMENT OF THE ISSUES**

Count V of WCCD's Complaint.

Counts I – IV, and (3) denying Avon's Motion for Summary Judgment except with respect to

for Summary Judgment filed by the West Central Conservancy District ("WCCD") as to

Township and Ronnie Austin (collectively, "Washington Township"), (2) granting the Motion

February 10, 2010 decision (1) granting the Motion for Summary Judgment filed by Washington

Appellant, The Town of Avon ("Avon"), respectfully appeals the trial court's

<sup>1</sup> Citations to "App." refer to the Appendix to Brief of Appellant.

On February 10, 2010, the trial court issued Findings of Fact, Conclusions of Law and judgment ("Order") in which it granted Washington Township's Motion for Summary Judgment, granted WCCD's Motion for Summary Judgment (except with respect to Count V), and denied Avon's Motion for Summary Judgment (except with respect to Count V). (App. 10-33) Pursuant to Indiana Appellate Rule 46(A)(10), a true and accurate copy of the Order is attached hereto. On March 8, 2010, Avon timely filed its Notice of Appeal. (App. 8; 1275) On

### **Disposition Below**

motions were fully briefed, the trial court held a hearing on January 8, 2010. judgment, supporting briefs, and designations of evidence. (App. 6) After the respective 2009, all parties (Avon, WCCD, and Washington Township) filed motions for summary both the WCCD Complaint and Washington Township Complaint. (App. 5) On November 6, purposes by an order dated January 9, 2009. (App. 3) On April 30, 2009, Avon filed answers to Ordinance is invalid. (App. 484) The two cases were consolidated for discovery and pre-trial enforcement. (App. 2)<sup>1</sup> On December 3, 2008, WCCD also filed a Complaint asserting that the Watercourse ("the Ordinance") was invalid and requesting a permanent injunction against its entitled Ordinance Exercising Power to Control and Regulate Taking of Water from a and Declaratory Judgment ("Complaint") seeking a declaration that Ordinance No. 2008-8 On October 23, 2008, Washington Township filed a Complaint for Permanent Injunction

### **Course of Proceedings**

documented by experts in the field. and welfare of its citizenry, particularly when the scarcity of the water supply has been well municipality has the authority to regulate the withdrawal of groundwater for the health, safety,

Avon retained Scott Dompke, a professional engineer with GRW, Inc., to study water supply issues and issue a feasibility study for a water utility. (App. 1045) Mr. Dompke's draft feasibility study that was delivered to Avon in January 2007 also noted that surface water demands will exceed supply sometime after 2015, which could cause an overall potable water

Experts agree that there is a potential shortage of potable water in Hendricks County, Indiana in the area encompassing Avon. Specifically, in 2003, the engineering firm Black & Veatch compiled data and authored a study entitled, "Water Supply Yield and Demand Evaluation for Indianapolis Water." (App. 518-19; 905-1043) One of the conclusions of the Black & Veatch study is that there is a significant water supply yield shortfall during period of drought for central Indiana, including Avon and Hendricks County. *Id.* In 2005, Malcolm Pirnie, a national engineering and consulting firm, issued a report entitled the Regional Water Authority Study that contained nearly 400 pages of data and analysis of water supply for central Indiana. (App. 518-19; 522-903) Like the Black & Veatch study, the 2005 Regional Water Authority Study found that the supply of potable water in central Indiana could be deficient in the event of drought conditions. *Id.* As a result of the limited supply, experts have urged counties and municipalities in central Indiana to enact water conservation ordinances and protect existing supply. (App. 519-20; 535) Indeed, one of the conclusions of the 2005 Regional Water Authority Study is that governmental entities such as Avon should "implement conservation measures and preserve the quality of supplies through source water protection." (App. 535)

### STATEMENT OF FACTS

March 23, 2010, the trial court clerk filed its Notice of Completion of Clerk's Record and on May 27, 2010, its Notice of Filing of Transcript. Avon now timely files its Brief of Appellant and Appendix.

Ordinance does not apply to wells dedicated to personal use, such as most residential wells.

The Ordinance does not completely prohibit the withdrawal of groundwater. The

supply from rapid depletion due to mass withdrawal and distribution. (App. 1078-79; 1081)

Thus, the Ordinance is Avon's attempt to heed the advice of experts to protect the limited water residents and the citizens of the Town of Avon as well as water conservation." (App. 1078)

deposition of Avon, the reason the Ordinance was adopted was "[t]o protect the future of the 480-81) As Greg Zusan, the Avon Town Council President, stated during the Rule 30(B)(6) (excluding other municipalities) to ensure that water resources are not unduly depleted. (App. watercourses, including aquifers, within the corporate boundaries of Avon and ten miles beyond

The primary objective of the Ordinance is to regulate the withdrawal of water from

any other body of water whether above or below ground." (App. 481)

Watercourse is defined in the Ordinance as "lakes, rivers, streams, groundwater, aquifers, and/or or on behalf of the Town pursuant to authority exercised under Ordinance 2005-39." (App. 481)

for retail, wholesale, or other mass distribution of water, unless such distribution is conducted by part, "No water shall be taken, or caused or permitted to escape, from a watercourse to be used supply based on the advice of experts in the field. (App. 480) The Ordinance states in pertinent preamble to the Ordinance provides that its purpose is to conserve and protect a limited water water supplies, Avon adopted the Ordinance on April 28, 2008. (App. 480-82; 1080-81) The consistent with the advice that governmental entities should enact laws to conserve these limited water shortage could arise in the future. (App. 1080-81) In reliance on that expert analysis, and

By April 2008, Avon was well aware of the conclusion of several experts that a potential

protect its interest in reserving water resources within its jurisdiction." (App. 1064)

shortage. (App. 1045-46, 1062) Mr. Dompke also concluded that "[t]he Town would be wise to

subdivisions?  
Without violating the Home Rule Act given that WCCD and Washington Township are political subdivisions?  
At its core, this case involves two key questions: Does Avon have the statutory right to regulate the withdrawal of groundwater for purposes of conservation and, if so, can Avon do so without violating the withdrawal of groundwater within its jurisdiction. Indiana statutes provide to regulate the withdrawal of groundwater within its jurisdiction. Indiana statutes provide

SUMMARY OF ARGUMENT

validity of the Ordinance and seeking an injunction against its enforcement.  
Washington Township's plans to sell water wholesale, both entities filed suit challenging the WCCD or Washington Township. Because the Ordinance could interfere with WCCD and revenue. (App. 1093-94; 1106-07) It is presently unknown who would purchase the water from Township intend to sell the water on a wholesale basis or through royalty contracts to generate Avon's corporate boundaries or within ten miles of those boundaries. WCCD and Washington property that WCCD and Washington Township, respectively, owns that is located within WCCD and Washington Township desire to withdraw water from an aquifer beneath the aquifer to ensure that it is not all exhausted. (App. 118-19)  
withdrawal of water at levels that permit mass distribution, but that preserve sufficient water in underground water resources. Once completed, the permitting process will allow for the be justified unless and until Indiana courts declare that Avon has the authority to regulate process because there is significant engineering expense necessary to do so, expense that cannot via a permitting process. (App. 1084-86) Avon has not completed work on the permitting wholesale basis, the intent of Avon is to use the Ordinance to regulate the withdrawal of water (App. 481) Even for proposed commercial wells intended for mass distribution of water on a

Avon the authority to regulate "watercourses," a defined term that includes the broad phrase "any other body of water." In addition to the plain language of the definition, which includes the expansive term "any," the General Assembly has recently confirmed its intent that units possess the right to regulate the withdrawal of groundwater. In the 2009 legislative session, the General Assembly explicitly referenced a county, city, and town's authority to adopt ordinances that "limit," "regulate," or "prohibit" the "withdrawal of groundwater." Ind. Code § 36-5-2-10; Ind. Code § 36-1-2-4.7.

Interpreting "any other body of water" to include underground water also comports with the widely-held understanding of the scientific community that aquifers constitute a "body of water." While no Indiana decision has addressed the specific question posed by this case, several courts in other jurisdictions have concluded that groundwater is a watercourse or body of water. Avon's Ordinance is merely a response to warnings from experts that there may be a potential shortage of potable water in the future and that municipalities should adopt conservation measures. Consistent with the broad authority granted to a unit under the Home Rule Act, Avon has the statutory authority to limit the depletion of a scarce water supply.

WCCD and Washington Township's claims under the Home Rule Act are without merit. First, the Ordinance does not improperly impose a duty on WCCD and Washington in violation of Indiana Code § 36-1-3-8(a)(3). The Indiana Supreme Court has explicitly held that a unit may impose regulations of general applicability on another political subdivision so long as the power is authorized by statute. WCCD and Washington Township are not immune from regulation merely because they are political subdivisions. Second, Washington Township's statutory right to sell natural resources located on park land does not render the Ordinance invalid under Indiana Code § 36-1-3-5(a)(2). Avon's authority to regulate the withdrawal of water and Washington

Township's authority to sell its natural resources can be harmonized by simply allowing Washington Township to sell water subject to reasonable restrictions that are imposed on any property owner. Third, the Ordinance complies with Indiana Code § 36-1-3-8(a)(7), which prohibits the regulation of conduct already exclusively regulated by the state. While the Indiana Department of Natural Resources ("DNR") has some regulatory control over groundwater, nothing in the statutes indicate an intent for that regulation to be exclusive. Regulation by more than one level of government is commonplace and this Court has approved of such multi-tiered regulation on several occasions. Absent some legislative intent for the DNR to preempt all local regulation, Avon is not precluded from adopting supplemental local regulations consistent with the DNR's regulatory scheme.

Finally, the trial court's holding that WCCD has a common law right to use water as it wishes (*i.e.*, without interference from Avon) is simply incorrect. While WCCD and Washington Township do have property rights in the water beneath their property, such property rights always yield to reasonable government regulation necessary to preserve the health, safety, and welfare of the public. Ownership of property and the right to use it without any government interference are two very different concepts that cannot be conflated. The Ordinance is a good faith response to dire warnings from experts that water resources are in short supply. Avon's legitimate health, safety, and welfare interest permits reasonable restrictions necessary to ensure that profit-taking by WCCD and Washington Township do not exhaust the region's main supply of potable water.

[T]he courts will not [generally] inquire as to the reasonableness, wisdom, or expediency of a municipal ordinance when the power exists to pass it, nor will

*Waste Dist.*, 700 N.E.2d 1179, 1184 (Ind. Ct. App. 1998). That burden is significant: challenging an ordinance bears the burden of proving invalidity.” *Taylor v. Fall Creek Reg'l* N.E.2d 1194, 1196 (Ind. Ct. App. 2004). WCCD and Washington Township bear the burden of its validity whenever possible.” *Kosciusko County Area Plan Comm'n v. Ist Source Bank*, 804 In addition, Indiana law is clear that “[a]n ordinance should be interpreted so as to uphold

regulatory authority over potable water resources and, thus, *de novo* review is appropriate. 973 (Ind. 2005). This case involves a pure question of law concerning a municipality’s (internal citations omitted); *see also Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, *Bellows v. Bd. of Comm'rs of County of Elkhart*, 926 N.E.2d 96, 113-114 (Ind. Ct. App. 2010)

When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Considering only those facts that the parties designated to the trial court, we must determine whether there is a “genuine issue as to any material fact” and whether “the moving party is entitled to a judgment a matter of law.” In answering these questions, the reviewing court construes all factual inferences in the non-moving party’s favor and resolves all doubts as to the existence of a material issue against the moving party. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law; and once the movant satisfies the burden, the burden then shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact. The party appealing from a summary judgment decision has the burden of persuading this court that the grant or denial of summary judgment was erroneous. Where the facts are undisputed and the issue presented is a pure question of law, we review the matter *de novo*.

It is well-established that the trial court’s grant of summary judgment to WCCD and Washington Township (and corresponding denial of most of Avon’s summary judgment motion) is subject to a *de novo* standard of review and entitled to no deference:

#### STANDARD OF REVIEW



the court inquire into the motives of the members of the municipal governing body in enacting it... As a general rule, an ordinance cannot be successfully assailed in a judicial tribunal as unreasonable where the Legislature has expressly conferred on the municipality the power to enact the ordinance, when the express grant of power is not in conflict with a constitutional prohibition or fundamental principles, and the ordinance itself does not infringe any constitutional provision. 20 ILE MUNCCORP § 38 (internal footnotes omitted).

ARGUMENT

**I. Avon Has The Statutory Authority To Regulate The Withdrawal Of Water From A Watercourse.  
A. A unit has the statutory power to regulate watercourses.**

Indiana's statutory scheme demonstrates that Avon has the power to regulate the withdrawal of water from any watercourse within its jurisdiction. Indiana Code § 36-1-2-23 defines a "unit" as a "county, municipality, or township" and Indiana Code § 36-9-2-10 unambiguously states: "A unit may regulate the taking of water, or causing or permitting water to escape, from a watercourse." In addition, Indiana Code § 36-9-2-8 states, "A unit may establish, vacate, maintain, and control watercourses" and Indiana Code § 36-9-2-11 states that a unit may "regulate conduct that ... affect[s] the flow of water[] in a watercourse." A municipality such as Avon "may exercise powers granted by sections 9, 10, 11, 12, and 13 of this chapter in areas within ten (10) miles outside of its corporate boundaries." Ind. Code § 36-9-2-19. Read together, these statutes authorize Avon to regulate watercourses (including controlling the withdrawal of water) within its corporate boundaries or ten miles beyond.

In addition, and entirely consistent with Indiana Code § 36-9-2, Indiana Code § 36-8-2-7 provides that "[a] unit may regulate any business use of a watercourse." Here, WCCD and Washington Township desire to withdraw groundwater for the purpose of selling it wholesale or via royalty contracts to generate revenue. (App. 1093-94; 1106-07) Such is undoubtedly a

<sup>2</sup> Unlike Avon, neither WCCD nor Washington Township has authority over watercourses. WCCD is a special taxing district and, therefore, is not a "unit" according to Indiana Code § 36-1-2-23. (App. 486) While Washington Township is a "unit" under Indiana law for most purposes, the General Assembly specifically removed townships from the definition of "unit" for purposes of the watercourse statutes, Indiana Code § 36-9-2 *et seq.* and Indiana Code § 36-8-2 *et seq.*

to the Indiana Department of Environmental Management ("IDEM"): restrictive ordinance," the town was required to report the action and the content of the ordinance 2-10 in 2009 to state that when a town adopted, amended or repealed an "environmental regulate the withdrawal of groundwater. The General Assembly amended Indiana Code § 36-5- clear that counties, cities, and towns have the authority to adopt ordinances that restrict or First and foremost, the General Assembly during the 2009 legislative session made it aquifer.

are at least three reasons why "watercourse" encompasses underground water located in an Instead, the General Assembly caste a broad net by including "any other body of water." There subterranean water from the definition of a watercourse nor limited the term to surface water. "water" Indiana Code § 36-9-1-10 (emphasis added). The General Assembly neither excluded "watercourse" as follows: "Watercourse includes lakes, rivers, streams, *and any other body of* of Avon because the Ordinance is valid and enforceable. The General Assembly has defined the trial court erred by granting summary judgment to WCCD and Washington Township instead critical question becomes whether an aquifer is a "watercourse" under Indiana law. If it is, then Having established that Avon has the statutory authority to regulate watercourses, the

**B. The definition of a "watercourse" under Indiana law includes underground aquifers.**

reasonable dispute that Avon has the authority to regulate watercourses.<sup>2</sup> "business use" that falls within the ambit of Indiana Code § 36-8-2-7. There can be no

In the wake of the adoption of Indiana Code § 36-5-2-10 and Indiana Code § 36-1-2-4.7, it cannot reasonably be disputed that the General Assembly believes that counties and municipalities have the authority to regulate the withdrawal of groundwater. That is the premise upon which the entire "environmental restrictive ordinance" concept is based. Stated differently, the General Assembly intends for a unit's power to regulate "watercourses" under Indiana Code § 36-9-2 *et seq.* and Indiana Code § 36-8-2-7 to include groundwater located in an aquifer and it assumes this power exists. If Avon has no authority to "limit," "regulate," or "prohibit" the withdrawal of groundwater (as WCCD and Washington Township contend and the trial court

imposed a duty to advise IDEM of the ordinance.

Thus, the General Assembly reaffirmed that counties, cities, and towns have the authority to limit, regulate, or prohibit the withdrawal of groundwater and, if that power was exercised, (Emphasis added); *see also* Ind. Code § 13-11-2-71.2 (providing a nearly identical definition).

- (A) *Withdrawal.*
  - (B) Human consumption.
  - (C) Any other use.
- respect to groundwater:*
- (1) is adopted by a municipal corporation; and
  - (2) *limits, regulates, or prohibits one (1) or more of the following with*
- "Environmental restrictive ordinance" means, with respect to land, any ordinance that:

follows:

Counties and cities were similarly charged. *See* Ind. Code §§ 36-2-4-8 and 36-4-6-14. Importantly, an "environmental restrictive ordinance" is defined in Indiana Code § 36-1-2-4.7 as

- (e) The legislative body [of a town] shall:
  - (1) subject to subsection (f), give written notice to the department of environmental management not later than sixty (60) days before amendment or repeal of an environmental restrictive ordinance; and
  - (2) give written notice to the department of environmental management not later than thirty (30) days after passage, amendment, or repeal of an environmental restrictive ordinance.

<sup>3</sup> The 2009 statutes that reference a county, city, and town's authority to regulate or prohibit the withdrawal of groundwater are critical to this case and were discussed extensively during the summary judgment proceedings. Despite the central importance of these statutes to the case, the trial court's Order makes no mention of them.

wherever located.

§ 36-9-2-10 provides that "watercourse" means "each," "every," and "all" bodies of water, (2010), available at <http://www.merriam-webster.com/dictionary/ANY>. Thus, Indiana Code understanding and definition of the term. See "any." *Merriam-Webster Online Dictionary* to the type or source of the solid waste."); This broad definition comports with the common modify 'garbage, refuse,' etc., [in a burning statute] implies that the definition is unrestricted as *State v. Money*, 651 N.E.2d 344, 346 (Ind. Ct. App. 1995) ("[T]he use of the word 'any' to selected without restriction or specification and is a synonym of the 'all' or 'each and every.'"); clear universal meanings which are not ambiguous. The word 'any' is used to indicate one *Assoc., Inc.*, 915 N.E.2d 536, 542 n.3 (Ind. Ct. App. 2009) ("The words 'any' and 'in' both have meaning of 'all', 'every', 'each', or 'each one of all.'"); *Ream v. Yankee Park Homeowner's* distributive sense, the sense in which the word is very frequently used, [any] may have the *& Calumet Dist. Transit Co. v. Mueller*, 12 N.E.2d 247, 249 (Ind. 1938) ("In its broad, "any" has an expansive definition that is synonymous with "every" or "all." See, e.g., *Chicago* precede the phrase "other body of water." Indiana courts have repeatedly stated that the word term includes subterranean water. The General Assembly expressly included the term "any" to The plain language of the definition of "watercourse" provides the second reason the trial court's decision cannot be reconciled with the 2009 legislation.<sup>3</sup>

groundwater ordinance is adopted if the power to adopt such ordinances did not even exist. The no sense. Certainly the General Assembly would not impose the duty to notify IDEM once a found), then the entire environmental restrictive ordinance scheme adopted just last year makes

The plain language of the definition of "watercourse" is also significant because of what it does not say. Nowhere in Indiana Code § 36-9-1-10 does the General Assembly limit the definition of watercourses to surface water, despite the fact in Indiana Code § 36-9-27.4 *et seq.* – the same article as the statute defining "watercourse" – the General Assembly specifically referred to "natural surface watercourses" when it wished to limit a watercourse to surface water. The natural implication of the absence of any reference to surface water just a few chapters away is that the General Assembly intended for "watercourse" in Indiana Code § 36-9-1-10 to mean any body of water, whether above or below ground.

Indiana appellate courts have often concluded that the absence of a term in a statute is intentional when other statutes indicate that the General Assembly knows how to include the term if it was intended. *See, e.g., United States Gypsum, Inc. v. Indiana Gas Co., Inc.*, 735 N.E.2d 790, 797 (Ind. 2000) ("The legislature explicitly exempted municipal utilities from the definition of 'public utility.' Other statutes' explicit references to municipal utilities in conjunction with public utilities show that the legislature knows how to say and include municipal utilities when it so desires."); *Jannichowski v. N. Indiana Commuter Transp. Dist.*, 905 N.E.2d 1041, 1048 (Ind. Ct. App. 2009) (citing various acts that contain a statute of limitations and holding, "We find the omission of a statute of limitation in the ITCA to be significant. This is because the General Assembly knows how to include a statute of limitation into the body of an act."). If the General Assembly intended to limit "watercourses" to surface water, it knew how to do so.

Third and finally, the conclusion that underground water is included in the definition of "watercourse" comports with the widely accepted definition of an aquifer in the scientific community. The American Geological Institute, a nonprofit coalition of forty-six geoscientific

and professional organizations comprised of approximately 120,000 scientists and engineers, publishes a *Glossary of Geology* that is considered the preeminent reference source for geoscience terms. App. 513. The *Glossary of Geology* defines a "water body" as "a separate entity or mass of water, distinguished from other water masses; e.g., an ocean, sea, stream, lake pond, pool, and water in an aquifer are distinct 'bodies of water.'" App. 514-515 (emphasis added). Avon designated an affidavit from Anne Kennedy, a licensed hydrogeologist with extensive experience in the analysis of underground water formations and hydrogeologic investigations associated with well field development and well field management for Indiana cities. App. 512. Ms. Kennedy stated that, in her professional opinion, an aquifer is a body of water that is located underground. App. 513. Neither WCCD nor Washington Township offered any expert analysis in rebuttal. It is widely accepted in the scientific community that an underground aquifer is considered a "body of water."

**C. Case law from Indiana and other jurisdictions support the finding that a watercourse includes aquifers.**

Despite voluminous briefing in the trial court, neither WCCD nor Washington Township could produce a single Indiana decision that stated that a "watercourse" is limited to surface water. Older Indiana decisions discussing disputes about underground water used terminology that suggests that a watercourse includes groundwater. See, e.g., *Gagnon v. French Lick Springs Hotel Co.*, 72 N.E. 849, 851-52 (Ind. 1904) ("If the water flows in a definite channel under ground, the same rules apply to it as surface streams, and the landowner cannot use or destroy it at his pleasure."); *New Albany and Salem RR Co. v. Petersen*, 1860 WL 4397, \*1 (Ind. 1860) (using the term "*underground watercourses*" in the context of discussing a dispute about diverting water from a well). More recent cases have discussed the definition of "watercourse" in the context of disputes about surface water and, not surprisingly, have used surface water

“watercourse,” several courts in other jurisdictions have held that groundwater contained in  
 While Indiana has not addressed whether subterranean water satisfies the definition of a

difference being that it is located underground. App. 513.

has many of the same characteristics as a lake in terms of defined boundaries and banks, the only  
 Whether a watercourse exists must be determined from the applicable facts.” *Id.* An aquifer  
 watercourse must have a defined bed and banks. These criteria are not conclusive, however.  
 advocates a flexible approach in defining what constitutes a watercourse: “It is often said that a  
 definition of a “watercourse” in Indiana Code § 36-5-2-10. *Id.* The *Birdwell* decision also  
 flows,” which would seem to exclude lakes as much as aquifers, yet lakes are included in the  
 Interestingly, the *Birdwell* Court defines a watercourse as a “channel through which water  
 watercourses in terms of surface water because that was precisely what was at issue in the case.  
 one farm to another. 439 N.E.2d at 721. Thus, it is only natural that the Court discussed  
 each year.” (App. 24) However, *Birdwell* involved a dispute over surface water draining from  
 though which water flows and has flowed ... ordinarily and permanently for a substantial period  
 commonly called ground water or aquifers. Instead, it was a term of art that meant ‘a channel  
 concluded that “[t]he common law definition of ‘watercourse’ did not extend to what is  
 The trial court cited *Birdwell v. Moore*, 439 N.E.2d 718, 721 (Ind. Ct. App. 1982) and  
 watercourse.

court has addressed the precise question here: Whether a body of water in an aquifer constitutes a  
 jointly owned pond). The most that can be said with respect to Indiana common law is that no  
*Torabi*, 693 N.E.2d 622, 627 (Ind. Ct. App. 1998) (dispute regarding a bridge located over a  
 2009) (dispute concerning the impact of a manufacturing facility on farm ponds); *Trowbridge v.*  
 terminology. See, e.g., *Long v. IVC Indus. Coatings, Inc.*, 908 N.E.2d 697, 703 (Ind. Ct. App.

