

To: Senator Patricia L. Birkholz, Chair
Michigan Senate Natural Resources and Environmental Affairs Committee

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Re: Groundwater and the Public Trust Doctrine

I. Introduction and Summary

This memorandum is being provided to supplement the testimony I gave before the Michigan Senate Natural Resources and Environmental Affairs Committee on November 14, 2007. While my testimony addressed numerous topics including the importance of the proposed Great Lakes Compact, this memorandum only addresses the applicability of the public trust doctrine to groundwater in Michigan. I am offering this memorandum to answer two specific questions: **(1) Does the public trust doctrine currently extend to groundwater in Michigan; and (2) What are the legal implications of extending the public trust doctrine to groundwater in Michigan?** After answering these questions, this memorandum offers a proposal for integrating public trust doctrine protections into a groundwater withdrawal and management statute.

The short answers to these questions are: **(1) Michigan courts have not extended the public trust doctrine to groundwater in Michigan; (2) the legal implications of extending the public trust doctrine to groundwater in Michigan are probably less significant than either proponents or opponents suggest.** The law in this area is fairly clear, but it is possible that a future court in Michigan may extend the public trust doctrine to groundwater, perhaps consistent with the proposal I offer.

This is a complex issue with valid concerns on both sides of the debate. Considering the current law, the legal implications for extending the public trust doctrine to groundwater, and the various goals of current efforts to better manage the state's groundwater, I offer the following recommendation and proposal. **The Michigan Legislature and the relevant state agencies should not allow any withdrawal of groundwater to impair or diminish the public trust in connected surface waters subject to the public trust doctrine.**

II. Michigan Courts Have Not Extended the Public Trust Doctrine to Groundwater

Michigan courts have expressly held that the public trust doctrine does not apply to groundwater and other non-navigable waters in Michigan. The Michigan Supreme Court has stated that the “public-trust doctrine applies only to *navigable* waters and not to all waters of the state.”¹ The Michigan Supreme Court defines navigable waters as waters capable of floating a log, and has expressly declined to take even the modest step of extending the public trust doctrine to waters that can be used for recreational boating.² Thus, in a recent case involving Nestlé’s pumping of groundwater for bottling and sale, the Michigan Court of Appeals rejected the plaintiffs’ claim that the groundwater pumping was subject to the public trust doctrine because the affected surface waters (most notably the Dead Stream) were not considered ‘navigable’ under state law.³

In that same case, the Michigan Court of Appeals expressly rejected the plaintiffs’ argument “that all water within Michigan is property held in trust for the people regardless of the navigability of individual bodies of water.”⁴ Plaintiffs relied on prior cases, the Michigan Constitution, and several statutes to support their claim that “the state has placed all waters, including groundwater, within this state in trust.”⁵ The court rejected this argument, holding:

The Constitution and the statutes cited do not attempt to claim ownership of water by the state itself. Indeed, this state has long recognized that private persons obtain property rights in water on the basis of their ownership of land. Therefore, the trial court properly determined that water, while a resource common to all Michigan citizens, is neither owned by the state nor subject to the public trust absent a determination that the body of water in question is navigable.⁶

The court’s decision does leave open the possibility that a groundwater withdrawal that affects a *navigable* connected surface water could violate the public trust doctrine, if the groundwater withdrawal threatens protected public trust purposes such as fishing or navigation. Michigan courts have not yet been faced with this question, since in the Nestlé case the affected surface water was not navigable and thus not protected by the public trust doctrine.

¹ Bott v. Natural Resources Comm., 327 N.W.2d 838, 846 (Mich. 1982) (emphasis in original).

² See Chris A. Shafer, *Public Rights in Michigan’s Streams: Toward a Modern Definition of Navigability*, 45 WAYNE L. REV. 9 (1999). Legislation has been introduced before in Michigan to use the recreational boating test to determine whether inland waters are “navigable” and subject to the public trust doctrine. See Mich. S.B. 767, Regular Sess. (1997). Such a proposal is worth further consideration, and is consistent with the law in many other states. It seems odd to extend the public trust doctrine to groundwater when it does not apply to all surface waters, including those capable of being used for recreational boating.

³ Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc., 709 N.W. 2d 174, 218-220 (Mich. App. 2005), *affirmed in part, reversed in part*, 737 N.W.2d 447 (Mich. 2007), *rehearing denied* 739 N.W.2d 332 (Mich. 2007).

⁴ Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc., 709 N.W. 2d at 221.

⁵ *Id.*

⁶ *Id.* (internal citations omitted).

III. Legal implications of extending the public trust doctrine to groundwater

The notion of expanding the public trust doctrine to groundwater has some appeal on scientific grounds. As a scientific matter, we now know that Michigan's surface waters and groundwater are highly connected, and that surface waters often depend upon groundwater for both quality and quantity.⁷ Given this hydrological connection between groundwater and surface water, there is some logic to the argument that the same legal rules (notably the public trust doctrine) should apply to all waters. However, it would be useful to first look at the legal implications of extending the public trust doctrine to groundwater.

The public trust doctrine serves four primary purposes: (1) it limits to some extent the ability of the state to divest itself of, or otherwise transfer title to, public trust assets to private parties; (2) it provides public access for the exercise of traditionally protected public rights such as fishing and navigation; (3) it provides a basis for government regulation to protect natural resources; and (4) it may provide a legal cause of action for citizens seeking to prevent environmental harm to a resource. To evaluate the merits and necessity of a proposal to extend the public trust doctrine to groundwater, it is useful to examine each purpose as it relates to groundwater.

(1) The public trust doctrine limits, to some extent, a state's ability to divest itself of, or otherwise transfer title to, public trust assets to private parties. This principle was first established by the United States Supreme Court in *Illinois Central Railroad v. Illinois*.⁸ In this famous decision, the Supreme Court held that the state of Illinois could not convey title to a critical portion of Lake Michigan shoreline to a railroad company. However, it remains unclear whether this limitation is substantive or merely procedural – that is, the public trust doctrine may only require certain procedures to guarantee public accountability when the state conveys trust property to a private party.⁹ Even if the public trust doctrine provides only a procedural check on the state's ability to transfer title to public trust resources to private parties, it is still an important and valuable protection for critical public trust resources such as the Great Lakes.

However, this purpose of the public trust doctrine is not applicable to groundwater. **Unlike the Great Lakes shorelines and underlying beds protected by the public trust doctrine, the state does not hold title to groundwater.**¹⁰ **Thus, the state would not be in a position to transfer title to groundwater resources to a private party.** The state may in the future acquire title to the groundwater within the state through either voluntary sales or condemnation, but that would be a prohibitively expensive endeavor beyond the current proposal under consideration in the legislature.

⁷ Groundwater Conservation Advisory Council, FINAL REPORT TO THE MICHIGAN LEGISLATURE IN RESPONSE TO PUBLIC ACT 148 OF 2003 (February 6, 2006), available at <http://www.deq.state.mi.us/documents/deq-gwcac-legislature.pdf>

⁸ 146 U.S. 387 (1892).

⁹ See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

¹⁰ See *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*, 709 N.W. 2d at 221.

(2) The public trust doctrine protects traditional public rights such as fishing and navigation on public trust waters.¹¹ These traditionally protected public rights were recently expanded to include beach walking along the shorelines of the Great Lakes below the ordinary high water mark.¹² Public access for navigation, fishing, and recreation is the most fundamental and well-established purpose and legal implication of the public trust doctrine. The foundation of the public trust doctrine in Michigan, the Northwest Ordinance of 1787, provided that “navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free....”¹³

However, protecting traditional public rights such as fishing and navigation is simply not applicable to groundwater. One cannot navigate, fish, or otherwise use groundwater for recreation. Of course, as discussed in the my recommendation and proposal below, groundwater supply to a surface water may be necessary to ensure that the surface water can support protected public navigation, fishing, and recreation. **Thus, the law should recognize that groundwater withdrawals can give rise to a public trust claim to protect uses of affected navigable surface waters.** But to declare that the groundwater itself is a public trust resource subject to public access for navigation, fishing, and recreation does make sense.

(3) The public trust doctrine has been cited as a basis for government regulation to protect natural resources. Governments have limited powers of regulation, and in some circumstances may lack the constitutional authority to regulate certain private conduct that could harm a natural resource. In these circumstances, it has been argued that the public trust doctrine gives government another legal basis for regulation.¹⁴

However, the state of Michigan already has ample Constitutional authority to protect groundwater and groundwater-dependent natural resources without the groundwater itself being subject to the public trust doctrine. The Michigan Constitution of 1963, article 4, § 52, gives the legislature authority to protect groundwater and all other natural resources.¹⁵ In a recent Attorney General Opinion, Mike Cox detailed Michigan’s constitutional authority in this area, stating that “the Legislature has the authority under Const 1963, art 4, §§ 51 and 52, to regulate the withdrawal and uses of the waters of the State, including both surface water and groundwater, ... to protect the natural resources of the State from pollution, impairment, and destruction....”¹⁶

¹¹ See *Glass v. Goeckel*, 703 N.W.2d 58, 62 (Mich. 2005).

¹² See *id.*

¹³ The Northwest Territorial Government, Ordinance of 1787 art. IV (1787).

¹⁴ See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. at 655-56.

¹⁵ Michigan Constitution 1963, art 4, § 52: “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.”

¹⁶ Michigan Attorney General Opinion No. 7162 (September 23, 2004), available at <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10238.htm>.

(4) The public trust doctrine may provide a legal cause of action for citizens seeking to prevent environmental harm to a resource. This was the hope for the public trust doctrine when Professor Joe Sax (at that time on the faculty of the University of Michigan Law School) launched the modern public trust doctrine into the environmental law field in 1970.¹⁷ However, since 1970 the public trust doctrine has been used with only limited success as a cause of action for citizen lawsuits to protect the environment.¹⁸ This is due in large part to the rise of statutory environmental protections with citizen enforcement provisions since 1970.¹⁹ This is especially true in Michigan, which passed the landmark Michigan Environmental Protection Act (MEPA), authored in large part by Professor Sax to further the goals of the public trust doctrine.²⁰ MEPA provides that “any person may maintain an action in ... court ... against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.”²¹ **Thus, MEPA already gives citizens a legal cause of action to prevent environmental harm to groundwater and groundwater-dependent natural resources.**²²

IV. Recommendation

Michigan courts have clearly decided that groundwater is not subject to the public trust doctrine. Extending the public trust doctrine to groundwater in Michigan may not have the legal significance hoped for by proponents or feared by opponents. As detailed above, the primary purposes of the public trust doctrine are either inapplicable to groundwater or duplicative of existing Constitutional and statutory law. The most controversial groundwater use seems to be the pumping of groundwater for bottling and sale. However, no court has ever held that the public trust doctrine would prohibit bottling and sale of water, regardless of whether that water is subject to the public trust doctrine or not. Thus, extending the public trust doctrine to groundwater would not alter the legal rules for the most controversial use of groundwater in Michigan.

¹⁷ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

¹⁸ See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

¹⁹ See Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

²⁰ See *id.* at 721.

²¹ M.C.L. § 324.1701(1).

²² It should be noted that the Michigan Supreme Court recently struck a blow to citizens’ ability to protect natural resources pursuant to MEPA by essentially overruling the legislature’s clear intent and limiting standing to bring MEPA claims. See *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*, 737 N.W.2d 447 (Mich. 2007), *rehearing denied* 739 N.W.2d 332 (Mich. 2007). Former Governor William Milliken rightly criticized the decision, and called for a constitutional amendment to restore citizens’ right to protect Michigan natural resources. See William Milliken, “Allow citizens to fight pollution,” *Traverse City Record-Eagle* (Dec. 9, 2007), available at http://www.record-eagle.com/opinion/local_story_343094529.html. The Supreme Court’s decision would similarly limit citizens’ ability to bring a public trust claim.

Nonetheless, there is reason for legal reform in this area.²³ Our scientific understanding of the groundwater – surface water connection has improved considerably in recent years, and we know how important groundwater inputs are to the health and functioning of many surface waters. It is certainly possible that groundwater withdrawals (individually or cumulatively) could diminish the flows of a navigable surface water protected by the public trust doctrine under well-established law. This must be guarded against by all branches of government (legislative, judicial, and executive) consistent with the public trust doctrine. **The Michigan Legislature and the relevant state agencies should not allow any withdrawal of groundwater to impair or diminish the public trust in connected navigable surface waters subject to the public trust doctrine.** For example, if groundwater withdrawals were to threaten navigation on the Grand River, those groundwater withdrawals should not be allowed as they would violate the public trust doctrine. Similarly, if groundwater withdrawals lowered lake levels on a navigable inland lake such that the public could no longer access it for fishing or hunting, those groundwater withdrawals should not be allowed as they would violate the public trust doctrine.

²³ For additional proposals for reform, see Ellen Kohler, *Ripples in the Water: Judicial, Executive, and Legislative Developments Impacting Water Management in Michigan*, 53 WAYNE LAW REVIEW 1 (2007).