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Michigan's Groundwater and the Public Trust Doctrine

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COLUMNS

12 PRESIDENTS PAGE

Made in Michigan: What it means to us that Michigan is a mandatory bar state

Dana Warnez

30 PLAIN LANGUAGE

Graphics in briefs: Why not? (Part 2)

Wayne Scheiss

34 BEST PRACTICES

Daubert challenges to expert testimony: Legal overview and best practices

Chad Engelhardt and Jennifer Engelhardt

38 ETHICAL PERSPECTIVE

Stop sending subpoenas to attorneys for protected information

Alecia M. Chandler

40 LIBRARIES & LEGAL RESEARCH

Michigan's groundwater and the public trust doctrine

Shay Elbaum

42 LAW PRACTICE SOLUTIONS

Cultivate innovation mindsets to build your future

Juda Strawczynski

46 PRACTICING WELLNESS

Workplace culture: What's love got to do with it?

Dawn Grimes Kulongowski

NOTICES

50 ORDERS OF DISCIPLINE & DISABILITY

56 FROM THE MICHIGAN SUPREME COURT

62 FROM THE COMMITTEE ON MODEL

CRIMINAL JURY INSTRUCTIONS

69 CLASSIFIEDS

LIBRARIES & LEGAL RESEARCH

Michigan's groundwater and the public trust doctrine

BY SHAY ELBAUM

In March, legislators introduced a package of bills in the Michigan House of Representatives that would apply the public trust doctrine to the state's groundwater. But what is the public trust doctrine and why does it matter if it applies to Michigan groundwater? This column provides an overview of the public trust doctrine and its application to groundwater, a summary of the bills now being considered, and resources for tracking their progress.

THE PUBLIC TRUST DOCTRINE

The public trust doctrine provides that the state holds natural resources in trust for the public and has an affirmative duty to manage those resources for the benefit of the public. Scholars generally trace its origin to Roman law and the Institutes of Justinian.¹ Skipping forward a millennium or so, the United States Supreme Court held in 1892 that the Great Lakes and the land underneath them were held in the public trust, invalidating a grant of most of the Chicago harbor to a private railroad company.² Following Joseph Sax's seminal 1970 article "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,"³ advocates increasingly turned to the doctrine to combat environmental problems and state courts and legislatures expanded its scope.

Today, all states apply some form of the public trust doctrine—with variations. Some states' constitutions include a version of the doctrine.⁴ Courts have applied the doctrine as both a matter of common law and statutory law. And some states have codified, added to, or even subtracted from its scope by statute. Idaho, for example, enacted a law excluding water resources from its public trust doctrine in response to dicta in an Idaho Supreme Court decision suggesting that the doctrine could apply to water.⁵

Idaho's approach is not the norm. Most states consider navigable waters to be within the public trust. Groundwater, however, is a

different story. Courts in some states have held that the public trust doctrine does not apply to groundwater; other states have avoided the question.⁶ Another approach, taken by the California Court of Appeals, is to apply the public trust doctrine to groundwater resources when groundwater extraction could affect a navigable waterway — for example, by lowering the water level in a hydrologically connected stream.⁷ The Hawai'i Supreme Court has gone even further, applying the doctrine to groundwater independent of its use or the impact on a surface water resource.⁸

THE PUBLIC TRUST IN MICHIGAN

In Michigan, the public trust doctrine applies to navigable waters,⁹ but no state court has applied it to groundwater. In a 2005 case, the Michigan Court of Appeals considered, then rejected an argument that groundwater was subject to the public trust doctrine.¹⁰ The case involved Nestlé's extraction and sale of groundwater in Mecosta County. Although both the trial and appellate courts rejected the public trust argument, they did enjoin Nestlé's groundwater extraction on other grounds. A groundwater pumping operation in another county, however, was permitted to move forward.

Nestlé's extraction and sale of Michigan groundwater have been consistently challenged by water conservation advocates.¹¹ The Great Lakes Compact, a legally binding interstate compact between the Great Lakes states, bans the removal of water from the Great Lakes basin.¹² But there is an exception: water may be transported elsewhere if it is in containers of 5.7 gallons or less, although states may pass more restrictive laws.¹³ Some have called this provision a loophole; others have argued that the water extracted is not nearly enough to affect Great Lakes water levels. Whatever one's assessment of this exception, it means that the compact does not prevent Nestlé (or anyone else) from bottling groundwater from the Great Lakes basin and selling it elsewhere.

CURRENT BILLS

Michigan lawmakers in March introduced a package of three bills intended to protect the state's groundwater resources. Similar bills have been introduced in past sessions without success. Rep. Yousef Rabhi (D-Ann Arbor) introduced 2022 HB 5953, which declares that "[t]he waters of this state, including groundwater, are held in the public trust by this state. The public trust in the water of this state applies to the quantity and quality of the water." Rep. Rachel Hood (D-Grand Rapids) introduced 2022 HB 5954, which would remove the exception permitting withdrawal of water from the Great Lakes basin in containers smaller than 5.7 gallons. And Rep. Laurie Pohutsky (D-Livonia) introduced 2022 HB 5955, which would add the "protection [and] conservation of...water" to the Michigan Natural Resource Commission's mandate.

All three bills were referred to the House Committee on Natural Resources and Outdoor Recreation, where they remain as of this writing. No hearings have been scheduled.

Researchers looking to track the progress of these bills can refer to the Michigan Legislature's website at legislature.mi.gov. Searching for the bill numbers brings up each bill's page, which includes basic information about the bill, the bill's text as introduced and in subsequent versions, analyses from the House and the Senate when available, and a list of actions on the bill as recorded in the House and Senate journals. The bill's page also includes a link to an RSS feed, which you can use to receive live updates on its progress.

More details on the bills' consideration by the Committee on Natural Resources and Outdoor Recreation or any House committee can be found on the Michigan House website at house.mi.gov. Check the committee schedule under the page's Information heading for meeting dates and agendas, including which bills will be considered and, possibly, a link to a live stream of proceedings. Minutes and testimony from past hearings are also available on the committee page under Committees > All Committees. If a committee meeting was recorded, it can be located under House TV > Video Archive. The Michigan Senate website at senate.michigan.gov is structured slightly differently but provides access to the same kinds of committee material.

CONCLUSION

While we don't know whether these bills will pass, their introductions indicate that the responsibilities of the state as steward of its

natural resources, including groundwater, are still contested and alterable. The public trust doctrine remains a powerful tool for environmental conservation, and we may yet see Michigan join the growing number of states applying it to their groundwater.



Shay Elbaum is the faculty research librarian at the University of Michigan Law Library. He received his law degree from the University of Michigan Law School and his master's degree in library and information science from Simmons College. He is a member of the Alaska Bar Association.

ENDNOTES

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2. *Illinois Central R Co v Illinois*, 146 US 387, 475; 13 S Ct 110; 36 L Ed 1018 (1892).
3. 68 Mich L Rev 471 (1970), available at <<https://www.law.berkeley.edu/files/CLEE/Sax68MichLRev471.pdf>> [<https://perma.cc/5S3G-RTAC>]
4. E.g., Alaska Const, art VIII; Haw Const, art XI, § 1; Neb Const, art XV, § 5; and Pa Const, art I, § 27.
5. Idaho Code § 58-1203.
6. E.g., *Rhode Island v Atlantic Richfield Co*, 357 F Supp 3d 129 (D RI, 2018) and *White Bear Lake Restoration Assn v Minnesota Dept of Nat Res*, 946 NW2d 373 (2020).
7. *Environmental Law Fdn v State Water Resources Control Bd*, 26 Cal App 5th 844; 237 Cal Rptr 3d 393 (2018).
8. *In re Water Use Permit Applications*, 94 Hawai'i 97; 9 P3d 409 (2000).
9. *Bott v Comm of Natural Resources*, 415 Mich 45; 327 NW2d 838 (1982).
10. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005).
11. Ellison, *Nestle water owners return Michigan permit, plan new withdrawal*, MLive (October 20, 2021) <<https://www.mlive.com/public-interest/2021/10/nestle-water-owners-return-michigan-permit-plan-new-withdrawal.html>> [<https://perma.cc/JMF2-NG8T>] (reporting on recent conflict and summarizing history) and *Nestlé Water Taking*, Michigan Citizens for Water Conservation <<https://savemewater.org/nestle-water-bottle/>> [<https://perma.cc/NJU2-ZJPT>].
12. Great Lakes-St. Lawrence River Basin Water Resources Compact (December 13, 2005), § 4.8, available at <<https://www.glscompactcouncil.org/media/ud2domov/great-lakes-st-lawrence-river-basin-water-resources-compact.pdf>> [<https://perma.cc/3ERL-2JS9>].
13. *Id.* § 4.12(10).