

Water for the Public, Not for Profit: Why Maine Should Hold Groundwater in the Public Trust

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Maine’s groundwater is being privatized and commodified by several bottled water companies, including Nestlé Waters North America (owner of many bottled water brands including Maine’s Poland Spring).¹ Nestlé, and other companies, are pumping, bottling and selling millions of gallons of groundwater each year from communities throughout the state, putting freshwater supply and the environment at risk. The people of Maine should not allow the profits of multinational bottled water companies to take precedence over the interests of Mainers. To protect Maine’s groundwater and the general public’s best interest, Maine should hold its groundwater in the public trust.

Why Should Maine’s Public Trust Include Groundwater?

(1) Maine’s Current Groundwater Rule Grants Private Ownership of Groundwater: The primary rule that has governed Maine’s groundwater for over a century is called absolute dominion.² Absolute dominion can leave groundwater vulnerable to corporate ownership. According to Maine’s Assistant Attorney General in 2005, under absolute dominion, groundwater is something that can be privately owned and is considered property — the landowner has complete authority over groundwater that lies directly below his or her land.³ Therefore, if Nestlé purchases land or obtains the appropriate leasing/property rights, it can also own groundwater below the land.

And although Maine’s police power rights allow the state to impose some withdrawal restrictions that pertain to the use of groundwater, the state could face regulatory takings challenges from a landowner, such as Nestlé, if the individual believes that the regulation has resulted in a taking of his or her private property since the absolute dominion rule gives the individual complete authority and ownership.⁴

(2) The Public Trust Grants the Public Control of a Common, Finite, Natural Resource: Contrary to absolute dominion, the public trust doctrine puts public interests before private interests. Thus, when a resource is held in the public trust, it is more difficult for private parties to inflict harm.⁵ The public trust doctrine is rooted in ancient legal principles and enables sovereign states to hold and protect natural resources.⁶ Under this doctrine, which dates from ancient Rome, running water — just like the air we breathe and the sea we navigate — is a common resource.⁷ Water belongs to the public and should be protected and preserved for the public.⁸

(3) The Public Trust Can Help Protect Maine’s Groundwater from Privatization: Bottlers like Nestlé are privatizing and commodifying groundwater in Maine, which is not in the public’s best interest. In regard to water resources, the public trust doctrine was traditionally used to give states the authority to protect navigable waters.⁹ A broader conceptualization of water as a commons gained speed in 1970 when Joseph Sax published his widely reported article on the public trust doctrine.¹⁰ Ultimately, Sax urged the courts to use the public trust doctrine as a means to protect natural resources, including water, from environmental degradation and privatization.¹¹ Over time, the doctrine has expanded,¹² and New Hampshire, Vermont, Tennessee and Hawaii have applied to public trust doctrine explicitly to groundwater.¹³ Maine could use the public trust to help safeguard its groundwater from privatization.

(4) The Public Trust Can Help Protect Maine’s Groundwater from Environmental Destruction: Water bottlers’ pumping operations can harm the environment and natural resources that communities may rely on for local farming or residential recreation. Even though groundwater is not “navigable,”¹⁴ groundwater sources are often connected to navigable surface waters,¹⁵ and when an aquifer is over-pumped, the water levels of a connected surface water body can fall and water flows can change.¹⁶ As stated in a U.S. Geological Survey report, “changes in the natural interaction of groundwater and surface water caused by human activities can potentially have a significant effect on aquatic environments.”¹⁷

State officials have said that large-scale groundwater extraction, such as for water bottling plants, could reduce the availability of local groundwater and surface water sources to the detriment of the resources that depend on them.¹⁸

In fact, after Nestlé began pumping groundwater from a Michigan aquifer, water flows in connected surface waters fell to the point that mud flats developed.¹⁹ When bottled water companies tap groundwater sources, they do not replenish what they pump out.²⁰ This differentiates water bottlers from local irrigation and agricultural water users, who do return water to aquifers.²¹

(5) Holding Groundwater as a Public Trust Can Help Maintain Community Cohesion: Many communities have had no option but to go to court to try and protect their groundwater from bottlers. Litigation between towns and Nestlé has disrupted harmony in communities across the United States, ranging from those in California,²² to Michigan²³ and right here in Maine.²⁴ These legal battles can be extremely expensive and time consuming,²⁵ and water bottling schemes have torn towns apart.²⁶ Although the Shapleigh and Newfield communities in Maine were successful in implementing local bottled water bans,²⁷ not all towns have had such success. A Maine resident living in a town near Fryeburg explained in a 2009 article that Nestlé

“bullied people and sued to get their way.”²⁸ Establishing groundwater in the public trust would be more effective for protecting common water resources in the first place.

Protect Maine’s Water for Generations to Come: Hold Groundwater in the Public Trust

Managing groundwater under a statewide commons framework and the public trust is important for the protection of all natural resources. *According to a statement made by Maine’s former head of the attorney general’s natural resource division, groundwater “is no more a publicly owned resource in Maine than oil is in Texas.”*⁴¹ As long as Maine follows the absolute dominion rule, groundwater will be treated as a property. If groundwater is treated as a property, it cannot adequately be protected for future generations.

It is imperative to act now and make the public trust the prevailing legal principle concerning groundwater.

Tales of Two Pioneering States that Hold Groundwater in Their Public Trust

Vermont’s Legislative Approach to Establishing Groundwater in the Public Trust also Supports Local Farming and Agricultural Water Users:

In June 2008, after the town of East Montpelier successfully stalled plans to commercially bottle and sell its groundwater,²⁹ Vermont successfully established groundwater as a public trust resource.³⁰ This law recognized that “the groundwater of Vermont is a precious, finite, and invaluable resource upon which there is an ever-increasing demand for present, new and competing uses.”³¹

The law requires groundwater reporting for use of more than 20,000 gallons per day to help the state track water use.³² Vermont began monitoring and regulating water use through a state-mandated permit for water withdrawals above 57,600 gallons a day—with exemptions for some local water users, such as farmers and public water systems.³³ Before filing for a withdrawal permit, an applicant must hold a public hearing about its proposal.³⁴

Hawai’i’s Historical Common Law Principles and a Constitutional Framework Upheld for Groundwater in

Landmark Court Decision: In 2000, in response to a controversial case that began in the mid-1990s, the Hawai’i Supreme Court issued a trailblazing decision that strengthened the function of the public trust doctrine as it relates to water resource protection. The court confirmed that the doctrine applies to the protection of all water resources — finding no distinction between groundwater and surface water resources.³⁵

Hawai’i’s public trust doctrine is rooted in both the state’s constitution and its common law principles.³⁶ In fact, water is the only natural resource that has its own section in the Hawai’i constitution, and that section obligates the state to protect and regulate both ground and surface water resources.³⁷ As Hawai’i’s supreme court noted, “The state also bears an ‘affirmative duty to take the public trust into account in the planning and allocation of water resources.’”³⁸

The Precautionary Principle: In addition to Hawai’i’s public trust doctrine provisions, the state directly applies what is called the precautionary principle to water management.³⁹ As affirmed by the state supreme court, the state’s Commission on Water Resource Management has concluded, “Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt ‘precautionary principles’ in protecting the resource. That is, where there are present or potential threats or serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent degradation. ‘Awaiting for certainty will often allow for only reactive, not preventive, regulatory action.’”⁴⁰

Principles for Managing Groundwater as a Public Trust:

Shared Use: Withdrawal of groundwater should be regulated in a manner that benefits the people of Maine, ensuring an adequate supply of groundwater for domestic, farming, dairy processing and industrial uses.

Long-Range Planning: Groundwater management should include long-range water resource planning, proper management and use of the water resources for the benefit of all residents.

Democratic Control: Groundwater usage should be determined by public bodies that are accountable to the people of Maine, rather than prioritized by those who can extract the water first or by sale to the highest bidder.

Holistic Management: The hydrological connection between groundwater and surface waters must be recognized, and all surface waters and groundwater should be held in public trust by the people of Maine for the benefit, protection and enjoyment of present and future generations.

Environmental Stewardship: Large-scale water extractions that can reduce groundwater and surface water levels, harming the environment and entire ecosystems dependent upon them, shall not be permitted.

Human Right to Water: Governments should increase investments in improved water systems, treatment systems and household wells to ensure that all Mainers have access to safe, clean water for drinking and sanitation.

Take Action!

Endnotes

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- 17 *Ibid*. at vii.
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