food&water watch

COMMON RESOURCES

Water Is NOT a Commodity, Water Is a COMMON Resource:

The Rationale for States to Hold Groundwater in the Public Trust

Fact Sheet • June 2012

Many communities have had no option but to go to court to try and protect their groundwater from corporate water bottlers. These legal battles can be extremely expensive and time consuming,[1] and water-bottling schemes have torn towns apart.[2] Although some communities have banned commercial water extraction,[3] not all towns have had such success.

States should not allow the interests of multinational bottled water companies to take precedence over the interests of the public, and all water should be under the dominion of the public and not under the control of private companies. States can better protect their groundwater resources and act in the public's best interest by placing groundwater in the public trust.

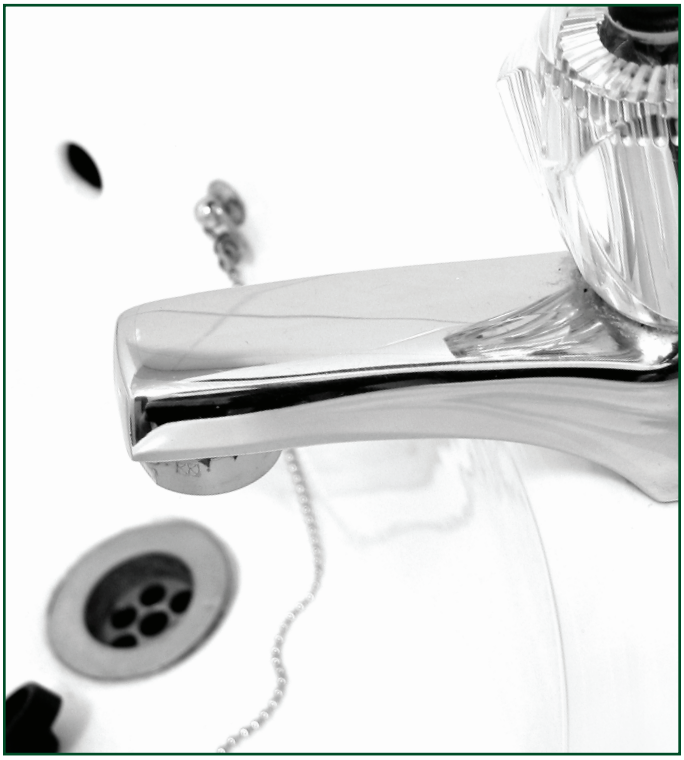
Water as a Commons and the Public Trust Doctrine

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.[4] The public trust doctrine is rooted in ancient legal principles and enables sovereign states to hold and protect natural resources.[5] Under this doctrine, which dates from ancient Rome, running water — just like the air we breathe and the sea — is a common resource.[6] Water belongs to the public and should be protected and preserved for the public.[7]

The Public Trust to Help Safeguard Groundwater from Environmental Destruction and Privatization

Multinational water-bottling companies are privatizing and commodifying groundwater, and this 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.[8] 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.[9] 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.[10] Over time, the doctrine has expanded,[11] and Hawai'i, New Hampshire, Tennessee and Vermont apply the public trust doctrine explicitly to groundwater.[12]

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,"[13] groundwater sources are often connected to navigable surface waters,[14] and when an aquifer is over-pumped, the water levels of a connected surface water body can fall and



water flows can change.[15] As noted in a U.S. Geological Survey report, "changes in the natural interaction of ground water and surface water caused by human activities can potentially have a significant effect on aquatic environments."[16]

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.[17] In fact, after a bottler began pumping groundwater from a Michigan aquifer, water flows in connected surface waters fell to the point that mud flats developed.[18] When bottled water companies tap groundwater sources, they do not replenish what they pump out.[19] This differentiates water bottlers from local irrigation and agricultural water users, who do return water to aquifers.[20]

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

Vermont: In June 2008, after the town of East Montpelier successfully stalled plans to commercially bottle and sell its groundwater,[21] Vermont successfully established groundwater as a public trust resource.[22] 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."[23]

The law requires groundwater reporting for use of more than 20,000 gallons per day to help the state track water use.[24] 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.[25] Before filing for a withdrawal permit, an applicant must hold a public hearing about its proposal.[26]

Hawai'i: 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.[27]

Hawai'i's public trust doctrine is rooted in both the state's constitution and its common law principles.[28] 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.[29] 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.'"[30]

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.[31] 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.'"[32]

Adaptive Water Management: Hawai'i's constitutional mandates for water protection allow for an adaptive approach to water resource management.[33] As described by the Center for Island Climate Change Adaptation and Policy at the University of Hawai'i, adaptive water management is shaped by policies and rules that are: "(1) forward-looking—focused on crisis avoidance as well as crisis mitigation; (2) flexible—able to adjust to changing needs and conditions; (3) integrated—able to address climate-related impacts that cut across political and geographical boundaries; and (4) iterative—utilizing a continuous loop of monitoring, feedback, and reevaluation."[34] Being adaptive allows water management practices to be preemptive rather than reactive.

Protect Water Resources for Generations to Come; Establish Groundwater as a Public Trust Resource

Given the world's growing population and the increasing pollution and overuse of water, the available freshwater supply is becoming more and more limited. A 2009 publication sponsored by the World Bank's International Finance Corporation, as well as a number of multinational corporations including Nestlé S.A. and The Coca-Cola Company, found that by 2030 global freshwater demand will exceed availability by 40 percent.[35] The United States is not exempt from this threat of water shortages.[36] Yet the bottled water industry and other private players want to take advantage of the water crisis by profiting off of dwindling supplies, selling off the water in our aquifers and commodifying a common resource that is essential for all life on Earth.

Managing groundwater under a statewide commons and public trust framework is paramount. If groundwater is treated as a commodity, it cannot adequately be protected for future generations.

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

- States need to explicitly extend their public trust to include groundwater by passing appropriate legislation or amending their state constitution.
- Water management practices should not be solely reactive. Proactive water protection provisions should support the public trust doctrine.
- To fully safeguard communities from water degradation and shortages, the bottling and commodification of common water resources must be banned.

Endnotes

1 Madigan, Kate. PIRGIM Education Fund. "Left Out to Dry: How Michigan Citizens Pay the Price for Unregulated Water Use." September 2005 at 13 and 14.

2 Conlin, Michelle. "A town torn apart by Nestlé: How a deal for a bottled water plant set off neighbor against neighbor in struggling McCloud, Calif." *Bloomberg Business Week*. April 16, 2008; Farwell, Jackie. "Tapping in. After 160 years in Maine, Poland Spring stirs up debate about the state's future." *Mainebiz*. April 20, 2009.

3 Farwell, 2009.

4 Kanner, Allan. "The Public Trust Doctrine, *Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources." *Duke Environmental Law & Policy Forum*, vol. 16, iss. 1. Fall 2005 at 61 and 62; Klass, Alexandra B. and Ling-Yee Huang. Center for Progressive Reform. "Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates." September 2009 at 1.

5 Kanner, 2005 at 61 and 62; Simmons, Randy T. "Property and the Public Trust Doctrine." PERC Policy Series, iss. PS-39. April 2007 at 2; Sax, Joseph L. "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" *Michigan Law Review*, vol. 68, iss. 3. January 1970 at 475.

6 *The Institutes of Justinian*, Book 2 §1.1 (Sandars, Thomas Collett, trans., 10th impression, 1900 at 90); Olson, James M. "Navigating the Great Lakes Compact: Water, Public Trust, and International Trade Agreements." *Michigan State Law Review*, iss. 2006:5. 2006 at 1110; Simmons, 2007 at 4; Spiegel, Danielle. "Can the public trust doctrine save western groundwater?" *New York University Environmental Law Journal*, vol. 18, iss. 2. 2010 at 424.

7 Klass and Huang, 2009 at 2; Spiegel, 2010 at 429 to 430.

8 Kanner, 2005 at 62, 68 and 70.

9 Spiegel, 2010 at 429.

10 Sax, 1970 at 484 to 485, 488 to 489, 556 to 557 and 565 to 566; Spiegel, 2010 at 429 to 430.

11 Kanner, 2005 at 62; Spiegel, 2010 at 429 to 430.

12 Spiegel, 2010 at 413.

13 *Ibid*. at 430

14 Winter, T.C. et al. U.S. Department of the Interior. U.S. Geological Survey. "Ground Water and Surface Water. A Single Source." U.S. Geological Survey Circular 1139. U.S. Government Printing Office. 1998 at iii and 1.

15 *Ibid*. at iii and 14.

16 *Ibid*. at vii.

17 U.S. Government Accountability Office. "Bottled Water: FDA Safety and Consumer Protections are Often Less Stringent than Comparable EPA Protections for Tap Water." (GAO-09-610.) June 2009 at 26.

18 Madigan, 2005 at 13.

19 Boldt-Van Rooy, Tara. "'Bottling Up' Our Natural Resources: The Fight Over Bottled Water Extraction in the United States." *Journal of Land Use*, vol. 18, iss.2, Spring 2003 at 279 and 280.

20 *Ibid*. at 279.

21 Barringer, Felicity. "Bottling Plan Pushes Groundwater to Center Stage in Vermont." *The New York Times*. August 21, 2008.

22 10 V.S.A. § 1390(5).

23 10 V.S.C. §1390(2) (2008).

24 10 V.S.A. §1417(a) (2008); Barringer, 2008.

25 10 V.S.A. §1418 (b)(1-6) (2008).

26 10 V.S.A. §1418 (c)(1) (2008).

27 State of Hawai'i, Department of Agriculture, Agricultural Development Division, Market Analysis and News Branch. "Economic Impact of the Waiahole Irrigation System." December 30, 2002 at 7 to 9; Klass and Huang. September 2009 at 12; *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw: Supreme Court 2000).

28 Wallsgrove, Richard and David Penn. "Water Resources and Climate Change Adaptation in Hawai'i: Adaptive Tools in the Current Law and Policy Framework." University of Hawai'i, Center for Island Adaptation and Policy. 2012 at 22 and 25.

29 *Ibid*. at iii and 22; Haw. Const. art. XI, § 1; Haw. Const. art. XI, § 7.

30 Wallsgrove and Penn, 2012 at 26; I*n re Water Use Permit Applications*, 9 P.3d 409, 453 (Haw: Supreme Court 2000).

31 Wallsgrove and Penn, 2012 at 26.

32 Commission on Water Resource Management, Department of Land and Natural Resources, State of Hawai'i. "Conclusions of Law." (Case No. CCH-PA95-1). December 24, 1997 at 33; *In re Water Use Permit Applications*, 9 P.3d 409, 466 (Haw: Supreme Court 2000); Wallsgrove and Penn, 2012 at 26.

33 Wallsgrove and Penn, 2012 at iii and 22.

34 *Ibid*. at iii.

35 The 2030 Water Resources Group. "Charting our Water Future: Economic frameworks to inform decision making." 2009 at i and 5.

36 Kloss, Christopher. United States Environmental Protection Agency. "Managing Wet Weather with Green Infrastructure Municipal Handbook: Rainwater Harvesting Policies." (EPA-833-F-08-010). December 2008 at 1.

For more information:
web: www.foodandwaterwatch.org
email: info@fwwatch.org
phone: (202) 683-2500 (DC) • (415) 293-9900 (CA)