

Legislative actions on groundwater and the public trust

Remarks January 26, 2016 NDCAP

Law re: public trust

In states where groundwater is not designated a public trust resource, a statutory groundwater allocation system is usually in place. In fact, few states lack a statutory groundwater allocation system. Such statutory groundwater allocation systems are a valid exercise of a state police power under the U.S. Constitution. The U.S. Supreme Court has long held that the states perform their regulation of land and public waters under their police power.

The Vermont Supreme Court has recognized the public trust doctrine and the authority of the state to supervise and control navigable waters and the lands lying under such waters. The Vermont Supreme Court also has invoked the public trust doctrine in several cases to reject claims of private rights with respect to public waters

Water and land held subject to the public trust may only be used for purposes approved by the legislature as public uses. For example, the Vermont General Assembly approved the use of the public trust land bordering Lake Champlain. If the General Assembly declares the groundwater of Vermont to be a public trust resource, it must also enact legislation authorizing the use or withdrawal of groundwater.

Background on ground water in VT

Vermont followed the common law rule for groundwater rights under which a property owner held absolute ownership of groundwater under the surface of their property subject to reasonable state regulation and then in 1985 the Legislature passed 10 V.S.A. § 1410, which abolished the doctrine of absolute ownership of groundwater and instead adopted as state policy the right of all persons to the beneficial use and enjoyment of groundwater free from unreasonable interference by other persons. This type of policy is the reasonable use doctrine, whereby landowners retain a right to use groundwater under their property, subject to the restriction that the use must be reasonable and must not harm other users. This right to reasonable use may be referred to as a usufructuary right. Many view usufructuary rights as subordinate to full property rights. Consequently, establishing a protected property interest in a water right sufficient for a takings claim is often difficult.

In Vermont, the reasonable use doctrine is enforced through a private right of action codified in 10 V.S.A. § 1410. Under §1410(b), any person may maintain an action for equitable relief or an action in tort to recover damages, or both, for the unreasonable harm caused by another person withdrawing, diverting, or altering the character or quality of groundwater.

Reasons for the groundwater designation

The Legislature was fully aware that 2/3 VT population depends on groundwater for their potable water as does agriculture and industry.

The Legislature was concerned about International treaty pressure (GATT, NAFTA, TPP) and taking claims in protecting the groundwater resource. In this case, it is important to make the designation of public trust before there are expectations of any use or an actual established use by an international investor.

Right of financial expectation – establishing groundwater as a public trust addresses the expectation before someone establishes a use thereby avoiding a possible takings claim.

The Legislature was convinced that we could not rely on a private right of action to protect such an important resource as groundwater on a case-by-case basis.

Steps in designating ground water

H 294 introduced in 2006 put in place a study committee on groundwater – legislature was not ready to move on this issue at in 2006. H 294 passed as part of Act 144.

Act 144 2006 created a 2 year study committee to advise the legislature and the administration on the advisability of making groundwater a public trust. It was a 14-member committee either peopled by the Secretary level members of the administration or appointed by the governor. There were four ringers though, two appointed by the Senate, and two appointed by the House.

The committee met several times both while the legislature was in and out of session. The committee called experts including Professor Parenteau, to inform the committee on what the law relative to both ground water and the public trust was, what other jurisdictions had done or were planning to do relative to ground water, what the administration and what the public thought we should do about the designation of groundwater. We discovered the states that declare groundwater to be a public trust resource in statute or constitution are Hawaii, New Hampshire, Connecticut, Tennessee, New Jersey, and New Mexico.

The committee issued interim and final reports. In a 10 to 4 vote, the committee recommended that the legislature NOT designate groundwater as a public trust resource. The four votes for the designation were Sen. Snelling and Kittell, Rep David Deen and Jon Groveman VNRC and they forwarded a minority report to the legislature. Despite the outcome of the committee deliberations, Sen Snelling and Rep. Deen introduced bills in the Senate and House that next year to designate groundwater a public trust resource. The Senate bill (S 304) passed, to become Act 199 of 2008.

ACT NO. 199 Groundwater resources; groundwater withdrawal

This act establishes a groundwater withdrawal permitting and reporting program at the agency of natural resources (ANR). Beginning September 1, 2009, any person that withdraws more than 20,000 gallons of groundwater per day over a calendar month at a tract of land or business shall file a groundwater withdrawal report with ANR.

On and after July 1, 2010, a permit from ANR shall be required for a new or increased groundwater withdrawal of more than 57,600 gallons for commercial or industrial use at a single tract of land or place of business. Permit applicants shall submit detailed information regarding the proposed groundwater withdrawal.

The act also declares groundwater to be a public trust resource that shall be managed for the benefit of state citizens. The designation of groundwater as a public trust resource ...does not create a new right of legal action by an individual except to remedy a particularized interest related to water quantity. The Act presumes a groundwater withdrawal complies with public trust requirements if used for farming, domestic use, a permitted public water system, a permitted potable water supply, dairy processing, or is permitted under the new permit program established by this act.

The Senate vote was 24 to 3 and in the House, the vote was 125 to 12 to pass Act 199.

Where are we now?

We now have the Omya decision issued by the SCOV in 2011 where they held that “It is not necessary to go beyond the plain meaning and structure of the state’s groundwater statute... to discern the legislative intent in adopting a public trust in groundwater. With regard to groundwater quantity, (the law) requires the state to manage its groundwater for the benefit of its citizens With regard to groundwater quality, ...(the law).... requires the state to manage its groundwater for the benefit of its citizens Groundwater must therefore be managed as a public trust resource with regard to the quality of groundwater as well as with regard to quantity.

Leading to the court deciding: “the ANR’s determination that the proposed facility meets the requirements of the..... Groundwater Protection Strategy and Regulation is not sufficient to carry out the state’s duty under 10 V.S.A. § 1390(5).1 Findings O through Q of the final certification therefore must be vacated and remanded for the ANR to carry out its public trust responsibility.”

Act 199 has been tested and found legitimate under the VT Constitution.

The Law

Title 10: Conservation and Development Chapter 048: Groundwater Protection

Subchapter 001: Policy; Definitions

§ 1390. Policy

The general assembly hereby finds and declares that:

(1) The state should adhere to the policy for management of groundwater of the state as set forth in section 1410 of this title;

(2) in recognition 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; and in further recognition that an adequate supply of groundwater for domestic, farming, dairy processing, and industrial uses is essential to the health, safety,

and welfare of the people of Vermont, the withdrawal of groundwater of the state should be regulated in a manner that benefits the people of the state; is compatible with long-range water resource planning, proper management, and use of the water resources of Vermont; and is consistent with Vermont's policy of managing groundwater as a public resource for the benefit of all Vermonters;

(3) it is the policy of the state that the state shall protect its groundwater resources to maintain high-quality drinking water;

(4) it is the policy of the state that the groundwater resources of the state shall be managed to minimize the risks of groundwater quality deterioration by regulating human activities that present risks to the use of groundwater in the vicinities of such activities while balancing the state's groundwater policy with the need to maintain and promote a healthy and prosperous agricultural community; and

(5) it is the policy of the state that the groundwater resources of the state are held in trust for the public. The state shall manage its groundwater resources in accordance with the policy of this section, the requirements of subchapter 6 of this chapter, and section 1392 of this title for the benefit of citizens who hold and share rights in such waters. The designation of the groundwater resources of the state as a public trust resource shall not be construed to allow a new right of legal action by an individual other than the state of Vermont, except to remedy injury to a particularized interest related to water quantity protected under this subchapter. (Added 1985, No. 53, § 1; amended 2007, No. 199 (Adj. Sess.), § 1, eff. June 9, 2008.)