

2003 WISCONSIN LAKES CONVENTION
KI CONVENTION CENTER
April 10-12, 2003

Breakout Session A: Water Supply: Will There Be Enough and
Why Is Getting Enough Becoming More And More Difficult?
(3:30p.m. - 5:00 p.m.)

Wisconsin Law of Groundwater Withdrawal -- A Primer
Tom Dawson

- I. Introduction
 - A. What is the current law of governing groundwater withdrawal in Wisconsin?
 - B. And how can the law affect future development of comprehensive groundwater withdrawal management policy?
- II. The current law governing groundwater withdrawal is primarily in two categories:
 - A. Common law
 - B. Statutory law
- III. Wisconsin Common Law of Groundwater Withdrawal
 - A. The common law of groundwater is governed by the "reasonable use" doctrine.
 - B. The doctrine applies to both groundwater "consumption" and to groundwater pollution.
 - C. The Wisconsin Supreme Court declared the present common law of groundwater withdrawal in *State v. Michels Pipeline Construction, Inc.*, 63 Wis.2d 278, 302-303, 217 N.W.2d 339 (1974).
 1. "A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless the withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure . . ."
 2. The Court overruled the common law stated in *Huber v. Merkel*, (1903), 117 Wis. 355, 357, 94 N.W. 354 (1903), ". . . If the waters simply percolate through the ground, without definite channel, they belong to the realty in which they are found, and the owner of the soil may divert, consume, or cut them off with impunity."
 - D. The common law enables a landowner or the State to bring lawsuits against persons who cause harm to private or public rights as a result of unreasonable use of the water.
 1. E.g., the State may bring a public nuisance action against persons who unreasonable pump water from the ground causing a nuisance to a community or causing specific injury to public property, such as to state public trust lands or waters.
 2. The public trust doctrine is discussed below.

- IV. Wisconsin Statutory Law of Groundwater Withdrawal
 - A. Wisconsin High Capacity Well Law (Wis. Stats. §§ 281.17 & 281.35)
 - B. 100,000 gallons per day wells
 - 1. Registration
 - a) All wells that withdraw an average of more than 100,000 gallons per day within a 30-day period must register the well with the DNR
 - 2. Reporting
 - a) All wells must report volumes withdrawn periodically with the DNR.
 - 3. Approvals
 - a) DNR must approve all high capacity wells
 - b) DNR will not approve, or limit wells, that impair public water utility supplies.
 - 4. DNR has taken the position it may not disapprove these wells on the basis of any other adverse effects, including effects on public rights in navigable waters.
 - C. 2 million gallons per day wells
 - 1. A person who wishes to construct or operate a well that withdraws an average of more than 2 million gallons per day within a 30-day period must, in addition to the requirements for wells exceeding 100,000 gallons per day:
 - 2. Must register, report withdrawals, and obtain approval from DNR.
 - 3. DNR may not approve wells that:
 - a) Impair public water utility supplies, or
 - b) Impair public water rights; or
 - c) Great Lakes or Mississippi River basin waters;
 - d) Future water use plans;
 - e) Cause adverse groundwater or interbasin transfer effects.
 - D. 5 million gallons per day wells in Great Lakes Basin
 - 1. Applies to withdrawal on average in excess of 5 million gallons per day in a 30-day period in Great Lakes Basin.
 - 2. The governors and premiers of the states and provinces in the region must be notified, and their comments considered on the application.
 - E. Rulemaking: DNR has rulemaking authority to implement the approval process.
 - F. Groundwater Plan: DNR is required to submit by August 1, 1988, a groundwater resources plan to the Legislature with recommendations.
 - G. Other: coastal zone and intergovernmental cooperation provisions are also included.

- V. Authority to create groundwater protection and management programs -- The Police Power.
- A. The primary source of Legislative authority to protect and manage groundwater resources is the state's police power.
 - B. This is the power to enact laws for the protection of the public health, safety or welfare. It is described as plenary in nature.
 - C. Exercise of the police power is limited only by other constitutional constraints, such as when a law bears no rational relationship to its purpose or it goes beyond the limits of constitutional authority.
 - D. The Legislature has ample police power authority to enact laws to protect, manage, and regulate use of groundwater. *E.g., see* 1983 Act 410 creating Wis. Stats. ch. 160.
 - E. Arguably DNR already has ample power to protect groundwater supplies without new legislation.
 1. "The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the *waters of the state, ground and surface, public and private*. . . *The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private.* To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter. In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole." Wis. Stats. § 281.11.
 2. 283.01 (20) "Waters of the state" means those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems *and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction*, except those waters which are entirely confined and retained completely upon the property of a person.
 - F. What if the Legislature or agencies lack the political will to exercise the authority they have to protect groundwater?

- VI. The duty to protect groundwater.
 - A. Introduction
 - 1. Is there a state legal duty to protect groundwater?
 - 2. If there is a duty, is it sufficient to respond to today's groundwater problems?
 - 3. If there are no duties to protect groundwater, should they be created?
 - B. The police power authority to do anything is also the power and authority to do little or nothing.
 - 1. The exercise of power and authority is discretionary.
 - a) The legislature may act, and commonly enacts laws that say a state agency "may" enact programs or rules to protect resources.
 - b) In the law, "may" means "may not".
 - 2. The failure of agencies with authority to protect groundwater from pollution led to 1983 Act 410, creating Wis. Stats. ch. 160.
 - a) 1983 Act 410 imposes non-discretionary duties on agencies.
 - b) Agencies are required to enact regulations to protect groundwater quality.
 - c) Agencies are required to take specified minimum actions when "enforcement standards" are exceeded.
 - C. A duty to protect groundwater can arise out of:
 - 1. Police power legislation imposing duties on agencies to protect groundwater; or
 - 2. Existing or new constitutional provisions requiring the Legislature or government agencies to act to protect groundwater, or limiting government power to act in a way that is harmful to groundwater; or
 - 3. State or government ownership (trusteeship) of groundwater.
 - D. Legislation can be enacted that imposes duties on agencies to protect and manage groundwater.
 - 1. Groundwater legislation could declare general or specific duties to protect groundwater as a function of its duties to protect navigable waters and the public health, safety and welfare; i.e., outlaw inaction.
 - 2. Legislation can impose specific duties on agencies to:
 - a) adopt management programs to protect and respond to water supply issues;
 - b) set minimum requirements and action "triggers" giving rise to specific duties to act.
 - 3. Example: 1983 Act 410.

- E. Constitutional sources of a duty to protect groundwater.
 1. Amend the state constitution:
 - a) We just saw a constitutional amendment on hunting and fishing rights.
 - b) An amendment could declare a "public trust" in the state's groundwater and imposing duties to protect groundwater similar to the public trust doctrine, OR simply impose an citizen-enforceable duty on the state to exercise its police powers to protect water quality and supplies.
 2. The public trust doctrine of navigable waters.
 - a) The courts have yet to declare a "public trust doctrine" for groundwater.
 - b) However, the public trust doctrine of navigable waters can reach beyond navigable waters where necessary to protect navigable waters.
 - c) *E.g.*, In *State v. Deetz*, 66 Wis.2d 1, 224 N.W.2d 407 (1974), the Wisconsin Supreme Court held that the state had standing to bring a public nuisance action to enjoin polluting runoff from uplands into navigable waters.
 - d) In *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972), the Wisconsin Supreme Court acknowledged the public trust doctrine as a source of state authority to protect non-navigable shorelands and wetlands as a component of the state's *duty* to protect navigable waters.
 - (1) "The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. . . . To further this duty, the legislature may delegate authority to local units of the government, which the state did by requiring counties to pass shoreland zoning ordinances." 56 Wis. 2d at 18.
 - (2) Nexus needed: "This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state." *Id.* "They . . . are subject to the state public trust powers" 56 Wis.2d at 19.
 - e) High capacity wells below the state regulatory 2 million gallon/day threshold, for regulation for public rights purposes, can harm navigable waters and their headwaters.

- f) Benefits and limits of the public trust doctrine
 - (1) The doctrine can be invoked in cases where the state or agencies fail to act and harm is being done, e.g., public nuisance.
 - (2) The doctrine may stop at effects on navigable waters (e.g., *State v. Deetz*), or on other public rights or communities (e.g., *State v. Michels Pipeline*)
 - (3) Remedies are judicial, case-specific, and reactive -- not administrative, comprehensive, or preventive.
- F. State ownership of groundwater -- public trust of groundwater.
 - 1. If the state owns the groundwater as it owns navigable water, then it has a duty as trustee to protect and manage it for the public good.
 - 2. There is no clear judicial recognition of state ownership of groundwater.
 - 3. Land owners have the right to *use* groundwater subject to common law reasonable use doctrine. *State v. Michels Pipeline*.
 - 4. Private *ownership* of groundwater is subject to question.
 - a) "It makes very little sense to make an arbitrary distinction between the rules to be applied to water on the basis of where it happens to be found. There is little justification for property rights in ground water to be considered absolute while rights in surface streams are subject to a doctrine of reasonable use." 63 Wis. 2d at 292.
 - b) "Thus the weight of authority in this country no longer supports the English rule of absolute possession. To highlight the fluidity of the law at the time Wisconsin decided the case of *Huber v. Merkel* one need only read the following passage from a treatise on water rights written only one year after that decision. . . . [3 Farnham, *Waters and Water Rights*, footnote 18, at pages 2710, 2711, 2712, sec. 935:]
 - (1) ' . . . The law with respect to rights in percolating waters was not developed until a comparatively recent period. And all the rules governing the subject cannot be regarded as settled at the present time. In the first place, the courts are not agreed as to the nature of the right in such water, if any exists. . . . The fact is that because of the difficulty of the attempt to formulate general rules to govern the ownership of, and rights in, percolating water, the courts have endeavored to escape that responsibility, and in doing so have stated different reasons for their action which do not harmonize well when brought together.'" 63 Wis. 2d at 293.

- G. A public trust duty to protect groundwater -- be careful what you ask for.
 - 1. Would constitutional recognition of public rights in groundwater take the sails out of the movement toward comprehensive state policy and legislation -- or give it impetus?
 - 2. Even if the courts were to recognize a state "public trust" duty to protect groundwater, would it be a substitute for a comprehensive state policy and management scheme?
 - 3. How far would courts be willing to go to order and supervise state development of effective groundwater protection programs?

- VII. Is existing law adequate to deal with groundwater supply challenges?
 - A. Courts are ill-equipped and loath to making new law and policy.
 - B. Suing to get court decisions is inefficient and subject to legislative reaction.
 - C. There is no substitute for comprehensive, effective, enforceable state policies and programs for managing our groundwater.
 - D. The hard questions to answer include
 - 1. What the policies and programs should be adopted?
 - 2. Should legislation or rules merely authorize, versus require, attainment of management goals?