

Notes for Talk on Groundwater Law Peggy Bensinger

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Good morning.

Bob asked me to talk to you about the law concerning the ownership and use of groundwater in Maine and I'm happy to do that today. It's a strange, interesting topic that's going to be more in the limelight as we go forward. It's also a subject area with great descriptive names!

The law governing who owns the groundwater and how it may be used has historically been developed in cases decided by the courts over many years, what lawyers call "the common law." In modern times this has been moderated by, and sometimes entirely replaced by, laws passed by State Legislatures, and then even those laws are interpreted by the courts, in a succession of cases as the years go by.

First, I'll describe the basic theories, or doctrines, of groundwater law. It's like a patchwork quilt across the country, with each state following one of the five or so approaches, with some shading variations making it even more colorful (and confusing!).

Doctrines

1. As many of you undoubtedly know, Maine follows the Absolute Dominion Rule of groundwater ownership and usage rights. Maine's Supreme Court adopted this rule, which is also called the English Rule of Capture (another great, dramatic name) in 1873. In doing so, Maine was following the courts of England, Massachusetts, and almost all of the other states. Under this rule, each landowner is allowed to capture as much groundwater as that landowner can put to a beneficial use. No landowner is guaranteed any specific amount of water. This doctrine of groundwater law was established, in part, because the location and behavior of groundwater was unknowable at that time. One court described the existence, origin, and movement of groundwater in one word – occult. So the courts declared that groundwater is part of the land owned by the property owner, the absolute property of the property owner, just like the rocks and soil that compose the land. Some courts compared groundwater to wild creatures to be pursued and captured by whoever could do so.

Under the Absolute Dominion Rule, landowners are not liable for dewatering neighbors' wells or taking water from under their land, unless they are guilty of "intentional malice" or "wanton waste," both of which are very hard to prove. One exception to this rule is that a landowner may not unreasonably divert an underground "watercourse" to the detriment of his or her neighbor.

The Absolute Dominion Rule was a tool by which the Courts could resolve disputes in the 1800s without having to know what was going on beneath the surface of the earth.

Gradually, as the demand for groundwater grew; pumps to withdraw groundwater came into use and became commonplace, which allowed more severe impacts on neighbors; and more was learned about groundwater, states started moving away from the simplistic Absolute Dominion Rule to other approaches to regulating the use of this resource. Now only Maine, Indiana and Texas still adhere to it, and even Texas, where they call it “the law of the biggest pump,” has adjusted its approach somewhat. In many states the courts have given modern scientific knowledge as the basis for abandoning the Absolute Dominion Rule.

2. Many states have moved to the Reasonable Use Rule, also known as “the American Rule.” This is less drastic than the Absolute Dominion Rule, but it still basically allows unlimited withdrawals in terms of quantity. It requires that water not be wasted and generally means that the uses of the water must be reasonable. It sometimes is interpreted to mean that water cannot be transported off the land for use elsewhere.

2-A. A branch off of either the Reasonable Use Rule is the Correlative Rights Rule, used by California, with its severe water shortages. That rule entails a more shared access approach.

3. A different approach is the Riparian Right Doctrine. This assigns rights in a way similar to how surface water rights are treated. There is limited private ownership of the groundwater. Usage rights are based on the size of the parcel of property owned. The amounts may be set by a governmental body, and these amounts can be decreased in drought conditions.

4. The Prior Appropriation Doctrine is followed by many states in the West. Conflicts are resolved by determining who has the earlier, or senior, rights. Water rights are not necessarily attached to the land. If you divert the groundwater, and put it to a beneficial use, you then have a right to it. It’s also referred to as “First in Time.” A governmental body may grant water rights under this approach.

5. The Restatement Approach balances the equities and hardships between competing users. Unlike under the Absolute Dominion Rule, no distinction is made between “percolating waters” and “watercourses.” If a use unreasonably causes harm to another by lowering the water table; exceeds the landowner’s share; or has a direct and substantial effect on surface waters and unreasonably causes harm to a surface water user, the property owner is liable. This is the most recently developed approach.

38 M.R.S. § 404

In Maine, the Absolute Dominion Rule has been eroded by certain laws enacted by the Legislature, perhaps most notably the 1987 Ground Water Rights Law, 38 M.R.S. § 404. This apparently grew out of the Action Plan recommendations of the 1985 Standing Committee on Groundwater.

Mark will talk about this as well, but this law creates liability for any person or entity that withdraws groundwater in an amount in excess of what would be used for a single family home when that withdrawal causes interference with a pre-existing “beneficial domestic use” of the

groundwater by a neighboring landowner or lawful occupant. (A “beneficial domestic use” is defined as the amount used for household purposes essential to health and safety)

It is particularly interesting what the Legislature stated as the reasoning for its enactment of this law. The bill’s Statement of Fact says:

Maine courts to date indicate that Maine is one of the last states in the nation retaining the English doctrine for absolute ownership of groundwater. This doctrine allows a landowner to use groundwater for any purpose and to any extent, even when such use interferes with pre-existing uses by other landowners of reasonable quantities of groundwater. This bill addresses the most important facet of this issue by allowing residential landowners to sue new groundwater users who interfere with their reasonable use. The use of groundwater for residential purposes is an essential right and has priority over other, newer uses.

Maine Common Law

As I mentioned, Maine adopted the Absolute Dominion Rule in 1873, in a case called *Chase v. Silverstone*. In that case the State Supreme Court, which is called the Law Court, ruled that a person who digs a well on his own property to obtain water for his domestic use, and thereby causes percolating water that supplies a neighbor’s well to dry up, is not liable. The Court said such a landowner is not liable for the diversion of “unknown subterranean waters” from a neighbor’s well.

Similarly, in an 1882 case the Law Court found that a landowner who digs a well or some other excavation is not liable if his actions divert water which normally finds its way through “hidden veins” to feed his neighbor’s well or spring.

But the doctrine exempts from this legal protection impacts to the flow of underground “watercourses.” Watercourses are defined as follows: the water usually flows in a particular direction, and by a regular channel; it has a bed with banks and sides; and it usually discharges into another body of water. A watercourse may be dry at times, but it must generally have a defined and substantial existence. The Courts have a presumption that groundwater is not a watercourse, that it is what is called “percolating” water. Percolating waters are those which seep, ooze, filter or percolate through the ground without a definite channel. They can include veins, rivulets or even lesser defined streams, in addition to underground lakes and artesian basins. I’m not sure whether these are scientific terms but these are the terms the courts have used.

The most important Maine case from a modern perspective is a 1999 case called *Maddocks v. Giles*. The facts of that case were that the Giles’ were dewatering their gravel pit for an increasingly deeper excavation and this process dewatered the Maddocks’ spring. The Maddocks’ didn’t have a house on their land but had a desire to sell water from their spring. So

they had no existing use of the groundwater, but had a planned, commercial use. Therefore, they were not protected by 38 M.R.S. § 404.

The Maddocks' asked the Court to abandon the Absolute Dominion Doctrine, adopt the Restatement Rule, and find the Giles' liable for the dewatering of their spring.

The Court declined to abandon the Absolute Dominion Doctrine and said that the question was whether the Maddocks' spring was fed by a watercourse or by percolating water. Under the Absolute Dominion Rule, if the spring was fed by a watercourse the Giles' could not stop or divert the flow to the injury of their neighbor.

The Court found that it was percolating water, but most importantly the Court declined to change the applicable legal doctrine. The Law Court gave two reasons for this decision:

- 1) Not convinced it's the wrong rule for Maine. The Maddocks did not present any evidence or studies showing that the old rule has caused problems, and landowners have relied on this rule for over a century.
- 2) Not persuaded that the Court, as opposed to the Legislature, should be weighing the policy considerations involved in this issue and effecting such a change. The Legislature can hear testimony from experts and survey Maine's water needs. This decision is best left to the Legislature.

Finally, the Court noted that the Legislature has taken action: In 1989 it created a study group, the "Water Resources Management Board," got a report in 1991 from it that recommended the adoption of the Reasonable Use Rule, and then the Legislature did not do that.

The Court also pointed out, in a footnote, that the Legislature did previously act on this issue, in 1987, when it adopted an exception to Maine's Absolute Dominion Rule in 38 M.R.S. § 404.

Conclusion

None of the various common law doctrines of groundwater law provide much protection for the resource. They accommodate as much use as the supply of water allows. They provide a framework for resolving disputes and promoting orderly economic growth, but they do not look to conserve or protect the resource.

In order to protect the resource, states have enacted overlays of laws applicable to groundwater. Mark Margerum and others will talk about Maine's statutes that govern the withdrawal of groundwater, and potential adverse impacts to groundwater. In many states groundwater scarcity or depletion is the most pressing issue that is being addressed by the state Legislatures. In Maine, while competing uses and drawdown is a public concern, groundwater contamination is the issue that's been more the focus of our legislation so far.

Maine is, I think, ahead of many states in that it recognizes the scientific reality of groundwater and surface water connectivity. Perhaps the construction of all of our laws doesn't reflect this explicitly, but the permits I've seen the DEP issue for large groundwater withdrawal operations require monitoring of nearby streams and wetlands in addition to monitoring of groundwater. However, Maine persists in adhering to the basic framework of an Absolute Dominion Rule for groundwater, while applying a Reasonable Use Test for surface water. If we now know they are connected, that doesn't make much sense.

Mark is going to talk next about the statutes Maine has that do regulate groundwater use and impacts to groundwater, despite the fact that Maine is an Absolute Dominion State.

If the Maine Legislature does decide to move us from the antiquated Absolute Dominion Rule to a more modern legal framework, it has already in place some language that can serve as a springboard for that leap. In addition to the language from section 404 that I quoted from earlier, Title 38 M.R.S. § 401, which is the Introduction to the Protection and Improvement of Waters Act contains the following findings:

The Legislature finds and declares that the protection of ground water resources is critical to promote the health, safety and general welfare of the people of the State

... an adequate supply of safe drinking water is a matter of highest priority and [] it is the policy of the State to protect, conserve and maintain ground water supplies in the State

The Legislature further finds that ground water resources are endangered by unwise uses and land use practices

This and other statutory provisions recognize the public nature of Maine's groundwater resources and the need for public protection.