

To

from Amos Baehr

02/2008

Minority Opinion on Designating Groundwater a Public Trust Resource

For the reasons set forth below, the undersigned respectfully dissent from the majority opinion of the Groundwater Committee and conclude that Vermont should declare groundwater a public trust resource.

The groundwater of Vermont is a resource integral and necessary to the economy, environment, and health of the state and its citizens. More than two-thirds of Vermonters rely on groundwater for their drinking water. Farmers rely on groundwater for irrigation and as drinking water for farm animals. Businesses in Vermont rely on groundwater for their operations. There is no question about the importance of groundwater to Vermonters.

Groundwater is a resource that is slow to recharge and clear itself of pollutants for which there is no immediate replacement. Moreover, the pressure on Vermont's groundwater is increasing. As Vermont grows, the demand for drinking water and water for commercial and industrial operations will continue to rise. In addition, national, regional and global water shortages place additional stress on water supplies as people look beyond their borders to meet their water needs. All of these issues combine to make a powerful and timely case for declaring Vermont's groundwater a public trust resource; a move that would simply afford our underground water supplies the same protection our surface waters now receive.

Adopting the public trust doctrine for groundwater is one of the most reasonable, simple and important steps the state can take that will assist Vermont in the long-term protection of its groundwater supplies. The state must utilize all tools available to manage the state's underground fresh water resources to assure that sufficient and potable supplies exist today and for generations of Vermonters to come.

The concept of the public trust is an ancient legal doctrine that holds that government on behalf of the citizens has an obligation to steward certain resources for the public good. Recognizing groundwater as a public trust resource would require the state to ensure that water is managed and used in the public interest to benefit all Vermonters. As the Committee report indicates, Vermont only recently began addressing most large withdrawals of groundwater and commenced serious efforts to map groundwater. Declaring groundwater a public trust resource is a fundamental, bedrock principle, and groundwater protection tool that must be established as Vermont begins to take steps to protect its groundwater.

It has long been established that surface waters in the United States are a public trust resource. However, despite the fact that groundwater and surface water are hydrologically connected and intrinsically linked, legally the public trust doctrine that applies to surface water does not automatically apply to groundwater. We believe that this irrational distinction should be corrected.

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Groundwater, like surface water, is not static. It moves through and between properties. Like surface water, groundwater lends itself to use but not ownership. Designating groundwater as a public trust resource will simply place it on equal footing with surface water – assuring that all of Vermont's water resources are managed in the public interest.

The main arguments the Committee heard against designating groundwater a public trust resource was that such a designation will lead to property takings litigation and that Vermont through a regulatory scheme can protect groundwater without designating groundwater a public trust resource.

There has not been a rash of public trust lawsuits in states that recently adopted the public trust designation for groundwater. **In fact in New Hampshire, where groundwater has been declared a public trust resource only since 1998, no such lawsuits related to the public trust have been filed.** Moreover, there has been no flood of public trust litigation in Vermont over surface water, which has been recognized as a public trust resource for nearly 100 years.

In addition, the committee heard clear testimony from four different attorneys (two of whom represent the state of Vermont) that even if lawsuits were filed, a public trust designation for groundwater will not result in a successful takings claim. All of these experts agreed on this point.

With regard to the need for the public trust designation, Vermont should avail itself of all tools to protect its groundwater resources. Given that surface water is recognized as a public resource, the question in our minds is not whether we should declare groundwater to be a public trust resource but rather, **why we should not do so? Why shouldn't Vermont adopt this groundwater protection tool that simply recognizes the public nature and common usage of water?**

Whenever a large withdrawal is proposed in Vermont one of the first questions asked by concerned citizens is who owns the water. In Vermont, the answer currently is it depends upon which lawyer you ask. **This lack of clarity is unacceptable. Designating groundwater a public resource eliminates confusion and, in short, puts public interest in the resource above private interests.**

The state should have an obligation to proactively manage Vermont's groundwater resources to ensure its use and availability for current and future Vermonters. The Legislature has an obligation to answer the question of who owns the water. Declaring groundwater, like surface water, a public resource that must be managed by the state in the public interest is the essential step to make this possible. Accordingly, we recommend that the Legislature declare groundwater to be a public trust resource.

The minority is:

Senator Snelling, Representative Deen, Senator Kittell and me. (Jon Groveman)

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