



House Bills 5065-5073 and Senate Bills 721-729

## Public Waters, Public Control: Why the Public Trust Doctrine Matters

### ***Opposition Argument:***

Opponents believe that extending public trust protections to groundwater is an unnecessary, excessively burdensome legislative step. They argue that case law already supports linking groundwater to public trust and that the courts, not the Michigan Department of Environmental Quality (MDEQ), should adjudicate any relevant disputes.

Opponents also argue that extending public trust to groundwater will diminish private property protections and could result in a “takings” of private property rights.

Finally, opponents argue that extending public trust to groundwater will harm business interests.

### ***Response:***

All the waters of Michigan are public resources, and public trust protections should be explicitly extended to include groundwater, in addition to lakes, streams, rivers and adjacent wetlands. Cooley Law Professor Chris A. Shafer testified to committees in both the Michigan House and Senate about why this matters. Simply put, without this additional protection, excessive groundwater withdrawals can significantly harm those surface water features that are fed by groundwater.

Surface water and ground water are hydrologically connected – a fact that was not understood until scientific research was done in modern times. All of these waters are essential to the state’s economy, to domestic use by our residents, and for environmental and recreational uses.

Public Trust is a common-law doctrine of property law, customized by each state. Dating back to the Roman Empire, it is based on traditional use of common areas for food, travel, and commerce. It established public rights in navigable waters, in land beneath the navigable waters, and on their shores. Individual states have since further refined the doctrine, using courts and legislatures to address unique circumstances and societal needs. More recently, recreation and the need for environmental protection have led to further evolution of public trust concepts.

“So long as the water flows and fish swim in [the river], the people may fish at their pleasure in any part of the stream subject only to the restraints and regulations imposed by the state. In this right they are protected by a *high, solemn and perpetual* trust, which it is the duty of the State to forever maintain.”

Michigan Supreme Court, *Collins v. Gerhardt*, 237 Mich. 38, 49 (1926)

Improved scientific awareness of the surface water-ground water connection has led to the application of some public trust protections some groundwater, but Michigan law has not yet been adjusted to clarify this connection. As a result, the courts are the only existing avenue for extending public trust protections to groundwater, and this is not sufficient. Applying the public trust doctrine in the law to groundwater simply brings the state's legal authority and responsibility in line with the scientific and hydrologic realities of Michigan's lakes and streams.

Additionally, state law uses characteristic fish populations to define Adverse Resource Impacts because that is where measurable data exist. Extending public trust protection to groundwater creates an opportunity to consider other ecological factors that contribute to healthy habitats for fish and other wildlife species.

As Professor Shafer noted during recent testimony, "The basic tenet of the public trust doctrine is that certain natural resources, especially the waters and beds of the sea coast and navigable lakes and rivers, are of such importance to the public that they are incapable of purely private ownership and control." Legislatively extending the public trust to groundwater reinforces its importance and creates a mandatory duty for the MDEQ to consider this protection during regulatory procedures. For these reasons, all waters of the state must be protected to prevent excessive and unreasonable exploitation. Expanding public trust protections to include our groundwater must be clear and explicit in statute.

Regarding concerns about private property rights, these bill packages specifically reserve riparian rights and property rights for lawful use of water. The 'takings' would actually occur when corporations divert water from local watersheds and affect the rights of riparian users. As Cooley Law Professor Chris Shafer recently testified, the GLGM-backed legislation offers greater regulatory certainty and better public oversight of our water resources by lowering the threshold of water withdrawals subject to regulatory review.

Further, these bill packages offer greater regulatory certainty for businesses by explicitly stating the public trust decision-making criteria in statute thereby requiring the MDEQ to use these criteria in their permit review process.