

The Great Lakes Environmental Law Center

*Protecting the world's greatest freshwater resource
and the communities that depend upon it*

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Date: May 29, 2008

Re: SJR 8 and groundwater rights in Ohio

I. Introduction and Summary

The Great Lakes Environmental Law Center is providing this memorandum to members of the Ohio General Assembly to assist in the consideration of Senate Joint Resolution 8.¹ SJR 8, sponsored by Senator Grendell, would enact section 19b in Article I of Ohio's Constitution if approved by the voters of Ohio. As detailed in this memorandum, the proposed constitutional amendment would provide for the protection of private groundwater rights while still allowing for regulation by the state consistent with established Ohio groundwater law.

Under Ohio law, individuals may acquire rights to use water by virtue of land ownership above or connected to the relevant water body. Riparian landowners have the right to use the water from surface water bodies that their land abuts. Landowners whose land overlies an aquifer have the right to use the groundwater from that aquifer. Rights to surface water and groundwater are rights to use the water, not to possess it. While Ohio's judiciary has recognized these rights, there exist legitimate common law and statutory

¹ Sub. S. J. R. No. 8, as adopted by the Ohio Senate, *available at* http://www.legislature.state.oh.us/res.cfm?ID=127_SJR_8.

limitations on water rights by virtue of the reasonable use rule and Ohio's regulatory scheme for water management. Ohio statutes also make clear that surface water and groundwater located partly or wholly within the state's boundaries are waters of the state. However, the public trust doctrine in Ohio applies only to navigable surface waters (including Lake Erie and the submerged lands below it²), not groundwater.

II. A Brief Background on Groundwater Science

Groundwater is defined as the water below the earth's surface that saturates the material (or substrate) in which it is contained. That material which contains the water below the earth's surface is called an aquifer. Groundwater is held in aquifers by an impermeable base layer that prevents the water from percolating down to lower layers of rock, and which creates a reservoir of useable water. Nearly all surface waters interact with groundwater in one of two ways. First, the surface water in some streams recharges the local groundwater aquifer by means of seepage through the surface water body's beds and banks. The second type of connection is where water bodies are replenished by the discharge of groundwater to the surface.

The advancement in the understanding of groundwater hydrology has further evinced that surface water and groundwater are part of a single hydrologic cycle. From a hydrological perspective, it makes little sense to manage groundwater independently of the surface water to which it is connected. For instance, where groundwater replenishes a stream by discharging water from the aquifer to the surface water, excessive withdrawals of groundwater from the aquifer can result in diminished flow to the stream, which in turn yields numerous problems, such as loss of water volume and injury to riparian property owners that depend upon the stream. However, the law in Ohio (and most other jurisdictions) treats groundwater very differently from navigable surface water for purposes of public rights.

III. Private Groundwater Rights in Ohio

For over a century, Ohio adhered to the "absolute ownership" rule for groundwater. In *Frazier v. Brown*,³ the Supreme Court of Ohio ["Court"] held that due to the ignorance of groundwater hydrology, the best rule was the absolute ownership rule. That rule permitted landowners to withdraw any amount of the groundwater underlying his land, no matter the effect of the withdrawal on other landowners with land overlying the same aquifer. The sole limitation on groundwater withdrawal was ownership of overlying land.

It should be noted that while Ohio courts have used the term "absolute ownership" to denote the rule in *Frazier*, the more appropriate term for the rule is the "rule of capture" (this is the term used in most other jurisdictions). Absolute ownership implies the right to exclude others completely from possession and use of the water. However, the rule from

² See *Thomas v. Sanders*, 65 Ohio App. 2d 5, 9-10; 413 N.E.2d 1224 (1979); Ohio Rev. Code § 1506.10 (the "Fleming Act").

³ 12 Ohio St. 294 (1861).

Frazier does not award a defined and exclusive property interest in water to overlying landowners, but rather allows limitless use of the quantity of water that can be pumped, regardless of the impact on other overlying landowners. Under the rule of capture, multiple landowners can access and use as much groundwater as they can withdraw, and none of them may complain about any other landowner's withdrawals. The rule does not protect water rights from competing uses and interference at all.

In 1984, the Ohio Supreme Court was presented with a dispute involving multiple landowners all drawing groundwater from a common aquifer. In *Cline v. American Aggregates Corp.*,⁴ the Court replaced the capture rule from *Frazier* with the reasonable use rule from the Restatement (Second) of Torts. The reasonable use rule still allowed each landowner to draw water from the common aquifer over which their land lay, but it placed two limitations on groundwater users. First, each landowner had to put the groundwater to beneficial use, as defined by the common law and statute.⁵ Second, one landowner could not use so much groundwater as to significantly harm another landowner's use. The Court stated that this new rule of liability was made possible by the advances in hydrology which permitted one to reliably determine the effect of one landowner's groundwater use on another. After *Cline*, the limitations placed on groundwater use did not simply consist of ownership of land overlying the aquifer, but also beneficial and reasonable use of the groundwater.

The *Cline* court established that property owners have the right to the reasonable use of the groundwater beneath their property. In a recent case, in response to a certified question from the federal Sixth Circuit Court of Appeals, the Ohio Supreme Court defined the right associated with groundwater. The Court in *McNamara v. Rittman*⁶ held that the property right to use groundwater is a usufructuary (and not a possessory) right to real property rights.⁷ The Court emphasized that *Cline*'s adoption of the reasonable use rule provided a right of landowners to groundwater use in the form of a right appurtenant to title in real property. The Court found justification for this view in the common law and in Ohio's Constitution.⁸ Thus, governmental interference with groundwater rights amounts to governmental interference with a private right, which transforms the interference into a potential taking.⁹

⁴ 474 N.E.2d 324 (Ohio 1984).

⁵ O.R.C. § 1521.17. The reasonable use rule itself comes from the Restatement (Second) of Torts § 858.

⁶ 838 N.E.2d 640 (Ohio 2005)

⁷ "A property owner has a potential cause of action against anyone who unreasonably interferes with his property right in groundwater. That cause of action arises only from the effect on the landowner's water rights-no other effect on the overlying property is necessary for the cause of action to proceed." *Id.* at ¶20.

⁸ OH Const. art. I, § 19. The *McNamara* court borrowed an interpretation of this constitutional provision from *Smith v. Erie RR. Co.*, 16 N.E.2d 310, ¶1 (Ohio 1938), which addressed the equal value of rights in tangible property and intangible interests appurtenant to rights in tangible property with respect to constitutional takings.

⁹ The Court stated clearly that the right to groundwater is usufructuary, and that attaching separate title to the groundwater itself was unnecessary to the holding. *McNamara*, 838 N.E.2d at ¶28. It should also be noted that the taking at issue in *McNamara* was a physical taking, and as the Court was merely answering a certified question of law, it never concluded that a physical taking had in fact occurred.

More recently, in *Portage Cty. Bd. of Commrs v. Akron*,¹⁰ a case involving water withdrawals from aquifers that feed the Cuyohoga River, the Ohio Supreme Court held that a riparian landowner who has an appurtenant right to water from a navigable stream does not have a property interest in the groundwater that feeds that navigable stream if the aquifer does not underlie the riparian landowner's land.¹¹ The holding ignores the advancements in science referenced by the *Cline* court by disregarding the hydrological connections between aquifers and the surface streams fed by them. Despite the fact that the 1912 ordinance granting water rights to Akron permitted the city to appropriate "all the waters which may flow into and from said Cuyahoga River," the Court failed to provide an explanation as to why there should be a legal distinction between tributary groundwater (groundwater that flows into a surface water body) and tributary surface water. The case leaves open the issue of whether a riparian water user whose land abuts a surface water body may sue a landowner whose land overlies an aquifer that is tributary to that surface water body if the latter's groundwater use significantly harms the riparian landowner's ability to use his surface water.

IV. Balancing Public and Private Water Rights in Ohio

While landowners with land abutting surface water or overlying groundwater have a right to use the water connected to their land, subject to regulation and common law standards, this does not amount to private ownership of the water.

Ohio law recognizes the right to use surface water or groundwater as a private right meritorious of constitutional protection from being "taken" by the government for public use without just compensation.¹² However, while landowners with property interests in water have constitutional protection from the government's physical and regulatory takings, that constitutional protection does not foreclose the ability of the government to regulate water use.¹³ Ohio has statutory authority to manage and regulate the diversions, allocations, and uses of water throughout the state.¹⁴ States may always regulate property pursuant to its police power to protect the public health, safety, morals and general welfare.¹⁵

Ohio courts have consistently held that the right to water "is not an ownership in the water but a right to its flow for the various lawful uses to which it may be subjected."¹⁶ This right to flow and use is termed a usufructuary right. The *McNamara* court affirmed

¹⁰ 846 N.E.2d 478 (Ohio 2006).

¹¹ *Id.* at 496.

¹² See *Mansfield v. Balliet*, 63 N.E. 86 (Ohio 1902) (recognizing riparian property interests in tidal waters); *State ex. rel. Squire v. City of Cleveland*, 82 N.E.2d 709 (Ohio 1948) (recognizing littoral property interests in non-tidal waters); *McNamara v. Rittman*, 838 N.E.2d 640 (Ohio 2005) (recognizing property interests in groundwater).

¹³ For a general understanding of the legitimacy of state laws limiting a riparian's right to use surface water or a landowner's right to use groundwater, see Joseph Sax, et al., *LEGAL CONTROL OF WATER RESOURCES* 383 n.1 (4th ed. 2006).

¹⁴ See e.g. O.R.C § 6119 Regional and Sewage Districts; O.R.C. § 6111 Water Pollution Control;

¹⁵ *State ex. rel. McElroy v. City of Akron*, 181 N.E.2d 26 (Ohio 1962).

¹⁶ *Akron Canal & Hydraulic Co. v. Fontaine*, 50 N.E.2d 897, 901 (Ohio Ct. App. 1943).

this when it stated that the right to groundwater was usufructuary, not possessory, and for that reason did not require title to the water itself, but rather title to the land overlying the water (or in the case of riparian or littoral landowners, title to the land abutting the tidal or non-tidal waters, respectively). This usufructuary scheme leaves open the question of who owns the water itself. Other state judiciaries have acknowledged that the state itself owns the water until its lawful appropriation or use by its residents.¹⁷

State ownership of waters within its jurisdiction is a concept codified in Ohio. For example, Ohio's statute on the division waters imposes various restrictions upon the private rights to use water by prohibiting certain unpermitted diversions and consumptive uses of "waters of the state."¹⁸ The statute defines "waters of the state" broadly to include "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within or border upon this state or are within its jurisdiction."¹⁹ Ohio's Water Pollution Control Act defines "waters of the state" in exactly the same way.²⁰

V. Conclusion

The proposed constitutional amendment in SJR 8 is entirely consistent with established Ohio law, as detailed in this memorandum. It provides for the protection of private groundwater rights as well as public rights to navigable waters and Lake Erie (including the submerged lands below it). Further, it recognizes the state's authority to regulate the use of groundwater to protect and manage this important resource within the bounds of constitutional law.

¹⁷ See e.g. *National Audobon Society v. Superior Court of Alpine County*, 658 P.2d 709, 723 (Cal. 1983) (citing Cal. Water Code § 102 "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.") See also *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n*, 956 P.2d 1260, 1268 (Colo. 1998); *Burlington Northern and Santa Fe Ry. Co. v. Benson County Water Resource Dist.*, 618 N.W.2d 155 (N.D. 2000).

¹⁸ Ohio Rev. Code §§ 1501.30-.35.

¹⁹ Ohio Rev. Code § 1501.30(6).

²⁰ Ohio Rev. Code § 6111.01(H).