

OVERVIEW

The following primer provides a brief legal background to FLOW’s model legislation, *Public Water, Public Justice*.¹ The purpose of the primer is to give the reader a general framework and understanding of the basic common law principles and constitutional and statutory provisions that guide water law and policy. They include:

- Water as public and sovereign for citizens;
- The reasonable use of water connected with land occupancy or ownership;
- The public trust doctrine that, at a minimum, protects navigable lakes and streams and the Great Lakes, but more recently embraces the science that groundwater, lakes, streams, wetlands and the hydrologic cycle are a singular system;
- The paramount concern for water and natural resources under state constitutions, (e.g., Michigan Constitution, Art. 4., Sec. 52); and
- The paramount public interest in public health (e.g., Michigan Constitution, Art. 4., Sec. 51).

These collective principles provide the legal authority and, in some instances, the legal duty for state governments to take responsible action, and to provide the standards and limitations necessary for protecting the public’s paramount interests in both public water and health.

THE COMMON LAW OF SOVEREIGN OR PUBLIC WATER

After the American Revolution and formation of the United States, the common law concerning ownership and control of water passed from the British Crown to each sovereign state in common or as a commons; as a result, each state owns or holds water as sovereign and has a duty to control and manage water for the benefit of citizens. The navigable waters of lakes and streams, and the tributary groundwater or springs that feed them are considered a special commons held and controlled under solemn, perpetual legal principles, which protect fundamental rights and uses of water by citizens, known as the public trust doctrine. Under these general principles, water is subject to the general obligation that government must

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manage and protect these commons above all other interests. This means that water is not alienable any more than government can transfer its sovereign powers and duties to protect the health, safety and welfare of citizens.

In contrast to water as a commons or special commons held in public trust, the ownership or lawful occupancy of land, whether private or public, came down as proprietary, exclusive and possessory, alienable and transferable, subject to the paramount public interests in water and lakebeds protected by the public trust doctrine.²

Further, it should be understood that landowners or occupants *do not own* water; they have only a right to the *reasonable or beneficial use* of water in connection with the overlying land or land adjacent (riparian) to a lake or stream. Traditional limitations on reasonable use under the common law prohibited a landowner from *selling* water off tract or out of a watershed, because it was not a recognized reasonable use. This is because, quite correctly, courts and society understood that all the landowners and occupants in a watershed shared in common a right of reasonable use of the water moving through the watershed or community, and that the sale of water would break this shared use or commons. As noted above, the reasonable use of a landowner sits side-by-side with the sovereign interest in water as a commons and the rights and limitations imposed on all users to protect the public trust in navigable lakes and streams or their tributary waters.

THE PUBLIC TRUST DOCTRINE

Every state took title and control to the waters and bottomlands of all of the navigable lakes and streams within its borders at the time of each state's admission to the United States. This is called the "equal footing" doctrine.³ These state lands and waters are held in trust for the benefit of each state's citizens. The federal government reserved navigational servitude in the water and lands to protect the right of each citizen to travel and engage in commerce, including shipping over these waters, fishing, boating, swimming, drinking water or sustenance.⁴

Under the common law, each state also holds these navigable waters and the lakebeds under them in public trust for every citizen. Moreover, each state by common law has the power to determine the nature and extent of the public trust in its waters, whether they are navigable or not, and to protect the public's rights to use these waters, lakebeds, and other public common property for the protected uses of public land or natural resources, "like navigable waters" that are deemed to be of a "special character."⁵ Once water or land is determined to be subject to the public trust doctrine, the state has an affirmative duty to protect these public trust commons, and neither the state nor any other person can alienate or subordinate this public trust primarily for private gain, nor can they impair the public trust or protected public trust uses. Each citizen is a legally recognized beneficiary of the public trust with the right to the certain protected trust uses, including navigation, fishing, drinking water, sustenance, boating, bathing, swimming and other forms of recreation. The government is accountable to citizens, the beneficiaries, based on a solemn duty in perpetuity to protect these public trust waters, lands and uses.

² The exception is where there is an overriding public interest, such as walking the shores of the Great Lakes below the ordinary high water mark of navigable lakes or streams under the public trust doctrine. *Glass v Goeckel*, 437 Mich 667 (2005); *Gunderson v State Indiana DNR*, 90 N.E. 3d. 1171 (IN 2018); *State ex. rel. Merrill v Ohio DNR*, 955 N.E. 3d. 935 (OH 2011).

³ The most recent U.S. Supreme Court case on the subject is *Montana PPL v Montana*, 565 U.S. 576 (2012). As described by the Court, states took title "absolutely" to those bottomlands and waters.

⁴ *Id.* *Arnold v Mundy*, 6 N.J.L. 1 (1821); *Obrecht v National Gypsum Co.*, 361 Mich 399 (1960).

⁵ *Id.*, at 603-604; *Illinois Central R Rd v Illinois*, 146 U.S. 387, 437 (1892); *Obrecht v National Gypsum Co.*, 361 Mich 399 (1960); *Glass v Goeckle*, 473 Mich 667 (2005).

Since the 1980s, when the California Supreme Court limited a water diversion by Los Angeles of a tributary nonnavigable stream to protect the downstream navigable Mono Lake, courts have increasingly recognized the singularity and interconnected nature of the hydrological cycle, and limited the use of tributary streams or groundwater that affects flows, levels or interferes with riparian or public trust interests in lakes and streams. In the past two decades, courts in Hawaii, Wisconsin, Arizona, South Dakota and California have ruled that groundwater is subject to the public trust doctrine under the common law or in conjunction with constitutional provisions.

In addition, states have passed laws that recognize waters of a state—groundwater, lakes and streams—as a single hydrological system. For example, all of the Great Lakes states and the federal government in adopting the Great Lakes Compact recognized the declaration or finding that the waters of the Great Lakes Basin are held in trust for the benefit of citizens.⁶ Several Michigan water and natural resource laws also have declared a public trust in water.⁷

COMMON LAW OF LAKES, STREAMS, AND GROUNDWATER

Under the common law in most riparian states located east of the Mississippi, off-tract or out-of-watershed diversion of water for sale is either prohibited or limited to protecting the flows and levels of the groundwater, streams and lakes shared by other landowners or occupants in a watershed or community. This latter instance is known as the correlative rights doctrine. The Michigan Supreme Court adopted this doctrine in 1917.⁸ Under this rule of law, a landowner or occupant of land cannot divert water off-tract or out-of-watershed for sale if the removal of water diminishes the flow or level of a marsh, stream or lake, or materially interferes with a neighbor's well. The elegance of the off-tract or out-of-watershed rule is that it protects and recognizes a legal preference for water as a local common resource that feeds and nurtures the watershed where it flows.

In the past decade or so, states through their legislatures or courts have relaxed the off-tract or out-of-watershed limitation. These states have created gaps or loopholes in this common law distinction, opening the door for diversions and sale or exports of water off-tract or out-of-watersheds. The Great Lakes Compact and a handful of state water laws allowing the withdrawal of water for the sale of bottled water and other cases have opened the door for the *sale* in addition to the reasonable use of water, despite the fact that earlier court precedents limit the off-tract diversion or export of water.⁹

BOTTLED WATER FROM PRIVATE LARGE-VOLUME WELLS OR PUMPS

The relaxation of the off-tract limitation in groundwater law has led to an increase in bottled water operations and sale of water, at little or no cost to the operators—whether water bottlers acquire control of the water through private wells, like Nestlé, or through public municipal water systems and pay only for the delivery of water. In short, while the reasonable use of water in connection with land is integral to ownership and in relation to other users of water in the same stream, lake or groundwater aquifer, the

⁶ P.L. 110-342, Sec. 1.3.1.a.

⁷ E.g., MCL 30101 et seq. (lakes and streams); MCL 32502, 32503, 32505; MCL 324.1701 et seq. (Great Lakes); MCL 32702(1)(c), 32505 (groundwater, surface water, Great Lakes); MCL 324.31519 (dam removal); MCL 324.32606(dams); MCL 324.34105 (groundwater, surface water, irrigation district agreements).

⁸ *Schenk v City of Ann Arbor*, 196 Mich 75 (1017).

⁹ Notable court cases include the Michigan Court of Appeals in the first *MCWC v Nestlé Waters* case decided in 2005, which ignored the off-tract limitation in *Schenk v Ann Arbor*, 196 Mich 75, and fashioned a new “reasonable use balancing test” consisting of a number of factors, although one of the factors at least retained a preference for in-watershed uses and an overall requirement that assures adequate water in a stream or lake. Other courts have adopted a similar reasonable use factor test based on Sec. 858, Restatement, Torts, 2d.

conversion of *use* of water to *sale* in containers or bottles severs the water from the public sovereign commons. Except for an application and administrative fee to help defray the costs of the state’s review, the actual conversion of water from a reasonable use to a right to sell sovereign water is at present essentially free.

BOTTLED WATER FROM PUBLIC OR MUNICIPAL WATER DEPARTMENTS

The same is basically true for the majority of bottled water labels, like Aquafina and Dasani, who obtain the water as customers from a municipal or public water department or utility service. A municipality withdraws public trust water from a public stream or lake or connected groundwater, and then treats, distributes, and discharges wastewater back to a public trust water course. The water and public waterworks system or infrastructure is public from start to finish. The water originates as public sovereign water, passes through public infrastructure and operations, and accrues revenues based on the nonprofit shared cost by statutory mandate to each user on the system,¹⁰ is treated as waste, and is discharged back to public trust waters. Customers on this public system receive water as a public service so they may *use* the water. However, a bottled water producer then on its own converts the public water from a *use* to *sale* of water without paying any additional fee for the conversion from use to sale or the right to sell the water. In effect, the public waterworks system and its users who share in the cost of the nonprofit service pay for or subsidize the sale of water by bottled water producers or those who sell water.

It should be noted that there is no way out of the system for the user who must pay his or her share of the cost: all customers who need or want to use public water from a public waterworks system must hookup to the system. Even though a landowner or occupant of land has a right to reasonable use of groundwater, they are prohibited from drilling and using their own well beneath their property where a public water utility exists.¹¹ On the other hand, a bottled water company can hookup and receives public water as a *user* based on a nonprofit cost fee or rate, packages the water, and *sells* it to a private consumer at highly marked up market prices with substantial private profit that is not shared with the other users who help pay the overall costs of the nonprofit system. From a broader perspective, this is not unlike a private company like Nestlé who withdraws water as a landowner for use, but bottles it and sells it at a substantial profit. In both instances, public water that is withdrawn and consumed as a public service or use, is severed and diverted for sale in bottles or containers; the sovereign, public and others users are subsidizing the seller’s gain or profit.

EXAMPLES OF CONSTITUTIONAL OR STATUTORY DECLARATIONS OF WATER AS PARAMOUNT PUBLIC TRUST OR INTEREST

This section features a range of constitutional and statutory provisions that address a public interest or public trust in water and natural resources.

Arizona A.R.S. § 45-141. Public nature of waters of the state

- A. The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject of appropriation and beneficial use as provided in this chapter.

¹⁰“Sec. 1 (2) The price charged by the city to its customers shall be at a **rate** which is based on the *actual cost of service* as determined under the **utility** basis of **rate-making**.” MCL 123.141. The effect of this language is to allow conversion of the rate or price charged for the water service into the sale of water at high profits without paying a royalty or fee that is correspondingly shared with the other users.

¹¹ E.g., Michigan Public Water Works Law, Section, MCL 123.141(2).

- B. This state may obtain any water that is necessary to maintain and protect public trust values that are identified by the commission.

In *Arizona Ctr. for Law in the Pub. Interest v. Hassell*,¹² the court recognized the connection between streams and groundwater, and application of public trust doctrine, which prohibited transfer of public trust lands or waters for private purposes.

California, Art. 10, Sec. 2

Sec. 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be *exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare* . . . The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

In 1983, the California Supreme Court recognized the public trust doctrine at common law in *National Audubon v L.A. Superior Court*.¹³ The Court ruled that the City of Los Angeles was restricted in diverting water from a non-navigable water course where it impaired a navigable public trust lake. More recently, with climate change impacts of drought, flooding, fire intensifying, the courts and legislatures have recognized water, including groundwater, as a public trust.¹⁴ In a recent groundwater case, a court ruled that groundwater withdrawals were limited by the public trust doctrine the same as connected surface waters.¹⁵

Hawaii Constitution, Art IX, Sec. 1

Sec. 1. All public resources are held in trust by the state for the benefit of its people” and the “State and its political subdivisions shall conserve and protect” the State’s water resources.

Between 2000 and 2017, the Hawaiian Supreme Court has interpreted this provision to incorporate the public trust doctrine into the constitutional and common law of Hawaii. *Waiahole I*¹⁶ “[T]he public trust doctrine applies to all water resources without exception or distinction.”¹⁷ The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.¹⁸

¹² 837 P.2d 158, 162 (Ariz. App. 1991).

¹³ 658 P.2d. 709 (Cal.1983).

¹⁴ State has an “affirmative duty to protect the public trust in planning and allocation of natural resources.” *Center for Biological Diversity v FPL Group Inc.*, 83 Cal. Rptr. 588 (2008); however, for public trust to apply to groundwater there needs to be a hydrologic connection between activity and harm to public trust. *Santa Teresa Citizens v City of San Jose*, 114 Cal. App. 4th 689 (2003).

¹⁵ *Environmental Law Foundation v State Water Control Board and County of Sisikiyou*, Decision, Cal. Ct of App. No. C083239, Aug. 29, 2018 (“The County’s squabble over the distinction between diversion and extraction is...irrelevant”), reversing *Sisikiyou County v Superior Court*, 217 Cal. App. 4th 83 (2013); Richard Franks, *Public Trust Applies to State Groundwater Resources* (Legal Planet, Sept. 4, 2018).

¹⁶ 93 P. 3d. 444 (2005).

¹⁷ *Id.*, at 445.

¹⁸ *Id.*, 451; *In Re Water Use Permit Applications*, 93 P. 3d. 643 (2004).

Michigan Constitution, Art. 4, Sec. 52, and Art. 4, Sec. 51 and Selected Laws

Sec. 52. The conservation and development of the natural resources of the state are *hereby declared to be of paramount public concern in the interest of the health, safety and general welfare* of the people. The legislature *shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.*

While no Michigan court has interpreted “paramount public concern” of natural resources of the state to mean “public trust,” the record of the Constitutional Convention of Michigan’s 1963 Constitution intended it to mean “paramount public interest,” recognizing those natural resources like water to be protected by a legally recognized superior interest like the public trust doctrine.¹⁹ Moreover, Art. 4, Sec. 52 commands the legislature (“shall”) “provide for protection of the air, water and other natural resources.” The Michigan Environmental Protection Act (“MEPA”) has been characterized by the courts as the legislature’s response to this constitutional mandate.²⁰ The MEPA provides for the protection of the air, water and natural resources and *public trust in those resources* from impairment.²¹ Further, the legislature has in several statutes declared the waters of the state, including groundwater, to be held in trust or subject to public trust protections,²² as has the Great Lakes Compact.²³

Section 51. The public health and general welfare of the people of the state are hereby declared to be matters of *primary public concern*. The legislature *shall pass suitable laws for the protection and promotion of the public health.*

Section 51 precedes Section 52 and, notably, contains a similar constitutional mandate that the legislature “shall pass suitable laws for the protection and promotion of the public health.” Thus, self-executing nature of Section 52 under the court’s decision in the *Vanderkloot* case would also appear to apply to paramount public concern for public health. Because of the similarity in structure and constitutional language of Section 51 with Section 52, the duty to consider and protect public health is analogous to the duty to prevent degradation of water or the environment under the MEPA.²⁴

Michigan Constitution, Art. 1, Sec. 17 (Due Process)

Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

In *Mays v Governor*, the Michigan Court of Appeals ruled that plaintiffs who claimed injury from lead exposure from the Flint water crisis had a right to bring an action for damages to their person and body based on the constitutional tort of denial of due process.²⁵ Their right to clean safe water and health is protected against deliberate indifference or other serious conduct by state

¹⁹ Olson, James, *Michigan Environmental Law*, Sec. 1.2, Mich Const. Art. 4, Sec. 52, pp. 10-11 (Neahtawanta Press, 2001).

²⁰ *Vanderkloot v State Highway Dept*, 392 Mich159 (1974).

²¹ Part 17, NREPA, MCL 324.1702, 1703(1).

²² E.g. Part 327, MCL 32702(1)(c); Part 30101, MCL 324.30101 et seq.

²³ “The waters of the state are valuable public natural resources held in trust by the state, and the state has a duty as trustee to manage its waters effectively for the *use and enjoyment of present and future residents* and for the protection of the environment.” Great Lakes-St. Lawrence River Basin Compact, Sec. 1.3(1)(a). The Compact also recognizes that the waters of the basin “are a single hydrologic system.” Sec. 1.3(1)(b).

²⁴ *Ray v Mason County Drain Comm’r*, 393 Mich 294, 306 (1975).

²⁵ *Mays v Governor Snyder*, 231 Mich App 1 (2018).

officials. State officials claimed that these citizens had adequate remedy under the citizen suit provisions of the federal Safe Drinking Water Act (“SDWA”), but the Court rejected the argument because the SDWA provided for prospective injunctive relief only, and that there was no direct citizen suit provision for injunction or damages claimed by the citizens under Michigan law. Thus, the only available remedy would be a claim for violation of a constitutional right to health and person under the constitution. While the Court found a remedy directly under the constitution, the case demonstrates the need for citizen suit remedies under a statute to protect and enforce their right to water and health provided to them from public waterworks or water utilities.

Michigan Financing and Rates for Public Water Systems

Financing Public Water Systems, MCL 141.121

Sec. 21. (1) *Rates for services* furnished by a public improvement *shall be fixed before the issuance of the bonds.* The rates shall be sufficient to provide for all the following:

- (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
- (b) The payment of the interest on and the principal of bonds payable from the public improvements * * * when the bonds become due and payable.
- (c) The creation of any reserve for the bonds as required in the ordinance.
- (d) Other expenditures and funds for the public improvement as the ordinance may require.

Setting Rates for Public Water Systems, MCL 123.141

Sec. 1 (2) The price charged by the city to its customers shall be at a **rate** which is based on *the actual cost of service* as determined under the **utility** basis of **rate**-making.

In the federal bankruptcy *Lyda* water shut-off case against the City of Detroit, the bankruptcy court rejected the notion that he had any authority to impose affordability plans or other measures on the city water department, because rates were based on the costs spread over the number of users.²⁶ The court noted that affordability or costs of assuring basic water needs, in an emergency or where residents cannot afford to pay their bill because of poverty or other exigencies, were not listed as a basis for setting sufficient rates.

Comment: In addition to Parts 1, 2 and 3 in the proposed Model *Public Water, Public Justice* Law, a Part 4 or standalone law should amend the definition of “rates” or “costs” as the “actual cost of service.” The definition of “cost of service” should include “the costs and expenses to assure affordability or other measures to assure basic water needs of residents are met.” This would acknowledge the reality that water services are a substitute requirement to hook up to and pay for water that would otherwise be part of their property right for the reasonable use of groundwater as an owner or occupant of their home. If all are required to hook up to the system and pay their share in the “costs,” then the fair and equitable way to spread these costs across the system should include the cost of assuring basic water needs (e.g. affordability plans or basic daily water limit at low fixed rate, that is spread across all users of different incomes or types).

²⁶ *In Re City of Detroit* (Lyda et al.), 2014 W.L. 6474081 (U.S.B. Ct., S.D., E.D., 2014); see also MCL 123. 141(2) “The price charged by the city to its customers *shall be at a rate which is based on the actual cost of service* as determined under the utility basis of rate-making” and “(3) The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) *shall not exceed the actual cost of providing the service.*”

Costs for purposes of budgeting for financing should also parallel this expanded and realistic definition of “cost of service.”

Pennsylvania Constitution, Art. I., Sec. 27

Sec. 27. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In *Pennsylvania Environmental Defense Foundation v Commonwealth*,²⁷ the state's Supreme Court extended the public trust doctrine under Art I, Sec. 27 to the revenues received by the state for leasing fish and game and state park lands for fracking and other oil and gas development. The legislature authorized transfer of a portion of those funds received from public trust state lands into the general fund, rather than for conservation or public trust purposes. The court prohibited use of funds received from sovereign public lands and natural resources of the state, because the funds are impressed with a continuing public trust purpose.²⁸ Under Art I, Sec. 27, all public natural resources are subject to and must be managed by the sovereign owner of these natural resources under the public trust doctrine.²⁹ The state, however, has authorized public water utilities to enter into public-private partnerships;³⁰ this increases the importance of declaring the rights to water and health and obligations under the public trust doctrine in the delivery of water services.

Vermont Statutes, 10, Sec. 1390 (5)

(5) It is the policy of the state that the groundwater resources of the state are held in trust for the public. The state shall manage its groundwater resources in accordance with the policy of this section, the requirements of subchapter 6 of this chapter, and section 1392 of this title for the benefit of citizens who hold and share rights in such waters. The designation of the groundwater resources of the state as a public trust resource shall not be construed to allow a new right of legal action by an individual other than the state of Vermont, except to remedy injury to a particularized interest related to water quantity protected under this subchapter.³¹

So far, the Vermont courts have interpreted this law to impose a duty on the state department of natural resources to protect the public trust in both lakes and streams and groundwater from violations of the standards or principle of the public trust doctrine.³²

²⁷ 108 A.3d. 140 (2014).

²⁸ For a case involving impressing public trust duties and limitations on the funds received by a municipal water authority for servicing waters of the state, Mayor and Council of *City of Clifton v Passaic Valley Water Comm'n*, 539 A.2d. 760 (N.J. 1987).

²⁹ Note: If Michigan's MEPA is a legislative implementation of the constitutional mandate to protect the water and natural resources and the public trust in those resources, then the MEPA's duties to prevent and protect from impairment should similarly extend to groundwater.

³⁰ Act 12 of 2016 (PA). The law authorizes private investment in public waterworks systems, including authority to “enhance rates” beyond public utility cost-based approaches.

³¹ 10 V.S.A. Sec. 1390(5).

³² *In re Omya*, No. 96-610, V-tec., at 5.

Wisconsin Constitution, Art. 9, Sec. 1

Section 1. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

The Wisconsin courts have developed an extensive body of public trust law to protect navigable lakes and streams, including the Great Lakes. In doing so, the sovereign ownership and control of the state to its waters as a commons is recognized. While the Wisconsin public trust doctrine has been limited to navigable waters, the courts have extended the public trust doctrine to groundwater withdrawals to protect fishing, boating and, presumably, other public recognized protected trust uses, such as drinking water.³³ Like Michigan and other Great Lakes states, Wisconsin, in adopting the Great Lakes Compact, declared that the waters of the state, including groundwater, are held in trust for the benefit of citizens.³⁴

SUMMARY AND CONCLUSION

Water is a commons held by each state as sovereign and public water for the benefit of each citizen. Some public waters, including lakes, streams and in some instances groundwater, are held in public trust. Under public trust law, each state has an affirmative duty to protect public trust uses of each citizen, as a beneficiary of the trust. The protected public trust uses are private and public uses related to navigation, fishing, boating, swimming, drinking water, sustenance and other paramount public health needs. Common law principles like riparian, groundwater and the public trust doctrine protect reasonable private and public uses that connect to or benefit the land or watershed as a whole. Historically, the reasonable or public trust uses of water do not include the “sale” or alienation of water out of watersheds for private purposes and gain. Only recently have courts considered the withdrawal of water for sale, completely severed from the watershed provided there is adequate water.

Because the state holds the water as sovereign, there is no authority for the sale of water unless expressly authorized by law, such as through a license or franchise to serve a public purpose. In those instances where bottled water is licensed under a royalty system, the states should be fairly compensated for the license or privilege to sell the waters of the state. Fair compensation means no “free” or substantially subsidized water, so a royalty or fee must be paid to the state. Moreover, a sale of water off-tract or out-of-watershed should not be authorized if it would measurably impair or diminish the quantity or quality of any lake, stream, marsh, wetland or neighboring well.

If done properly, there is no constitutional or legal impediment to declaring water sovereign, public, held in public trust to protect public trust and private reasonable uses of water. In fact, these principles require the state or local governments to prohibit impairment, diminishment of water quantity or quality, to prohibit the sale of water or its privatization by private persons, and if allowed in narrow circumstances, only where there is no harm, a public purpose, license, and a royalty or fee. The royalties or fees must be placed in a trust fund and held for specific public trust purposes and needs.

³³ *Lake Beulah Mgmt. Dist. v. Dept. of Nat. Resources*, 799 NW 2d 73 (Wis. 2011).

³⁴ Wis. 281.443.1m(a)(1).