

# *State of Maine*

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## *Memorandum*

**To:** Senator Scott W. Cowger  
Representative Theodore S. Koffman  
Members of the Joint Standing Committee on Natural Resources

**From:** Dennis J. Harnish, Assistant Attorney General

**Date:** April 15, 2005

**Subject:** Analysis of L.D. 1489

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L.D. 1489 claims groundwater as a public natural resource owned by all the citizens of the State of Maine. This bill also provides that the citizens of the State of Maine have the right to regulate the extraction and use of groundwater. Because groundwater is privately owned, L.D. 1489 would change the law with regard to ownership. However, the State of Maine already has the right, under its police powers, to regulate the extraction and use of groundwater and to some extent Maine is already regulating groundwater extraction and use.

### **A. Groundwater in Maine Is Privately Owned.**

The absolute dominion rule, also known as the English rule, has been the law in this State for over a century. Pursuant to the absolute dominion rule, a property owner may dig a well or make other excavations within his own bounds and be subject to no claim for damages even though the effect of this well or excavation may be to cut off and divert water which would otherwise find its way to the well or spring of his neighbor. Chase v. Silverstone, 62 Me. 175, 183-84 (1873). Accord, Chelsea v. King, 74 Me. 164, 170 (1882).

In the 132 years since the Chase opinion was issued, most jurisdictions in the United States have adopted the reasonable use, or American rule. The reasonable use rule prevents a landowner, over his neighbor's objections, from wasting groundwater or from transporting it off his land for use elsewhere. See Roger A. Cunningham, et al., the Law of Property § 7.5(1984) and Restatement (2d of Torts § 858 (1979).

In 1999, the Law Court was invited to abandon the absolute dominion rule in preference for the American rule. However, in Maddox v. Giles, 1999 ME 63 ¶ 11, 728 A. 2d 150, 154, the

Law Court declined to do so. First, the Court stated that it was not convinced that the absolute dominion rule was wrong for Maine. Second, the Court noted that for over a century landowners in Maine had relied on the absolute dominion rule. Third, the Court deferred to the Legislature to consider the “heavy policy considerations involved in this issue, not the least of which is the reliance of landowners on the present property laws.” Giles, ¶ 12. In sum, the Court concluded, “. . . that at this time the question of whether to depart from our common law on groundwater issues is best left to the Legislature.” Id.

The Giles Court found it significant that the Legislature had, prior to 1999, already considered taking action in the area of groundwater rights by creating a Water Resources Management Board and by charging it with the duty to undertake a comprehensive study of water law in Maine. See, 5 M.R.S.A. § 6301 (Supp. 1998), repealed by 5 M.R.S.A. § 6306 (Supp. 1998). The Court found that the Water Board had reported to the Legislature and had suggested that the Legislature adopt reasonable use principles, but that the Legislature chose to leave the common law as it currently stands. Giles at ¶ 13.

As the Law Court noted in Giles, the Legislature had, prior to the Giles decision, enacted an exception to the absolute dominion rule by creating liability when a person withdraws groundwater in excess of household purposes for a single-family home and the withdrawal interferes with a preexisting household use of groundwater. 38 M.R.S.A. §§ 404(1) & (2) (1989). However, as the Giles Court observed, this statute does not regulate commercial withdrawals of water and it does not protect potential, as opposed to preexisting, uses of groundwater. In sum, Maine remains an absolute dominion rule jurisdiction, except as modified by the statute described above, and this means that groundwater in this State is privately owned.

#### **B. Groundwater Extraction and Use are Subject to Police Power Regulation within Constitutional Limits.**

This does not mean, however, that Maine may not regulate groundwater. Indeed, groundwater extraction and use are already regulated to some degree. For example, the Maine Department of Environmental Protection (“DEP”) regulates groundwater withdrawals under the Site Location of Development Law, DEP Regulations, Chapter 375 §§ 8(A)-(D). Maine’s statutes also prohibit (with a number of exceptions) the transportation of water across municipal boundaries by pipelines or in containers larger than 10 gallons. 22 M.R.S.A. § 2660-A, Water Resources Management. The quality of groundwater is also regulated by the State of Maine. Groundwater is included in the definition of “Waters of the State” set forth at 38 M.R.S.A. § 361-A and, therefore, is subject to Maine’s Water Control Act, 38 M.R.S.A. §§ 413, 403, 465-C and 470, as well as its Oil Laws. See, for example, 38 M.R.S.A. §§ 543 and 548.

In sum, although the groundwater in Maine has been, and still is, considered to be private property, it is, like other private property, subject to regulation by the State for protection of the public safety, health and welfare. It is clear, however, that legislative initiatives that would regulate groundwater withdrawals will be subject to close review by parties interested in protecting the private rights of property owners. See, for example, the essay entitled *Maine Water Resources Management: A Major Legislative Initiative*. 6 Me. Bar Journal 28 (1991) wherein Martin J. Robles, Esquire argued that “[w]ater rights are property rights. As a result,

legislation modifying water rights . . . should recognize that landowners and investors may have vested rights in existing riparian and groundwater rights.” Implicit in this statement is that legislation that interferes with vested rights might be challenged as a regulatory taking.

Regulatory takings challenges are by nature fact specific and must be decided on a case-by-case basis. Therefore, it is impossible to give a bright line answer to whether groundwater extraction legislation would go “too far” and thereby trigger the need to provide compensation to the property owner. See Pennsylvania Coal v. Mahon, 260 U.S. 303 (1922). However, as a working generalization, regulation of private property that does not deprive the property owner of substantially all value of his or her property will not be considered to constitute a taking under the Maine or United States Constitutions. Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978); Seven Islands Land Co. v. LURC, 450 A. 2d 475 (Me. 1982).

In conclusion, groundwater in Maine is presently owned by the owner of the surface property overlying the groundwater. The State has in the past regulated both the quality of groundwater and quantity of groundwater withdrawals in limited circumstances. Additional regulation should not violate the takings clauses of the United States and Maine Constitutions, so long as this regulation meets the tests established by the United States Supreme Court and the Maine Law Court cases cited above.