

**Senate Committee on Natural Resources
and Environmental Affairs**

**Hearing: November 26, 2001
Saginaw, Michigan**

TESTIMONY OF JAMES M. OLSON¹

Good evening, Senator Sikkema, Senator Peters, and Members of the Committee on Natural Resources and Environmental Affairs. My name is Jim Olson. I am an attorney in Traverse City, Michigan, and I submit this written testimony on behalf of the Michigan Citizens for Water Conservation. Thank you for the huge public service you have provided this Fall in conducting these hearings on the Great Lakes and Michigan's water resources.

In submitting these remarks, I want to emphasize that the Michigan Citizens for Water Conservation ("MCWC") is a non-partisan, non-profit organization, concerned like you with the future of Michigan's precious water and water related natural resources and amenities. While MCWC is involved in a lawsuit with the Perrier Group over the high-capacity wells proposed for Mecosta County, its mission is not to stop Perrier or any other water bottling company. MCWC's primary mission is to protect Michigan's and the general public's rights in the "waters of the State," as that term has been understood since the beginning of statehood. The "waters of the State" belong to no one, but are used and enjoyed by many for drinking, food, navigation, boating, recreation, tourism, and industry. Until this century, the use and enjoyment has gone unnoticed and with little regulation. We as a state have enjoyed abundance. We now realize

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this abundance does not exist in a state that is so closely tied to its water resources for quality of life, livelihood and economic growth and strength.

For the first time in Michigan's history, others eye our water resources for their gain and economic growth outside of the State and, indeed, outside of the Great Lakes Basin. The focus is suddenly on capturing or claiming private ownership of Michigan's water for sale, shipment, and use elsewhere. Fundamentally, Michigan should not, and in MCWC's view, cannot, allow private expropriation of water resources for sale inside or outside of the State without first affirming and declaring its ownership interest in these waters. A legislatively created system then needs to be set up that evaluates and determines the purpose, necessity, availability of surplus water, comprehensive and incremental impacts, and fair compensation to the State and its citizens, including local governments, before granting authorization for the sale of our water resources.

The important distinction here is privatization and sale of raw water as opposed to use of our water. The use of our water must be assessed and conservation promoted to the full extent possible, but this is not the same as sanctioning the outright sale of water. MCWC is concerned about use of water for farming, business, industry, recreation, and local communities. But the evaluation and regulation of these uses and their impacts should not be confused with the authorization to withdraw and sell or transfer raw water for the sake of selling it outside the scope of reasonable use (confined by law to on-tract or inter-watershed end-uses) or in violation of the public trust in our waters. Under U.S. Supreme Court law, Michigan has the right to define the extent to which its property and water law may allow the sale and transfer of its water, and the exercise of this power, unlike the regulation of private uses, is free from interference by the commerce clause of the United States Constitution or international trade agreements. A failure on the part of the legislature to require this authorization will be tantamount to an abdication of the State's and its citizens' interests in these water resources.

The connecting waters and tributaries of the Great Lakes that are within the territory of Michigan and Michigan's inland lakes and streams are owned by the State and held in public

trust for the benefit of all citizens. This public trust is a legally enforceable limitation on the transfer and disposal or exclusive possession of these public trust waters. *Illinois Central Railroad v Illinois*, 146 US 387, *aff'd* 154 US 225 (1894); *Obrecht v National Gypsum Co*, 361 Mich 399, 105 NW 143 (1960); *People v Babcock*, 38 Mich App 336, 351; 196 NW2d 489 (1972); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970); *Collins v Gerhardt*, 237 Mich 48, 211 NW 115 (1927); *People v Broedell*, 365 Mich 201, 204-205 (1961) (holding that the *de minimis* harm argument is inapplicable to public trust water decisions). For example, these public trust waters and their bottomlands cannot be disposed of or expropriated without authorization under the Great Lakes Submerged Lands Act, Part 325, Natural Resources and Environmental Protection Act, MCL 324.32501, *et seq.* Inland waters are waters of the State and subject to the public trust under the Inland Lakes and Streams Act, Part 301, Natural Resources and Environmental Protection Act), MCL 324.30101, *et seq.* Public trust waters cannot be withdrawn and sold without legislative authorization, and even then cannot be subordinated.

Groundwaters are also part of the “waters of the State.” MCL 324.3101(i). Groundwaters that feed our lakes and streams are directly connected and part of those waters. Virtually all federal and state laws and agreements include groundwater in definitions of water resources within the Great Lakes Basin. See Great Lakes Preservation Act, *supra*. Governor Engler confirmed this in his letter to the Mayor of Webster, New York last April, when he warned the Mayor that the city’s proposed sale of groundwater would violate the federal Water Resources Development Act, 42 USC 1962d-20(d), that prohibits diversion or export of Great Lakes water resources. Under Michigan Supreme Court legal precedent, groundwater may be reasonably used but it is held in common, and not owned by anyone. *Schenk v Ann Arbor*, 196 Mich 75; 163 NW 109 (1917). In more recent decisions aimed at answering the question of whether groundwater falls within the “property of the insured” exclusion under liability insurance policies, the Michigan Supreme Court has held that groundwater is not “property of the insured,” but held in common by all, including an interest of the State.

It is critically important for the future of Michigan that the Legislature affirm and declare its interest in the “waters of the State,” and require authorization for the sale or transfer of these waters. Analytically, while this may as a practical matter be thought of as regulation, the State’s power to regulate is based more on its property power (power over the public domain) and right to define property and water rights within the State, and not so much on the police power. Under the property power, there is no implication regarding takings of private property; nor is there a problem with the commerce clause of the United States Constitution.

There are fundamentally four areas for needed legislative action, each with a distinct focus.

A. Authorization

First, there needs to be a law that authorizes the sale or transfer or privatization of our water before it is taken. This assures that the State assents to the transfer of its interest in the “waters of the State” consistent with our common law and Constitution. Waters of the State include “groundwaters, lakes, rivers, and streams.” MCL 324.3101(i). Any water sale and transfer law must contain the following basic elements:

1. A declaration and reaffirmation that the “waters of the State” are impressed with a public trust.
2. A requirement that before any sale or transfer of water is authorized, there must be a finding that, based on short and long term planning and local and state need, there is a surplus of water.
3. A requirement that the proposed sale and transfer is in the public interest and for a valid public purpose.
4. A showing and finding that the sale or transfer will not interfere with or harm the public trust in the waters of the State.
5. A showing and finding that the State will be paid fair compensation for authorizing the sale and transfer of its water.

6. The establishment of a water resources protection and trust fund.

B. Comprehensive Evaluation of Impacts, Conservation, and Future Use

Second, there needs to be a comprehensive water use (as distinct from the authorization to sell). This law should contain the following requirements:

1. A declaration and reaffirmation that the “waters of the State” are impressed with a public trust.
2. An environmental impact statement (EIS) that discloses to the fullest extent possible the direct, cumulative, and incremental likely effects and feasible and prudent alternatives, both short and long-term, based on an independent hydrogeological investigation (HI) and scientifically reliable modeling, biological inventory.
3. The EIS and HI must demonstrate no likely adverse effects on present and future needs of the water or related water resources and the natural resources of the State, and that if there are such likely effects a showing that there are no feasible and prudent alternatives before approval.
4. A showing and finding that the sale or transfer will not interfere with, diminish, or harm the public trust in the waters of the State.
5. A showing and demonstration that feasible and prudent conservation measures will be implemented in conjunction with the use.
6. Monthly monitoring and filing of water use and parameters, including monitoring for potential impacts on other water users and water resources, including surface waters, wetlands, and other environmental features.
7. An impact or user fee system to reimburse the State fully for its administration, review, independent investigations and analyses incurred in conjunction with any use application.

C. Amend the Safe Drinking Water Act

Third, the Safe Drinking Water Act, MCL 325.1001, *et seq.*, should be amended to require standards similar to those listed above for high-capacity wells.

D. Implement Annex 2001 Consistent with Public Trust Standards

Fourth, Annex 2001 needs to be implemented by amendment to the Great Lakes Preservation Act, MCL 324.32701 *et seq.* However, it must be understood that since the Great Lakes water resources are impressed with a public trust, Annex 2001 standards cannot be broader than the standards under the public trust doctrine. *Illinois Central* and *Obrecht, supra*. In *Illinois Central* (adopted by the Michigan Supreme Court in *Obrecht*), the U.S. Supreme Court ruled that a state legislature could not grant or sell public trust bottomlands and waters where it violated public trust standards. Annex 2001 requires that the following standards must be met:

1. Includes all reasonable and appropriate water conservation measures;
2. Does not, individually or cumulatively, ... cause significant adverse impact to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin;
3. Results in an Improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and
4. Complies with all applicable laws.

To satisfy the limitations imposed by public trust law, any implementation of Annex 2001 must, at a minimum, also meet the following standards:

- a. The purpose is primarily public.
- b. There is sufficient information to determine impacts on the public trust.

- c. There will be no impairment, including potential incremental impairment from other similar proposed projects, of the public trust for navigation, boating, swimming, fishing, and other recreational uses.
- d. Fair compensation is paid.

As can be seen, the public trust standards in some respects are more stringent. These standards parallel those set forth for the water sale or transfer law described above. To the extent that a sale, diversion, export, or transfer out of the Great Lakes Basin is involved, it should be subjected to the same requirements so it satisfies the public trust standards for the Great Lakes water resources.

MCWC wishes to offer its assistance to you, the Committee on Natural Resources and Environmental Affairs, and the Legislature in establishing and implementing the forgoing legislative framework for protecting Michigan's water and its future.

Thank you.

Submitted by:

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