

PROTECTING THE PUBLIC TRUST AND HUMAN RIGHTS IN THE GREAT LAKES

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INTRODUCTION

People often stare in disbelief when they hear that the Great Lakes could be drained to supply the water needs of consumers around the world, harming the local communities and economies of the Great Lakes and enriching a handful of multinational corporations who take the water free of charge. Part of the disbelief comes from our perceived water abundance. Most who live in the Great Lakes Basin are privileged enough to not have to think about where their water comes from or whether it will be around for their children's children.

Despite this apparent abundance, however, parts of the Basin face water scarcity. Water levels in the Great Lakes hit record lows at the turn of the millennium¹ and water-thirsty communities are waiting in the wings for

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1. MAUDE BARLOW & TONY CLARKE, *BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER* 9 (2002) ("In 2001, the water was more than a

out-of-basin diversions.² In Wisconsin, for example, Waukesha and New Berlin would like to tap into Lake Michigan via a pipeline from Milwaukee and use the water in the Mississippi River Basin.³

Looking outside the Great Lakes Basin, the “[g]lobal consumption of water is doubling every 20 years, more than twice the rate of human population growth,”⁴ and that “every eight seconds, a child dies from drinking contaminated water.”⁵ In fact, half of the people on Earth “lack basic sanitation services” and hence, are exposed to water-borne diseases.⁶ It is against this backdrop that this Article asks whether all people should have access to clean water as a freely-accessible public good. With the Great Lakes containing about ninety-five percent of the United States’ fresh surface water supply and twenty percent of the Earth’s fresh surface water supply,⁷ should Canada and the United States open up the Great Lakes to be exported to serve water needs around the world?

This Article explains that the Great Lakes water is a public trust; this water should be delivered as a freely accessible public good for domestic use; and the United States and Canada should not allow private corporations to take Great Lakes trust water out of the public commons—without paying for it—and export it around the world. This does not mean, however, that the Great Lakes governments turn their collective backs on areas of the world suffering severe water shortages. Canada and the United States should allow the Great Lakes to be used outside the Basin for humanitarian, non-commercial purposes. Also, this Article articulates how Great Lakes states can strengthen protections for the Great Lakes trust by passing legislation to implement the Great Lakes–St. Lawrence River Basin Water Re-

meter below its seasonal average in the Port of Montreal, and Lakes Michigan and Huron were down by 57 centimeters (about 22 inches).”).

2. Darryl Enriquez, *Selling Water to Waukesha Could Be Liquid Gold Mine: Milwaukee Utility Could Gain a \$1.7 Million Revenue Stream*, MILWAUKEE J. SENTINEL, July 22, 2006, at A1.

3. *Id.*

4. BARLOW & CLARKE, *supra* note 1, at 7.

5. *Id.* at 52.

6. *Id.*

7. INT’L JOINT COMM’N, A GUIDE TO THE GREAT LAKES WATER QUALITY AGREEMENT: BACKGROUND FOR THE 2006 GOVERNMENTAL REVIEW iv (2005), available at <http://www.ijc.org/en/activities/consultations/glwqa/guide2bw.pdf> [hereinafter IJC GUIDE]; U.S. GEN. ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMM. ON OVERSIGHT OF GOV’T MGMT., THE FED. WORKFORCE AND THE DIST. OF COLUMBIA, COMM. ON GOV’T AFFAIRS, U.S. SENATE, GREAT LAKES: A COORDINATED STRATEGIC PLAN AND MONITORING SYSTEM ARE NEEDED TO ACHIEVE RESTORATION GOALS 3 (July 16, 2003), <http://www.gao.gov/new.items/d03999t.pdf>; David Naftzger, *The First of the Governors’ Priorities: Annex 2001*, in STATE OF THE GREAT LAKES ANNUAL REPORT FOR 2003 6 (2004), <http://www.deq.state.mi.us/documents/deq-ogl-SOGL03.pdf>.

sources Compact and Agreement of 2005 (“Compact”) that aims to fulfill the states’ duties as trustees of this world-class resource.

I. THE GREAT LAKES AS A WATER COMMONS AND A PUBLIC TRUST

The notion of the commons is “the idea that through our public institutions we recognize shared humanity and natural resources to be preserved for future generations.”⁸ “Water is a commons because it is the ecological basis of all life and because its sustainability and equitable allocation depend on cooperation among community members.”⁹ The Great Lakes are the quintessential shared commons. Bordered by eight Great Lakes states and two Canadian provinces, they sustain the lives of forty million people.¹⁰

This shared commons is under pressure from in-basin and out-of-basin water uses,¹¹ and with only one percent of the Great Lakes water renewed annually, the future of this vulnerable and valuable resource is in question.¹² Water levels in three of the Great Lakes hit extremely low levels in 2007, with Lakes Michigan and Huron about two feet below their long-term average levels and Lake Superior having dropped an entire foot in just one year.¹³

Meanwhile, water-thirsty communities are lining up to obtain approvals for out-of-basin diversions,¹⁴ and at least one Great Lakes city is allowing a private corporation to export Great Lakes water in bottles carrying the Dasani label.¹⁵ When private corporations are allowed to profit by taking public water out of the commons free of charge and selling it, we are seeing a departure from our present day and historic Public Trust Doctrine. Without adequate regulations to prevent privatization of the Great Lakes, what will prevent a tragedy of the Great Lakes commons?¹⁶

With a regionally-shared public commons like the Great Lakes, it is difficult to prevent over-exploitation without a solid and consistent legal framework in place. At the core of this legal framework needs to be the

8. BARLOW & CLARKE, *supra* note 1, at xiv.

9. VANDANA SHIVA, *WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT* 24 (2002).

10. IJC GUIDE, *supra* note 7, at iv.

11. *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc.*, 203 F. Supp. 2d 853, 859 (W.D. Mich. 2002).

12. IJC GUIDE, *supra* note 7, at iv.

13. Dan Egan, *Superior has dropped by 1 foot in the past year; near record seasonal low*, MILWAUKEE J. SENTINEL, Aug. 28, 2007, available at <http://www.jsonline.com/story/index.aspx?id=653949>.

14. Enriquez, *supra* note 2.

15. Milwaukee is currently selling water to Coca-Cola for its Dasani brand of bottled water. See John Schmid, *Looking to Soak up Lake’s Potential: Economic Asset Largely Untapped, Leaders Say*, MILWAUKEE J. SENTINEL, June 24, 2006, at A1.

16. Garrett Hardin, *Tragedy of the Commons*, 162 SCI. 1243, 1248 (1968).

Public Trust Doctrine, which recognizes that the Great Lakes constitute a commons to be shared by all.¹⁷ This concept can first be seen in the Great Lakes Charter of 1985 and then echoed by the subsequent Great Lakes Charter Annex and the Great Lakes Compact.

Public Trust Doctrine, in its most basic form, is the legal concept that the government holds the common water resource in trust for the public and regulates the commons in the public interest.¹⁸ This does not foreclose the use of the trust by private corporations, but it should prevent private ownership and over-exploitation.

A functioning trust relationship requires transparency of the trustees' actions; adequate regulations governing shared access and use of the trust property; and public participation by the trust beneficiaries, including the ability to enforce and to call for routine accounting of the trust to ensure that the government is managing it in the public interest.

In the United States, from entry into the Union to the present, the Public Trust Doctrine has existed to guide decisions about Great Lakes Basin water.¹⁹ Each of the Great Lakes states holds navigable waters in trust and should manage those waters for the benefit of the public.²⁰ The Public Trust Doctrine has evolved in the common law in a variety of ways throughout the Basin states, but key judicial decisions emphasize a common legal foundation for the Great Lakes' protections.

The Public Trust Doctrine embodies the time-honored concept that the state holds all navigable waters in trust for the public.²¹ The state is the trustee, every member of the public is a beneficiary, and the waters are the trust property.²² Each state in the Northwest Territory of the United States was allowed into the Union on the condition that it incorporated the Public Trust Doctrine into the laws of the newly-formed state.²³

Water is not like other types of property;²⁴ water's unique legal status militates against defining it as a product or commodity that can be bought and sold, largely because surface water rights are usufructuary—one can

17. The Great Lakes Charter: Principles for the Management of Great Lakes Water Resources, Feb. 11, 1985, <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf> [hereinafter Great Lakes Charter 1985].

18. See, e.g., *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

19. See, e.g., *Ill. Cent. R.R.*, 146 U.S. at 452-54.

20. *Id.* at 347.

21. *Id.*

22. For a history of the evolution of this doctrine in Wisconsin, see Melissa Kwater-ski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Power in Wisconsin*, 27 *ECOLOGY L.Q.* 135 (2000).

23. See, e.g., WIS. CONST. art. IX, § 1.

24. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 *ENVTL. L. REV.* 473, 475 (1989).

only use, but not own, water.²⁵ “[P]roperty rights in water have been delineated in very limited terms. Water has been described as . . . belonging to the public; as subject to public servitudes; as incapable of full ownership . . .”²⁶ This concept has been clearly articulated in Wisconsin law, for instance, where a riparian landowner may make reasonable use of the water that passes by his or her property, but cannot possess a property right to “the particles of water flowing in the stream.”²⁷ Other Great Lakes states have similarly embraced this concept:²⁸

The roots of private property in water have simply never been deep enough to vest in water users a compensable right to diminish lakes and rivers or to destroy the marine life within them. Water is not like a pocket watch or a piece of furniture, which an owner may destroy with impunity. The rights of use in water, however long standing, should never be confused with more personal, more fully owned, property.²⁹

One of the most famous public trust cases to come out of the Great Lakes states, of course, is *Illinois Central Railroad v. Illinois*. In that opinion, the United States Supreme Court first held that “the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake” cannot be abdicated, and “cannot be relinquished by a transfer of the property.”³⁰ The *Illinois Central* decision established that the State of Illinois could not abandon its trust responsibilities in the lakebed of Lake Michigan by granting it to a railroad.

During the same time period, at the end of the 1800s, a variety of Great Lakes state courts came to the same conclusion.³¹ They uniformly discussed water as something that is held by the state that cannot be sold, unless it is clearly for a public benefit.³² “[T]he rights of the state in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation.”³³

Almost two decades after *Illinois Central*, the United States Supreme Court took up the issue of water diversions and clarified that “the state was warranted in prohibiting the acquisition of the title to water on a larger

25. Joseph L. Sax, *Rights that “Inhere in the Title Itself”: The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 944 (1993).

26. *Id.*

27. *Willow River Club v. Wade*, 76 N.W. 273, 277 (Wis. 1898).

28. *See, e.g., Bradshaw v. Duluth Imperial Mill Co.*, 53 N.W. 1066, 1068 (Minn. 1892); *People ex rel. Att’y Gen. v. Kirk*, 45 N.E. 830, 833 (Ill. 1896); *Scranton v. Wheeler*, 57 F. 803, 813 (6th Cir. 1893); *Bodi v. Winous Point Shooting Club*, 48 N.E. 944, 944 (Ohio 1897); *Coxe v. State*, 39 N.E. 400, 400 (N.Y. 1895).

29. Sax, *supra* note 24, at 482.

30. *Ill. Cent. R.R.*, 146 U.S. at 452-53.

31. *See, e.g.,* sources cited *supra* note 28.

32. *See id.*

33. *Bradshaw*, 53 N.W. at 1068.

scale.”³⁴ In *Hudson County Water Co. v. McCarter*³⁵, the Court upheld the right of New Jersey to prohibit the diversion of water from the Passaic River to consumers on Staten Island, New York.³⁶ This keystone case can speak to contemporary questions about diversions and privatizing water in the Great Lakes.³⁷

[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as [the] population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.³⁸

By the time the Governors and Premiers signed the Great Lakes Charter in 1985, the Public Trust Doctrine was a well-developed legal doctrine governing navigable waters in the Great Lakes states.³⁹ The Great Lakes Charter clearly echoes the Public Trust Doctrine by defining the role of the Great Lakes states and provinces as trustees of the Great Lakes. The very first finding in the Great Lakes Charter declares, “The water resources of the Great Lakes Basin are precious public natural resources, shared and held in trust by the Great Lakes States and Provinces.”⁴⁰

Similarly, the Great Lakes Charter Annex 2001 reaffirms the Public Trust Doctrine in its first finding: “The Great Lakes are a bi-national public treasure and are held in trust by the Great Lakes States and Provinces.”⁴¹

34. *Hudson Water Co.*, 209 U.S. at 354. Some have argued that water has already been defined as a “commodity” in the United States Supreme Court case of *Sporhase v. Nebraska*, 458 U.S. 941, 945 (1982). However, that holding is limited to groundwater, which has historically (for better and for worse) not been widely recognized as a public trust water. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563-64 (1871). Moreover, *Sporhase* did not overrule *Hudson County Water Co.*, which upheld a surface water diversion prohibition. The importance of *Sporhase* is that it clarified that management of water needed to be done in a way that was even-handed and treated in- and out-of-state users similarly. Regulatory controls should apply to both in-basin consumptive uses and out-of-basin (and out-of-state) diversions. See also James M. Olson, *The Future Gradient of Water Law at the Toledo College of Law Conference on the National Groundwater Water Crisis* (Mar. 14, 2003).

35. 209 U.S. 349 (1908).

36. *Id.*

37. *Id.* at 355-57.

38. *Id.* at 356.

39. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); James M. Olson, *Annex 2001 and the Future of the Great Lakes: New Wine into Old Wineskins*, in DECISION TIME: WATER DIVERSION POLICY IN THE GREAT LAKES BASIN 7-12 (2004), available at <http://www.savemewater.org/news/Jim%20Olsons%20-%20WWICS.pdf>.

40. Great Lakes Charter 1985, *supra* note 17, at 1.

41. The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter 1 (June 18, 2001), available at

Finally, the most recent of the regional water agreements, the Great Lakes Compact, echoes the finding that Great Lakes Basin waters are “precious public natural resources shared and held in trust” by the states.⁴² It also explains the Public Trust duty this places on the states and provinces for purposes of the Compact:⁴³

[As trustees of the Basin’s natural resources, the Great Lakes States and Provinces] have a shared duty to protect, conserve, . . . and manage the renewable but finite Waters of the Basin for the use, benefit and enjoyment of all their citizens, including generations yet to come.⁴⁴

This public trust duty to present and future generations is the lens through which the rest of the Great Lakes Compact should be read. In order to fulfill their duties as trustees, the Compact creates conservation and management standards for the Basin, for instance. Recognizing the legal existence of the Great Lakes as a public trust could help protect the lakes from global and local over-exploitation that could lead to a tragedy of the commons. If water is a public trust held by the government for the public benefit, then private ownership of water for primarily a private purpose is precluded, and water will need to be managed within the Basin in a way that upholds the public interest and protects the water commons.

II. THE NEED AND MEANS TO STRENGTHEN THE GREAT LAKES COMPACT TO PROTECT THE PUBLIC INTEREST AND HUMAN RIGHTS IN WATER

Never before has the need to reinvigorate the public trust in water been so great. The Great Lakes Compact is being considered for implementation in the Great Lakes region against the backdrop of a world in which water scarcity is an ever increasing reality and a handful of multinational corporations are profiting by enclosing the water commons, taking water without compensating the public, and essentially privatizing a formerly-public resource. This Part provides an overview of the global water scarcity issue and the rise of water privatization. Then it proposes a solution that states can use when passing Great Lakes Compact implementing legislation to stop corporations from raiding the public trust in the Great Lakes.

<http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf> [hereinafter Great Lakes Charter Annex 2001].

42. Great Lakes—St. Lawrence River Basin Water Resources Compact art. 1, § 1.3(1)(a), Dec. 13, 2005, available at http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_water_resources_Compact.pdf [hereinafter Great Lakes Compact 2005].

43. *Id.* § 1.3(1)(f).

44. *Id.*

A. Privatization and Global Thirst

“Water promises to be to the 21st century what oil was to the 20th century: the precious commodity that determines the wealth of nations.”⁴⁵ Increases in the world’s population coupled with increased pollution and climate change are straining the world’s water resources. Billions of people are caught between the “twin realities of water scarcity and water pollution.”⁴⁶ Despite water being essential for human survival, over one billion people lack access to clean drinking water.⁴⁷ More than double that number lack access to sanitary facilities.⁴⁸ Scarcity of water is becoming a major problem in developing countries and is closely related to poverty, rapid population growth, and urbanization.

The problems associated with lack of access to safe drinking water and sanitation facilities are clear enough. Governments are spending more and more money on public health problems caused by water-borne diseases which are rampant in developing countries.⁴⁹ Most of these diseases are preventable. More than five million people, most of them children, die every year from water-related illnesses.⁵⁰

While some find this unjust, the private sector has increasingly taken advantage of this scarcity as an opportunity to profit. A handful of multinational corporations are growing wealthy by privatizing water through a number of avenues. Private corporations take public water and privatize it for profit in two basic ways: they take over delivering water through municipal water systems or they take water from the public domain—without paying for it—and export it in bulk out of its basin of origin. Multinational companies that provide water services are engaged in a more than one trillion dollar per year industry.⁵¹ For instance, a small group of companies currently controls much of the international water market. Two France-based transnational corporations, Vivendi and Suez, own or have controlling

45. Shawn Tully, *Water, Water Everywhere*, FORTUNE, May 15, 2002, at 344.

46. BARLOW & CLARKE, *supra* note 1, at 51.

47. It is estimated that about one billion people in the world lack access to fresh water while 1.7 billion lack adequate sanitation. See Ismail Serageldin, *Beating the Water Crisis*, OUR PLANET, Oct., 1996, <http://www.ourplanet.com/imgversn/83/serag.html> (last visited Apr. 1, 2007).

48. *Id.*

49. In South Africa, for example, 300 people died from cholera after turning to a contaminated lake or river because they lacked access to clean and affordable tap water. *Background: Whose Hand on the Tap? Water Privatization in South Africa* (CBC radio broadcast Feb. 2003), available at <http://www.cbc.ca/news/features/water/southafrica.html>.

50. Sara Grusky, *IMF Forces Water Privatization on Poor Countries*, WATER-NUNC.COM, Feb. 2001, <http://www.waternunc.com/gb/ProblemofWater.htm> (last visited Apr. 1, 2007).

51. TONY CLARKE, *INSIDE THE BOTTLE: AN EXPOSÉ OF THE BOTTLED WATER INDUSTRY* 9 (2005).

interests in water companies in over 130 countries serving more than 100 million people.⁵²

Bottled water is the most familiar commodity coming from the second basic way of privatizing water—bulk exports. The industry has grown tremendously since the 1970s, with unprecedented growth in the past decade to a more than thirty-five billion dollars a year industry.⁵³ In the 1970s, the volume of water bottled and traded worldwide was 300 million gallons (about one billion liters) per year;⁵⁴ in 1980, the volume increased to 650 million gallons (about 2.5 billion liters) per year;⁵⁵ in 2000, the volume increased to 22.3 billion gallons (84 billion liters) per year;⁵⁶ and in 2004, the volume increased to 40.8 billion gallons (154.3 billion liters) per year.⁵⁷

This push to profit off the thirst of billions is exemplified by the following statement by Coca Cola's chair and CEO in its Annual Report:

All of us in the Coca-Cola family wake up each morning knowing that every single one of the world's 5.6 billion people will get thirsty that day . . . and that we are the ones with the best opportunity to refresh them.

. . . if we make it impossible for these 5.6 billion people to escape Coca-Cola . . . then we assure our future success for many years to come. Doing anything else is not an option.⁵⁸

Coca-Cola, of course, has also moved into the bottled water industry and markets the water it bottles from municipal taps in the United States under the name Dasani.⁵⁹ Coca-Cola's perspective paints the picture of a world dependent on paying a private corporation to fulfill a basic human need: drinking water. This is diametrically opposed to the Public Trust Doctrine, which requires that water be held in trust for use by the public.

Wisconsin faced a significant privatization threat in 2000 when Nestle/Perrier attempted to obtain permits to bottle the spring waters feeding the Mekan River in Waushara County, Wisconsin.⁶⁰ When the public outcry thwarted the company, it turned to the spring waters feeding the Big Springs

52. BARLOW & CLARKE, *supra* note 1, at 85.

53. *See* CLARKE *supra* note 51.

54. *Id.* *See also* BARLOW & CLARKE, *supra* note 1, at 143.

55. BARLOW & CLARKE, *supra* note 1, at 143.

56. *Id.*

57. John G. Rodwan, Jr., *Bottled Water 2004: U.S. and International Statistics and Developments*, BOTTLED WATER REP., Apr./May 2005, available at <http://www.beveragemarketing.com/news3e.htm>.

58. *See* COCA-COLA BOTTLING CO. CONSOL., 1993 ANNUAL REPORT 10, at 9 (1994).

59. Schmid, *supra* note 15.

60. *See* Tom Vanden Brook, *Perrier Wants to Draw Water on State Land: Bottler's Proposal Sparks Concern for Trout Stream*, MILWAUKEE J. SENTINEL, Dec. 19, 1999, at A1.

area of Adams County, Wisconsin.⁶¹ In a display of community concern that combined local organizing, town hall meetings, media outreach, local resolutions, state legislation, and litigation, Wisconsin residents effectively forced Nestle/Perrier to abandon its project.⁶² Regardless of the residents' success, this episode highlights Wisconsin's lack of legal protections to prevent private companies from taking and privatizing public waters.

Nestle/Perrier then tried to obtain spring water in Michigan. In Michigan, Citizens for Water Conservation filed a lawsuit against Nestle/Perrier, and a Mecosta County trial court shutdown four large production wells with a total capacity of 210 million gallons a year for bottled water because the diversion of water for sale violated riparian common law principles restricting water use to watersheds.⁶³ In a decision in November 2005, the Michigan Court of Appeals affirmed the trial court, finding that the amount of groundwater diverted by Nestle was unreasonable under the common law because of its interference with riparian rights.⁶⁴ However, Nestle/Perrier then negotiated an agreement forty miles from the Mecosta County bottling plant, whereby it acquired part of a municipal well field in Evart, Michigan.⁶⁵ Nestle/Perrier is trucking the water from Evart to its bottling plant in Mecosta County.⁶⁶

Although bottled water is the most common form of bulk export, water can also be exported via water bags, tankers, canals, and pipelines. Turkey has already used water bags to ship water internationally.⁶⁷ In 2000, Nordic Water Supply, a Norwegian corporation, used five million gallon bags to export water from Turkey to northern Cyprus.⁶⁸

Government reaction to attempts to privatize water has been mixed. Some governments are banning bulk water exports, while others are promoting them. In 1993, British Columbia banned bulk water exports.⁶⁹ Prior to the ban, several companies planned to transport water by supertanker along the Pacific Coast.⁷⁰ According to one account, "[u]nder one contract,

61. Kevin Murphy, *Nestle Waters Won't Develop Big Spring Site: Company Says Project is Dead, Letting High-Capacity Well Permits Expire*, MILWAUKEE J. SENTINEL, Sept. 20, 2002, at B7.

62. *See generally id.*

63. Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc., No. 01-014563-CE (Mecosta County Ct. Nov. 25, 2003).

64. Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc., 709 N.W.2d 174 (Mich. Ct. App. 2005).

65. *See* Ed White, *Water, Water Everywhere*, GRAND RAPIDS PRESS, Dec. 1, 2005, at A12.

66. *See id.*

67. Mark Clayton, *Forget OPEC. The Next Cartel May Export Drinking Water*, CHRISTIAN SCI. MONITOR, Dec. 30, 2004, at 13.

68. *Id.*

69. BARLOW & CLARKE, *supra* note 1, at 134.

70. *Id.* at 134-35.

the annual volume to be shipped to California was equivalent to the total annual water consumption of the City of Vancouver in Canada.”⁷¹

Alaska, on the other hand, is promoting water privatization and export. Although it is unclear whether the project is viable, Global H2O, a Canadian-based company, has a thirty-year agreement with Sitka, Alaska to export 18.2 billion gallons of water per year.⁷² According to one account, Global H2O was working with Signet Shipping Group to obtain supertankers to export this water to China for bottling.⁷³

As markets for privately-supplied water grow, so do concerns about whether we will be able to protect and conserve water in its natural state, and whether privatization is the answer to a thirsty world.⁷⁴ The World Bank is facilitating the privatization of water by requiring some poor countries to open their water systems to private corporations as a condition of receiving loans.⁷⁵ A report of the World Bank on Water Resources Management proposes a new approach to managing water resources by the adoption of a comprehensive policy framework and the treatment of water as an economic good.⁷⁶

However, privatization in developing countries often increases water costs, which drives those most in need back to unsafe water supplied by contaminated rivers or streams. After privatization, the poor are being cut off from the systems under a simple equation: no money, no water. Examples of water privatization of municipal water systems show that this strategy is not benefiting the ability of the poor to access water. In South Africa, water privatization increased in the price of water up to twenty percent of household income and many people’s taps were shut off due to unpaid bills. About 300 people died from cholera after turning to a contaminated lake or river for their water supply.⁷⁷ In Ghana, the average price of water doubled after the World Bank and International Monetary Fund imposed conditionalities on water.⁷⁸ In Cochabamba, Bolivia, the price of water reached al-

71. *Id.* at 135.

72. *Id.*

73. *Id.*

74. Water Export Controls and Canadian International Trade Obligations: Legal Opinion Commissioned by the Council of Canadians, Aug. 17, 1999, available at http://www.canadians.org/water/documents/water_export_controls_Aug_99.pdf.

75. Friends of the Earth Malaysia, *World Bank Sucks Water*, in WATER JUSTICE FOR ALL: GLOBAL AND LOCAL RESISTANCE TO THE CONTROL AND COMMODIFICATION OF WATER 5 (Friends of the Earth International, ed., 2003), <http://www.foei.org/publications/pdfs/water.pdf> [hereinafter *World Bank Sucks Water*].

76. THE WORLD BANK, WATER RESOURCES MANAGEMENT: EXECUTIVE SUMMARY (1995), <http://siteresources.worldbank.org/INTWRD/214573-1111579063201/20424649/WRMExSumof1993WaterPolicy.pdf>.

77. See generally *supra* note 49.

78. *World Bank Sucks Water*, *supra* note 75, at 5.

most twenty-five percent of household income after privatization.⁷⁹ And in Selangor, Malaysia, the price of water increased by 35.7 percent in 2001 after privatization; in 2002 taps were turned off due to unpaid bills.⁸⁰ Privatization, whether it is by taking over municipal services or by selling water in bottles, can be at odds with protecting the public trust in water. When looking at the future of the Great Lakes, these issues must be considered.

B. Remove the Bottled Water Exemption and Avoid Privatizing the Great Lakes

The Great Lakes are a world-class resource shared bi-nationally between Canada and the United States. With about 20 percent of the world's fresh surface water resources, the Great Lakes could become a source of future wealth for a few private corporations, at the expense of the public if privatization is allowed to continue. As shown above, privatization of the Great Lakes would not serve to quench the thirst of billions on the planet who lack access to safe and abundant drinking water. This commons should not be privatized and exported by private corporations who take the water out of the public commons free of charge.

In the late 1990s, the Nova Group in Canada received a permit (that was subsequently withdrawn) for bulk exports of water to Asia.⁸¹ The company planned to send three billion liters of Lake Superior water to Asia over a five-year period.⁸² In part, this proposal showed the vulnerabilities in the laws governing exports of water from the Great Lakes. Proposals like the Nova Group's serve as an impetus for articulating a responsible legal structure for the region.

The governors and premiers responded by creating a Great Lakes Compact that clearly prohibits the bulk transfer of water out of the Basin if it is transferred in a container larger than 5.7 gallons.⁸³ However, the Compact leaves it up to each state to decide whether exporting water in containers less than 5.7 gallons is a prohibited diversion.⁸⁴ This exemption allows

79. Friends of the Earth United States et al., *Thirst for Profits: Are Major Corporations Fit to Deliver Water to the World?*, in WATER JUSTICE FOR ALL: GLOBAL AND LOCAL RESISTANCE TO THE CONTROL AND COMMODIFICATION OF WATER 6 (Friends of the Earth International, ed., 2003), <http://www.foei.org/publications/pdfs/water.pdf>.

80. Friends of the Earth Malaysia, *Malaysia: Pay up or Get Cut off*, in WATER JUSTICE FOR ALL: GLOBAL AND LOCAL RESISTANCE TO THE CONTROL AND COMMODIFICATION OF WATER 6 (Friends of the Earth International, ed., 2003), <http://www.foei.org/publications/pdfs/water.pdf>.

81. *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc.*, 203 F. Supp. 2d 853, 859 (W.D. Mich. 2002).

82. *Id.*

83. Great Lakes Compact 2005, *supra* note 42, § 4.12(10).

84. *Id.*

private corporations to take water out of the public trust, without compensating the public for it, and is inconsistent with the long-standing Public Trust Doctrine.

States should eliminate the bottled water loophole that allows the diversion of Great Lakes water based on the size of the container being used to transport the water out of the Great Lakes Basin. Eliminating this loophole will further long-term protections for the Great Lakes because it will reduce the likelihood that a company could successfully claim that the Great Lakes Compact discriminates against commerce by prohibiting bulk exports of water in tankers, pipelines, et cetera, while allowing exports of water in bottles. Governments could eliminate this loophole with narrowly-tailored language that prohibits diversions of water that were intended for commercial sale as a product.

The ongoing push to privatize and allow multinational corporations to control water should be seen as a break from longstanding precedent. Older than the Great Lakes states and Canadian provinces, the Public Trust Doctrine has long held that water cannot be privately owned and is a trust held by the government for the public's use and enjoyment.⁸⁵ Each state should eliminate the bottled water loophole when it passes the Great Lakes Compact legislation. By so doing, it will recognize and reaffirm the existence of the Great Lakes and the waters feeding them as a public trust, managed by a variety of governments for the benefit of the trustee public.

One way to do this is to draft state implementing legislation that includes "water bottled for sale" in the definition of diversions and explicitly treat bottled water the same as it does all other diversions. This type of clarifying language is needed to ensure that the Great Lakes commons is not enclosed and over-exploited by private corporations for commercial purposes.

C. Using the Great Lakes Compact to Protect Human Rights in Water

Removing the bottled water exemption will not result in Great Lakes water being inaccessible to provide for the human right to water in truly humanitarian situations. The Great Lakes Compact allows withdrawals from the Great Lakes Basin "[t]o use in a non-commercial project on a short-term basis for firefighting, humanitarian, or emergency response purposes."⁸⁶ If used properly, this exemption from the Compact will allow the United States and Canada to meet humanitarian needs without privatizing the Great Lakes for commercial purposes.

85. *See, e.g.*, *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

86. Great Lakes Compact 2005, *supra* note 42, § 4.13(2).

CONCLUSION

Water is essential for all life; it should be freely accessible to provide for domestic needs. The way to manage the many competing uses of water and uses of the Great Lakes in particular is through a public trust where the government is the trustee, the public is the beneficiary, and the water is managed in an ecologically-sustainable manner. Private corporations should not be allowed to take water free of charge out of the public trust any more than one is allowed to privately own the state capitol building.

Currently, the Great Lakes states have the opportunity to act to affirm their public trust responsibilities and protect the Great Lakes. They can do this by passing the Great Lakes Compact into state law and by creating legislation that closes the bottled water loophole to the diversion prohibition in the Compact. Long-term protections of the public trust in the Great Lakes would not result in closing off the Great Lakes to the rest of world when there is a truly non-commercial, humanitarian need for water. The Great Lakes Compact provides for such a situation with its humanitarian exception. Through the Compact, the Great Lakes states and provinces can protect the Great Lakes trust while still being open to providing water to areas of the world that face humanitarian water crises.