

Water Wars: Advocating for 'public trust'

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TRAVERSE CITY -- It was a busy summer on the water front for Great Lakes advocates in what environmentalists and others are calling "The Water Wars."

Traverse City environmental attorney Jim Olson, west Michigan citizens groups and various organizations are in the thick of it, working to plug holes they see in laws and agreements designed to protect the lakes from water withdrawals, sale, privatization and export outside the basin.

Their activism is based on two words -- public trust -- a legal concept that's becoming increasingly important in Great Lakes water diversion issues.

"This fight isn't about bottled water," said Olson, attorney for Michigan Citizens for Water Conservation in its nine-year battle with Nestle Waters North America in Mecosta County. "It's about who owns the water, who controls it and whether water is to be viewed as a commodity or a public commons to be held in a public trust by Great Lakes governments for the benefit of all."

For Olson and other Great Lakes advocates, the battle won't be over until loopholes are fixed in the Great Lakes Compact and Michigan adopts a law, either by legislative action or referendum, that clearly defines Michigan's lakes, rivers, streams and groundwater as a "public trust" to give them the same protection against privatization as the Great Lakes and its surface water.

Public trust

Generally, "public trust" refers to a common-law principle dating to Roman times that says government owns title to submerged land under navigable waters and holds them in trust for the public. Traditionally, any use or sale of submerged lands must be in the public interest.

In modern times, the doctrine has been expanded to include water and other natural resources, Olson said. The public trust also is a theoretical base in the Michigan Environmental Protection Act of 1970, or MEPA, that allowed citizens for the first time to bring suit against "unreasonable" environmental pollution, impairment or destruction by government or private action, a provision that has been weakened.

Olson said the public trust doctrine:

- Protects something that is publicly owned, not privately owned.
- Sets an outer boundary on self-interest, or selfish-interest, in using public resources for private gain.

- Transcends competing interests in a way similar to the Bill of Rights. It is a legal doctrine that says the courts can draw the line on human and government behavior in regard to publicly owned natural resources.
- Allows citizen participation and watchdog function.
- Government stewardship responsibility to protect and maintain public natural for future generations.

Uncharted region

Many consider Olson a pioneer in the public trust doctrine, but he credits mentor Joseph Sax, an environmental law professor who re-introduced the 2,000-year-old legal tradition into modern environmental law in the late 1960s and 1970s. Sax also drafted MEPA.

Those were grim environmental times in the industrial Great Lakes basin. Thick mats of algae blanketed Lake Erie, which was declared dead for lack of oxygen. Pollution clogged rivers, dirtied skies, poisoned birds and fish. The public roared.

Olson was in school and college in the 1960s. He graduated from Traverse City Senior High in 1963, Michigan State University in 1968 and Detroit College of Law in 1970. He then clerked a year for state Supreme Court Justice Thomas Brennan in 1970-71 before starting his law practice in 1972 in his hometown.

"Joe Sax is the pioneer," Olson said. "I guess maybe I'm a scout of some kind for the public trust. I just happened to start practicing law when MEPA was enacted and I used it vigorously the first 10 years of my practice."

Indeed, he entered uncharted legal territory. He knew of no MEPA cases when he opened his Traverse City office. Environmental law was a developing field.

Disillusionment over how MEPA and public interest arguments fared in two of his earliest "citizens" cases was part of that sorting process. One case involved a strip of public land near the Boardman River that the state Department of Transportation proposed to sell for a Holiday Inn expansion. Another was a citizen's suit seeking to block a proposed coal dock for Cleveland Cliffs mining company in the Upper Marquette Harbor.

He began reading everything he could find on the public trust doctrine.

"In my work in the legal system western jurisprudence, I had never come across the idea that there was more to the law than simply bailing out competing interests, that would look at something as stewardship. The only thing I can think of similar to this idea is the Bills of Rights, something that transcended the self-interest of competing interests."

In 1974, five years into his practice, he decided to get a post-graduate master of law degree in public lands, natural resources and environmental law at the University of Michigan Law School, while continuing to practice law. Sax, who taught at U-M from 1966 to 1986, oversaw his three years of study.

Today, after more than three decades of practice, Olson believes the public trust doctrine can save essential natural resources like water for future generations and protect them from further degradation, destruction, privatization for export across the world.

Olson is a firm believer in citizen participation, too. He was a co-founder of Northern Michigan Environmental Action Council in 1980. He is chairman of the steering committee for the new Flow for Water Coalition of several nonprofit, citizen-based organizations from Michigan, the Great Lakes basin, the United States, and Canada.

"The public knows about the public trust in their gut and their hearts, even if they don't have the words," he said. "It's one of the things the people understand even if the Department of Environmental Quality, the Legislature and governor don't. If the governments don't act, I think the citizens will. If the Legislature won't do it, I don't think the people will stand for them being our legislators. It's that serious."