

Traverse City Attorney is Defender of Global Water

Traverse City attorney Jim Olson's idea that water should be kept clean and plentiful for generations to come should be an easy sell. It's not.

Sep 28, 2011 Jeff Smith

As global demand for water grows, Traverse City attorney and longtime water defender Jim Olson says we need more protections ASAP to keep water clean and plentiful for generations to come. Why is that idea such a hard sell?

It's Friday, May 6, 2011, and a clear and cool spring evening has graced Traverse City amid what's otherwise been a good season for raising lake levels—rainy, that is.

On Front Street, the marquee outside Traverse City's State Theatre shines bright with the words “FLOW for Water, Saving the Great Lakes Forever,” while inside, about 250 people settle into the remarkably cushy theater seats to hear some of North America's most esteemed water advocates explain the urgent need to strengthen water protection laws throughout the Great Lakes basin.

The house lights dim and a 60-something man approaches the podium. He's about 5-foot-10, of average build and has a curve to his shoulders that suggests he's spent untold hours reading and writing. He's balding, but wears the hair that's left kind of longish. He seems in no real hurry.

The gentleman has a perplexing presence, a presence that is somehow both modest and commanding at the same time, an effect that is amplified by the richly red



velvet theater curtain that drapes behind him and glows vividly under the spotlights above.

The speaker begins by stating what in this theater tonight is the most obvious thing possible. “My name is Jim Olson.” The crowd instantly erupts in applause and cheers, like they’ve all just been waiting for the opportunity. Olson is one of their water heroes. Raised on the shore of East Grand Traverse Bay and now a nationally renowned environmental attorney, he has been working to protect that amazing covalent bonding of two hydrogen atoms and one oxygen atom since his career began in the mid-1970’s. The crowd quickly quiets as Olson continues. He explains that he is the chair of the organization FLOW for Water, which coordinated this conference that runs through the next day, and then he gets to the point of why everybody’s here.

“It doesn't take much to go on Google or on the Internet to understand that there is a collision between water and forces of privatization—the demands on water from energy, food, access to water for drinking. And it's not gonna get better for water unless we continue something that started 2000 years ago when water was first considered a commons—considered public.”

For an introductory speech to this group, Olson can speak in such shorthand, hit the highlights, reference the context, but not delve into it. But for those not so close to the issue, a metaphor helps convey Olson’s water-world view.

What he sees could be described as a bunch of hoses snaking their way toward the Great Lakes from distant lands. A hose snaking from tar sands development in western Canada—a hydrocarbon extraction process that demands billions of gallons of water, but is happening in a parched land. A hose snaking from America’s High Plains, where farmers are draining the Ogallala Aquifer at a disturbing rate—where will the water to grow food for future Americans come from? A hose snaking from dry but growing cities like Los Angeles and Las Vegas—will America tell people they can’t move there, or will it be easier to build a pipeline to the Great Lakes? Hoses even snake from foreign nations that might face drought or that just might desire fresh, beautiful Great Lakes water to purchase and drink.

For the other half of the metaphor, picture spigots—business and policy developments within the Great Lakes and globally that could open the faucets to let the water flow. Hook the hoses to the spigots and, well, you get the idea.

For Olson, one spigot is the geographic shift in the nation's population to the arid West. Based on the 2010 census, Great Lakes states will lose seven seats in the House of Representatives; western states gain eight, with Texas (currently suffering severe drought) alone gaining four. But that's just the latest in a century-long trend. In 1900, the Midwest had 35 House seats and the West had five. Today the West outnumbers the Midwest. Will representatives from an ever-growing and ever-thirstier West simply vote to pipe water from the Great Lakes?

Another spigot is the ongoing encroachment of private companies into the water industry. Great Lakes cities are signing long-term contracts with private water companies, giving them the right to provide water to the citizenry, and to set the price for that water. At what point in the world of sliding scales and slippery slopes does the company suddenly claim it is now the owner of the water, not just its custodian?

A third and potentially large spigot, in Olson's view, are protection gaps in the Great Lakes–St. Lawrence River Basin Water Resources Compact [the Great Lakes Water Compact for short]. One gap allows water to be shipped out of the basin if it is in containers of 5.7 gallons or smaller. “What's to prevent, say, China from buying a piece of land in Michigan and pumping water into 5.7-gallon bottles and shipping it home?” Olson asks. On its face, that might sound absurd, but in a sense, something not too unlike it is already happening. Consider that Nestle, foreign-owned and the largest food company on the planet, is already pumping Great Lakes–basin groundwater into allowable containers and shipping it where it pleases. The company could, if it so chose, fill a supertanker with water—packaged in allowable containers—and ship it to a parched Mongolia. Totally legal. Right now. Today.

Olson sees another flaw in the compact's wording that allows water to be shipped out of the Great Lakes Basin if it is included in a product (like, say, water in a can of green beans), but then a provision in the law defines water itself as a product. Olson sees

that as a legal crack in the door that a savvy lawyer could leverage open to include bulk diversions of water.

There are other hoses, other spigots, but the point is made: at the very time demand for clean water is growing globally, the slide toward privatizing water is speeding up and the protections weakening.

What's needed, Olson says, is a powerful legal protection that is time tested and resilient enough to fend off shifting politics and growing demands that will inevitably come as the decades evolve. Olson had hoped the Great Lakes Water Compact would have provided that protection, but in his view the loopholes mentioned above cause it to fall short. Even the sponsor of the federal legislation, Michigan former House Representative Bart Stupak, refused to vote for its passage because the legislation became weakened during negotiations.

Flow for Water's primary mission is to forward the solution Olson envisions, a solution that draws upon principles Olson has been advocating for in courts, writing about in books and journals, and stumping for at conferences around the United States for more than three decades. Boiled to its essence, Olson and Flow for Water want state and federal laws passed that clearly state all Great Lakes waters (groundwater and surface water) should be considered a commons and protected through public trust. They must also state clearly that Congress did not intend for water to be considered a product, as Olson feels the existing Great Lakes Water Compact does.

By "Water should be considered a commons," what Olson means is that the rights to Great Lakes waters—surface and groundwater—should be shared by the citizenry. Each person would have a right to use the water, but because everybody else would also have a right to use the water, no individual would have the right to export water, wreck the water, or use up the water so that others can't use it. "It's based on the idea that some things are so essential to life, like air and water, that nobody has the right to own them, that everybody has a right to access them subject to the limitation that no matter what the use, it will be preserved for future generations," Olson says.

"Protected through public trust" is also a simple idea. Essentially it means that Great Lakes waters—surface and groundwater—would be protected for both today's

generations and all future generations. Navigable surface waters of the Great Lakes basin are already protected under public trust principles, but water in small streams and groundwater are not.

In Olson's opening remarks at the conference, when he refers to a 2000-year tradition of water as a commons he's referring to ideals first expressed in Roman law, expanded upon in England's Magna Carta, incorporated into colonial law and eventually United States federal and state law over the years, mostly through a set of court decisions, but also some limited legislation.

One might think it would be hard to argue against the plain rationale that we should protect the water for future generations and ourselves, but we're in a time of message twisting and anti-big government activism. [Recall that when Michelle Obama encouraged moms to feed kids healthier food to combat an epidemic of childhood obesity, Sarah Palin attacked her because the advice represented government interference.] The idea of water owned by the people was a juicy target for the property rights activists.

“What people didn't understand is that these principles don't grab or diminish people's access to water, they protect everybody's access. The farmer will always have access to water because nobody else can take it away,” says former Michigan House Representative Dan Scripps—himself an environmental attorney, speaking from his office in a Washington, D.C., law firm.

In September 2009, when Scripps introduced legislation that would establish water as a commons protected by public trust principles, legislation that was based on consultations with Olson, Republicans rose up strongly against it based largely on private-property-rights objections. The message: this is a government power grab for water.

Democrats, frightened by their sense of a broad public backlash to government regulation (Tea Party noted) also refused to put their force behind it. The bill never even earned a hearing in the House, and the man who beat Scripps, Ray Franz, used the proposed legislation as his central weapon against Scripps. Click on Franz's website

today and his most prominent video shows him boasting, “I’m not an environmental attorney.” Listen to the applause.

Jim Olson knows that Flow for Water has a large hill to climb. To strengthen the Great Lakes Water Compact, identical legislation must pass in eight states and then identical federal legislation must also pass—the same gauntlet the original legislation had to run. And he knows the political climate is not right at the moment for passage, so for now, public education is the goal—convince people that we owe it to ourselves and our descendents to keep water clean because clean water is essential to life and business.

When Olson first began to write about water and public trust principles, however, the hill loomed even larger, and he was even more alone. Thirty years ago he submitted an article to a law journal about water and public trust and they rejected it, saying it was too much about values and not just about law. But Olson wouldn’t give up and submitted it to another law journal that eagerly published it.

Even just ten years ago, only two mainstream environmental groups—Clean Water Action and Food and Water Watch—supported Olson when he built a case for public trust protection of Great Lakes groundwaters during the Nestle bottled water case. But following Olson’s victory, many of them have come to agree with his point of view, says Olson’s law partner Chris Bzdok.

“The public trust is one of those rare legal principles that protects common values, in the same way the first amendment protects free speech,” Olson says. “It embodies Aldo Leopold’s Conservation Ethic.”

When Olson reflects back on his decision to become a lawyer, he says, “I wanted something that, if I failed at it, I wanted to fail because I tried so hard I failed knowing that I couldn’t do it. I didn’t want any excuses. Do it as hard as I can and see where it leads.” Over three decades later, that tenacity has not abated.

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