

**POINT**  
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## Should water be managed as a commodity?

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Water's long been deemed a "commodity" in theory since the U.S. Supreme Court's *Sporhase v. Nebraska*, 458 U.S. 941 (1982) decision struck down Nebraska's water transfer reciprocity statute as an impermissible burden on interstate commerce. It's also long been considered a "commodity" in practice, as shown by the tens of millions of dollars worth of water transfers negotiated between riparian and inland communities throughout the Great Lakes basin.

Individual rights to use our common water resources can be created by state water law doctrines or by issuing a water user a permit or license. For example, Illinois requires Lake Michigan water users to obtain an allocation permit in order to manage the Chicago diversion. But many of the Great Lakes states either don't regulate water withdrawals from other sources or only regulate water quality but not quantity

in their withdrawal permits. Using water without any public oversight over the amounts withdrawn can lead to a "tragedy of the commons."

If the states won't assess resource sustainability in their water permits, then we must turn to markets to do the job, simply because water transactions should internalize relative resource scarcity (assuming that water prices are elastic – which they may not be – and that, under principles of supply and demand, scarcer resources command higher prices). Market forces – and the threat of higher water prices – can provide a check on water resource over-use and encourage water conservation. Many economists also claim that free markets manage resources more efficiently than government fiat. Commodifying our water resources is probably the cheapest and most efficient way to manage them while also protecting the long-term sustainability of our shared waters.

## counterpoint

**James Olson, Olson and Bzdok, P.C., Traverse City, Mich.**



*Attorney James Olson currently represents Michigan Citizens for Water Conservation, a nonprofit organization contesting a groundwater use issue by Nestle North American Waters, Inc. (The views expressed by the author are his own, and not necessarily those of his client.)*

If water is made a commodity, the power to safeguard the water commons will be severely compromised. Once water is treated as a commodity, private property or contract rights may attach, and the power of government to protect or manage the natural resource is limited by the Constitution (e.g., the Commerce Clause) or, arguably, international trade agreements, like the North American Free Trade Agreement (NAFTA).

Water is generally non-renewable (a finite supply) and not owned by anyone. Water is considered a commons, held and managed by government for the benefit of all citizens. In *Illinois Central Railroad v. Illinois* (1892), the U.S. Supreme Court held that the water resources of the Great Lakes are subject to a public trust. This public trust prohibits the conversion of water into a commodity for sale or export except in very narrow circumstances. Other

Supreme Court decisions have held that water is not a commodity unless the legislature of a state has chosen to make it an article of commerce.

British Columbia has been sued for more than 10 billion dollars for refusing to allow the export of its fresh water. This claim turns on whether water is a good protected by NAFTA. So long as water is a commons, and not a commodity, citizens will not be held hostage by international trade or constitutional challenges.

Water is viewed as a commons because it is recognized as a foundation for the survival of all citizens and the environment in which they live. The conversion of water into a commodity would subordinate this commons to the market place and control of private interests. This would trade fundamental human rights and democracy for economic gain. If water itself is a commodity, then we will have sold off the Garden of Eden.