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## **Detroit's Bankruptcy and Water Shutoffs Strike a Blow to the Rights and Public Trust in Water of Detroit's Poor**

By Jim Olson<sup>1</sup>

Detroit's emergency manager filed for bankruptcy in July 2013 to force creditors to negotiate a bankruptcy plan that would slash the city's unwieldy debt, and, it appeared, to derail a state court constitutional challenge to the emergency manager's authority. Last week the U.S. Bankruptcy Court in Detroit approved a plan that would over time give Detroit a chance to survive. Missing from the plan, however, was any mention of the disturbance and threat to the rights to water, and health of Detroit's poor caused by the abrupt termination of their water service.

Over the past year, Detroit has shutoff an unprecedented 27,000 households- more than 10 percent of the city's total, preventing families, children and those with medical conditions from accessing water for drinking, cooking, bathing, and flushing. The city launched the shutoffs without warning to improve its chances in negotiating the bankruptcy plan. The move sought to improve its position with suburbs and private water companies who have been eying the prize of taking over the bonanza of Detroit's water system

Notably, state, charities, and businesses stepped forward with donations of hundreds of millions to save the inestimable value of the collection of art and landmark buildings at the Detroit Art Institute. Ironically, no one has stepped forward to contribute to a plan for an affordable rate structure, based on individual ability to pay, to save Detroit's water system that serves Detroit's poor, mostly African American population – a wrenching irony for a city that runs along the shores of the Great Lakes, the world's largest supply of fresh surface water and the source of Detroit's drinking water.

Detroit's loss in population, increased costs of operations, aging infrastructure, unemployment, and the loss of tax base from the flight of the auto industry and people to the suburbs have combined to pump up the average water bill above \$100 per month for a family – in some instances reportedly as high as \$2,000 because of mistakes or charges for which residents were not responsible. This cost is simply staggering in a city rife with poverty, where

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20 percent of the city's population lives on less than \$800 per month to meet all their needs. Failure to pay by those who cannot afford their water bill because of low income, medical conditions, or other competing basic needs – often a just position in a system beset with leaks and billing errors – has resulted in the massive shutoffs without notice or chance to respond.

In America, the due process and equal protection clauses of the Constitution are supposed to protect the fundamental rights of persons' liberties and property from harm. A person's interest in liberty and property cannot be terminated in our country without notice and an opportunity to be heard. Water, liberty and life are one. It would seem that Detroit should not be allowed to shutoff water service to its residents without respecting their life and liberty from harmful risks and unfair or discriminatory actions.

Having filed for bankruptcy protection in Mid-2013, the city of Detroit clearly has a need to collect revenue or take other actions to help exit bankruptcy out from under intolerable and often unwarranted debt. Severing water from the homes or off the back of its remaining poor and most vulnerable residents risks an even greater intolerable threat -- one that could force a cycle of even fewer residents and exponentially higher water bills, the effect of which could push out its remaining residents so others can rebuild and inhabit the city.

### **Lawsuit to Protect Residents' Interests of Liberty and Property Inherent in Water**

Last month, a U.S. bankruptcy court rejected a lawsuit brought by several homeowners to delay the city's shutoffs, pending a more thorough review of their challenge that their constitutionally protected interests inherent in their human and public trust rights to water have been violated. Despite Detroit's acknowledgment that it had not followed its own rules to provide residents an opportunity to address errors, and had not followed or enacted plan to help impoverished households that were unable to pay, the city ordered thousands of more shutoff to continue.

Something has gone terribly wrong here that deserves much closer scrutiny, not only for the residents of Detroit but for people around the country and world who lack access to water to preserve their health and quality of life. The world faces an increasingly intense water crisis, where in a few years more than a billion people will not have access to sufficient potable water. In less than 20 years, demand for freshwater will exceed supply by as much as 30 percent. Because of this demand, citizens and corporations are already fighting over the control of freshwater, a struggle that strikes at the heart of liberty, and social and economic justice. How we view and manage water today will set precedents that dictate how we treat water and each other tomorrow.

Detroit's poor and vulnerable residents have been dehumanized. They deserve their day in court and a fighting chance to live safely in their homes. Court statements of residents recounted that they were living in poverty, often compounded by the needs of the elderly, children, disabled or ill; several residents were never informed that they had a right to request a

delay;<sup>2</sup> others were not granted an opportunity to dispute bills; still others' water service had been terminated or threatened with termination where their landlord had failed to pay the bill.<sup>3</sup> The city even acknowledged it had not followed rules that protect residents from shut-offs for good cause.<sup>4</sup> At one point, a city official reportedly told residents they could go the Detroit River for their water. This was a slap in the face: after a large city has used taxpayer funds and state credit to replace individual rights to water withdrawals from the river or groundwater with a common public water system, its residents are told they have no right to the city's water to meet basic needs; and then residents are sent to the polluted river with buckets in hand simply because they are either too poor to pay for their city's public water or too disempowered to challenge the city's broken process. There is a miserable disconnect here.

Not surprisingly, the bankruptcy court found that the water shut-offs "have and will continue to cause irreparable harm to health, family, sustenance and children's well-being."<sup>5</sup> Yet the court was unmoved, and concluded that the plaintiffs had not established they had an interest in liberty or property that was protected by our Constitution.

Detroit argued that the bankruptcy court has no jurisdiction to entertain the residents' claims that it violated the right to notice and an opportunity to be heard. Detroit also argued that it was lawful for government to hide under the cloak of bankruptcy and immunize itself from claims it had trampled on residents' human and public trust rights.

A bankruptcy court, with few exceptions, does not have jurisdiction to decide claims against a city in bankruptcy if the city's actions fall within the range of the proper exercise of governmental powers. Notably, one of the exceptions to this bar on claims in bankruptcy contemplates jurisdiction for claims that a city has violated the Constitution. To avoid the constitutional claims stemming from the Detroit water shutoffs, the court found that the residents did not have a sufficient interest in liberty or property to invoke the constitution. Unfortunately, the court failed to consider the fact that the residents held a human right to water and health under international law and an interest as beneficiaries of the public trust in water drawn from the Detroit River or Lake Huron that would have established a sufficient interest in liberty or property.

Properly understood, these residents should been able to pursue their Constitutional claims: there is a human right to water, health and family under international law; there is a right to enough water to meet basic human needs from a public water system that supplies residents public trust waters from the Detroit River and Lake Huron.

### **Inalienable Right to Water as a Commons and Public Trust**

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<sup>2</sup>Lydia et al. v. City of Detroit et al. (Case No. 13-53846, Chat. 9, Adversary Proceeding No. 14-04732) (U.S. Bankruptcy Court, E. D. Michigan, S. Div. - Detroit), First Amended Complaint (statements by Parham, Ward, Taylor, Eubank and Jackson); Plaintiffs Brief in Support of Motion for Reconsideration, p. 11.

<sup>3</sup>Id., Brief in Support of Motion for Reconsideration, pp. 12.

<sup>4</sup>Id., Hearing Transcript, Opinion on Temporary Restraining Order, p. 17.

<sup>5</sup> Hearing on Temporary Restraining Order (Doc. 82-14-04732-swr).

The Declaration of Independence declared that, “all men [and women] are created equal” and “endowed with certain unalienable rights that among these are Life, Liberty and the pursuit of Happiness.” Along with the Bill of Rights, including protection of free speech, assembly, petition, and the right to equal protection and due process of law, the inalienable right to water is paramount. Life, liberty and the pursuit of happiness would be rendered meaningless without the right to breathe the air and drink from our common public resources.

Water has been considered public and common to citizens for nearly 2,000 years. The principle dates back to the Justinian Codes in Rome, where air and running water were considered common to all citizens. The principle can be traced directly through the Magna Carta to the United States and to the water of the Great Lakes. The Northwest Ordinance of 1787 preserved the rights of citizens in the use of navigable waters, such as the Great Lakes and their connecting rivers, and protected civil liberties and outlawed slavery. In 1892, the U.S. Supreme Court ruled that the Great Lakes were owned by the state in trust for the benefit of each citizen’s paramount use for drinking, health, and sustenance.<sup>6</sup> As cities grew and demand for water increased, cities tapped public trust waters such as Lake Huron and the Detroit River. It was neither cost effective nor socially acceptable to let people fend for themselves at the shore. So public water systems were financed to deliver water as a service as a substitute. These systems are operated on a nonprofit or “cost” basis.<sup>7</sup>

Detroit extracts public trust water, and its common public water system is inherently essential to each person in the city. Just because a gallon of water is removed from the Detroit River or Lake Huron to be delivered, as part of a public water system does not mean the public trust or inalienable right in these common waters is lost. Quite the opposite: The water and water system are public and carry the obligation to honor the public trust in water. Does this mean that water is free? No, it means the government, as trustee, and all citizens as common beneficiaries, bear the cost of providing water to all residents, including those without the ability to pay or whose health or well-being would be endangered; the right to water should be preserved and applied equally.

Under the public trust in water and the civil liberties protected by the Declaration of Independence, each citizen holds a right to a quantity of water necessary to his or her health and well-being. Detroit has breached this trust by not legally recognizing this right. The city and the courts must respect and implement these interests of citizens under the public trust as protected interests under our Constitution.

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<sup>6</sup>Clifton v Passaic Calley Water Com’n, 539 A.2d. 760 (1987). Court ruled that a water commission held public trust water from the Delaware River and the public infrastructure that delivered the water in trust for the benefit of its residents. The participating municipalities could not transfer funds dedicated for water and residents for other purposes. Public water, infrastructure, and profits derived from such water and system are subject to protection for basic rights of residents under the public trust doctrine. Similarly residents should not be squeezed to pay increasingly higher water bills by a shrinking poor population without violating their rights to liberty or property under their rights under public trust in water.

<sup>7</sup>Illinois Central Railroad v Illinois, 146 U.S. 387 (1892).

## **Human Right to Water, Health, and Family**

In 2010, the United Nations General Assembly adopted a resolution declaring that there is a human right to water and sanitation. The human right to water is inseparable from the human right to health. The U.N. Declaration of Human Rights expressly recognizes the human right to health and family. The rights to health and family are also recognized by the International Covenant on Civil and Political Rights, the American Declaration on Rights and Duties of Man, the Covenant on Rights of Persons with Disabilities, and the Convention on Rights of the Child. State governments and political subdivisions, like Detroit, are subject to these principles and rights of international law, and our courts are bound to apply them as the supreme law of the land under the U.S. Constitution.

In October, an investigation team from the U.N. Human Rights Special Rapporteurs urged Detroit to grant notice, fair and equal treatment, hearings and protections for Detroit's poor and vulnerable residents. The U.N. Rapporteurs recommended that water connections should be restored to residents unable to pay or who have not been provided opportunity for hearings or financial assistance. The Rapporteurs also urged the city, state and federal government to establish a mandatory affordability threshold, and that the city should implement a method to provide water for those living in poverty or unable to pay for a minimum amount of water. As noted above, about 100 liters or about 35 gallons per day are required to protect a person's health and that of his or her household and family. Assuming 27,000 households used 100 gallons per day, the amount of water they use per day would be less than 3 million gallons. This is infinitesimal when compared to the nearly two billion gallons average delivered within the city every day.

## **Detroit Bankruptcy Ignores Water Shutoffs of Detroit's Poor and Vulnerable**

Detroit and the press have been glowing over the bankruptcy court's approval of its bankruptcy plan and prospects of exiting bankruptcy. The plan pays tens of millions of attorney fees, takes care of pensions, hands over cash and real estate to creditors, and releases water and sewer department to a regional Great Lakes Water Authority. The bankruptcy court and plan said and did nothing to address the water shutoffs, gross errors, and water and injustices to the poor, elderly, sick and children who cannot pay water bills now or in the future. It fails to recognize the findings and recommendations of the U.N. rapporteurs. Detroit continues to close shutoff valves and mark disconnected residences with a swash of blue paint on their sidewalk, a humiliating punch to those struggling to survive. Ask any one of the thousands of Detroiters and their households whose water no longer comes from their tap to describe the reality that they suffer, and be ready to brace yourself.

Detroit can no longer ignore or deny the human right to water that belongs to the health and well-being of Detroiters. Once established, international legal rights must be heeded by the city and courts as a matter of liberty or property. If poor or vulnerable residents have or will suffer irreparable harm to health and family or household, then water should be restored and shutoffs prohibited until their constitutionally protected public trust and human rights have been properly decided and preserved. These Detroit residents should have been, or should be, granted

their day in court. Better yet, officials should take charge as trustees of this water for the benefit of Detroit residents. It is shameful that water so essential to health and well-being is last on the list for the future of Detroit. A city that isolates and cuts off its poor from services, cuts off its legs to succeed.

### **New Regional Great Lakes Water Authority Does Not Address Water Shutoffs**

The city of Detroit has entered into an agreement to form a Great Lakes Water Authority with the suburbs served by Macomb, Oakland, and Wayne Counties. The new authority will lease the Detroit water treatment facilities and pipelines to the suburbs. But the agreement places the burden of fixing and operating its water infrastructure and service within Detroit on the city and its residents; the agreement exempts the counties and their suburbs from any financial responsibility to pay for Detroiters. And the suburbs do not have to pay for Detroit's expenses and debts. While the agreement provides \$5 million per year for those unable to pay throughout the new regional system, it does not specifically address the extraordinary exigencies of Detroit and its residents; and it does not ensure a minimum amount of water for those who are vulnerable or unable to pay. And, although the new authority acclaims itself the "Great Lakes Water" Authority, nowhere does the agreement recognize that the water and public infrastructure are held in common to be managed in trust for the benefit of residents and citizens. Nowhere does the agreement recognize that the rights of residents shall be respected or applied to protect the fundamental human right to water, health and family.

No matter what happens with the Great Lakes Water Authority, the city and courts must serve the public interest. The public interest in water and human decency demand, at the very least, that the true "cost" must be shared by everyone -- the suburbs and the city -- and that this includes the cost of making sure that the poor and vulnerable are treated fairly, equally, and if they are unable to pay, assured enough water to drink, cook, and bath. Water, liberty and justice are not reserved for or those who can afford it.

### **A Call to Action**

It is time that the city and courts immediately end its water shutoff program and restore water to those who have been harmed. It is time to enact and implement a true plan that provides: (1) funding and water for each person based on the ability to pay; (2) the right to notice and fair hearing; (3) the right to be free from unequal or discriminatory treatment; (4) the responsibility of the counties, suburbs, and the city to share and pay for the cost of the plan; and (5) recognition that these Great Lakes waters and regional authority and infrastructure shall be held and managed by the governments as a public trust for residents and for purely public purposes. The public interest in the protection of the rights to water, health, liberty and justice of tens of thousands of Detroit residents far outweighs the expediency of shutoffs, mistreatment of residents, the city's bankruptcy plan, and the parochial concerns of any one special interest. Until these principles are addressed, Detroit's bankruptcy plan and the new regional water authority's plan fall short of the overriding public interest in the constitution and international law.