

Nestlé cannot claim bottled water is 'essential public service', court rules

Michigan's second-highest court rules in favor of township in case that could damage company's effort to privatize water

Tom Perkins in Detroit *The Guardian* Thu 5 Dec 2019 <https://www.theguardian.com/business/2019/dec/05/nestle-bottled-water-michigan-osceola-private-public>

Michigan's second-highest court has dealt a legal blow to Nestlé's Ice Mountain water brand, ruling that the company's commercial water-bottling operation is "not an essential public service" or a public water supply.

The court of appeals ruling is a victory for Osceola township, a small mid-Michigan town that blocked Nestlé from building a pumping station that doesn't comply with its zoning laws. But **the case could also throw a wrench in Nestlé's attempts to privatize water around the country.**

If it is to carry out such plans, then it will need to be legally recognized as a public water source that provides an essential public service. The **Michigan** environmental attorney Jim Olson, who did not represent Osceola township but has previously battled Nestlé in court, said any claim that the Swiss multinational is a public water utility "is ludicrous".

"What this lays bare is the extent to which private water marketers like Nestlé, and others like them, go [in] their attempts to privatize sovereign public water, public water services, and the land and communities they impact," Olson said.

The ruling, made on Tuesday, could also lead state environmental regulators to reconsider permits that allow Nestlé to pump water in Michigan.

The Osceola case stems from Nestlé's attempt to increase the amount of water it pulls from a controversial wellhead in nearby Evart from about 250 gallons per minute to 400 gallons per minute. It needs to build the pump in a children's campground in Osceola township to transport the increased load via a pipe system.

The township in 2017 rejected the plans based on its zoning laws, and Nestlé subsequently sued. A lower court wrote in late 2017 that water was essential for life and bottling water was an "essential public service" that met a demand, which trumped Osceola township's zoning laws.

However, a three-judge panel in the appellate court reversed the decision.

The appellate judges acknowledged that water was "essential to life", but wrote that the context in which water is sold also had to be considered. Marketing bottled water in an area where tap water is available is unessential.

"The circuit court's conclusion that [Nestlé's] commercial water bottling operation is an 'essential public service' is clearly erroneous," the judges wrote. "Other than in areas with no other source of water, bottled water is not essential."

The court noted that infrastructure that provides essential public services included electrical substations, sewage facilities or other similar structures. Nestlé's pumping station does not fit in that category.

The judges also disagreed with Nestlé's argument that it represented a "public water supply". They said state law "unambiguously" implies public water supplies are "conveyed to a site through pipes" while nonessential water is provided in bottles.

"We conclude that [Nestlé's] proposed booster-pump facility is not a 'public water supply' under [Michigan law]," the court wrote.

Osceola township's attorney, William Fahey, told the Guardian it was clear that Nestlé's bottling operation "is a commercial purpose" and the pump was prohibited by the township's zoning laws. He said Nestlé could appeal to the Michigan supreme court, or it could attempt to build the pump elsewhere in the township.

In a statement to the **Detroit Free Press**, Nestlé's natural resource manager, Arlene Anderson-Vincent, said the company believes "the plan we proposed met the Township's site plan and special land use standards".

"We will evaluate our possible next steps in the legal process," she said.

The court's determination could also have an impact on the state permit that allows Nestlé to increase its extraction load to 400 gallons per minute. The Michigan department of environment, Great Lakes and energy (EGLE) issued the permit in part because it determined Nestlé provided an essential public service and was not damaging the local water table.

Several Native American tribes and the environmental attorney Ross Hammersley are challenging the permit in state administrative court. Hammersley told the Guardian the appellate court finding that Nestlé is not a public water source could help in his case, as could remarks about the company's impact on the water table.

"[Nestlé] extracting water and sending it to other places where it cannot return to the water table, and, critically, doing so faster than the aquifer can replenish, is an 'irretrievable' depletion unless the pumping is reduced or halted," the judges wrote.

The administrative court's ruling is expected early next year, but Olson already views the latest decision as a "huge victory".

"In the context of the larger question, 'Who owns the water?' – in this round, the state and public do, because selling containerized water for profit is simply private, not public," Olson said.