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Protecting the Great Lakes in the Face of a Water Crisis: The Need for Immediate Ratification of the Great Lakes - St. Lawrence River Basin Water Resources Compact, and for an Amendment to the Boundary Waters Treaty of 1909

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**PROTECTING THE GREAT LAKES IN THE FACE
OF A WATER CRISIS: THE NEED FOR
IMMEDIATE RATIFICATION OF THE GREAT
LAKES—ST. LAWRENCE RIVER BASIN WATER
RESOURCES COMPACT, AND FOR AN
AMENDMENT TO THE BOUNDARY WATERS
TREATY OF 1909**

MARK SOBOCIENSKI

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INTRODUCTION

An ecological disaster has resulted from the virtual disappearance of the Aral Sea located in Central Asia.¹ This disaster must serve as a lesson regarding the importance of water management. In 1960, the Aral Sea was the world's fourth largest lake.² By 2002, its volume had decreased by two thirds as a result of the former Soviet Union's decision to divert two of its rivers for the purpose of irrigating desert land for agriculture.³ The consequences of this decision have been disastrous for the region. What was once a thriving fishing community has become a place of "human suffering, brought on by malnutrition, thirst, and disease."⁴ People involved in the fishing industry have lost their livelihood as the fish have disappeared along with the Sea.⁵ Farmers have also been adversely affected by the disaster. The pollution left in the dried up sea was carried by the wind to nearby farms, contaminating the soil.⁶ As a result, farmers had "to compensate for [the] declining output by putting more pesticides and fertilizers into the soil—poisoning it even more."⁷ The farmers were also adversely affected by the drastic climate change created by the sea's disappearance. Without the Aral Sea to moderate the climate, the region has suffered from "shorter dryer summers and longer colder winters."⁸

1. 1990: *Aral Sea Is 'Worlds Worst Disaster,'* BBC NEWS, Oct. 22, 1990, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/22/newsid_3756000/3756134.stm (stating that the Royal Geographical Society has found evidence that the region around the Aral Sea is "the world's worst ecological disaster").

2. *Id.*

3. Stephanie Kriner, *Aral Sea Ecological Disaster Causes Humanitarian Crisis*, AM. RED CROSS, Apr. 10, 2002, <http://www.redcross.org/news/in/asia/020410aral.html>. "Following three decades of harmful farming and irrigation practices to grow cotton during the Soviet era, the lake that former fishing and agricultural communities depended on for survival lost two-thirds of its volume." *Id.*; see also Nicole Jones, *South Aral Sea 'Gone in 15 Years,'* NEW SCIENTIST, July 21, 2003, <http://www.newscientist.com/article.ns?id=dn3947>. The Aral Sea was once the size of Ireland, but is now a quarter of that size, and broken into two separate sections: the North Sea and the South Sea. Jones, *supra*.

4. Kriner, *supra* note 3.

5. *Id.* (stating that thousands of people involved in the fishing industry lost their jobs as the fish have virtually disappeared from what remains of the Sea).

6. *Id.* The pollution, which was previously diluted by the water in the sea, was concentrated on the dry land left behind. See Ali Okda, *Aral Sea Region: Kyzylorda Oblast, Kazakhstan*, <http://nailaokda.8m.com/aral.html> (last visited Oct. 11, 2008). This contaminated soil was then dispersed by winds to regional farms, devastating the agricultural industry. *Id.*

7. Kriner, *supra* note 3.

8. 1990: *Aral Sea Is 'Worlds Worst Disaster,'* *supra* note 1; Kriner, *supra* note 3. The region needs 200 frost free days in order to harvest cotton, but after the disappearance of the Aral Sea, the region only enjoys 170 such days. Kriner, *supra* note 3. This demonstrates the lack of

Perhaps the most disturbing aspect of the crisis has been its effect on the health of the region's people. "The area suffers from an unprecedented increase in rates of throat and lung cancers, kidney disease, hepatitis, asthma, bronchitis, gastro-intestinal ailments, infant mortality, birth defects, anemia and tuberculosis" Furthermore, the infant mortality rate is thirty times higher than before because of the increased contamination in the drinking water.¹⁰

As the federal and state legislatures seek a solution to the impending water crisis in the U.S., they must not forget the lessons learned from the Aral Sea disaster. There is little doubt to where the federal legislature will look when the water crisis reaches its boiling point: to the Great Lakes, the source of 95% of the freshwater in the United States.¹¹ Although this *sharing of the wealth* may seem like a logical answer to many *thirsty* citizens residing in the southwest¹² and southeast,¹³ the decision to divert

planning that went into the decision to divert the two major tributaries of the Aral Sea. The diversions were originally meant to boost the cotton production, but have instead harmed the industry by altering the weather. In addition to shortening the growing season, agriculture has suffered due to the decrease in rainfall. *See id.*

9. Kriner, *supra* note 3. "Death from chronic gastritis and kidney disease has increased by 15%, heart disease has doubled and incidences of kidney disease has risen 15 fold." 1990: *Aral Sea Is 'Worlds Worst Disaster,' supra* note 1. In addition, "[c]ancer has increased tenfold and death from TB is 21 times higher than it was in the 1960's, . . . [prior to the diversions]." *Id.*

10. Paul Welsh, *The Aral Sea Tragedy*, BBC NEWS, Mar. 16, 2000, <http://news.bbc.co.uk/2/hi/asia-pacific/678898.stm>.

11. Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 414 (2006). "[T]he Great Lakes are the world's largest surface freshwater system, containing ninety-five percent of the fresh surface water in the United States and twenty percent of the world's supply." *Id.*

12. One example of the desperate conditions in the southwestern United States is the recent depletion of the Colorado River, which supplies thirty million people and seven states with water. Robert Kunzig, *Drying of the West: The American West Was Won by Water Management. What Happens When There's No Water Left to Manage?*, NAT'L GEOGRAPHIC, Feb. 2008, at 96. Scientists have studied the annual variations in Colorado River's flow as far back as the Middle Ages and have determined that the population boom of the Southwest was made possible by an unusually wet period during the twentieth century, found to be the wettest century in the last millennium. *Id.* at 96-97. Now, the population boom, which depended on this phenomenon, will need to look for answers as this wet period has ended. *See id.* at 97. This wet period has given people the illusion that the amount of precipitation that the region enjoyed over the past century is normal and will continue. *See id.* at 98. The region received a wake-up call in 2002, when the Southwest had suffered its third consecutive dry year, and its driest year on record. *Id.* at 96. This caused the flow of the Colorado River to fall "to a quarter of its long term average." *Id.* These dry spells appear to be a long term problem for the region, as scientists have projected continual drought conditions that will cause the River to fall to about half its current flow by the middle of the 21st century. Kunzig, *supra*, at 97. The fact that the Southwest is entering a naturally drier period is predicted to be exacerbated by global warming. *Id.* The world's deserts are found at around thirty degrees north and south of the equator due to the effect of an "atmospheric circulation pattern called Hadley Cells." *Id.* Under this pattern, moisture rises at

large amounts of water outside of the Great Lakes basin would most likely sentence the region to a fate similar to the Aral Sea. The Great Lakes are a non-renewable resource with an average of less than one percent of the water being renewed annually by precipitation, surface water runoff, and inflow from ground water sources.¹⁴

Protecting the Great Lakes from harmful diversions involves a complex balancing of international interests between the United States and Canada and the regional interests of the eight Great Lakes states and two Canadian provinces. Diversions of Great Lakes water outside of its basin¹⁵ are currently governed by four agreements: the Boundary Waters Treaty of 1909, the original Great Lakes Basin Compact, the Great Lakes Charter of 1985, and the Water Resources Development Act of 1986.¹⁶ As the threat

the equator, is released as down pours in the tropical regions, and then the resulting dry air sucks up the moisture at around thirty degrees latitude. *Id.* Currently, the Southwestern United States is on the northern edge of this region, and global warming is expected to expand this region even farther north. *Id.* This will result in the southwestern United States going further into drought than what would naturally occur. *See id.*

13. The Southeast has generally been considered a region that enjoys a large amount of rain. Recently, this characteristic has changed, as the water supply is becoming inadequate for the region's population. *See Tresa Baldes, The Environment: With Droughts and Population Booms, States Are Battling in Court over Rights to Water*, DAILY BUS. REV., Mar. 27, 2008, at A10. The desperation in this region is demonstrated by the amount of litigation between the states over water rights. *Id.* Florida, Georgia, and Alabama are in litigation over access to two river basins the states share. *Id.* Mississippi sued the city of Memphis, Tennessee, alleging that the city is stealing about twenty-five million gallons of Mississippi's water every day. *Id.* South Carolina filed suit against North Carolina claiming that it is withdrawing too much water from a river shared by the two states. *Id.* The city of Atlanta, Georgia, is involved in eight lawsuits with Florida and Alabama over Lake Lanier, which flows through all three states and provides the greater Atlanta region with water. *Id.* This court battle is crucial for Atlanta because as the Lake continues to decline in volume it stares "down the prospect of literally running out of drinking water." Dan Egan, *Great Lakes, Great Peril/Swelling Southeast Has Unquenchable Thirst; Options Running Dry; with Thirsty Neighbors, the Great Lakes Region Can Learn from Atlanta's Desperate Attempts to Find a New Supply of Drinking Water*, MILWAUKEE J. SENTINEL, Mar. 23, 2008, at A1. These lawsuits are indicative of the fact that, like the Southwest, this region has an inadequate water supply for its population. It is only a matter of time before these states band together for the common goal of exploiting the water rich Great Lakes.

14. Chris A. Shafer, *Great Lakes Diversions Revisited: Legal Constraints and Opportunities for State Regulation*, 17 T.M. COOLEY L. REV. 461, 464–65 (2000).

15. Great Lakes—St. Lawrence River Basin Water Resources Compact, § 1.2, Dec. 13, 2005,

http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf [hereinafter New Compact] (defining the term *Basin* or *Great Lakes Basin* as "the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivières, Québec within the jurisdiction of the Parties").

16. Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 [hereinafter Boundary Waters Treaty]; Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968) [hereinafter Original Compact]; GREAT LAKES CHARTER: PRINCIPLES FOR THE MANAGEMENT

of water diversion outside of the basin becomes increasingly imminent, the Great Lakes states and provinces have realized that these four laws provide inadequate protection over their precious resource.¹⁷ In response to this concern, governors of the eight Great Lakes states signed the Great Lakes—St. Lawrence River Basin Water Resource Compact (the New Compact) in December 2005.¹⁸ This New Compact, which was the result of five years of negotiations and compromise between the eight states and two provinces,¹⁹ is designed to strengthen the current protections for the lakes and to “prevent water diversions to thirsty areas of the country or abroad.”²⁰ In order to accomplish this goal, the New Compact prohibits any *New or Increased Diversions* outside of the Great Lakes Basin, which is defined by the watershed area where the water would drain back into its Great Lakes source.²¹ This general prohibition has many exceptions for communities just outside of the basin; these exceptions will later be

OF GREAT LAKES WATER RESOURCE 1 (1985),

<http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf> [hereinafter GREAT LAKES CHARTER]; Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (codified as amended at 33 U.S.C. §§ 2201–2348 (2000)); see also discussion *infra* Part II regarding the four existing laws and agreements protecting the Great Lakes.

17. See Dan Egan, *Great Lakes Compact Hits Rough Waters: 2 Say State Gets a Raw Deal; Backers Fear Threat to Resource*, MILWAUKEE J. SENTINEL, Feb. 17, 2008, at A1. “[T]he existing rules governing diversions are considered by most to be too weak and arbitrary to withstand a court challenge—and such a challenge could lead to an opening of the Great Lakes floodgates. That’s why passing the New Compact is so important to so many people.” *Id.*

18. New Compact, *supra* note 15, § 1; see also Egan, *supra* note 17, at A1 (describing the compact as a “bipartisan effort to craft new rules to block thirsty outsiders from someday tapping into and potentially draining the world’s largest freshwater system”). The eight Great Lakes states include: Indiana, Illinois, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. Press Release, David Naftzger, Executive Director, Council of Great Lakes Governors, President Bush Signs Great Lakes Compact: Governors Applaud Historic Action to Protect the Lakes (Oct. 3, 2008),

<http://www.cglg.org/projects/water/docs/PressReleasePresidentSignsCompact10-3-08.pdf>. For the purposes of this article, the use of the words *state(s)* or *party state(s)* refer to the eight Great Lakes States. Any use of these words referring to a different state will be specified. Also, any use of the word *provinces* will refer to the two provinces of Ontario and Quebec.

19. See Egan, *supra* note 17, at A1. David Naftzger, executive director of the Council of Great Lakes Governors, highlighted the amount of effort put into forming the compact. *Id.* He explained how many compromises were made between various interests over the five year process in order to reach the current form of the compact, which has gained overwhelming support. *Id.* In creating the compact, the drafters heard input from business leaders, environmentalists, and political leaders from both parties. *Id.* They also held more than 60 public meetings and considered over 13,000 public comments. *Id.*

20. Julie A. Varughese, *State Approves Water Compact; New York Lawmakers Pass Legislation on Great Lakes Agreement*, ALB. TIMES UNION, Feb. 14, 2008, at A3.

21. New Compact, *supra* note 15, §§ 1.2, 4.8. “All New or Increased Diversions are prohibited, except as provided for in this article.” *Id.* § 4.8. A “basin” is defined as “the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivieres, Quebec.” *Id.* § 1.2.

discussed in detail.²² Despite hitting a seemingly insurmountable hurdle in Wisconsin and Ohio,²³ the New Compact was finally enacted by all eight Great Lakes states in July 2008, which allowed the New Compact forward.²⁴ In order to be binding, the New Compact must be approved by both houses of the United States legislature, and signed into law by the President.²⁵ Amazingly, it took the Senate merely nine days to approve the New Compact.²⁶ Proponents of the New Compact hope that the House of Representatives and President move just as quickly in finalizing the New Compact.²⁷ Such approval from the federal government would essentially convert the New Compact into federal law.²⁸ In addition to the New Compact, the two Canadian provinces, which are unable to make an agreement with the states under the supremacy clause, have passed separate but similar legislation.²⁹

This article seeks to establish the importance of providing permanent maximum protection to the Great Lakes from future diversions outside of the basin in the face of increasing water shortages.³⁰ It will

22. *Id.* § 4.9 (providing the exceptions to the general rule prohibiting *New or Increased Diversions*).

23. Dan Egan, *Action on Protective Laws Ever Likelier Congress, President, Candidates Pledge Support for Compact*, MILWAUKEE J. SENTINEL, Aug. 17, 2008. In the winter of 2008, prominent members of the Wisconsin Assembly from communities just outside of the watershed expressed their concern over the provision in the Compact requiring unanimous consent from the other states before the outside community can tap into the nearby water from Lake Michigan. See John Flesher, *Proposed Changes Could Unravel Great Lakes Protection Deal*, DET. FREE PRESS, Feb. 15, 2008. In Ohio, the New Compact was stalled by concerns over individual property rights. See *id.* This resistance quickly collapsed under the pressure of “swelling public support for Great Lakes protection.” Egan, *supra* note 23.

24. *Id.*

25. U.S. CONST. art. I, § 10, cl. 3. The clause states, “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State” *Id.* In *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893), the Court interpreted the constitutional clause requiring congressional consent of interstate agreements to apply to an interstate agreement that would amount to an “infringement on the rights of the national government.” It is clear that such approval is needed for the Great Lakes Compact, as it concerns the regulation of interstate commerce. See *id.*

26. Egan, *supra* note 23.

27. See *id.*

28. See *Cuyler v. Adams*, 449 U.S. 433, 438, 442 (1981).

29. Dan Egan, *Great Lakes Deal Announced; Doyle to Call for Special Session to Adopt Legislative Compromise on Water Use*, MILWAUKEE J. SENTINEL, Apr. 10, 2008, at A1.

30. Ron Seely, *Great Lakes Compact Hits Snag in State*, WIS. ST. J., Sept. 11, 2007, at A1 (discussing the importance of the compact in the face of growing scarcity of fresh water, particularly in western states, and the fact that the Great Lakes are already experiencing record low water levels). Wisconsin Governor, Jim Doyle has also stressed the imminent threat to the Great Lakes, stating that “as we speak, Georgia is trying to take some of Tennessee’s land to get a little bit of the Tennessee River over water fights, and the water fights that we have seen going on in the Southwest . . . there is no doubt people already have, and will, look to the Great Lakes for

examine the shortcomings of the four governing laws currently in place to protect the Great Lakes and demonstrate the need to make the New Compact binding as quickly as possible in order to compensate for these shortcomings. Part I of this article will discuss the geography of the Great Lakes region in order to put the matter in its context. Part II will examine the content and problems with the current legislation aimed at protecting the Great Lakes from large diversions. It will emphasize the weakness of these current laws and the urgent need to finalize the New Compact. Part III will discuss recent attempts and discussion of Great Lakes diversions, which have sparked the creation of the New Compact. Part III will also examine the content and current status of the New Compact. It will discuss the recent opposition to the New Compact in early 2008, which nearly destroyed the New Compact's chances for success, and how this opposition was completely overcome by summer 2008. Part III will distinguish the New Compact from current legislation in an attempt to explain why the New Compact will offer greater protection than the existing framework. This article will conclude with a proposal to protect the Great Lakes through swift enactment by the House of Representatives, followed by approval from the President. If the New Compact is not signed into federal law, it will not be binding, and the region will suffer from weak protection under the current laws. Unfortunately, finalizing the New Compact will not necessarily provide permanent protection to the Great Lakes region because a subsequent Congress could revoke its acceptance through retraction or passing inconsistent law.³¹ As fresh water becomes increasingly scarce and the Great Lakes states lose congressional delegates to the drier western states after the 2010 census, such future revocation is possible.³² It is important that this tempting short term solution does not occur.

Finally, the conclusion will propose an amendment to the Boundary Waters Treaty of 1909 between the United States and Canada. This Treaty is greatly flawed and must give way to a more comprehensive version. The scope of the amended Treaty should include the rivers, tributaries, and ground water of the Great Lakes. It should also include Lake Michigan, which even though it does not border Canada, is connected to Lakes which do. The vague language of the Treaty should also be amended to be more specific and incorporate many of the protections promulgated in the New Compact. Finally, the amended Treaty must expand the International Joint

that source of water." Egan, *supra* note 29, at A1.

31. Notes, *Legal Problems Relating to Interstate Compacts*, 23 IOWA L. REV. 618, 628–29 (1938).

32. See Flesher, *supra* note 23.

Commission's (IJC[’s]) jurisdiction to hear disputes between the two countries.

I. GEOGRAPHY OF THE GREAT LAKES: ABUNDANCE OF WATER BUT STILL VULNERABLE

In order to put the discussion in its context, it is important to understand the geography of the Great Lakes. The five Great Lakes (Lake Huron, Lake Ontario, Lake Michigan, Lake Erie, and Lake Superior) make up the largest freshwater system in the world, containing 20% of the world's freshwater and 95% of the surface water in the United States.³³ The Great Lakes Basin covers 95,000 square miles³⁴ and contains 5,440 cubic miles of fresh surface water and 1,000 cubic miles of stored water.³⁵ The Great Lakes include the states of Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, New York, and Pennsylvania.³⁶ They also includes the Canadian provinces of Ontario and Quebec.³⁷ The eight states are home to about eighty million people and the two provinces have a population of eighteen million people.³⁸ About forty million of this total population relies on the Great Lakes for “consumption, recreation, and industrial purposes.”³⁹ The Great Lakes also “support the region’s manufacturing, tourism, and agricultural industries, valued collectively at \$438 billion (U.S.) per year.”⁴⁰

These statistics show that the vast amount of water in the Great Lakes region is greatly disproportionate to the region’s population compared with the United States and the world as a whole. The uneven distribution of this important resource in the United States will continue to become more pronounced as the population of the Great Lakes states continues to be stagnant, while the dry regions of the southern and western portions of the country enjoy a population boom. The 2000 census demonstrated that between 1990 and 2000 the eight Great Lakes states only increased its population by an average of 7.6%.⁴¹ However, during this

33. Hall, *supra* note 11, at 414.

34. Shafer, *supra* note 14, at 464.

35. Hall, *supra* note 11, at 414.

36. *Id.* at 415.

37. *Id.* at 417.

38. Thomas Agnello, *Diversionary Tactics: Little Traverse Bay Bands of Odawa Indians v. Great Springs Waters of America, Inc.: The Feared Inadequacy of Current Great Lakes Water Diversion Enforcement Mechanisms, and the Great Lakes Annex*, 25 WIS. INT’L. L.J. 135, 137 (2007).

39. *Id.* at 137.

40. Hall, *supra* note 11, at 415.

41. ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND

same period, six states in the dry southwest increased their populations by an average of nearly 35%.⁴² This is indicative that the pressure from the booming southern and western states will increase as its populations skyrocket and its water sources disappear.

Although it may seem, with its vast amount of fresh water, that the Great Lakes states can afford to share a portion of its supply with less fortunate regions, the lakes remain vulnerable. As previously stated, the Great Lakes are a non-renewable resource with an average of only less than one percent of the water being renewed annually by precipitation, surface water runoff, and inflow from ground water sources.⁴³ In addition, many of the Great Lakes are already at near record low levels,⁴⁴ and are already being burdened with four major and several minor diversions.⁴⁵ It is important that the nation recognize this vulnerability and act quickly to protect its precious natural resource.

II. THE EVOLUTION OF LEGISLATION PROTECTING THE GREAT LAKES FROM DIVERSIONS OUTSIDE OF ITS BASIN

A. THE BOUNDARY WATERS TREATY OF 1909

The Boundary Waters Treaty of 1909, between the United States and Great Britain (representing Canada), was the first major legislation regulating water diversions, and is still in effect today.⁴⁶ The goal of the Treaty was to resolve and prevent disputes between the two countries regarding water quality and the quantity of the boundary waters.⁴⁷ The

MATERIALS 3 (3d ed. 2005). This number was reached by calculating the mean average of the percentage change in the populations of the eight Great Lakes states. The percentage of change in the populations for each state is as follows: Minnesota: 12.4%, Indiana: 9.7%, Wisconsin: 9.6%, Illinois: 8.6%, Michigan: 6.9%, New York: 5.5%, Ohio: 4.7%, and Pennsylvania: 3.4%. *Id.*

42. *Id.* This number was reached by calculating the mean average of the percentage change in the populations of six states in the southern and western regions of the United States. The percentage change in the populations for each state is as follows: Nevada: 66.3%, Arizona: 40%, Colorado: 30.6%, Utah: 29.6%, Texas: 22.8%, and New Mexico: 20.1%. *Id.*

43. Shafer, *supra* note 14, at 464–65.

44. *Declining Water Levels in the Great Lakes May Signal Global Warming*, SCI. DAILY, Jan. 1, 2008, <http://www.sciencedaily.com/releases/2007/12/071230093533.htm> (asserting that the Great Lakes water levels are at near record lows). Researchers in Michigan, who have examined data of water levels of the Great Lakes for over a century, concluded that the shrinking of the Great Lakes may be due to global warming. *Id.* The data, showing a gradual decline in water levels since 1973, is consistent with the projections on climate change. *Id.*

45. Shafer, *supra* note 14, at 465.

46. Agnello, *supra* note 38, at 143; see *Boundary Waters Treaty*, *supra* note 16.

47. THE GREAT LAKES - ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT: IMPLEMENTATION HANDBOOK FOR NEW YORK STATE 11 (2007), available at

Treaty established an International Joint Commission (IJC) to arbitrate “disputes involving diversions and construction projects that affect the level and flow of boundary waters”⁴⁸ The Treaty prohibits additional uses, obstructions, or diversions, “whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line” without the approval of the IJC.⁴⁹ The IJC is made up of six members, three appointed by the President of the United States, and the other three by the Canadian government.⁵⁰ In making its decision regarding a dispute or application for IJC approval of a project, the IJC must hold a public hearing where all interested parties have an opportunity to be heard.⁵¹

Although the Treaty symbolizes an important desire for the two countries to work together in order to protect its common resource, in reality, the Treaty’s many flaws provide little protection over diversions outside of the basin. This article will examine three principle shortcomings of the Treaty.

The first flaw in the Treaty is the limited definition of the boundary waters. The Treaty defines the boundary waters as:

[T]he waters from main shore to main shore of the lakes and rivers and connecting waterways . . . along which the international boundary between the United States and . . . Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.⁵²

This definition only includes four of the five Great Lakes. Because Lake Michigan lies entirely within the United States, it is not within the definition of the *boundary waters*; therefore, the lake is not governed by the Treaty.⁵³ However, because the Great Lakes system is ultimately connected, any diversion from Lake Michigan would impact Lakes that border Canada.⁵⁴ Another problem with this definition is that it excludes

<http://www.columbia.edu/cu/mpaenvironment/pages/projects/fall2007/GreatLakesFinalReport.pdf>.

48. *Id.*; see Boundary Waters Treaty, *supra* note 16, arts. VIII, IX, X.

49. Boundary Waters Treaty, *supra* note 16, art. III. Uses, obstructions, and diversions already permitted or provided for in a special agreement between the countries are excluded from the requirement to seek approval from the IJC. *Id.* art. III.

50. *Id.* art. VII.

51. *Id.* art. IX.

52. *Id.* preliminary art.

53. *Id.*; Hall, *supra* note 11, at 417.

54. Various channels in the Great Lakes connect all five Great Lakes to each other, and ultimately, the Atlantic Ocean. See Great Lakes Information Network, <http://www.great->

the hundreds of tributary waters.⁵⁵ Diversions from such water would obviously affect the water level of the Great Lakes, and should be included within the definition. The final flaw in the definition of the *boundary waters* is that it does not include ground water of the Great Lakes, which contains 15% of the total water in the system.⁵⁶ In order to fully protect the Great Lakes, the United States and Canada should amend this Treaty to regulate diversions from all five lakes, including any tributary and groundwater.

The second main problem with the Treaty is that it fails to clearly define the type of action that triggers the protection from the Treaty. As previously stated, the Treaty's protection is triggered by uses, obstructions, or diversions that affect the natural level or flow of any boundary water.⁵⁷ This language does not create a clear message as to which diversions are acceptable. There are many factors, such as existing diversions, that contribute to a lake's water flow or level; therefore, determining a single diversion's effect on any lake is very difficult. A single hearing could be dedicated to this issue alone. Moreover, a diversion would have to be massive in order to, by itself, create a measurable decrease in the water level or a noticeable change in the flow of water.⁵⁸ This opens up the possibility of large diversions going unregulated by the commission. The new Treaty must clarify the type of use, obstruction, or diversion that triggers review by the commission.

The final flaw in the Boundary Waters Treaty of 1909 is that the IJC is greatly limited in its jurisdiction over disputes due to a provision in the

lakes.net/lakes/#overview. Development, such as dams and manmade canals, allow one to navigate from one Great Lake to another without interruption. *See id.* The St. Mary's River connects Lake Superior to Lake Huron. *See id.* A system of locks, called the Soo Locks, allow vessels to navigate the river and move between the two lakes. *See id.* This is necessary because of a sudden drop in the water level that would make navigation impossible for most vessels. *See id.* Lake Huron and Lake Michigan converge at the gap that divides the Lower and Upper Peninsulas of the state of Michigan. *See id.* Lake Huron and Lake Erie are then linked by the St. Claire and Detroit rivers. *See* Great Lakes Information Network, *supra* note 54. The Niagara River then connects Lake Erie with Lake Ontario. *See id.* Navigation is made possible through this channel by a man-made canal, which provides a detour around Niagara Falls. *See id.* The water then continues to flow through the St. Lawrence River, until it connects to the Atlantic Ocean. *See id.*

55. Boundary Waters Treaty, *supra* note 16, preliminary art.; Hall, *supra* note 11, at 417.

56. Hall, *supra* note 11, at 431 (citing N.G. Grannemann et al., The Importance of Ground Water in the Great Lakes Region 1 (U.S. Geological Survey Water Resources Investigations Report 00-4008 (2000))); Boundary Waters Treaty, *supra* note 16, preliminary art.

57. Boundary Waters Treaty, *supra* note 16, art. III.

58. Hall, *supra* note 11, at 417 (describing how the size of the Great Lakes creates a situation where it would take a massive diversion to have any measurable effect on the size or flow of the Great Lakes).

Treaty that requires consent from both nations in order for the IJC to be granted authority over a claim.⁵⁹ For example, if Canada desires for the IJC to settle a dispute, the United States Senate must give its consent for this to occur.⁶⁰ This provision greatly weakens the IJC's effectiveness, as either country can withhold consent when it feels that the commission will not rule in that country's favor. Since its inception, the IJC has served more of an advisory function. While the IJC has been asked to provide many non-binding reports, it has never, in its nearly 100 year history, been required to provide a binding arbitration.⁶¹ The amended Treaty should strengthen the IJC's authority by granting it jurisdiction over all disputes between the two parties concerning the quality and quantity of any of the boundary waters, and not just disputes that are convenient for both countries.

The Boundary Waters Treaty of 1909 was an important first step in protecting the Great Lakes at an international level. However, with many changes in the global market over the past 100 years, an amended Treaty is long overdue. As the global water supply continues to disappear, both countries will likely attempt to take advantage of the premium cost that water will demand. If this does occur, the present Treaty will be inadequate to prevent the two countries from exploiting this resource and will cause future detriment to the region.

B. THE ORIGINAL GREAT LAKES BASIN COMPACT

There is an existing Great Lakes Basin compact (the Original Compact) that has been ratified by Congress and, therefore, is binding.⁶² Negotiations for this Original Compact began in the 1940's; however, it was not signed by all eight Great Lakes states until 1963, and not approved

59. Boundary Waters Treaty, *supra* note 16, art. X. Any disputes may be referred for decision by the IJC with consent from both parties. *Id.* For the U.S. this requires the consent of the senate, and for Canada, the consent of the Governor of General Counsel. *Id.* The IJC is to hold a hearing regarding the dispute and a decision will be rendered by a majority. *Id.* If the IJC is evenly split, or unable to render a decision, the commissioners are to "make a joint report to both governments, or separate reports to their respective governments, showing the different conclusions arrived at with regard to the matters or questions referred." *Id.* A final decision will then be reached by a third party, called an umpire, who was chosen under procedures set forth in the Hague Convention. *Id.*

60. Boundary Waters Treaty, *supra* note 16, art. X. In order for Canada to bring a dispute to the commission, it must have the consent of a two-thirds majority of the senate. Hall, *supra* note 11, at 418.

61. Keith R. Fisher, *The Great Lakes-St. Lawrence River Basin Compact and Agreement: International Law & Policy Crossroads*, 2006 MICH. ST. L. REV. (SPECIAL ISSUE) 1085, 1089 (2006).

62. Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968).

by Congress until 1968.⁶³ Much like the New Compact, the Original Compact provides for a commission comprised of representatives from the eight member states.⁶⁴ However, unlike the New Compact, the Original Compact only grants the commission the authority to gather data, conduct research, and make non-binding recommendations regarding policy surrounding the Great Lakes.⁶⁵ This purely advisory function, much like the IJC created through the Boundary Waters Treaty of 1909, does not provide the authority needed to protect the Great Lakes from out of basin withdrawals. If the New Compact is finalized, it would likely supersede this inadequate Original Compact, and give the new commission the authority to make binding decisions.⁶⁶ This ability to make binding decisions is crucial to the New Compact's effectiveness.

While the U.S. Congress ratified the Original Compact in 1968, its approval was limited to certain provisions.⁶⁷ For example, the states drafted the Original Compact to include the two Canadian provinces and to allow the states the ability to make recommendations to Congress regarding Great Lakes foreign policy; however, Congress refused to consent to these provisions, and they were eliminated.⁶⁸ It is important for the House of Representatives and the President in finalizing the New Compact to recognize the years of effort involved in forming the New Compact and not to alter essential provisions, as it did in ratifying the Original Compact. Each provision of the New Compact was carefully drafted; thus, any alteration could frustrate the purpose of the New Compact.

C. GREAT LAKES CHARTER OF 1985

The Great Lakes Charter of 1985 (the Charter) is a non-binding

63. Fisher, *supra* note 61, at 1090.

64. Art. IV, 82 Stat. at 415.

65. Art. VI, 82 Stat. at 417. The Original Compact provides for recommendations regarding research and programs and allows the commission to "[r]ecommend uniform . . . laws, ordinances, or regulations relating to the development, use and conservation of the Basin's water resources . . ." *Id.* The compact made clear that the commission was completely advisory in nature by including a provision stating that "no action of the commission shall have the force of law in, or be binding upon, any party state." Art. VI, 82 Stat. at 418.

66. Fisher, *supra* note 61, at 1090 (stating that "[the] advisory, recommendatory function [of the commission] will likely be superseded if the [New] Compact is ratified by Congress"); see also Hall, *supra* note 11, at 423-24 (stating how the New Compact would make the original compact unnecessary because the functions of the committee would overlap with the New Compact going further).

67. Art. IX, 82 Stat. at 418-19 (providing that the consent does not extend to the provision granting Ontario and Quebec the ability to become parties to the compact or the provisions allowing the member states to recommend international action between Canada and the U.S.).

68. *Id.*; Fisher, *supra* note 61, at 1090.

agreement by the eight Great Lakes states and two Canadian provinces to manage and regulate “new or increased consumptive uses or diversions” beyond a certain threshold volume.⁶⁹ The Charter first provides that each state will collect and maintain data regarding the location, type, and quantities of water use, diversion, and consumptive use, and information regarding projections of current and future needs.⁷⁰ The states and provinces are responsible for working together to create a system of accomplishing this objective.⁷¹ The Charter also creates the Water Resources Management Committee (WRMC), which is composed of members appointed by the governors and premiers of each state and province.⁷² The WRMC must manage and facilitate the exchange of data and implement the provisions of the Charter.⁷³

The proper procedure under the Charter depends on the volume of the new or increased consumptive use or diversion measured in gallons per day.⁷⁴ There are three threshold levels of volume that trigger different responsibilities.⁷⁵ The main provision of the charter prohibits the issuance of a permit for any new or increased diversion or consumptive use averaging over 5,000,000 gallons per day in any thirty-day period without notifying and consulting with all parties to the Charter.⁷⁶ When a state or province receives an application for a permit to conduct such a diversion or consumptive use, the permitting state must notify the governors and premiers of all parties and the IJC.⁷⁷ The permitting state must consider any feedback regarding the proposed action before rendering its decision.⁷⁸ Any party may object to the proposed diversion or consumptive use, which will trigger a consultation process aimed at reconciling the various interests.⁷⁹ The permitting party makes the ultimate decision and must provide notice of its decision to the other member states.⁸⁰ A second main provision of the Charter provides that the permitting state must gather and report accurate information regarding any new or increased diversion or

69. Hall, *supra* note 11, at 424; see GREAT LAKES CHARTER, *supra* note 16, at 1.

70. GREAT LAKES CHARTER, *supra* note 16, at 3.

71. *See id.*

72. *See id.*

73. *Id.*

74. *See id.* at 4.

75. *See id.* at 6. The three threshold levels are 100,000 gallons, 2,000,000 gallons, and 5,000,000 gallons. See GREAT LAKES CHARTER, *supra* note 16, at 4–6.

76. *Id.* at 4; see also Hall, *supra* note 11, at 425; Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., 203 F. Supp. 2d 853, 858 (W.D. Mich. 2002).

77. GREAT LAKES CHARTER, *supra* note 16, at 4; Hall, *supra* note 11, at 425.

78. GREAT LAKES CHARTER, *supra* note 16, at 4; Hall, *supra* note 11, at 425.

79. GREAT LAKES CHARTER, *supra* note 16, at 4; Hall, *supra* note 11, at 425.

80. GREAT LAKES CHARTER, *supra* note 16, at 4.

consumptive use averaging over 100,000 gallons per day in any thirty-day period.⁸¹ The final provision of the Charter requires a permitting state to manage and regulate any new or increased consumptive use or withdrawal in excess of 2,000,000 gallons per day average over any thirty-day period.⁸²

The Charter has often been referred to as “a handshake agreement” because of its good faith, non-binding nature.⁸³ In creating the Charter, the legislature attempted to provide an incentive for the parties to gather and share important information and to provide an open forum for the parties to discuss and compromise on important actions. However, the lack of enforcement, mainly the result of the parties’ failure to obtain congressional approval, has frustrated the Charter’s purpose. This is demonstrated by the lack of compliance with the managing and regulating provisions, and the failure by the parties to maintain updated information, as required by the Charter.⁸⁴ Furthermore, even if all parties chose to comply with the Charter, the notification and consultation requirements would not apply to any consumptive use or diversion that falls short of the high threshold average of 5,000,000 gallons per day. This would leave a large amount of water unprotected.

D. WATER RESOURCES DEVELOPMENT ACT OF 1986

Congress passed the Water Resources Development Act (WRDA) in 1986,⁸⁵ which appeared to provide extensive authority for the Great Lakes region to regulate diversions outside the Great Lakes basin. The WRDA states that “[n]o water shall be diverted or exported from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lake basin unless such diversion or export is approved by the Governor of each of the Great Lakes States.”⁸⁶ The WRDA goes further, requiring the same

81. *Id.* at 6; *see also* Fisher, *supra* note 61, at 1090; Hall *supra* note 11, at 424, 426.

82. GREAT LAKES CHARTER, *supra* note 16, at 6.

83. *E.g.*, Hall, *supra* note 11, at 424 (referring to the compact as the “Unfulfilled Promise of a Handshake Agreement”); *see, e.g.*, Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., 203 F. Supp. 2d 853, 858 (W.D. Mich. 2002) (calling the Charter a “gentlemen’s agreement” between the Great Lakes states and provinces).

84. *See* Hall, *supra* note 11, at 425. “This good faith cooperative approach has proved to be an insufficient incentive, as several states (notably Michigan) have failed to comply with their management and regulatory commitment.” *Id.* Furthermore, “poor compliance and underfunded reporting programs have resulted in a continued lack of data and information regarding Great Lakes water withdrawals.” *Id.* at 426.

85. Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (codified as amended at 33 U.S.C. §§ 2201–2348 (2000)).

86. 42 U.S.C. § 1962d-20(d) (2000).

unanimous approval in order to even conduct a study on the possibility of such a diversion.⁸⁷ At first glance, these provisions seem to provide a protection similar to the New Compact, which also prohibits any diversions outside of the Great Lakes basin without the unanimous consent of the governors of all Great Lakes states.⁸⁸ The WRDA, also like the New Compact, does not require a certain threshold volume in order for the regulation to be triggered.⁸⁹ Such seemingly broad language may cause some to feel overly confident in the protection that the WRDA offers. Despite the similarities between the WRDA and the New Compact, a closer inspection reveals many important differences. For example, while the New Compact includes both diversions and consumptive uses, the WRDA is limited to diversions.⁹⁰ Furthermore, the WRDA only applies to surface water, whereas the New Compact covers both surface water and ground water.⁹¹ The inclusion of both surface water and ground water is crucial because, as stated in Part II of this article, ground water makes up 15% of the total water in the Great Lakes system.⁹²

In addition to the narrow scope of protection offered by the WRDA, the statute was further weakened by a United States District Court's decision in *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of America, Inc.*⁹³ In *Little Traverse Bay*, the Michigan Department of Environmental Quality granted a license to Great Spring Waters of America, Inc., a bottled water company, permitting it to pump four hundred gallons per minute from one of Lake Michigan's tributaries to its bottling plant.⁹⁴ There was evidence that a portion of the water was to be sold outside of the Great Lakes states.⁹⁵ Michigan Attorney General Jennifer Granholm and United States Senator Carl Levin advised Michigan Governor John Engler that the project fell "within the WRDA proscription

87. § 1962d-20(e).

88. New Compact, *supra* note 15, § 4.8 (stating that "[a]ll New or Increased Diversions are prohibited, except provided for in this Article").

89. *See* § 1962d-20(d) (stating that "[n]o water shall be diverted" outside of the Great Lakes Basin without any mention of quantity); *see* New Compact, *supra* note 15, § 4.8 (also prohibiting any diversion outside of the basin without a numerical limitation).

90. *Compare* § 1962d-20 (making no mention of consumptive uses), *with* New Compact, *supra* note 15, § 4.10 (setting out the procedure for the "management and regulation of new or increased withdrawals and consumptive uses").

91. *Compare* § 1962d-20 (providing no provision for the diversion of ground water), *with* New Compact, *supra* note 15, § 2.1 (defining water as "ground or surface water contained within the basin").

92. Hall, *supra* note 11, at 431 (citing Grannemann et al., *supra* note 56).

93. *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am.*, 203 F. Supp. 2d 853, 853 (W.D. Mich. 2002).

94. *Id.* at 854.

95. *Id.*

against water exportation” and, therefore, would require him to seek the unanimous approval of all governors of the Great Lakes states.⁹⁶ However, Engler felt that seeking approval was unnecessary because he believed that it would not cause a diversion of Great Lakes waters.⁹⁷ As a result, three American Indian nations filed a claim against the bottled water company and Engler seeking an injunction against the project for violation of the WRDA.⁹⁸ The court dismissed the action, stating that the WRDA does not create an express or implied right to a private cause of action.⁹⁹ This lack of a private cause of action is yet another important distinction between the WRDA and the New Compact. Unlike the WRDA, the New Compact allows “[a]ny aggrieved [p]erson” to bring a civil action compelling any person to comply with the new compact.¹⁰⁰ The New Compact goes even further, providing that “Any Person aggrieved by any action taken by the Council [established under the New Compact] shall be entitled to a hearing before the council.”¹⁰¹ Although the term *any aggrieved person* is not defined, the New Compact could be reasonably interpreted to allow for a private cause of action. The ability of a private citizen to enforce the New Compact or to challenge the council’s decisions is an important oversight function, and provides yet another reason to enact the New Compact.

III. THE GREAT LAKES-ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT: THE NEED FOR URGENT ACTION

A. ATTEMPTS AND DISCUSSION OF LARGE DIVERSIONS: CATALYST FOR NEW COMPACT

Recent events have demonstrated the vulnerability of the Great Lakes and sparked the emergence of the New Compact. One such event occurred in 1998, when the Nova Group, a Canadian Company, was granted a permit from the government of Ontario to annually ship 159 million gallons of water from Lake Superior to Asia by tanker.¹⁰² None of

96. *Id.* at 854–55.

97. *Id.* at 855.

98. *Id.* at 853. The three American Indian nations that brought suit were the Little Traverse Bay Bands of Odawa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Little River Band of Ottawa Indians. *Little Traverse Bay Bands*, 203 F. Supp. 2d at 853.

99. *Id.* at 856.

100. New Compact, *supra* note 15, § 7.3(3).

101. *Id.* § 7.3(1).

102. HANDBOOK, *supra* note 47, at 7 (attributing the current push to create the New Compact to the specific event); Shafer, *supra* note 14, at 463–64 (citing to International Joint Commission, Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States 44 (2000) [hereinafter IJC, Final Report]).

the agreements or legislation discussed above had the power to legally stop this event from occurring.¹⁰³ Fortunately for the region, the Canadian government intervened to convince the Nova Group to withdraw their permit.¹⁰⁴ The lack of an enforcement mechanism to stop such a large project served as a wake-up call to anyone concerned with the future of the region. This concern sparked negotiation between the Great Lakes states and the provinces, which culminated in the signing of the New Compact.¹⁰⁵

The imminent need for stronger protection became even clearer after New Mexico's Governor Bill Richardson commented during his presidential campaign to a crowd in Nevada in October 2007.¹⁰⁶ During Richardson's speech, he discussed the nation's current water shortage, stating that "states like Wisconsin were awash in water."¹⁰⁷ Although these statements were not acted on, it once again reminded the Great Lakes region how it is perceived by drier states—as a region that enjoys a disproportionate amount of water. As Great Lakes states are greatly outnumbered, it is easy to see how other states will be able to justify tapping into this water-rich area when the water shortage becomes a crisis. The drier states will see the Great Lakes states as a greedy region that must share its resource during desperate times. However, as demonstrated by the Aral Sea disaster, utilizing Great Lakes water to help mitigate the disaster in the south and southwest may create another disaster in the Midwest. This must be avoided by finalizing and retaining the protections granted by the New Compact.

B. THE FORMATION OF THE NEW COMPACT: YEARS IN THE MAKING

The process of creating the New Compact began in 2001, when the governors of the eight Great Lakes states signed an Annex to the Great Lakes Charter of 1985.¹⁰⁸ This non-binding agreement gave rise to the research and negotiation that would result in the New Compact.¹⁰⁹ The

103. See THE GREAT LAKES - ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT: IMPLEMENTATION HANDBOOK FOR NEW YORK STATE, *supra* note 47, at 7.

104. *Id.*

105. See *id.*

106. Richard Mertens, *States Eye Stricter Curbs on Great Lakes Water: Lake Levels Reached Record Lows Last Year, and the Region Worries that Fast-Growing States and Communities Will Try to Grab Its Water*, CHRISTIAN SCI. MONITOR, Jan. 7, 2008, at 3.

107. *Id.*

108. See THE GREAT LAKES CHARTER ANNEX: A SUPPLEMENTARY AGREEMENT TO THE GREAT LAKES CHARTER 1 (2001), available at <http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf> [hereinafter GREAT LAKES CHARTER ANNEX].

109. See Hall, *supra* note 11, at 432 (describing the Annex as "setting the table for a new

parties to this agreement committed to developing and implementing an interstate compact that would offer greater protection to the region.¹¹⁰ The Annex emphasized the need for diverted water to be returned to its original source, a principle that guided certain provisions of the New Compact.¹¹¹ The Annex also broadened the scope of protection, covering all water withdrawals, not just diversions, and defining water to include both ground and surface water.¹¹² The Annex granted the authority to establish a Water Management Working Group and advisory committee to implement the principles and commitments found in the Annex.¹¹³ This committee released a first draft of the New Compact on July 19, 2004, and afterwards heard and read thousands of public comments.¹¹⁴ Further negotiations and drafts ensued, and eventually the final version of the New Compact was signed by the governors of all eight states on December 13, 2005.¹¹⁵ The states also signed a parallel agreement with the premiers of Ontario and Quebec.¹¹⁶ Although the New Compact will be binding if finalized by the U.S. Congress, the agreement with the Canadian provinces must remain non-binding, as only the federal government can make such an agreement with a foreign country.¹¹⁷ This New Compact took about five years to develop, and “was the result of a lot of compromise between . . . varied and diverse interests.”¹¹⁸ The drafters received “input from business leaders, environmentalists and political leaders from both parties. . . .” They also held “more than 60 public meetings and . . . [received] more than 13,000 public comments.”¹¹⁹

Great Lakes Compact”).

110. See GREAT LAKES CHARTER ANNEX, *supra* note 108, at 2. Directive number two of the Annex states that “[t]he Governors and Premiers agree to immediately prepare a Basin-wide binding agreement(s), such as an interstate compact and such other agreements, protocols or other arrangements between the States and Provinces as may be necessary to create the binding agreement(s) within three years of the effective date of the Annex.” *Id.* This directive created the agreement to develop what is now the New Compact.

111. See *id.* “The new standard shall be based upon the following principles: Preventing or minimizing Basin water loss through return flow and implementation of environmentally sound and economically feasible water conservation measures[.]” *Id.*

112. See *id.* at 3. The annex defines the waters of the Great Lakes Basin to include “the Great Lakes and all streams, rivers, lakes, connecting channels, and other bodies of water, including tributary groundwater, within the Great Lakes Basin.” *Id.* (emphasis added).

113. See Hall *supra* note 11, at 434.

114. See *id.*

115. See New Compact, *supra* note 15; see also Joseph W. Dellapenna, *International Law's Lessons for the Law of the Lakes*, 40 U. MICH. J.L. REFORM 747, 747 (2007).

116. See Dellapenna, *supra* note 115, at 747.

117. See *id.*

118. Egan, *supra* note 17, at A1.

119. *Id.*

C. CONTENT OF NEW COMPACT

The New Compact is a complicated agreement, providing various types and degrees of regulations and management schemes depending on the type, location, and amount of the proposed withdrawal. For example, the degree of regulation will differ depending on whether the transfer of water is inside or outside of the Great Lakes basin.¹²⁰ Transfers entirely outside of the basin will be subject to the strictest regulation and interstate regional review because the water will leave the Great Lakes watershed and, therefore, will not naturally return to its source.¹²¹ Furthermore, water transferred from one Great Lake watershed to another Great Lake watershed will invoke stronger regulation than a transfer within the same watershed, but because it is still within the Great Lakes basin, it will receive less regulation than a transfer completely outside of the basin.¹²² In addition to various regulations on water withdrawals, the New Compact also imposes a general obligation on the party states to collect and share data, to create programs for implementing the New Compact, and to provide certain reports.¹²³ Other main provisions of the New Compact create and set out the powers of a Great Lakes-St. Lawrence River Basin Water Resources Council (the Council), allow for public involvement in matters related to the New Compact, and provide for enforcement of its provisions.¹²⁴ These provisions will be discussed in detail in the following section.

1. The Creation and Authority of the Council

The New Compact sets forth two key provisions creating and empowering a Council comprised of the governors of all eight states.¹²⁵ Each governor has the power to “appoint at least one alternate” to act and

120. Compare *infra* Part III.C.2 (discussing the regulation of withdrawals, which includes transfers of water within the same basin, and is mainly subject only to regulation by the state where a permit for withdrawal is sought, with minimal input required from other states only for large transfers), with *infra* Part III.C.3 (discussing the strict general prohibition on certain transfers either outside of the Great Lakes basin or from one Great Lake basin to another).

121. See *infra* Part III.C.3.b), c) (discussing narrow exceptions for transfers of water entirely outside of the Great Lakes basin); see also New Compact, *supra* note 15, § 1.2 (defining the Great Lakes basin by the extent of its watershed, which is the area where the water will naturally remain within the Great Lakes system, and not be lost to another system).

122. See *supra* notes 120–21 and accompanying text.

123. See *infra* Part III.C.2.

124. See *infra* Part III.C.1 (creating the council and enumerating its powers); *infra* Part III.C.4 (discussing provisions for public involvement and enforcement).

125. New Compact, *supra* note 15, § 2.1 (creating the council), § 3.2 (granting the council enumerated powers).

vote on his or her behalf.¹²⁶ The authority of the Council varies, depending on the situation. In some circumstances, a state reviewing an application for a particular use may need to obtain unanimous consent from the entire council.¹²⁷ In other situations, the Council's function may only be advisory, such as reviewing state programs and decisions and making recommendations for improvements.¹²⁸ Such review functions may require input from the premiers of Ontario and Quebec.¹²⁹ Other powers of the Council include conducting research and compiling data, conducting investigations, instituting court actions, and creating and enforcing "such rules and regulations as may be necessary for the implementation and enforcement of" the New Compact.¹³⁰

2. State Regulation and Decision-Making Standard for Withdrawals

Certain proposals will be regulated and managed solely by the state having jurisdiction over the application for the proposed use.¹³¹ The New Compact sets out the standards that a state must use to regulate any "New or Increased Withdrawals."¹³² A *withdrawal* is defined by the New Compact as "the taking of water from surface water or groundwater [of the basin]."¹³³ Unlike a diversion, which will be discussed later, a withdrawal includes transfers of water within the same watershed, and is not limited to

126. *Id.* § 2.3.

127. *See, e.g., id.* § 4.9(2)(c)(iv) (requiring unanimous consent from the Council for intra-basin diversions that would result in a "New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90 day period"); *id.* § 4.9(3)(g) (requiring unanimous consent from the Council for transfers to a community outside of the Great Lakes basin but within a County that is at least partially within the basin).

128. *E.g., id.* § 4.10 (stating that the Council, along with the provinces, must assess water management programs created by the states, and make recommendations for improvements). While the Council's recommendations regarding the state's programs may only be advisory in nature, the Council still retains the power to initiate an action if such programs are in violation of the provisions of the New Compact. *Id.* § 7.3(2).

129. *See, e.g.,* New Compact, *supra* note 15, § 4.15(1) (requiring the party states to work with the provinces to determine the "cumulative impacts of Withdrawals, Diversions and Consumptive Uses from the Water of the Basin"); *id.* § 3.4 (setting out the procedures for "[t]he Council, in cooperation with the Provinces," to review each state's water management programs and determine whether the programs are in compliance with the New Compact's provisions).

130. *Id.* § 3.3(1); *see also* §§ 3.2, 3.3 (setting out the Council's powers).

131. *Id.* § 4.10 (requiring state management and regulation of any New or Increased Withdrawal and Consumptive Use that surpasses a certain threshold level established by that state). Certain withdrawals, such as withdrawals within the same Great Lake watershed, will only be managed by the state reviewing the application, while other withdrawals, such as those completely outside of the basin or from one Great Lake basin to another, will be subject to additional regulation by the other party states. *See supra* note 119 and accompanying text.

132. *See* New Compact, *supra* note 15, § 4.10.

133. *Id.* § 1.2.

transfers outside of the Great Lakes basin or from one Great Lakes watershed to another.¹³⁴ The New Compact requires each state to “create a program for the management and regulation of New or Increased Withdrawals . . . by adopting and implementing Measures consistent with the Decision-Making Standard.”¹³⁵ The Decision-Making Standard, which will be discussed later, is designed to ensure that the withdrawal is not harmful, that it is reasonable, and that any withdrawal not used for consumption be returned to its source.¹³⁶ The state must determine a threshold volume of water that will trigger scrutiny under its management system.¹³⁷ If the state does not set such a threshold level within ten years of the New Compact’s enactment, a default threshold level of “100,000 gallons per day or greater average in any 90 day period” will be imposed.¹³⁸ Each state must provide a report to the Council and regional body,¹³⁹ disclosing the details of its management programs designed to implement the New Compact.¹⁴⁰ The first report must be made one year after the New Compact is effective, and every five years thereafter.¹⁴¹ The Council and regional body must review the report to determine whether the programs are properly implementing the provisions of the New Compact, and make recommendations for approval, which may include a recommendation for the threshold level to be lowered.¹⁴²

The Decision-Making Standard provides a guide for states in implementing their programs regulating “New or Increased Withdrawals or Consumptive Uses” because such programs must conform to this standard.¹⁴³ The first requirement under the Decision-Making Standard is that any water withdrawn from the basin be “returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use.”¹⁴⁴ The New Compact also requires that the withdrawal “be

134. *See id.* (defining withdrawals more broadly than diversion with the former including the transportation of water within the same Great Lake basin).

135. *Id.* § 4.10(1).

136. *See id.* § 4.11.

137. *Id.* § 4.10(1).

138. New Compact, *supra* note 15, § 4.10(2).

139. *Id.* § 1.2 (defining the *regional body* as including the council members and premiers of Ontario and Quebec, which allows for the Canadian provinces to be involved in the Decision-Making process even though they are unable to serve on the council).

140. *Id.* § 3.4 (1).

141. *Id.*

142. *Id.* § 3.4(2).

143. *Id.* § 4.10. “Each Party shall create a program for management and regulation of New or Increased Withdrawals and Consumptive Uses by adopting and implementing Measures consistent with the Decision-Making Standard.” New Compact, *supra* note 15, § 4.10.

144. *Id.* § 4.11(1). The New Compact defines “Consumptive Use” as the “portion of Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to

implemented so as to ensure that the proposal will result in no significant individual or cumulative adverse impacts to quantity or quality of the Waters and Water Dependent Natural Resources.”¹⁴⁵ A third requirement under the Decision-Making Standard is that the withdrawal be implemented using “Environmentally Sound and Economically Feasible Water Conservation Measures.”¹⁴⁶ A fourth criteria is that the withdrawal cannot violate any provisions found in applicable regional, interstate, or international agreements, or conflict with any controlling municipal, state, or federal law.¹⁴⁷ The final requirement for a proposal to meet the Decision-Making Standard is that the proposed use be reasonable.¹⁴⁸ In determining the reasonableness, the court considers the following six factors: (1) whether the proposed use is efficient or wasteful; (2) if the user proposes an increased withdrawal, whether the existing water supply has been used efficiently;¹⁴⁹ (3) how well the proposed use balances economic and social development with environmental protection, considering the other existing or planned withdrawals from the same source; (4) “[t]he supply potential of the water source, considering quantity [and] quality”; (5) “[t]he probable degree and duration of any adverse impacts . . . [of] the proposed Withdrawal . . . to other lawful . . . uses of water or to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin, and the proposed plans and arrangements for avoidance or mitigation of such impacts”; and (6) whether there are any “restoration of hydrologic conditions and functions of the Source Watershed”¹⁵⁰ The

evaporation, incorporation into Products, or other processes.” *Id.* § 1.2.; *see id.* §§ 4.11(1) , 1.2 (inferring that the requirement for withdrawn water to be returned to its original source, which is found throughout the New Compact, is crucial to the preservation of the Great Lakes system; however, this imprecise definition of *Consumptive Use* may provide an opening for water users to undermine the effectiveness of this provision).

145. *Id.* § 4.11(2).

146. *Id.* § 4.11(3).

147. New Compact, *supra* note 15, § 4.11(4).

148. *Id.* § 4.11(5).

149. *Id.* § 4.11(5)(a)–(b) (noticing that this provision, unlike most of the New Compact, requires examination of the existing water supplies).

Despite the compact’s generally limited focus on managing and regulating only new or increased water uses, criterion (5)(b) requires consideration of “efficient use . . . of existing water supplies.” If applied strictly, a community could not obtain approval for an increase in its water withdrawal to meet the needs of a growing population without first implementing conservation measures for its existing uses. Similarly, a manufacturer or irrigator that wishes to expand and increase its water use must first take measures to reasonably reduce its current water use through conservation practices. Through this criterion, the compact could force efficiency improvements and water conservation on many existing users as they expand, encouraging a “hard look” at existing water use practices and methods.

Hall, *supra* note 11, at 438 (omission in original) (footnote omitted).

150. New Compact, *supra* note 15, § 4.11(5)(c)–(f).

New Compact makes clear that the Decision-Making Standard is the minimum standard and that states are free to impose stricter standards for withdrawals.¹⁵¹

In addition to managing certain new or increased withdrawals, each state must “develop and maintain a Water Resources inventory” within five years of the New Compact’s implementation.¹⁵² “[A]ny person [including existing users and consumptive users] who Withdraws Water in an amount of 100,000 gallons per day or greater average in any 30-day period . . . or Diverts Water of any amount” must register with the state within the time frame set by the council and provide certain details regarding the use, including the estimated amount of the withdrawal, measured in “gallons per day average in any 30 day period.”¹⁵³ The registrant also has an annual duty to disclose certain information to the state, such as the volume withdrawn.¹⁵⁴ The state will then use this information in its inventory and annual report, which must be made available to the public for inspection.¹⁵⁵ The states are also required to collaborate with Ontario and Quebec to monitor the “Cumulative Impacts of Withdrawals, Diversions and Consumptive Uses from the Waters of the Basin” either every five years or “each time the incremental Basin Water losses reach 50 million gallons per day average in any 90-day period in excess of the quantity at the time of the most recent assessment, whichever comes first.”¹⁵⁶

Additionally, each state has the responsibility of developing water conservation and efficiency programs within two years of enactment, which must apply to both existing and new uses.¹⁵⁷ Such programs must be consistent with both the state and “Basin-wide goals and objectives.”¹⁵⁸ The Basin-wide goals and objectives will be provided by the Council in order to give the states proper guidance.¹⁵⁹ The objectives will seek to improve, restore, and retain the quantity of the Great Lakes water and ecosystem as well as ensure its sustainable and efficient use.¹⁶⁰ The state may choose whether to make the water conservation program voluntary or mandatory.¹⁶¹ Finally, each state must make an annual report to the

151. *Id.* § 4.12(1).

152. *Id.* § 4.1(1).

153. *Id.* § 4.1(3) (emphasis added).

154. *Id.* § 4.1(4)–(5).

155. *Id.* § 4.1(5).

156. New Compact, *supra* note 15, § 4.15.

157. *Id.* § 4.2.

158. *Id.* § 4.2(2).

159. *Id.* § 4.2(1)–(3).

160. *Id.* § 4.2(1).

161. *Id.* § 4.2(5) (stating that “Each Party shall implement . . . a voluntary or mandatory Water

Council and the public regarding the success of the conservation and efficiency program in meeting the state's goals and objectives.¹⁶²

3. Prohibition on New or Increased Diversions

At the heart of the New Compact is its prohibition on all “New or Increased Diversions.”¹⁶³ The New Compact defines a diversion as “a transfer of Water from the [Great Lakes] Basin into another watershed, or from the watershed of one of the Great Lakes into that of another [of the Great Lakes].”¹⁶⁴ In other words, this prohibition does not apply to withdrawals within the same watershed, as it does not fall under the New Compact’s definition of a *diversion*.¹⁶⁵ This general prohibition is subject to three exceptions: intra-basin transfers, a proposal to transfer water to an area outside of the watershed but within a straddling community, and a proposal to transfer water to a community within a straddling county.¹⁶⁶ Even if an applicant for a new or increased diversion falls into one of these exceptions, and is not subject to the complete prohibition, the applicant must still adhere to other regulation, depending on the exception invoked, and in some cases, the amount of the diversion.¹⁶⁷ In some circumstances, a state will be required to obtain unanimous approval from the governors of all eight states in order to be able to approve a diversion falling under one of the exceptions.¹⁶⁸

conservation program for all, including existing, Basin Water users.”).

162. New Compact, *supra* note 15, § 4.2(2).

163. *Id.* § 4.8. (“All New or Increased Diversions are prohibited, except as provided for in this Article.”).

164. *Id.* §§ 4.8, 1.2. The New Compact does not consider removing water from the basin and carrying it outside of the basin to be a diversion, unless the container used is greater than 5.7 gallons. *Id.* § 4.12(10) (“A Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons shall be treated under this Compact in the same manner as a Proposal for a Diversion.”). A bottled water or soft drink company may be able to exploit this provision in order to gradually transfer significant amounts of bottled water from the basin without being subject to the strict requirements of the New Compact. *Cf. id.* Fortunately, states are expressly given the ability to promulgate their own regulations for such removals in containers less than 5.7 gallons in volume. *Id.* (“Each Party [State] shall have the discretion, within its jurisdiction, to determine the treatment of Proposals to Withdraw Water and remove it from the Basin in any container of 5.7 gallons or less.”)

165. *See* New Compact, *supra* note 15, § 4.9(1). It is important to note that a *withdrawal* within the same watershed, while not subject to the complete prohibition, will be subject to the Decision-Making Standard. *See id.* § 4.11.

166. *Id.* § 4.9(1)–(3).

167. *See id.* § 4.9 (establishing the three exceptions to the prohibition on diversions, and setting out numerous criteria in order to invoke the exceptions).

168. *See, e.g., id.* § 4.9(2)–(3) (requiring unanimous consent from the Council for intra-basin withdrawals resulting “in a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period” and for any diversion to a Community within a

a. Intra-Basin Transfers

One of the three exceptions to the prohibition on “All New or Increased Diversions” is for intra-basin transfers.¹⁶⁹ The New Compact defines intra-basin transfers as “the transfer of Water from the watershed of one of the Great Lakes into the watershed of another Great Lake.”¹⁷⁰ If the intra-basin withdrawal is “less than 100,000 gallons per day average over any 90-day period,” the proposed withdrawal will only be subject to the management of the state where the application is filed.¹⁷¹

If the proposed withdrawal is greater than 100,000 gallons per day average over any ninety-day period, and the consumptive use from the withdrawal is less than five million gallons per day average over that same period, it will still be subject to state management, but will also incur further regulation.¹⁷² For example, such withdrawal will be required to meet the “Exception Standard,” which requires many of the same things as the Decision-Making Standard, but with a greater emphasis on ensuring that there is no alternative to the withdrawal.¹⁷³ The Exception Standard first mandates that all water withdrawn must be returned to its original source, minus any consumptive use.¹⁷⁴ This requirement is relaxed for Intra-Basin Transfers that do not involve Consumptive Uses over “5 million gallons per day average over any 90-day period.”¹⁷⁵ Such transfers are permitted to return the water to “another Great Lake Watershed rather than the Source Watershed.”¹⁷⁶ Intra-Basin Transfers exceeding this threshold must comply with the original requirement under the Exception Standard, which mandates that the water be returned only to its original source.¹⁷⁷ Second, it must be shown that the withdrawal “cannot be reasonably avoided through the efficient use and conservation of existing

Straddling County, but outside of the Great Lakes basin).

169. *Id.* § 4.9(2).

170. New Compact, *supra* note 15, § 1.2.

171. *Id.* § 4.9(2)(a).

172. *Id.* § 4.9(2)(b).

173. *Id.* § 4.9(2)(b)(i).

174. *Id.* § 4.9(4)(c).

175. *See id.* § 4.9(2)(b).

176. New Compact, *supra* note 15, § 4.9(2)(b) (“The Proposal shall meet the Exception Standard and be subject to management and regulation by the Originating Party, [the state with jurisdiction over the application,] except that the Water may be returned to another Great Lake watershed rather than the Source Watershed [for a withdrawal less than 5 million gallons per day average over any 90-day period].”)

177. *Id.* § 4.9(2)(c) (“If the Proposal results in a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period [the Proposal] shall meet the Exception Standard, ensuring that the Water Withdrawn shall be returned to the Source Watershed.”)

water supplies.”¹⁷⁸ Third, the Exception Standard requires that the withdrawal not result in “significant individual or cumulative adverse impacts to the quantity or quality of the [w]aters and . . . [n]atural [r]esources of the Basin.”¹⁷⁹ The fourth requirement is that the exception “be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures.”¹⁸⁰ Finally, the exception must be implemented in compliance with any municipal, state, federal, or international law.¹⁸¹ In addition to meeting the Exception Standard, the applicant for the new or increased intra-basin diversion must show that there are “no feasible, cost effective, and environmentally sound water supply alternative within the Great Lake watershed to which the Water will be transferred.”¹⁸²

If an intra-basin transfer will result in “a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90 day period,” in addition to the requirements above, the applicant must meet two significant additional criteria: regional review and approval by the Council.¹⁸³ The New Compact sets out a comprehensive system for regional review, which is a procedure designed to provide an opportunity for involvement by the eight states, two Provinces, and the public, when a proposal of a certain magnitude is submitted.¹⁸⁴ When a proposal is submitted for regional review, the regional body, comprised of the states and provinces, will be given an opportunity to consider and discuss the proposal with emphasis on its potential impact to the *integrity* of the Great Lakes ecosystem.¹⁸⁵ The New Compact contains provisions requiring the

178. *Id.* § 4.9(4)(a). The Decision-Making Standard also looks at the efficient use of the existing water supply as one factor in determining whether the withdrawal is reasonable, but does not require further proof that, despite the efficient use, the withdrawal cannot be avoided. *See id.* § 4.11(5)(b). In contrast, the language in the Exception Standard creates a heavier burden on an applicant because it requires that, even if the existing water supply were being used efficiently, the *New or Increased Diversion* be absolutely necessary, and that it “cannot be reasonably avoided.” *Id.* § 4.9(4)(a). The Exception Standard also has the additional requirement that the exception be limited to quantities that are *reasonable* considering their purpose. *Id.* § 4.9(4)(b).

179. New Compact, *supra* note 15, § 4.9(4)(d). This requirement is also found in the Decision-Making Standard. *Id.* § 4.11(2). However, the provision in the Exception Standard also requires that consideration be given to the precedent that would be set by granting the proposal. *Id.* § 4.9(4)(d).

180. *Id.* § 4.9(4)(e).

181. *Id.* § 4.9(4)(f).

182. *Id.* § 4.9(2)(b)(ii).

183. New Compact, *supra* note 15, § 4.9(2)(c)(iii)–(iv).

184. *Id.* § 4.5 (establishing the details and procedure for regional review).

185. *Id.* § 4.5(1). In considering the “integrity of the Great Lakes . . . Ecosystem,” the regional body must bear in mind “the uncertainties with respect to demands that may be placed on Basin Water, including groundwater, levels and flows of the Great Lakes and the St. Lawrence

regional body to provide the public with notice and an opportunity to comment during the review period.¹⁸⁶ After review has ended, the regional body will make findings and recommendations regarding the proposed use.¹⁸⁷ If all members agree, a declaration of finding is written and released to the public.¹⁸⁸ If the members of the review board are unable to agree, they may issue a declaration with multiple opinions.¹⁸⁹

Finally, the applicant for such a large intra-basin diversion under this provision has the onerous burden of procuring unanimous approval by the Council.¹⁹⁰ This requirement will be discussed in greater detail further in this article.

b. Straddling Communities

The second exception to the general prohibition on “All New or Increased Diversions” is a proposal to divert water to a straddling community.¹⁹¹ This exception arises when the water is to be transferred to a part of a community that is outside of the basin, but at least a portion of that community does lie within the basin.¹⁹² Such diversions will be regulated by the state with jurisdiction over the permit.¹⁹³ However, in order to fall within the purview of this exception, certain criteria must be met. The diversion must be “used solely for Public Water Supply Purposes

River, future changes in environmental conditions, the reliability of existing data and the extent to which Diversions may harm” the basin. *Id.*

186. *Id.* § 4.5(3) (setting out the procedure for public participation).

187. *Id.* § 4.5(5).

188. New Compact, *supra* note 15, § 4.5(5)(e)&(h).

189. *Id.* § 4.5(5)(g) (“Should consensus not be achieved, the Regional Body may issue a Declaration of Finding that presents different points of view and indicates each Party’s conclusions.”).

190. *See id.* § 4.9(2)(c)(iv) (“If the Proposal [for an intra-basin diversion] results in a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period[, it must be] . . . approved by the Council. Council approval shall be given unless one or more Council Members vote to disapprove.”).

191. *Id.* §§ 4.8, 4.9(1).

192. *Id.* § 4.9. A “Straddling Community” is defined as “any incorporated city, town or the equivalent thereof, wholly within any County that lies partly or completely within the Basin, whose corporate boundary *existing as of the effective date of this Compact*, is partly within the Basin or partly within two Great Lakes watersheds.” *Id.* (emphasis added). The framers of the New Compact inserted the italicized words in order to prevent towns from manipulating their boundaries in order to abuse this exception. Hall, *supra* note 11, at 442–43. Because a portion of a community must be within the basin in order to be “straddling,” logic dictates that this exception will only occur for a transfer to the portion of the community that is not within the basin. *Cf.* New Compact, *supra* note 15, § 1.2. If the transfer was to the portion of the community that is within the basin, it would not meet the definition of a “diversion” and not need an exception to the general prohibition on “New or Increased Diversions.” *Cf. id.* §§ 1.2, 9.8.

193. New Compact, *supra* note 15, § 4.9(1).

within the Straddling Community.”¹⁹⁴ In addition, all water not used for consumption must be returned to its source watershed.¹⁹⁵ If the New or Increased diversion will be “100,000 gallons per day or greater average over any 90 day period,” the proposed diversion must also meet the six requirements under the Exception Standard, which was previously discussed in sub-sub-section (a) of this sub-section.¹⁹⁶ Any proposed diversion with “a New or Increased Consumptive Use of 5 million gallons per day or greater average over any 90-day period” will be subject to regional review, and all the notice and consultation requirements that accompany it.¹⁹⁷

c. A Community Within a Straddling County

The final exception to the New Compact’s prohibition is for transfers to a community that is not located within the basin, but is situated in a County that is at least partly within the basin.¹⁹⁸ Proposals under this exception will also be regulated by the states.¹⁹⁹ Water users wishing to take advantage of this exception will have to meet the same requirements as the Straddling Communities, but will also be subject to further regulation. One such additional requirement is that the applicant demonstrates that the Straddling County is without adequate supply of potable water and does not have a reasonable alternative supply within the basin where the community is located.²⁰⁰ Also, while a diversion to a Straddling Community is subject to the Exception Standard and regional review only when it reaches a certain threshold, a diversion to a community within a Straddling County will be subject to the Exception Standard and

194. *Id.* § 4.9(1). “Public Water Supply Purposes” is defined as “water distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators.” *Id.* § 1.2.

195. *Id.* § 4.9(1)(a).

196. *Id.* § 4.9(1)(b); *see id.* 4.9(1)(a) (providing for an exception for the prohibition against diversions).

197. New Compact, *supra* note 15, § 4.9(1)(c); *see also id.* § 4.5(1)–(5) (mandating regional review, including, a notice requirement); *supra* pp. 29–31 (discussing the procedure for regional review); *supra* Part III.C.3.a) (discussing the procedure for regional review).

198. New Compact, *supra* note 15, § 4.9(3). Such location is referred to as a “Community within a Straddling County.” *Id.* § 1.2. The New Compact defines this as “any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly . . . within the Basin [and that is not a Straddling Community] . . .” *Id.* § 1.2.

199. *Id.* § 4.9(3)(c).

200. *Id.* § 4.9(3)(a) (d) (“The Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water [and it must be shown that] [t]here is no reasonable water supply alternative within the basin in which the community is located . . .”).

regional review, regardless of the amount diverted.²⁰¹ Another additional requirement is for the proposed use “not [to] endanger the integrity of the Basin Ecosystem.”²⁰² The final requirement, which is also mandated for certain large intra-basin transfers, is that the diversion be unanimously approved by the Council.²⁰³ Many persons who oppose the New Compact point to this provision as the reason for their objection.²⁰⁴ This exception for communities within a Straddling County includes certain areas that may be located near one of the Great Lakes, but just outside of that lake’s watershed.²⁰⁵ Some residents of these communities are resentful of their inability to access water from the nearby lake without all eight governors approving the diversion.²⁰⁶ It appears that this provision will continue to take center stage for states such as Wisconsin and Ohio who have yet to approve the New Compact.

4. Public Participation and Enforcement

The New Compact contains numerous provisions to ensure that the public has access to information and the ability to comment on proposed water use. For example, “all meetings of the [C]ouncil [are] open to the public, except with respect to issues of personnel.”²⁰⁷ Many documents are also required to be available for public inspection, such as minutes of Council meetings, documents related to an application for withdrawal, and all inventories and assessments of programs required under the New

201. Compare *id.* § 4.9(1) (requiring users to meet the Exception Standard for “a New or Increased Withdrawal of 100,000 gallons per day or greater average over any 90-day period” and undergo regional review for a “New or Increased Consumptive Use of 5 million gallons per day or greater average” during that same period), with New Compact, *supra* note 15, § 4.9(3) (requiring compliance with the Exception Standard and submission to regional review, without expressing a threshold amount).

202. *Id.* § 4.9(3)(e).

203. *Id.* § 4.9(3)(g).

204. See, e.g., Egan, *supra* note 29, at A1 (stating how opponents to the New Compact in the Wisconsin Assembly have spoken out against “a provision that gives each Great Lakes governor veto authority over another state’s diversion application for communities that . . . lie entirely outside the basin”); see also Egan, *supra* note 23, at A1; Mertens, *supra* note 106, at 3 (“In Wisconsin, some people have objected to a provision that allows any state to veto diversions to communities at the edge of the basin.”).

205. Egan, *supra* note 17, at A1 (discussing Waukesha County, which “is so close to the shores of Lake Michigan but just outside of its basin”).

206. E.g., *id.* In Waukesha, which, despite its proximity to Lake Michigan, is outside its watershed, “residents are in dire need of a fresh source of water because the wells they have historically relied upon are contaminated with radium, a naturally occurring but potentially cancer-causing substance.” *Id.*

207. New Compact, *supra* note 15, § 6.1(1).

Compact.²⁰⁸ The public must also be notified of all applications for withdrawals from the basin and be given the opportunity to submit comments before the applications are acted upon.²⁰⁹

In order for an agreement to be effective, it must contain enforcement provisions strong enough to deter signatories, and others from violating its provisions. The New Compact contains a variety of methods for settling disputes among the various interests. Any disputes between the states “regarding interpretation, application and implementation of [the New Compact] shall be settled by alternative dispute resolution,” with the procedures for this process to be determined by the Council, in consultation with the Provinces.²¹⁰

The New Compact also allows an *aggrieved person* by an action taken by one of the states to seek “a hearing pursuant to the relevant [state’s] administrative procedures and laws.”²¹¹ The *aggrieved person* subsequently has a right to judicial review in the relevant state court.²¹² The New Compact makes clear that a State or Province is to be treated as an *aggrieved person* for the purpose of this provision and, therefore, may bring an action against another State or Province.²¹³ This provision provides the only guidance on the definition of an *aggrieved person*. The New Compact does not precisely define this term within its definitional section; therefore, there may be some room for interpretation. It is important, in order to provide maximum enforcement and oversight, that this definition be broadly interpreted to include private citizens.

The New Compact also provides that “[a]ny Person aggrieved by an action taken by the Council . . . shall be entitled to a hearing before the [C]ouncil.”²¹⁴ In addition, the *aggrieved person* will be given the right to judicial review in one of the United States District Courts.²¹⁵ This last provision is crucial because there is much opportunity for inherent bias

208. *Id.* § 6.1(2) (requiring minutes of Council meetings to be open to the public); *id.* § 6.2(1) (requiring the states to provide the public with notice of any applications for a withdrawal, and a reasonable comment period); *id.* § 4.1(5) (requiring public disclosure of information collected in the water resource inventory); *id.* § 4.2(2) (requiring each state to annually assess and report on its water conservation and efficiency program and make such report available to the public).

209. *Id.* § 6.2(1).

210. New Compact, *supra* note 15, § 7.2.

211. *Id.* § 7.3(1).

212. *Id.* § 7.3(1)(ii).

213. *Id.* § 7.3(1).

214. *Id.* § 7.3(1).

215. *Id.* § 7.3(1)(i). Such action will take place “in the United States District Courts for the District of Columbia or the District Court in which the Council maintains offices.” New Compact, *supra* note 15, at § 7.3(1)(i).

during the initial proceeding in which the Council is ruling on an action against itself. Judicial review will provide much needed independent oversight of the claim.

In addition, a state or the Council may initiate an action “to compel compliance with the provisions of” the New Compact, and any other regulations enacted by the Council.²¹⁶ The action may be heard in the court of the relevant state, or in one of the Federal District Courts.²¹⁷

The New Compact further permits “[a]ny aggrieved Person, Party or the Council” to seek judicial or administrative civil action against *any person* who pursued a “New or Increased Withdrawal, Consumptive Use or Diversion” without obtaining the required approval.²¹⁸ Such action can only be brought if the relevant state, the Council, and the alleged violator, are all given at least sixty days notice, and if neither the state nor the Council has already pursued the action.²¹⁹

Overall, these provisions appear to provide significant opportunity for enforcement and oversight. At the very least, it is an improvement over current laws, such as the Original Great Lakes Compact, which fails to provide its commission with any enforcement authority,²²⁰ or the Boundary Water Treaty of 1909, which severely limits the authority of the IJC.²²¹ Furthermore, unlike the WRDA, the New Compact appears to provide the ability for a private individual to enforce its provisions.

D. WISCONSIN AND OHIO PUT ASIDE INDIVIDUAL STATE CONCERNS FOR THE BENEFIT OF THE GREAT LAKES REGION

In February 2008, it appeared that the New Compact had hit an insurmountable hurdle in the Wisconsin legislature.²²² After passing the Wisconsin Senate, the New Compact needed ratification from the Wisconsin assembly, but hit substantial opposition, including from two *powerful* Assembly leaders, the Assembly Speaker, Mike Huebsch, and the Chairman of the Assembly’s Natural Resources Committee, Scott

216. *Id.* § 7.3(2)(a).

217. *Id.* (“Jurisdiction over such actions is granted to the court of the relevant Party [State], as well as the United States District Courts for the District of Columbia and the District Court in which the Council maintains offices.”).

218. *Id.* § 7.3(3). The language of this provision, particularly the term *any person*, seems to be very broad.

219. *Id.*

220. See *supra* Part II.B (discussing the lack of enforcement power granted to the commission in the Original Great Lakes Compact).

221. See *supra* Part II.A (discussing the narrow jurisdiction given to the IJC).

222. See Egan, *supra* note 17, at A1.

Gunderson.²²³ These leaders particularly had a problem with the provision requiring certain diversions to Wisconsin communities outside of the basin to obtain approval from all eight states.²²⁴ They argued that states such as Michigan, which “lies almost entirely within the basin,” and Illinois, which is permitted to withdraw 2.1 billion gallons of water per day from Lake Michigan, pursuant to a historic settlement approved by the United States Supreme Court, have little incentive to exercise their discretion carefully because they are not as dependent on the other states for approval of proposed actions.²²⁵ Opponents of the New Compact in Wisconsin feared that this provision would create an unreasonable burden on the state.²²⁶ Fortunately for those supporting the New Compact, this seemingly insurmountable hurdle in Wisconsin was quickly overcome in early April when, “after three weeks of closed-door negotiations” the two sides reached a compromise regarding “specific language in the state bill that [would] implement the deal.”²²⁷ Most importantly, the compromise allowed the *original language* of the New Compact to remain in-tact.²²⁸

The New Compact also faced significant opposition in Ohio. The main issue in Ohio was the concern over the effect of the New Compact on

223. *Id.* (discussing the concerns of Wisconsin Assembly leaders).

224. *Id.* It must be noted that the WRDA also requires such unanimous approval, but unlike the New Compact, it does not enumerate standards that “a community must meet to secure Great Lakes water.” *Id.* Also, the New Compact goes further by allowing one to appeal the Council’s decision denying an application, so long as the standards are met. *See id.* As a result, it does not appear that these communities are in any better position under the current law. *Cf. id.*

225. Egan, *supra* note 17, at A1. One Wisconsin legislator alleged that the New Compact: [P]uts Wisconsin at an economic disadvantage with nearby Illinois and Michigan. The reason: Illinois is essentially exempt from major tenets of the compact because it reversed the flow of the Chicago River over a century ago and is now allowed to take 2.1 billion gallons a day from Lake Michigan, the result of a decades-old lawsuit over the diversion that was finally settled by the Supreme Court. Michigan, meanwhile, likely will never have to worry about other states vetoing a request to take water outside of the Great Lakes basin because, unlike all the other Great Lakes states, Michigan lies almost entirely within the basin.

Id.; *see also* Wisconsin v. Illinois, 449 U.S. 48, 54 (1980) (providing the most recent amendment to the decree allowing Illinois to withdraw this large quantity of water). This exception is specifically recognized in the New Compact. New Compact, *supra* note 15, § 4.14.

226. Egan, *supra* note 17, at A1.

227. Bridget Thoreson, *Update: Great Lakes Compact Compromise Reached*, THE JOURNAL TIMES, Apr. 10, 2008, http://www.journaltimes.com/articles/2008/04/10/local_news/doc47fceb91c2b4f891359893.txt (announcing a compromise within the Wisconsin Assembly). Two significant compromises were the state’s agreement not to gain new authority over groundwater and the removal of the previous requirement that the statewide conservation program be mandatory. *Id.* None of these compromises effected the underlying provisions of the New Compact, as it permitted the conservation programs to be voluntary or mandatory. New Compact, *supra* note 15, § 4.2(5).

228. Egan, *supra* note 29, at A1.

private property rights.²²⁹ However, one influential Ohio state senator, Tim Grendell, who had been opposed to the New Compact, indicated that his concerns would be silenced so long as the Ohio Constitution were amended to “ensure that the compact language [would not] infringe on the groundwater rights of private property owners.”²³⁰

These compromises by Wisconsin and Ohio culminated in the enactment of the New Compact by all eight states in August 2008.²³¹ This demonstrated that the member states recognized that the need for quick, serious protection of the Great Lakes outweighed any dissatisfaction over particular provisions of the New Compact. Without the New Compact, the Great Lakes region would only be protected by the existing laws, which as demonstrated, are far too weak to withstand the inevitable pressure on the Great Lakes in the face of increasing demand for fresh water. This approval from all eight states was a huge step because the Compact cannot be unilaterally altered or revoked by any member state.

CONCLUSION

The current battles between many states over dwindling water supplies should serve as a warning to the Great Lakes region. As the water crisis continues, it is inevitable that these battles will find their way north, to the Great Lakes system, the source of 95% of freshwater in the United States.²³² As demonstrated by Nova Group’s ability to obtain a permit from Ontario to annually ship a massive quantity of Great Lakes water to Asia,²³³ the current laws provide inadequate protection in the face of imminent pressure from drier states.

Although the New Compact may not be perfect and may result in a minor loss of autonomy to the signatory states, it is a substantial improvement over existing protection. It should be sufficiently strong to withstand the future pressure from those outside of the Great Lakes basin. Fortunately, the eight Great Lakes states recognized this principle and put aside their individual needs, in order to benefit the Great Lakes region as a whole.²³⁴ It has taken over seven years for the New Compact to reach its current status.²³⁵ It is essential that the House of Representatives and the

229. Mertens, *supra* note 106, at 3 (“In Ohio, opponents have argued that the compact infringes on local property rights.”).

230. Egan, *supra* note 29, at A1.

231. See Egan, *supra* note 23.

232. Hall, *supra* note 11, at 414.

233. See Shafer, *supra* note 14, at 463–64 (citing IJC, Final Report, *supra* note 102, at 44).

234. See *supra* Part III.D.

235. See discussion *supra* Part III.B. The formation of the New Compact began in 2001 when

President recognize the many years worth of effort and compromise and finalize the New Compact. Even if this is accomplished, the battle is not over. The Great Lakes states will have to continue to fight in order to ensure that no subsequent Congress will revoke this hard fought approval by enacting inconsistent federal legislation. Unfortunately, the necessary congressional approval of an interstate compact is as fragile as any other federal law, and can be overturned accordingly.²³⁶ After the 2010 census, the eight Great Lakes states will lose delegates, while the drier western states will gain them, increasing the chance of revoking congressional consent to the New Compact.²³⁷ As a result, those concerned over the fate of the Great Lakes region must continue to be vigilant and prevent this from happening.

In addition, the United States and Canada must work together to amend the Boundary Waters Treaty of 1909. There is ample evidence that water supply will be a major issue in the near future, and the two countries should prepare for any possible contingency as soon as possible. The current form of the Treaty provides little practical protection because its original signatories were unable to anticipate the problems the two countries would face a century later. It is only logical that the Treaty be amended to include Lake Michigan, groundwater, and all Great Lake tributaries within its protection, as any withdrawal from these sources will inevitably affect the entire international system. The language of the Treaty, which only triggers protection for an action affecting the natural flow or level of water,²³⁸ is absurdly vague and must be amended to clarify the actions that are subject to protection under the Treaty. This comment recommends that the persons drafting the amended Treaty use the New Compact as a guide for determining the actions that will trigger protection because the New Compact reflects the sentiment of the states and provinces of the Great Lakes region. Finally, the Treaty must expand the IJC's jurisdiction and allow it to hear any dispute between the two countries over the quantity or quality of Great Lakes water without requiring consent from both nations. The limited jurisdiction currently in place greatly weakens the effectiveness of the IJC and allows either country to withhold consent when it feels that the commission will not rule in that country's favor. These amendments to the Treaty would provide another layer of protection for the Great Lakes

the governors of the Great Lakes states signed an Annex to the Great Lakes Charter of 1985, which was a commitment to form an interstate agreement to provide increased protection. *Id.* This began discussions leading to the New Compact. *See id.*

236. *See Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

237. *See Fleisher*, *supra* note 23.

238. Boundary Waters Treaty, *supra* note 16, art. III.

region and make it more difficult for future Congressional members to authorize devastating withdrawals from the Great Lakes system.

As states become more desperate for freshwater, lawmakers will be more likely to look for short term relief and ignore the future consequences of their actions. The vast amount of water in the Great Lakes system may seem to be an obvious solution to short term water problems. However, lawmakers cannot forget the lesson learned from the Aral Sea disaster. That tragedy was caused by leaders of the Soviet Union focusing on the potential for short term agricultural profit at the expense of future generations. Unfortunately, such short-sighted planning seems to occur repeatedly and it is imperative that laws, such as the New Compact and an amendment to the Boundary Waters Treaty of 1909, be enacted and retained in order to avoid the potential devastation from opening up the Great Lakes system to diversions outside of the basin. One irresponsible decision by current or future government may cause irreparable damage to the rare treasure called the Great Lakes.