

**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**

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**INTRODUCTION**

On December 13, 2005, the governors of the eight Great Lakes states and the premiers of the two Canadian Great Lakes provinces convened in Milwaukee to sign the historic Great Lakes Charter Annex Implementing Agreements (“Annex”).<sup>1</sup> The Annex seeks to preserve Great Lakes water—a non-renewable natural resource that replenishes less than 1 percent of its annual loss and serves as the primary source of water for forty million people—by prohibiting its diversion to regions lacking sufficient sources of freshwater.

Approval of the Annex by the pertinent governors and premiers occurred partially in response to a 2002 holding, in which a District Court engaged in the first federal judicial interpretation of a Water Resources Development Act (WRDA) provision restricting the diversion of Great Lakes water to locations outside the Great Lakes Basin (“Basin”).<sup>2</sup> In *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of America, Inc.*, the court concluded that Congress did

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<sup>1</sup> Lee Bergquist, *Leaders Sign Accord on Great Lakes Water*, MILWAUKEE J. SENTINEL, Dec. 14, 2005, at 1A.

<sup>2</sup> *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc.*, 203 F. Supp. 2d 853, 856 (W.D. Mich. 2002).

not imply a private right of action for citizens to prevent unauthorized diversions.<sup>3</sup>

Numerous scholars responded to this holding by emphasizing the potentially ominous consequences flowing from the court's refusal to enforce the relevant WRDA provision.<sup>4</sup> Accordingly, these scholars called for immediate federal legislation or a bilateral treaty in order to quell the impending doom of massive Great Lakes water diversion to areas outside the Great Lakes Basin—notably the arid, water-deprived regions of the Sun Belt and Asia.<sup>5</sup> However, while such writers accurately exposed the shortcomings of current legislation pertaining to Great Lakes diversion, as rendered evident by the *Little Traverse Bay Bands* holding, several aspects of the decision acknowledge the vitality of existing statutory, common law, and public policy mechanisms for enforcement against unauthorized diversions of Great Lakes water to locations outside the Basin. Nevertheless, although not as catastrophic as some have construed, the existing enforcement regime does contain flaws that ratification of the Annex would rectify.

To provide a backdrop for the proposed Annex, Part I of this Comment provides a summary of the international geo-political context for the Great Lakes water diversion controversy. This context has spawned numerous legislative endeavors. Part II presents a chronological account of the legislative endeavors—particularly incrementally augmented international agreements—enacted in order to alleviate the quagmire of Great Lakes water diversion. Shortcomings of such legislation sowed the seeds for litigation testing the potency of the current enforcement regime, which a court confronted in *Little Traverse Bay Bands*.

Part III.A offers an exhaustive examination of the *Little Traverse Bay Bands* holding and its language portending the unlikelihood of future enforcement of the pertinent WRDA provision while Part III.B analyzes the pro-enforcement elements of the *Little Traverse Bay Bands* holding. Finally, Part IV concludes that although the enforcement regime under *Little Traverse Bay Bands* could suffice to preserve Great Lakes water levels, ratification of the controversial Great Lakes Annex should

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<sup>3</sup> *Id.* at 865. Section 1109 of the WRDA is codified at 42 U.S.C. § 1962d-20.

<sup>4</sup> See Charles F. Glass, Jr., *Enforcing Great Lakes Water Export Restrictions Under the Water Resources Development Act of 1986*, 103 COLUM. L. REV. 1503 (2003); Jerome Hinkle, *Troubled Waters: Policy and Action in the Great Lakes Symposium: "Environmental Injustice"*, 20 T.M. COOLEY L. REV. 281, 319 (2003).

<sup>5</sup> Glass, *supra* note 4, at 1509.

proceed in order to establish more reliable and streamlined enforcement procedures and regulations.

## **I. EIGHT AMERICAN STATES, TWO CANADIAN PROVINCES, AND ONE NON-RENEWABLE NATURAL RESOURCE**

### **A. GREAT LAKES BASIN GEOGRAPHY AND DEMOGRAPHICS**

In order to understand the current water diversion controversy, one must comprehend the geography and demographics of the Great Lakes region. The Great Lakes Basin spans an area approximately 1,500 miles long and includes the American states of Minnesota, Wisconsin, Illinois, Michigan, Indiana, Ohio, Pennsylvania, and New York, as well as the Canadian provinces of Ontario and Quebec.<sup>6</sup> More than eighty million people reside in the eight Great Lakes states,<sup>7</sup> and an additional eighteen million reside in the two Great Lakes provinces.<sup>8</sup> Of these citizens, roughly forty million rely directly on the Great Lakes water supply for consumption, recreation, and industrial purposes.<sup>9</sup> Consequently, these citizens hold a vested interest in preserving the water levels and supply of the Great Lakes Basin.

However, regions enduring water shortages perceive the Great Lakes' water as their oasis.<sup>10</sup> Interested parties in these regions see the Great Lakes states and provinces as possessing an abundant water supply in excess of their needs.<sup>11</sup> Indeed, the waters of the Great Lakes constitute one-fifth of the world's freshwater supply,<sup>12</sup> and considering that the forty million citizens of the Great Lakes region comprise less

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<sup>6</sup> Hinkle, *supra* note 4, at 287.

<sup>7</sup> Rankings Tables for States: 1990 and 2000, United States Census Bureau: <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf>.

<sup>8</sup> *The Daily*, Population and Dwelling Counts, for Canada, Provinces and Territories, 2001 and 1996 Censuses <http://www12.statcan.ca/english/census01/products/standard/popdwell/Table-PR.cfm> (last visited Oct. 27, 2005).

<sup>9</sup> Julia R. Wilder, *The Great Lakes as a Water Resource: Questions of Ownership and Control*, 59 IND. L.J. 463 (1983). See Hinkle, *supra* note 4, at 287.

<sup>10</sup> See Glass, *supra* note 4, at 1508-09.

<sup>11</sup> Wilder, *supra* note 9, at 463-464.

<sup>12</sup> International Joint Commission, The Largest Freshwater System on Earth: The Great Lakes-St. Lawrence River System, [http://www.ijc.org/en/background/ijc\\_cmi\\_nature.htm](http://www.ijc.org/en/background/ijc_cmi_nature.htm) (last visited Oct. 27, 2005).

than one-half of 1 percent of the world's population of nearly 6.5 billion, the Great Lakes states and provinces do in fact wield control over a disproportionately large amount of the Earth's freshwater relative to the global population.<sup>13</sup>

In any event, Basin citizens do not enjoy an inexhaustible supply of water, for the lakes only replenish less than 1 percent of their annual loss.<sup>14</sup> Thus, for elected officials in the Great Lakes states and provinces, extensively restricting the diversion and export of Great Lakes water to areas outside the Basin will require a precautionary policy approach.<sup>15</sup>

## B. LEGAL FOUNDATION FOR THE DIVERSION CONTROVERSY

The primary legal justifications for restricting diversion derive from common law riparian and usufructuary principles.<sup>16</sup> These two principles correspond to distinct constituents of the bundle of sticks comprising property rights. Riparian ownership implies a property right between a sovereign and a body of water.<sup>17</sup> The states and provinces contiguous to the Great Lakes and the St. Lawrence River lawfully claim such rights.<sup>18</sup> Usufructuary rights relate to the privilege to use and divert water in the contiguous water body.<sup>19</sup> "Interstate Compacts, federal regulation under the commerce clause, and international treat[ies]"<sup>20</sup> produce such rights.

Despite holding well-established riparian and usufructuary rights in Great Lakes water, states and provinces within the Great Lakes Basin have historically sought more predictable, clearly defined rights to regulate the diversion of water outside the Great Lakes system.<sup>21</sup> These incremental efforts recently spawned Annex 2001, a multilateral initiative between the governments of the eight American states and two

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<sup>13</sup> United States Census Bureau, Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited Oct. 15, 2006).

<sup>14</sup> Glass, *supra* note 4, at 1504.

<sup>15</sup> Glass, *supra* note 4, at 1504; Wilder, *supra* note 9, at 466. See *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc.*, 203 F. Supp. 2d 853, 857 (W.D. Mich. 2002).

<sup>16</sup> See Wilder, *supra* note 9, at 468.

<sup>17</sup> *Id.*

<sup>18</sup> See *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842).

<sup>19</sup> Wilder, *supra* note 9, at 468.

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* Part II.

Canadian provinces to improve protections of their rights to prohibit unauthorized diversions of Great Lakes water.<sup>22</sup>

### C. AMERICAN SENTIMENTS

The fiery nature pervading the Annex negotiations underscores a persistent suspicion among political leaders in the Great Lakes region regarding the possibility of federal government intervention condoning substantial new extra-regional diversions. These leaders declare that a strengthened international agreement serves as the panacea for tenuously enforceable current agreements. Recent Great Lakes regional news articles and editorials exemplify this anxious sentiment. For example, Governor James Doyle of Wisconsin, a Great Lakes state, described the Annex as being “born out of the recognition that demand for Great Lakes water will certainly be growing in the future as other parts of the world look greedily . . . at this incredible resource.”<sup>23</sup> Governor Doyle further asserted that “[o]nce implemented, these agreements will ensure that when other regions, particularly Western states, look towards the Great Lakes to solve their problems, we will have the legal authority to protect ourselves.”<sup>24</sup>

Representative Bart Stupak, a United States congressman representing the Great Lakes state of Michigan, not only shared Governor Doyle’s sentiment regarding the indispensable nature of the Annex, but expressed trepidation that the Annex required more onerous safeguards in order to accomplish its purpose.<sup>25</sup> Representative Stupak unequivocally avowed the following: “There should be no diversion of Great Lakes water. Period. The agreements, as drafted, will leave the Great Lakes [region], its citizens, businesses and tourists worse off than they are now. We need to do more to protect, conserve and improve this valuable resource.”<sup>26</sup> He expressed further misgivings when passionately

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<sup>22</sup> Gerald Galloway & Ralph Pentland, *Securing the Future of Groundwater Resources in the Great Lakes Basin*, 43 GROUND WATER 737, 741 (2005).

<sup>23</sup> Dan Egan, *New Great Lakes Rules Expected on Monday: Water Could be Allowed Outside of Basin*, MILWAUKEE J. SENTINEL, July 16, 2004, at 1B.

<sup>24</sup> *Id.*

<sup>25</sup> Press Release, Rep. Bart Stupak, Stupak: No Diversion of Great Lakes Water. Period. (Aug. 31, 2004), <http://www.house.gov/stupak/press2003-2004/083104water.html>.

<sup>26</sup> *Id.*

cautioning that “the Agreements open the flood gates for removal of Great Lakes water for diversion and sale outside of the basin.”<sup>27</sup>

#### D. CANADIAN SENTIMENTS

Several prominent Canadian elected officials echo the sentiments of passionate United States officials when perceiving the successful opposition to Great Lakes water diversion as paramount to national prosperity. Pat Martin, a member of the Canadian Parliament, characterized the desired passage of the Great Lakes Annex as possibly “the most important foreign policy issue facing Canada.”<sup>28</sup> Canadian Senator Jerry Grafstein highlighted the magnitude of the Great Lakes negotiations when proclaiming, “Forget about Kyoto, our real challenge is the Great Lakes.”<sup>29</sup> However, they also see diversion as a potential abuse predominantly sought by their powerful American neighbors. Member of Parliament Martin articulated distrust of the United States when alleging that “the Americans have their eye on our water perhaps more than any other resource and they’re perhaps getting fidgety and getting impatient about accessing this natural resource.”<sup>30</sup> A Canadian lawyer also expressed cynicism with the Annex when emphasizing that the then-circulating draft eliminated both the Canadian and provincial governments’ rights to consent to or veto diversion of Great Lakes waters.<sup>31</sup>

The existence of such disconcerting loopholes stymied the initial Canadian enthusiasm favoring an Annex agreement. On November 15, 2004, the province of Ontario revealed its decision to decline the then-circulating Annex draft.<sup>32</sup> The Ontario provincial government also insinuated an aversion to even recommencing Annex negotiations with the United States, and neighboring Quebec also expressed such apprehensions but remained undecided.<sup>33</sup> One Canadian journalist demonstrated the Canadian skepticism toward an Annex agreement in

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<sup>27</sup> Press Release, Rep. Bart Stupak, Statement of Rep. Stupak on Great Lakes Water Diversion Proposal (Sept. 14, 2004), <http://www.house.gov/stupak/press2003-2004/091404water.html>.

<sup>28</sup> Mary Gordon, *MP Wants to Ban Water Exports*, TORONTO STAR, Oct. 20, 2004, at A06.

<sup>29</sup> Stephen Handelman, *What Happened to Our Lakes: Long Imperiled by Pollution and Neglect, the Great Lakes Face a Complex New Threat: The Buying and Selling of their Waters*, TIME CANADA, Dec. 6, 2004, at 40.

<sup>30</sup> Gordon, *supra* note 28.

<sup>31</sup> *Id.*

<sup>32</sup> Handelman, *supra* note 29.

<sup>33</sup> *Id.*

the following manner: when rhetorically pondering whether the lakes constitute an asset or a precious heirloom, the journalist concluded that “the answers often depend on which side of the Basin you happen to sit.”<sup>34</sup>

Widespread reactions opposing the Annex—when juxtaposed with the legal status quo—represent a recurrent motif in Canadian publications. Critics claim that “the proposal actually weakens existing protections for the lake ecosystem” and could lead to a colossal diversion of water.<sup>35</sup> An Ontario journalist characterized American officials as “being pressured by water-hungry U.S. cities and towns and businesses near the lakes to ease the rules governing who and how much can be siphoned off the fresh water resources.”<sup>36</sup>

In the minds of Canadians, an even graver threat to “one of the greatest natural treasures known to man”<sup>37</sup> presents itself in one of the two components of the Annex, the Great Lakes Basin Water Resources Compact (“Compact”). This proposed Compact would allow a simple majority (as opposed to a unanimous vote) of Great Lakes state governors to authorize water diversion from the Basin.<sup>38</sup> Many Canadians and Annex opponents object to the Compact on the grounds that it violates the U.S.-Canadian Boundary Waters Treaty of 1909.<sup>39</sup>

#### E. THE “STRADDLING COMMUNITIES” DILEMMA

Additionally, exclusion clauses for “straddling communities” pose a lurking threat to the proposed Annex in accomplishing its purpose of strengthening enforcement mechanisms for diversion restrictions.<sup>40</sup> Straddling communities find themselves outside the Great Lakes Basin but inside counties or metropolitan areas partially within the Basin.<sup>41</sup> Water diverted to straddling communities does not naturally return to the Basin. The prominent Chicago-area diversion of Great Lakes water

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Bill Thompson, *Great Lakes Get No Respect*, THE RECORD (Kitchener-Waterloo, Ontario), Dec. 18, 2004, at E4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *See infra* Part II.

<sup>40</sup> Press Release, The Council of Canadians, Great Lakes Remain Unprotected Under New Agreement (June 30, 2005), available at <http://www.vivelecanada.ca/article.php/20050630104814276>.

<sup>41</sup> *Id.*

entails this type of diversion to straddling communities.<sup>42</sup> The Milwaukee suburb of Waukesha serves as an example of a straddling community exerting pressure on Great Lakes politicians, for the suburb seeks to tap into Great Lakes water through a ratified Annex.<sup>43</sup>

Although straddling communities might rest within a greater metropolitan area largely supplied with Great Lakes water, exemption clauses permitting diversion to them creates a dangerous precedent marred with slippery slope potential. By allowing such communities water rights equivalent to communities within the Basin, a political border replaces the ecological border.<sup>44</sup> This, in turn, sows the seeds for incremental expansion of the relative political boundaries and later redefinition.<sup>45</sup>

Providing equal water rights to straddling communities also provokes greater international conflict, since such provision effectively changes the flow of commerce based solely on jurisdictional rather than ecological grounds. Consequently, the proposed exemptions for straddling communities appear incompatible with supervening international trade agreements, notably NAFTA, and thus open a Pandora's box of international trade litigation. The outcomes of such litigation could, in due course, countenance Great Lakes water exportation to additional communities, states, and countries wholly outside the Great Lakes Basin.<sup>46</sup> As University of Wisconsin water expert Vicky Harris queried, "Once you open the faucet, where do you turn it off?"<sup>47</sup>

An Annex without any loopholes for new diversions or exportations outside the Basin, critics contend, would tactfully circumvent supervening international laws. For example, declining to grant exemptions to straddling communities or to any corporations would render the aforementioned relevant provisions of NAFTA dormant.<sup>48</sup> Moreover, these critics contend, in order to acquire strong enforceability prospects, the Annex must contain provisions consistent with its intended

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<sup>42</sup> See *infra* Part IV.C.

<sup>43</sup> See Felicity Barringer, *Growth Stirs New Water Battle for Great Lakes*, N.Y. TIMES, Aug. 12, 2005, at A12; Dan Egan, *Water Pressures Divide a Great Lakes State*, MILWAUKEE J. SENTINEL, Nov. 23, 2003, at 1A.

<sup>44</sup> See Barringer, *supra* note 43; Egan, *supra* note 43.

<sup>45</sup> See Barringer, *supra* note 43; Egan, *supra* note 43.

<sup>46</sup> See Barringer, *supra* note 43.

<sup>47</sup> Handelman, *supra* note 29, at 40.

<sup>48</sup> Tony Clarke, *The Great Lakes Loophole*, TORONTO STAR, Aug. 25, 2005, at A28.



purpose “to ensure efficient use and conservation of water supplies.”<sup>49</sup> Loopholes for straddling communities and bottled water companies do not comport with these intended purposes. Additionally, since NAFTA considers water an “economic good,” as soon as Great Lakes water is used as a commodity, the United States and Canadian governments would waive their ability to prohibit or even limit such commercial uses.<sup>50</sup>

## II. HISTORICAL LEGISLATION, TREATIES, AND CHARTERS

### A. THE BOUNDARY WATERS TREATY OF 1909

Any proposed Annex imposing limits on Great Lakes diversion or exportation must acknowledge existing legislation. The first major influential legislation pertaining to Great Lakes water diversion occurred in 1909 with the ratification of the Boundary Waters Treaty between the United States and Great Britain (representing its Dominion of Canada).<sup>51</sup> The treaty created an inter-governmental organization known as the International Joint Commission (IJC) to serve as the authority responsible for approving or refusing any additional uses, obstructions, or diversions of boundary waters between the two countries.<sup>52</sup>

The treaty charges the IJC with the responsibility of acting as a public clearinghouse for United States and Canadian citizens on issues relating to the boundary waters between the United States and Canada.<sup>53</sup> Ultimately, the treaty seeks to resolve all potential disputes that might arise between the United States and Canada that pertain to use of their shared boundary waters.<sup>54</sup> It does so by providing the IJC with the jurisdiction to review and render opinions on various controversies enveloping the region.<sup>55</sup> The treaty enumerates such considerable

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Boundary Waters Treaty, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448.

<sup>52</sup> *Id.* art. III.

<sup>53</sup> *Id.* art. IX.

<sup>54</sup> *Id.* Introduction.

<sup>55</sup> *Id.* art. VIII.

responsibilities for the IJC in order to manage the boundary waters and to protect them for affected citizens and future generations.<sup>56</sup>

More pertinent to the issue of diversion, Article II of the treaty explicitly vests rights in bordering states and provinces for the use and diversion of water on their side of the boundary line.<sup>57</sup> These rights provide the basis for compacts between the various states and provinces to evade Commerce Clause challenges. As the language of the treaty establishes, the contracting parties “reserve[] . . . to the several State Governments on the one side and the Dominion or Provincial Governments on the other . . . the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on [their] own side of the line which in their natural channels would flow across the boundary or into boundary waters.”<sup>58</sup> To underscore the drafters’ awareness of diversion issues, Article II also reserved a right for the two federal governments to “object to any interference with or diversions of waters on the other side of the boundary . . . .”<sup>59</sup>

However, the Boundary Waters Treaty does not encompass as many restrictions on diversion as many Great Lakes Basin residents and political officials currently seek.<sup>60</sup> Since Lake Michigan does not border Canada, the treaty does not apply to the Lake Michigan watershed.<sup>61</sup> Moreover, the treaty does not explicitly cover “groundwater or connecting lakes and tributaries”<sup>62</sup> within the Great Lakes watershed.

## B. THE GREAT LAKES CHARTER OF 1985

The next meaningful bilateral attempt to strengthen protections against Great Lakes water diversions culminated with the Great Lakes Charter of 1985.<sup>63</sup> As with the contemporary attempts to restrict diversion, the charter arose from prominent proposals to divert Great

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<sup>56</sup> International Joint Commission, Who We Are, [http://www.ijc.org/en/background/ijc\\_cmi\\_nature.htm#role](http://www.ijc.org/en/background/ijc_cmi_nature.htm#role) (last visited Oct. 27, 2005).

<sup>57</sup> Boundary Waters Treaty, *supra* note 51, art. II.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *infra* Parts I.C., I.D. (discussing the intentions of various individuals and groups to seek greater protections). But see Hinkle, *supra* note 4, at 304 (showing the absence of those protections).

<sup>61</sup> Hinkle, *supra* note 4, at 304.

<sup>62</sup> *Id.*

<sup>63</sup> Great Lakes Charter, Feb. 11, 1985, available at <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf>.

Lakes Basin water to water-deprived regions in the American South and West.<sup>64</sup> The drafters of the charter stated its purpose as the following:

[T]o conserve the levels and flows of the Great Lakes and their tributary and connecting waters; to protect and conserve the environmental balance of the Great Lakes Basin ecosystem; to provide for cooperative programs and management of the water resources of the Great Lakes Basin by the signatory States and Provinces; to make secure and protect present developments within the region; and to provide a secure foundation for future investment and development within the region.<sup>65</sup>

Thus, the drafters intended the charter to serve as a “farsighted planning and management mechanism.”<sup>66</sup> To accomplish the respective goals of the Great Lakes states and provinces, it notably states that further diversions or withdrawals “will not be allowed if individually or cumulatively they would have any significant adverse impacts on lake levels, in-basin uses, and the Great Lakes Ecosystem.”<sup>67</sup> Most significantly, Principle IV of the charter mandates that any Great Lakes state or province wishing to implement a new and substantial withdrawal shall notify, consult, and seek the consent of all Great Lakes states and provinces.<sup>68</sup>

The charter suffers from several insurmountable shortcomings, however, thus annihilating any intended legal thrust of the document. First and foremost, the charter permits each state and province to utilize any forum to seek “adjudication or protection of [their] rights in and to Basin water resources.”<sup>69</sup> Second, it permits all withdrawals from the Basin amounting to fewer than five million gallons per day.<sup>70</sup> Lastly, it insists on unanimous state consent to exports but not to diversions.<sup>71</sup>

### C. PROTECTION UNDER THE WATER RESOURCES DEVELOPMENT ACT OF 1986

Consequently, officials from the Great Lakes states and provinces promptly sought a legally enforceable agreement to combat the

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<sup>64</sup> Hinkle, *supra* note 4, at 304.

<sup>65</sup> Great Lakes Charter, *supra* note 63, Purpose.

<sup>66</sup> Hinkle, *supra* note 4, at 304.

<sup>67</sup> Great Lakes Charter, *supra* note 63, princ. III.

<sup>68</sup> *Id.* princ. IV.

<sup>69</sup> *Id.* Reservation of Rights.

<sup>70</sup> *See id.* Consultation Procedures.

<sup>71</sup> *Id.* princ. III.

deficiencies of the charter. They found apparent success in the federal Water Resources Development Act (WRDA) (codified as 42 U.S.C. § 1962d), which became effective on November 17, 1986.<sup>72</sup> The relevant WRDA provision included congressional findings emphasizing the need to carefully manage and protect the Great Lakes Basin to meet the needs of its citizens, to safeguard the vigor of the Basin economy and environment, and to preserve good relations between the United States and Canada.<sup>73</sup> Congress therefore declared its purpose as being “to take immediate action to protect the limited quantity of water available from the Great Lakes system for use by the Great Lakes States,”<sup>74</sup> to encourage the Great Lakes states to develop—via agreement with Ontario and Quebec—specific conservation guidelines and standards governing withdrawals and diversions, and to prevent any diversions outside the Basin (including for federal studies).<sup>75</sup>

With these findings and intentions in mind, Congress successfully enacted the following proscription on new diversions:

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake[s] States.<sup>76</sup>

Congress most recently revisited Section 1962d-20 in 2000 to further limit removal of Great Lakes Water away from the Basin. This amended the provision into its current form, in order “to broaden its terms so as to apply to ‘exports’ as well as ‘diversions’ and to recognize the need for the Great Lakes States and Provinces to consult to develop a conservation standard pertinent to WRDA decisions.”<sup>77</sup>

Ostensibly, the WRDA places tenacious limits on new diversions outside the Great Lakes Basin. However, since its inception, grave concerns existed regarding the constitutionality of the act.<sup>78</sup> In fact, the relevant WRDA provision “is widely considered unconstitutional”<sup>79</sup> as an

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<sup>72</sup> Federal Water Resources Development Act, 42 U.S.C. § 1962d-20 (2000).

<sup>73</sup> *Id.* § 1962d-20(a).

<sup>74</sup> *Id.* § 1962(b).

<sup>75</sup> *Id.* § 1962d-20(b).

<sup>76</sup> *Id.* § 1962d-20(d).

<sup>77</sup> *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc.*, 203 F. Supp. 2d 853, 858 (W. D. Mich. 2002). *See also* 42 U.S.C. § 1962d-20(d).

<sup>78</sup> Hugh McDiarmid, Jr., *Far-Reaching Pact Protects Water Supply*, *Detroit Free Press*, Dec. 13, 2005, at 1.

<sup>79</sup> *Id.*

impingement on Congress's enumerated power to regulate interstate commerce.<sup>80</sup> Some scholars contend that the accurate textual interpretation of Section 1962d-20 requires self-activation by the Great Lakes governors.<sup>81</sup> Some congressmen and senators interpret the provision as devoid of a federal enforcement mechanism.<sup>82</sup> These qualms sowed the seeds for litigation testing the statutory interpretation and constitutionality of WRDA Section 1962d-20.

### III. WRDA ENFORCEMENT TESTED

#### A. THE LITTLE TRAVERSE BAY BANDS HOLDING

The first judicial clash over Great Lakes diversion under the WRDA occurred in *Little Traverse Bay Bands*.<sup>83</sup> United States District Judge Enslin acknowledged the particularly contentious nature of the litigation and the gravity of the issues at stake, commencing his opinion by quoting Mark Twain: "Whiskey is for drinkin', but water is for fightin'."<sup>84</sup> The case involved a claim by three American Indian nations to enjoin Great Springs Waters of America, Inc. ("Great Springs"), a subsidiary of Perrier, from bottling and exporting waters from the Great Lakes and Great Lakes tributaries.<sup>85</sup> The plaintiffs also named then-governor of Michigan John Engler as a co-defendant, since the state of Michigan granted Great Springs a permit to pump four hundred gallons of Great Lakes Basin water per minute to its bottling plant.<sup>86</sup> Plaintiffs alleged that Great Springs intended to sell some of its bottled water outside the Great Lakes Basin and the Great Lakes states, including to the inland states of Iowa and Kentucky.<sup>87</sup>

Defendants brought forth a motion to dismiss for failure to state a claim upon which relief can be granted, contending that the WRDA

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<sup>80</sup> See Hinkle, *supra* note 4, at 309.

<sup>81</sup> See *id.* at 310.

<sup>82</sup> 144 Cong. Rec. H11828 (daily ed. Nov. 3, 2000) (statement of Rep. Stupak). See generally Glass, *supra* note 4, at 1509-10.

<sup>83</sup> Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc., 203 F. Supp. 2d 853 (W.D. Mich. 2002).

<sup>84</sup> *Id.* at 854.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

does not create a private right of action to enjoin exportation of Great Lakes waters outside the Great Lakes Basin.<sup>88</sup> Therefore, the court decided the specific legal issue of whether the WRDA creates such a private right of action when the governors of the Great Lakes states fail to exercise their right to enforce the provision.<sup>89</sup>

In its analysis, the court recognized that the language of the WRDA does not include an *express* right of action to enjoin exportation of Basin water outside the Basin.<sup>90</sup> The court also acknowledged that the WRDA does not establish any criminal penalties for exportation of Basin water outside the Basin.<sup>91</sup> The court then proceeded to determine whether an *implied* private right of action existed. In doing so, the court invoked the relevant legal standard for determining an implied cause of action, as propounded by the United States Supreme Court in *Cort v. Ash*.<sup>92</sup> The *Cort* test entails application of the following four factors:

Is the plaintiff one of the class for whose especial benefit the statute was enacted?

Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>93</sup>

In terms of the first factor, Judge Enslen reasoned that the act “describes a general and public right which inures to all persons who live by, use and enjoy the waters.”<sup>94</sup> Moreover, the fact that Congress intended to grant the Great Lakes governors a cause of action to enforce compliance detracts from the argument that Congress intended a private cause of action.<sup>95</sup>

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<sup>88</sup> *Id.* at 856.

<sup>89</sup> *Id.* at 857.

<sup>90</sup> *Id.* at 856.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 860-61 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

<sup>93</sup> *Id.* (citing *Cort*, 422 U.S. at 78).

<sup>94</sup> *Id.* at 863.

<sup>95</sup> *Id.*

On the second factor, the court noted that every suggestion in the act and the legislative record indicated a lack of a private cause of action.<sup>96</sup> Rather, “the language of the statute and legislative history is couched in light of the history of and deference to the Great Lakes Governors,” and a private cause of action might impede the governors from uniformly resolving exportation issues.<sup>97</sup>

The court also found the notion of an implied private cause of action to be inconsistent with the statutory scheme.<sup>98</sup> Judge Enslen interpreted the scheme as espousing the intent to endorse the authority of the Great Lakes governors.<sup>99</sup> Accordingly, lawsuits by innumerable individual users of Great Lakes Basin waters would enfeeble congressional intent.<sup>100</sup>

On the fourth factor, Judge Enslen concurred with the plaintiffs’ contention that federal enforcement interests trumped state enforcement interests in the legislation in controversy.<sup>101</sup> The court also agreed that federal interests served as a catalyst for the legislation, since the Great Lakes Basin constitutes a “huge and important source of fresh water for the United States, which is critical to interstate commerce.”<sup>102</sup>

Nevertheless, the court ultimately concluded that the totality of the circumstances discountenanced plaintiffs’ contention that Section 1962d-20 established a private and implied cause of action.<sup>103</sup> Consequently, the court held that it lacked subject matter jurisdiction and, as a result, dismissed plaintiffs’ lawsuit.<sup>104</sup> Great Springs prevailed in its quest to continue exporting bottled Great Lakes water to states outside the Basin. The holding thus confirmed prior skepticism regarding the prospects of a viable enforcement mechanism under the WRDA.

## **B. THE POSSIBILITY OF FUTURE ENFORCEMENT UNDER THE WRDA**

Despite the seemingly anti-enforcement result in *Little Traverse Bay Bands*, the holding does contain several pro-enforcement elements.

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 864.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 865.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

The overarching aspect of the court's reasoning pertains to the fact that Congress enacted Section 1962d-20 while cognizant of the impending negotiations between the Great Lakes governors and the premiers of Ontario and Quebec.<sup>105</sup> Hence, the court presumes that Congress crafted the text of Section 1962d-20 in order for the act to serve as a tool in furtherance of a subsequent bilateral agreement.<sup>106</sup>

However, the court noted the quandary inherent in such a legislative intent. When addressing the ramifications of the governors ignoring the statutory prohibition against extra-Basin diversions and exports, the court characterized the possibility as "a significant and potentially terrible problem."<sup>107</sup> However, the court found solace in the notion that "it is also a problem that the Act appears to overlook for the present in the hopes that later legislation or dispute resolution mechanisms will resolve it."<sup>108</sup> The court proceeded to aspire for the mechanisms being negotiated to "address citizen concerns and especially those of disadvantaged minorities, including Indian tribes."<sup>109</sup>

Essentially, the court deferred enforcement of the act pending the future fruits of current negotiations between the Great Lakes states and provinces. The language of the holding tends to indicate that a private cause of action is not necessary now, considering that the relevant government officials are currently entrenched in promulgating a more practicable enforcement scheme. However, the court impliedly held that if the anticipated schemes are not enacted and implemented, then a private cause of action might ensue.<sup>110</sup>

Moreover, the court properly recognized that Section 1962d-20 *does* currently institute at least one enforcement mechanism: the gubernatorial veto.<sup>111</sup> The court thus expects that if a groundswell of citizens indeed considers a proposed diversion or exportation outside the Basin to be deplorable, then at least one of the Great Lakes governors will exercise his or her veto authority. Thus, no need for a private cause of action exists since "the Act assumes . . . that the Governors will act in favor of the interests of their citizens."<sup>112</sup> By recognizing this, the court

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<sup>105</sup> See *id.* at 863-65.

<sup>106</sup> See *id.*

<sup>107</sup> *Id.* at 864.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 864. See generally 42 U.S.C. § 1962d-20(d).

<sup>111</sup> 42 U.S.C. § 1962d-20(d). See *Little Traverse Bay Bands*, 203 F. Supp. 2d at 864.

<sup>112</sup> 203 F. Supp. 2d at 863.



impliedly affirms the legitimacy of the gubernatorial veto as an enforcement mechanism.

Furthermore, the court embraces another Section 1962d-20 enforcement mechanism as presumptively valid. Judge Enslen discusses the potential pervasiveness of governors' ignoring Section 1962d-20 violations.<sup>113</sup> The court characterizes this quagmire in terms of governors acting in self-interest that contravenes federal interests in the Great Lakes waters.<sup>114</sup> For example, Michigan governor Engler acted in such a manner when writing to Ohio governor Taft in 2001 and beseeching Taft to ignore any opposition to the Great Springs project.<sup>115</sup> In such a situation, the court "assumes without deciding that . . . officers of the federal government could bring suit to enforce the Act."<sup>116</sup> However, the court cautions that such enforcement might prove difficult in the absence of intervening federal standards and an explicit delegation of authority to an executive branch officer.<sup>117</sup>

Perhaps the most significant consequence of the *Little Traverse Bay Bands* holding pertains not to private causes of action but rather to the political process. Although the court rejected the private cause of action as an enforcement mechanism under Section 1962d-20, the court did recognize the validity of the gubernatorial veto.<sup>118</sup>

Two corollaries can derive from this recognition. First, the specter of eight wayward governors acting according to self-interest and not exercising their veto power does lurk over the statute. However, the momentum of the second corollary severely mitigates the likelihood of the first corollary becoming the norm. The second corollary highlights the ability of the political process to dispel the feasibility of a unanimous bloc of wayward governors ever surfacing. As declining water levels render the magnitude of the gubernatorial veto more salient to citizens of Great Lakes states, voters will likely seek governors who will pledge to exercise their veto power over diversions and exports outside the Basin. By occurring in just one state, this would suffice to turn the tide if a coalition of wayward governors ever arose.

In fact, approximately five months after the *Little Traverse Bay Bands* holding, Democratic candidate Jennifer Granholm—who as

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<sup>113</sup> *Id.* at 864.

<sup>114</sup> *Id.*

<sup>115</sup> Glass, *supra* note 4, at 1517.

<sup>116</sup> 203 F. Supp. 2d at 864.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Michigan's attorney general advised Governor Engler that she believed the Great Springs diversion violated Section 1962d-20<sup>119</sup>—defeated Governor Engler's lieutenant governor and hand-picked successor, Dick Posthumus, in the 2002 Michigan gubernatorial race,<sup>120</sup> and was recently elected by a wider margin in 2006.<sup>121</sup> This election result buttressed the political process theory of the WRDA gubernatorial veto. To diversion and export opponents, however, this served as a mere interim remedy.

#### IV. THE GREAT LAKES ANNEX: A MORE RELIABLE ENFORCEMENT MECHANISM

Export and diversion opponents found a more substantial institutional response in the Great Lakes Charter Annex Implementing Agreements of 2005.<sup>122</sup> All eight Great Lakes governors and both Great Lakes premiers signed the Annex on December 13, 2005.<sup>123</sup> However, in order for the Annex to become legally binding, it must still clear several legislative hurdles. The Ontario legislature and the Quebec National Assembly must implement the agreement through modifications to applicable preexisting legislative and regulatory measures.<sup>124</sup> In the United States, the legislatures of all eight Great Lakes states must ratify the Annex.<sup>125</sup> The governor of each Great Lakes state must then submit the ratified legislation to the United States Congress, which must in turn consent to the Annex as an interstate compact.<sup>126</sup> If ratified, the Annex

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<sup>119</sup> *Id.* at 854-55.

<sup>120</sup> *Illinois Rep. Rod R. Blago . . .*, WASH. POST, Nov. 7, 2002, at A31.

<sup>121</sup> See generally State of Michigan, Office of the Governor, <http://www.michigan.gov/gov> (last visited June 15, 2007).

<sup>122</sup> See Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, available at [http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Sustainable\\_Water\\_Resources\\_Agreement.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf) [hereinafter Resources Agreement]; Great Lakes-St. Lawrence River Basin Water Resources Compact, Dec. 13, 2005, available at [http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Water\\_Resources\\_Compact.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf) [hereinafter Compact].

<sup>123</sup> See Press Release, Council of Great Lakes Governors, Governors and Premiers Sign Agreements to Protect Great Lakes Water (Dec. 13, 2005), available at [http://www.cglg.org/projects/water/docs/12-13-05/Annex\\_2001\\_Press\\_Release\\_12-13-05.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Annex_2001_Press_Release_12-13-05.pdf).

<sup>124</sup> Council of Great Lakes Governors, Frequently Asked Questions, Annex 2001 Implementing Agreements (Jan. 2006), available at [http://www.cglg.org/projects/water/docs/12-13-05/Annex\\_Implementing\\_Agreements\\_Frequently\\_Asked\\_Questions\\_1-23-06.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Annex_Implementing_Agreements_Frequently_Asked_Questions_1-23-06.pdf). [hereinafter Frequently Asked Questions].

<sup>125</sup> Compact, *supra* note 122, § 9.4.

<sup>126</sup> *Id.*

will endow citizens of the Great Lakes Basin with unprecedented protections against extra-Basin water diversions and exports.<sup>127</sup>

### A. GENERAL PROVISIONS AND STRUCTURE

The Annex consists of two separate accords: the Great Lakes Sustainable Water Resources Agreement (“Resources Agreement”) and the Great Lakes Basin Water Resources Compact.<sup>128</sup> The former serves to preserve the Basin ecosystem whereas the latter specifically serves to protect the quantity of Basin water.<sup>129</sup> The Compact proves most relevant to this Comment and shall be examined in greater detail.

The Compact commences with a declaration of findings acknowledging the paramount importance of the Great Lakes watershed to the Great Lakes states and provinces.<sup>130</sup> Following the declaration of findings, the drafters enumerated the purposes of the Compact.<sup>131</sup> Principal purposes of undertaking intergovernmental action include protecting Basin waters, eliminating causes of present and future controversies, creating a private right of action to enforce the Annex, and preventing significant deleterious effects of Basin water withdrawals.<sup>132</sup>

In terms of organization, the Compact establishes the “Great Lakes-St. Lawrence River Basin Water Resources Council” as a “body politic and . . . as an agency and instrumentality of the governments of the respective Parties (states and provinces).”<sup>133</sup> The respective governors and premiers of each party comprise the council membership, and the Compact affords each of them with one vote on all council matters.<sup>134</sup> The council generally decides matters by a simple majority.<sup>135</sup>

The hallmark of the Compact consists of its rigorous substantive provisions. In addition to clearing the aforementioned political ratification hurdles, each party must also develop a water management, conservation, and efficiency program in order to successfully implement the Compact.<sup>136</sup> The Compact further calls for each water management

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<sup>127</sup> Council of Great Lakes Governors, *supra* note 123.

<sup>128</sup> Frequently Asked Questions, *supra* note 124.

<sup>129</sup> Compact, *supra* note 122, § 1.3(2); Resources Agreement, *supra* note 122, art. 100(1).

<sup>130</sup> Compact, *supra* note 122, § 1.3(1).

<sup>131</sup> *Id.* § 1.3(2).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* § 2.1.

<sup>134</sup> *Id.* §§ 2.2, 2.4.

<sup>135</sup> *Id.* § 2.4.

<sup>136</sup> *Id.* § 3.4.

program to be reviewed every five years to account for advances in science and technology.<sup>137</sup>

Most significantly, the Compact creates a strict regulatory and enforcement regime and specific standards governing water diversions and exports within and outside the Basin.<sup>138</sup> These standards apply to the entire Great Lakes watershed and thus quell previously articulated concerns pertaining to the geographic scope of the Annex.<sup>139</sup> Under the Compact requirements, each party must maintain a Water Resources Inventory documenting the “location, type, and quantity of withdrawals, diversions, and consumptive uses.”<sup>140</sup> Additionally, each party must annually report its Water Resources Inventory to a database repository, after which the aggregated information will be made publicly available.<sup>141</sup>

## B. DIVERSION PROHIBITIONS

Regarding the contentious issue of diversion, the Compact states that “All New or Increased Diversions are prohibited, except as provided in this Article.”<sup>142</sup> To enforce this provision, the Compact imparts to each party, within its jurisdiction, the responsibility of managing and regulating new or increased withdrawals, consumptive uses, and diversions.<sup>143</sup>

Each party also bears the burden of *granting* new or increased withdrawals, consumptive uses, and diversions that are permitted by exceptions within the Compact.<sup>144</sup> To do so, parties must allow prospective water users an opportunity to apply for a new or increased use.<sup>145</sup> In determining whether to accept an application for a new or increased use of Basin water, the originating party (“the Party within whose jurisdiction an Application or registration is made or required”)<sup>146</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *See id.* arts. 3-4.

<sup>139</sup> The Compact defines “Waters of the Basin” as “all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the Basin.” *Id.* § 1.2. *See also* Hinkle, *supra* note 4, at 304 (noting that “Basin” does not include the Lake Michigan watershed, “which is entirely enclosed within the borders of the United States”).

<sup>140</sup> Compact, *supra* note 122, § 4.1.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* § 4.8.

<sup>143</sup> *Id.* § 4.3.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* § 1.2.

must assess whether the proposed use is consistent with the Standard of Review and Decision promulgated by the Compact.<sup>147</sup> If the proposed use does not violate the Standard of Review and Decision, then the originating party retains the discretion to accept or reject the application.<sup>148</sup> States or provinces “may impose a more restrictive decision-making standard for Withdrawals.”<sup>149</sup> Thus, “although a Proposal meets the Standard of Review and Decision it may not be approved” under the laws of an originating party that implements more arduous application criteria.<sup>150</sup>

### C. DIVERSION EXCEPTIONS

Despite the general diversion prohibition promulgated by Section 4.8 of the Compact, the final document nonetheless permits several significant types of diversions. The Great Lakes states ultimately garnered the assent of Ontario and Quebec on one of the most controversial issues of the Annex negotiations: an exception for straddling communities and counties.<sup>151</sup> Under the signed Compact, originating parties retain the right to govern proposals to divert water to straddling communities outside the Basin.<sup>152</sup> The key check on a party’s autonomy to grant such diversions requires that all water withdrawn from the Basin ultimately be returned to the Basin.<sup>153</sup> For many straddling communities, the cost of building infrastructure to return water to the Basin will likely preclude them from applying for Basin water. Additionally, straddling communities seeking more than five million gallons of Basin water per day must acquire unanimous approval from the council.<sup>154</sup>

The Compact institutes even more onerous restrictions on diversions to straddling counties.<sup>155</sup> For mere application eligibility, a

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<sup>147</sup> *Id.* §§ 4.3, 4.12.

<sup>148</sup> *Id.* § 4.12(1).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* § 4.9(1). This compromise was reached after the Great Lakes states agreed to stringent tests for such diversion, as well as the requirement that all diverted water must be returned to the Basin. See Keith Leslie, *Changes Made to International Draft Agreement on Diverting Great Lakes Water*, CANADIAN PRESS NEWSWIRE, Nov. 18, 2005.

<sup>152</sup> Compact, *supra* note 122, § 4.9(1).

<sup>153</sup> *Id.* § 4.9(1)(a).

<sup>154</sup> *Id.* § 4.9(2)(c)(iv).

<sup>155</sup> See *id.* § 4.9(3).

straddling county's proposal must demonstrate a lack of a reasonable water supply alternative within the Basin in which the community is located; the proposal must also guarantee that a high percentage of water will be returned to the Basin, and it must demonstrate that the diversion will not endanger the Basin Ecosystem. Finally, the council must unanimously approve the proposal.<sup>156</sup> Straddling counties must meet all these criteria, regardless of the size of the proposed diversion.<sup>157</sup>

Another exception exists for diversions permitted under current enforcement regimes.<sup>158</sup> As the text indicates, exceptions "will be implemented so as to ensure . . . compliance with all applicable municipal, State and federal laws as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909."<sup>159</sup> The "Chicago Diversion" constitutes the most significant diversion grandfathered by this exception.<sup>160</sup> Under the Compact, "the Parties acknowledge that the United States Supreme Court decree in *Wisconsin v. Illinois* shall continue in full force and effect."<sup>161</sup> The consent decree established by *Wisconsin v. Illinois* permits a diversion of 3,680 cubic feet per second from Lake Michigan to the Chicago River, which ultimately flows into the Mississippi River watershed.<sup>162</sup>

The Compact also permits an exceptionally controversial—albeit subtle—exception for bulk water transfers.<sup>163</sup> According to the text, "[a] Proposal to Withdraw Water and 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 Diversion."<sup>164</sup> Thus, any proposal to withdraw water and remove it from the Basin in any container *less than* 5.7 gallons does not constitute a diversion under the Compact. This effectively creates an exemption for the bottled water industry.<sup>165</sup> Therefore, the Compact leaves the floodgates open for massive exports

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<sup>156</sup> *Id.* §§ 4.9(3)(a)-(g).

<sup>157</sup> *See id.* § 4.9(3).

<sup>158</sup> *Id.* § 4.9(4)(f).

<sup>159</sup> *Id.*

<sup>160</sup> *Wisconsin v. Illinois*, 449 U.S. 48 (1980) (entering consent decree permitting the massive "Chicago Diversion" of Lake Michigan water). *See* Compact, *supra* note 122, § 4.14.

<sup>161</sup> Compact, *supra* note 122, § 4.14(2).

<sup>162</sup> *Wisconsin*, 449 U.S. at 48. The Chicago River used to flow into Lake Michigan, but engineers reversed the flow of the river in 1900 in order to prevent further pollution of the lake, which provided the city's drinking water. *See* LOUIS P. CAIN, SANITATION STRATEGY FOR A LAKEFRONT METROPOLIS: THE CASE OF CHICAGO 59-64, 78 (1978).

<sup>163</sup> *See* Compact, *supra* note 122, § 4.12(10).

<sup>164</sup> *Id.* (emphasis added).

<sup>165</sup> McDiarmid, *supra* note 78.

of Great Lakes water to areas outside the Basin, with the only caveat being that no water is removed in a container greater than 5.7 gallons. As litigation in *Little Traverse Bay Bands* and *MCWC v. Nestle Waters North America, Inc.*<sup>166</sup> demonstrates, bottled water companies already seek such exports.

#### D. PUBLIC REACTION: PANACEA

Despite the numerous exceptions to diversion and export prohibitions, scores of (primarily American) government officials, private citizens, and publications lauded the Annex as the desirable culmination of years of intense bipartisan, binational negotiations. One Chicago newspaper praised the signing of the Annex as the harbinger of “the most important week in Lake Michigan’s history since the glaciers left town.”<sup>167</sup> Governor Rendell of Pennsylvania called the Annex a “strategic alliance” that will assist in management and preservation of the Great Lakes.<sup>168</sup> Ohio senator George Voinovich declared that in nearly forty years of work to restore and guard the Great Lakes, he had “not seen a more productive month than . . . December [2005] in terms of the long-term health of the Lakes.”<sup>169</sup> Voinovich vowed to support the Compact through Congress.<sup>170</sup>

Several prominent environmental organizations also support ratification of the Annex. Despite several reservations, the Georgian Bay Association “applauded” the 2005 Annex draft.<sup>171</sup> Great Lakes United, another environmental advocacy group, “praised the eight states and two provinces of the Great Lakes [B]asin” for signing the “first viable plan to ensure the long-term protection and sound management” of Great Lakes water.<sup>172</sup>

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<sup>166</sup> See generally *Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 709 N.W.2d. 174 (Mich. Ct. App. 2005).

<sup>167</sup> Burt Constable, *Drop in the Bucket Compared to Iraq, Great Lakes Need Money*, CHI. DAILY HERALD, Dec. 15, 2005, at 17.

<sup>168</sup> *Gov. Rendell’s Administration Signs Historic Agreement to Improve Health, Economic Vitality of Great Lakes*, PR NEWswire, Dec. 13, 2005.

<sup>169</sup> Sen. George Voinovich, Op-Ed., *Great Lakes Month 2006: Great Lakes Year?*, STATES NEWS SERVICE, Dec. 21, 2005.

<sup>170</sup> *Id.*

<sup>171</sup> Penny Pepperell, *The Great Lakes Charter Annex: GBA’s Position on the July, 2005 Revised Agreement*, GBA UPDATE (Georgian Bay Ass’n, Toronto, Ont.), Fall/Winter 2005, at 12.

<sup>172</sup> Press Release, Great Lakes United (Dec. 12, 2005), available at [www.glu.org/english/documents/news/files/annex\\_press\\_release\\_12\\_12\\_05.pdf](http://www.glu.org/english/documents/news/files/annex_press_release_12_12_05.pdf).

### E. PUBLIC REACTION: ATROCITY

Opponents (primarily Canadian) of the Annex view it as a mere instrument of institutionally authorized export of Great Lakes water. Critics emphasize that the Annex allows exemptions for the bottled water industry.<sup>173</sup> They also note that the Annex leaves withdrawals of fewer than five million gallons per day to the discretion of the originating party.<sup>174</sup> An official for the Council of Canadians—a progressive Canadian public interest group—lamented that “the current deal claims to protect the Great Lakes from the threats and impacts of diversions while allowing large withdrawals to continue.”<sup>175</sup> Overall, Annex critics bemoan the fact that the agreement seems to sap Canadian sovereignty over the Great Lakes by proffering concessions to the United States bottled water industry.<sup>176</sup> Although “the rules generally have been supported by U.S. conservation groups . . . [i]t’s been a different story in Canada.”<sup>177</sup>

### F. ANALYSIS OF THE EFFICACY OF THE ANNEX RELATIVE TO THE STATUS QUO

As the *Little Traverse Bay Bands* holding revealed, grave reservations cloud the enforcement capacity of current diversion enforcement regimes.<sup>178</sup> Moreover, scholars widely consider the relevant WRDA statute to be unconstitutional.<sup>179</sup> Although certain encouraging aspects of the *Little Traverse Bay Bands* holding include support for the WRDA enforcement regime,<sup>180</sup> a ratified Annex would prohibit more diversions and would more likely withstand constitutional scrutiny.

Meanwhile, as the Annex awaits ratification by the relevant state and provincial legislatures and Congress, “the dry southwestern United

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<sup>173</sup> Richard Brennan, *Border States Protect Lakes*, TORONTO STAR, Dec. 14, 2005, at A18; *Great Lakes Deal Would Allow Water Bottling*, THE RECORD (Kitchener-Waterloo, Ont.), Nov. 24, 2005, at A10.

<sup>174</sup> *Great Lakes Deal Would Allow Water Bottling*, *supra* note 173.

<sup>175</sup> *Id.* (quoting Susan Howatt, national water campaigner for the Council of Canadians).

<sup>176</sup> *See id.*

<sup>177</sup> Dan Egan, *Governors Poised to Sign the Great Lakes Water Rules, but Restrictions on Diversions Aren’t Ironclad Just Yet*, MILWAUKEE J. SENTINEL, Dec. 12, 2005, at B1.

<sup>178</sup> *See generally* *Little Traverse Bay Bands v. Great Spring Waters*, 203 F.Supp.2d 853 (W.D. Mich. 2002).

<sup>179</sup> *See* McDiarmid, *supra* note 78.

<sup>180</sup> *See generally* *Little Traverse Bay Bands*, 203 F.Supp.2d 853; Glass, *supra* note 4, at 1517.



States is developing at a rapid clip and gaining congressional seats while the Great Lakes region is losing them.”<sup>181</sup> Therefore, proponents of preserving the Great Lakes would benefit from swift ratification of the Annex, which proffers fewer arbitrary diversion rules and more consistent, specific, and scientifically buttressed standards than the WRDA.<sup>182</sup> In any event, expedient passage of the Annex would prevent new WRDA litigation from resulting in additional grandfathered diversion schemes.

## CONCLUSION

As arid regions of the world endure substantial population growth rates, they look elsewhere for their water needs. Although the Great Lakes Basin comprises one-fifth of the world’s freshwater supply, it also constitutes a non-renewable resource. To protect the abundance of this resource, diversion enforcement mechanisms must operate in a strict, reliable, and constitutional manner. Since an increasing body of case law suggests the impotence of much of the current diversion enforcement regime, more exacting legislation proves paramount to preservation.

Ratification of the Great Lakes Annex Implementing Agreement will likely provide such a legislative enforcement mechanism. Although the Annex does entail policy controversy—notably the specter of massive bottled water exports of Basin water to areas outside the Basin—it does not contain any constitutional controversy. Consequently, as one Great Lakes Basin legislator surmised, ratification of the Annex serves as “our best and maybe last hope for protecting our lakes for future generations.”<sup>183</sup> Accordingly, ratification of the Great Lakes Annex should proceed in order to enhance enforcement against improvident diversions.

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<sup>181</sup> Kari Lydersen, *States, Canada Move to Block Sales of Water*, WASH. POST, Oct. 30, 2005, at A03.

<sup>182</sup> *Compare Compact*, *supra* note 122, art. 4, and *Resources Agreement*, *supra* note 122, ch. 2, with 42 U.S.C. §§ 1962d-20 (a), (d), (f).

<sup>183</sup> Egan, *supra* note 177 (quoting Wisconsin Rep. John Richards).