

## Great Lakes Water: Limitations on Privatization and Diversions James M. Olson<sup>1</sup>

In the last quarter of the 20<sup>th</sup> century, it became evident that the world's water supply is not infinite and for the most part not renewable. At the beginning of the 21<sup>st</sup> century, we realize that freshwater is in critically short supply. The causes are many and complex, from global climate change to failed irrigation projects in the Aral Sea region of western Asia, the Tigris and Euphrates regions of the Middle East, the Yangtze River, and the urban demands in China's northeast, Mexico City, the United States' own California, and Las Vegas, to mention just a few. For centuries, it has been believed that water could be harnessed and used for any human need. We have now come to realize that there may not be enough.<sup>2</sup> A recent World Bank Report predicts that two-thirds of the world's population, that's about 4 billion people, will be without adequate drinking water by the year 2025. In short, there is a looming world-wide water crisis of monumental proportions, the twists and turns of which could make Jack Nicholson's tribulations in the movie "China Town" seem trivial.

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<sup>2</sup>Postel, Sandra, *The Last Oasis, Facing Water Scarcity* (Norton & Co., 1992); *Pillars of Sand* (Norton & Co, 1999). The author has made a very strong case for abandoning massive water diversions in favor of water conservation and sustainable water allocation. See also Engleman, Robert, *Sustaining Water: Population and the Future of Renewable Water Supplies* (Population Action International, 1993); Reisner, Marc, *Cadillac Desert* (Viking, 1986).

The Great Lakes represent one-fifth of the world's surface freshwater, but only one percent of the Great Lakes water is renewed every year.<sup>3</sup> With global water demand doubling every twenty years, it is with little wonder that other states, countries, and private companies have their eyes on the Great Lakes. The purpose of this article is to provide an elementary overview of some of the laws and agreements that currently govern withdrawal and removal of water from the Great Lakes Basin.

## **Federal and State Diversion Laws**

### **1. United States Supreme Court**

Diversions from the Great Lakes Basin are not new, but they are the exception rather than the rule.<sup>4</sup> The U.S. Supreme Court confronted this issue in its 1925 decision of *Sanitary District of Chicago v United States*.<sup>5</sup> In 1899, the Secretary of Army had issued a permit for Chicago to divert up to 10,000 cubic feet per second (cfs), but the Supreme Court ultimately limited it to 3,200 cfs because of the threatened impact on navigation.<sup>6</sup> To say the least, the Chicago Diversion has been jealously watched by Michigan and others over the years, and while the flow of the water out of Lake

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<sup>3</sup>*IJC Report*, p. 6; Great Lakes Information Network, "An Overview of Flows," [www.great-lakes.net/envt/water/flows/html](http://www.great-lakes.net/envt/water/flows/html) (Feb. 16, 2000)

<sup>4</sup>There are eight inter-Basin and six intra-Basin diversions. Most of them involve navigation projects, like the Erie, Welland, and Portage Canals. The rest, like the Chicago Diversion, involve public or municipal withdrawals. See Fig. 2, *IJC Report*, p. 13. (**Appendix 1**).

<sup>5</sup>*Sanitary District of Chicago v United States*, 266 US 405, 45 S. Ct. 176, 69 L Ed 352 (1925).

<sup>6</sup>International Joint Commission, *Final Report on Protection of Waters of the Great Lakes*, Feb. 22, 2000 ("IJC Report"), pp. 12, 17; *Sanitary District of Chicago v United States*, *Id.*

Michigan and the Basin<sup>7</sup> has exceeded the Supreme Court's limit from time to time, it has remained, insofar as officially reported, relatively close to the mark.<sup>8</sup>

## 2. Federal Water Resources Development Act

Two decades ago a Texas Company called ETSI announced plans to divert water through a proposed pipeline from the Missouri River to Wyoming coal fields, then mix the coal in a slurry for transport by another pipeline to Arkansas. This drew enough attention that South Dakota and Minnesota flirted with the idea of piping water from Lake Superior to Wyoming. Not long after, fickle weather over the Central United States lowered the Mississippi River to unprecedented levels, and shipping and navigation became difficult if not impossible. Speculation abounded that the Corps of Engineers would approve diversions of water from Lake Michigan to the Mississippi.

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<sup>7</sup>The actual boundaries of the Great Lakes Basin encompass much less land and water area than one would initially imagine. Most of the Basin includes large parts of Ontario and Michigan's Lower and Upper Peninsulas. Only about one-half mile of Chicago's shoreline is within the Basin, the remainder of Chicago and Illinois flows to and is part of the Mississippi River watershed. Wisconsin, Minnesota, Indiana, Ohio, Pennsylvania, and New York also have relatively narrow land areas that are part of the Great Lakes Basin. For example, large cities within Great Lakes Basin states, but not within the Basin include New York City, Philadelphia, Minneapolis, Cincinnati, and most of Chicago. *Id.*, *IJC Report*, Fig. 1, p. 4 (**Appendix 2**).

<sup>8</sup>The Corps of Engineers reports that the flow of diverted water has averaged 3,439 cfs from 1981 to 1981. *IJC Report*, p. 12.

Through the leadership of former Governor Milliken and others, the region's Congressional delegation mobilized Congress to pass the Water Resources Development Act of 1986.<sup>9</sup> Great Lakes states and Congress sought to ban any diversions or removals of water from the Great Lakes Basin until a comprehensive policy and legal analysis could be completed and an institutional framework for considering the future of water removals from the Basin implemented. Twenty years and several federal, state, and provincial administrations later, this framework is almost a reality. Or is it?

The WRDA declared in 1986:

No water shall be diverted 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 Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes states.<sup>10</sup>

Just two years ago, a company by the name of Nova Group, Ltd. obtained a permit from an Ontario Provincial district office to withdraw 159 million gallons per year of water into a super tanker for shipment to Asia. After public outcry and the quick action by Michigan's Congressional leadership, the permit was cancelled by the Ontario Ministry of the Environment. The company pulled its appeal after strong opposition from Michigan's Congressional delegation and several citizen organizations.

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<sup>9</sup>42 USC, Section 1962d-20(d).

<sup>10</sup>Michigan has a similar prohibition against diverting water out of the Great Lakes basin, and groundwater is included in the definition of water of the Great Lakes basin. *Great Lakes Preservation Act*, MCL 324.32701 et seq.

Responding in part to the Nova proposal, former Senator Abraham<sup>11</sup> introduced a bill in 1999 to add a new section to the WRDA which would impose a moratorium on the “bulk export of freshwater.”<sup>12</sup> Senator Levin voiced serious concerns about the amendment’s implication that it would permit “exports” within the United States but outside the Basin, and believed the existing language banning any “diversion” was “legally sufficient.”<sup>13</sup> Ultimately, Senator Abraham’s proposed amendment was modified in favor of simply amending the law by adding the word “exported.”

No 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 Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lakes states.<sup>14</sup>

Since the enactment of WRDA, no diversions have been approved by the Great Lakes Governors. Akron, Ohio straddles the drainage divide between the Ohio River and Lake Erie. Its proposal to withdraw water from Lake Erie with a promise to return it was approved by the Great Lakes states governors in 1998. The Governors approved a similar request to divert water from Lake Michigan by the Pleasant Prairie, Wisconsin. Both of these diversions complied with WRDA because they involved municipal purposes and hinged on the return of equivalent water so that there would be no net loss of water.

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<sup>11</sup>Now U.S. Secretary of Energy.

<sup>12</sup>106<sup>th</sup> Congress, 1<sup>st</sup> Session, S1667,

<sup>13</sup>146 Cong Rec S 9151-9152 (Sept. 25, 2000).

<sup>14</sup>42 USC 1962d-20(d), as amended, September, 2000.

In the years to come the reach of WRDA's prohibition of diversions or exports of Great Lakes water will be tested well beyond a few favors to municipalities located within Great Lakes states that involve a full return of water. Parts of six counties in the Chicago area that border Lake Michigan face serious water shortages because of warming trends and urban sprawl, restricting shipping, use of marinas, and expansion of cities.<sup>15</sup> Here in Michigan The Perrier Group wants to tap 210 million gallons a year of spring waters that feed a stream that flows to Lake Michigan, divert it through a 12 mile pipeline to a bottling plant, and truck seventy-five percent of it outside of the Great Lakes Basin. Michigan's Attorney General was requested to issue an opinion on whether the Perrier proposal constitutes a diversion or export of water from a tributary of the Great Lakes outside of the Basin.<sup>16</sup> The Attorney General released two letter opinions in September, 2001. The first was addressed to Michigan's Governor Engler, concluding that the Perrier proposal was subject to the

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<sup>15</sup>**“Near Vast Bodies of Water, Land Lies Parched,”**  
**NYTimes.com/2001/08/12/national/12WATE.html.**

<sup>16</sup>In a letter dated June 12, 2001, State Rep. Julie Dennis requested the Attorney General of Michigan to issue a formal opinion on whether or not the project would violate the WRDA. A similar letter was also submitted to the Attorney General on June 7, 2001 by Sen. Charles Dingell. See Hains, **Memorandum to the Attorney General of Michigan, Regarding the Issues Raised in the Letter Dated June 12, 2001 directed to the Attorney General by Rep. Julie Dennis.** Mr. Hains is an attorney who represents The Perrier Group. See also Olson and Dettmer, **Reply to GSWA/Perrier's Memorandum of the Attorney General, July 27, 2001.** A similar dispute boils over a Perrier project on tap for Wisconsin.

WRDA and urging the Governor to implement the consensus process with the Governors of other Great Lakes State.<sup>17</sup> On the same date, the Attorney General sent Senator Dingell and Representatives Dennis and O'Neil a letter, also concluding the Perrier proposal was covered by the WRDA and urging the adoption of a comprehensive state water use law.<sup>18</sup> The Attorney General reasoned that withdrawing the groundwater that feeds the Little Muskegon River and bottling it for retail sale outside the Great Lakes basin “constitutes a diversion or export ‘for use outside the basin within the meaning of federal law.’”<sup>19</sup>

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<sup>17</sup> Letter from Attorney General Jennifer M. Granholm to Governor John Engler, dated September 13, 2001.

<sup>18</sup>Letter from Attorney General Jennifer M. Granholm to Senator Charles Dingell and Representatives Julie Dennis and William O'Neil, dated September 13, 2001.

<sup>19</sup>Note 20, *supra*.

No doubt the Great Lakes, particularly Michigan which lies in the heart of the Basin's water resources, will be the battle grounds over private efforts to obtain perpetual supplies of water for diversion or transport to other parts of the country or other countries around the world.<sup>20</sup>

### **3. Boundary Waters Treaty of 1909**

In 1909, the United States and Canada signed the Boundary Waters Treaty that governs the use of waters in the Great Lakes. The Treaty prohibits diversion of the waters of the Great Lakes, but, unlike the WRDA, the Treaty covers only the surface waters of the Great Lakes that share a common boundary between the two countries. Lake Michigan is not governed by the Treaty, and connecting lakes and tributaries, including groundwater, are exempt. This shortcoming of the Treaty surely led to the WRDA and the Provinces and Great Lakes states arrangement under the Great Lakes Charter of 1985.<sup>21</sup>

### **4. Great Lakes Charter**

The Great Lakes Charter is a non-binding, voluntary arrangement signed by the Great Lakes states and provinces that provides that no new or increased diversion of water or consumptive use of water resources of the Great Lakes will be approved or permitted without notice to and consultation seeking concurrence by all affected states and provinces. The Charter declares, "it is the intent of the signatory states and provinces that diversions of Basin water resources will not be allowed if individually or cumulatively they would have any significant adverse impacts on

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<sup>20</sup>The International Joint Commission believes that privatization of water may be appropriate, at least for municipalities. *IJC Report.*, p. 18 Others take an opposite view. Barlow, M., "Blue Gold," (Special Report, International Forum on Globalization, June, 1999); Graham, "A Hundred Rivers Run Through It," *Harpers Magazine*, June, 1998.

<sup>21</sup>Signed by Governors and Premiers on February 11, 1985.

lake levels, in-basin uses and the Great Lakes Ecosystem.”<sup>22</sup> The Charter stipulates that the water resources of the Basin should be treated as a single hydrologic system that transcends political boundaries in the Basin, and that water resources of the Basin include all of the Great Lakes, lakes and streams, and tributary groundwaters.<sup>23</sup>

**5. Annex 2001**

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<sup>22</sup>Id.

<sup>23</sup>Id.

Because of the increased pressures on the Great Lakes since 1985, the Premiers and Governors began a process to amend the Charter, and late last year released Annex 2001 to supplement the Great Lakes Charter<sup>24</sup> in order to promote fundamental principles of cooperation and to protect, conserve, and improve the waters. Annex 2001 was approved by the Governors and Premiers this past Summer, and the Annex gives the provinces and states three years in which to enter into formal binding agreements and implement its principles through legislative enactments.<sup>25</sup>

Section II of Annex 2001 calls for a new decision making standard which will include a standard that “no State or Province will allow a new or increased withdrawal of Waters of the Great Lakes Basin, except for those withdrawals deemed to have *de minimis* impact,<sup>26</sup> unless the applicant [establishes that its proposal meets four standards]:

- a. Includes all reasonable and appropriate water conservation measures; and
- b. Does not, individually or cumulatively, ... cause significant adverse impact to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and
- c. Results in an Improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and
- d. Complies with all applicable laws;

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<sup>24</sup>Draft, December 14, 2001, Annex 2001, A Supplementary Agreement to the Great Lakes Charter.

<sup>25</sup>Section 1, Annex 2001.

<sup>26</sup>But see note 43, *infra*.

Until the new standards are implemented, Section III calls for similar interim criteria for review of proposals that are subject to the WRDA, except that a proposal is presumed to have *de minimis* impact (less than one million gallons) and therefore be approved if it meets the interim criteria. Governor Engler considers the *de minimis* provision inappropriate because it would compromise the integrity of WRDA,<sup>27</sup> and Attorney General Granholm agrees.<sup>28</sup> The Governor and Attorney General may well have a legal basis to challenge the *de minimis* provision because Michigan's waters are impressed with a public trust.<sup>29</sup> Moreover, it is not at all clear what is meant by "improvement of the Waters." The Perrier Group argues in support of its proposal that a \$500,000 gift for watershed restoration is sufficient.<sup>30</sup> If this is sufficient, then water traders could purchase control over hundreds of millions of dollars worth of Michigan's water for a pittance. This, of course, raises fundamental questions regarding the nature of water rights and the public trust in Michigan's waters.

## **6. Limitations under the Common Law: Riparian, Groundwater, and the Public Trust**

### **1. "Reasonable Use" under Riparian Law**

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<sup>27</sup>Letter from Governor John Engler to Governor Tom Ridge, Pennsylvania, dated April 18, 2001.

<sup>28</sup>Note 20, *supra*, p. 2.

<sup>29</sup>Note 43, *infra*.

<sup>30</sup> See Hains, **Memorandum to the Attorney General of Michigan, Regarding the Issues Raised in the Letter Dated June 12, 2001 directed to the Attorney General by Rep. Julie Dennis**, p. 18.

Michigan follows the reasonable use rule for riparian rights in lakes and streams. Under this rule, any riparian owner has the traditional use of the water from lakes and streams for domestic, fishing, hunting, swimming, and agricultural purposes.<sup>31</sup> A riparian owner also may use the water from lakes and streams for non-traditional purposes, such as for municipal water supplies, industrial, development purposes, subject to the correlative rights of other riparians and the public.<sup>32</sup> A basic principle of riparian law holds that a riparian owner cannot divert the water from a lake or stream for use on a non-riparian or off-tract property.<sup>33</sup> Michigan courts appear to recognize, but have not yet decided the off-tract question. However, off-tract use may under some circumstances be considered reasonable where the use is necessary, promotes a public benefit, such as a municipal water supply, and would not harm other riparians or the public.<sup>34</sup>

2. “Reasonable Use” under the American Rule of Groundwater

The Michigan Supreme Court adopted the American Rule of reasonable use of groundwater in *Schenk v Ann Arbor*,<sup>35</sup> presumably including the limitation on off-tract diversion unless for a municipal purpose.<sup>36</sup> The Court of Appeals has recommended that courts should follow sections 850 and 850A of the Restatement of Torts, 2d, which looks at either the unreasonable use of the watercourse or the harm such use causes to others without respect to whether the water is used to benefit the surface estate or off-tract.<sup>37</sup> However, in *Schenk* the Court relied on a series of New

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<sup>31</sup>*Collins v Gerhardt*, 237 Mich 48, 211 NW 115 (1927).

<sup>32</sup>*Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967).

<sup>33</sup>Sax, Abrams, Thompson, Jr., *Legal Control of Water Resources, Cases and Materials*, 7<sup>th</sup> Edition (West Publishing, 1991), pp. 38, 83, 107-109.

<sup>34</sup>*Schenk*, note 35, *infra*; *Thompson v Enz*, note 33, 379 Mich at 686; Cameron, **Michigan Real Property Law, 2<sup>nd</sup>, Section 3.8** (I.C.L.E.).

<sup>35</sup>196 Mich 75, 163 NW 109 (1917).

<sup>36</sup>*Id.*; See *Meeker v East Orange*, 77 N.J. Law, 623, 74 A. 379 (1909).

<sup>37</sup>**Restatement of Law Second, Torts 2<sup>nd</sup>, Section 850A, Reasonableness of the Use of Water**; *Maerz v US Steel Corp.*, 116 Mich App 710, 323 NW2d 524 (1982).

York and New Jersey cases that prohibited withdrawals and diversions of groundwater that diminish the adjacent interconnected waters of a lake or stream.<sup>38</sup>

3. The Public Trust

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<sup>38</sup>*Meeker, supra*, note 37; *Smith v City of Brooklyn*, 160 N.Y. 357, 54 N.E. 787.

Michigan's public lakes and streams are impressed with a public trust that grants citizens, as beneficiaries of this trust, the paramount right to use these lakes and streams for boating, fishing, swimming and recreation.<sup>39</sup> The public trust grants public access to and over all such navigable streams for the use and enjoyment of these public recreational uses, and such public uses are not subject to trespass claims asserted by riparians who own the land along and beneath the river.<sup>40</sup> The public trust in the states waters cannot be disposed, alienated, or subordinated for purely private purposes,<sup>41</sup> and even if deemed a public purpose, only if "in accordance with the regulatory assent of the State" consistent with the public interest in the public trust, and the present or future use of the waters by the public.<sup>42</sup> In order to protect public trust waters and bottomlands from incremental or nibbling effects of cumulative individual projects, Michigan has rejected a *de minimis* rule.<sup>43</sup>

### Conclusion

Michigan has not adopted a comprehensive water withdrawal, transfer, and water use law. It is one of handful of states that has not done so. Given the historical perception of unlimited abundance, this is not surprising. Given the looming world water crisis and the evidence of water shortages for Michigan's marinas, navigation, boating, and fishing in the past few years, this is unforgivable. The WRDA and Annex 2001 to the Great Lakes Charter provide a launch to managing Michigan's treasured water resources, but implementation is called for. It is time for a fully

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<sup>39</sup>*Collins v Gerhardt*, 237 Mich 38, 211 NW 115 (1927).

<sup>40</sup>*Moore v Sanborne*, 2 Mich 520 (1853), *Collins*, *supra*.

<sup>41</sup>*Illinois Central Railroad v Illinois*, 146 US 387, *aff'd* 154 US 225 (1894); *Obrecht v National Gypsum Co*, 361 Mich 399, 105 Nw 143 (1960); *People v Babcock*, 38 Mich App 336, 351, 196 NW2d 489 (1972); Sax, Joseph, L., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1968).

<sup>42</sup>*Netdweg v Wallace*, 237 Mich 14, 20, 208 NW 51 (1927); *Obrecht*, note 41, *supra*, 361 Mich at 413; see also section 1703(1) of the *Michigan Environmental Protection Act*, Part 17, NREPA, MCL 324.1701 et. seq.; Haynes and Smary, Eds., *The Public Trust Doctrine*, Chpt. 13, **Michigan Environmental Law Deskbook** (ICLE, 1992).

<sup>43</sup>*People v Broedell*, 365 Mich 201, 204-205 (1961).

developed water use that recognizes the State's interest, the public trust, and the reasonable and conservation-minded use of these waters to meet Michigan's current and future needs for drinking water, water dependent natural resources, tourism, recreation, agriculture (both growing and packaging), and industry.<sup>44</sup>

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<sup>44</sup>As if this writing, at least one set of bills has been introduced in the state legislature, and more comprehensive water use and protection measures that take into account the public trust in the waters of the state are under consideration.