

WATER REGULATION ALONG THE GREAT LAKES DIVIDE

A. Dan Tarlock

Professor of Law, Chicago-Kent College of Law

The Great Lakes States face a paradoxical situation: the most abundant resource, the Great Lakes, is primarily dedicated to non-consumptive uses, navigation and ecosystem conservation. The less abundant resources, surface and ground water, are basically subject to capture by the first user. The reason for is that the evolving Atight® bi-national Great Lakes protection effort has run ahead of state water management reform.

I. THE COMMON LAW BASELINE

In all of the 8 Great Lakes states, the common law of riparian rights is the legal baseline. Some states, notably Minnesota and Wisconsin, have supplemented the common with a statutory permit system. However, regulation remains less than comprehensive so the common law remains an important source of law both as default rules and to interpret the statutes. The net result is that, with some exceptions, the water law of the Great Lakes basin states encourages the unlimited use of water without regard to conservation considerations. The common law of riparian rights is a rule that requires all riparians along a stream system to share the stream, but sharing is difficult to enforce

so the real rule is: use first and take a small risk of adverse consequences.

Different rules apply to groundwater. The common law of ground water use is a law of capture by overlying land owners. Under the pure common law rule, each overlying owner can capture as much water as he or she can pump subject only to the correlative rights of other overlying landowners to join a pumping race. The rule has been slightly modified by most statutes by legislation or judicial decision. Most states- with the possible exception of Indiana¹- adhere to the reasonable use rule which prohibits non-overlying owners, usually municipalities, from damaging pumpers who overlie an aquifer. Michigan, Ohio and Wisconsin have gone further and adopted the rule proposed by the Restatement of Torts (Second) which imposes a reasonable use or non-injury limitation on large overlying pumpers, usually mines or quarries, who damage small overlying owners.² However, the important point is that groundwater is still basically allocated by a rule of capture; groundwater rights are not integrated with surface rights and the law

¹ Wiggins v. Brazil Coal & Clay Corp., 452 N.E.2d 958 (Ind. 1983). An intermediate appellate court recently refused to apply the rule to pumping that caused subsidence, City of Valpariso v. DeFler, 694 N.E.2d 1177 (Ind.App. 1998), and criticized the harshness of the common law rule. See also Natural Resources Commission v. Amax Coal Co., 638 N.E.2d 418 (Ind.1994)(SMCRA modifies common law rule).

² Maerz v. American Steel Corp., 323 N.W.2d 524 (Mich. 1982); Cline v. American aggregates Corp., 474 N.E.2d 324 (Ohio 1984); and State v. Michaels Pipeline Construction Co., 217 N.W.2d 339 (Wis. 1974).

encourages rather than discourages mining in excess of safe annual yield.³

The common law doctrine of riparian rights encourages unlimited use because it is primarily a tort rather than property regime. Under the doctrine of riparian rights, rights are assigned based on the ownership of land abutting a stream. All riparians within the watershed of a stream have equal rights to use and enjoy the waters. Riparian rights are both consumptive- the right to divert- and non-consumptive- the right to use of surface for navigation and to erect piers to exercise the right of navigation. In practice, the common law of riparian rights functions as a tort regime. The law is invoked only after one riparian has made a use that injures another. The injured riparian seeks post hoc redress, usually damages for the injury. Riparians in fact have property rights in the water, but the extent of the rights is indeterminate because, under the modern common law, each riparian has a right to make a reasonable use of

³ Nebraska has used Section 858 of the Restatement of Torts (Second) to achieve a partial integration. A senior surface appropriator does not have an absolute right to claim that hydrologically connected groundwater is part of his or her supply. Rather, a court can apply the Section 858 balancing factors to make a case by a case determination about the reasonableness of the competing uses. Spear T Ranch. Inc. V. Knaub, 269 Neb. 177, ___N.W.2d___ (2004)

the water and a duty not to injure other riparians. There is no interference unless one person's use precludes or substantially diminishes another's. Reasonableness is a very fact-sensitive balancing test so it is difficult, if not impossible, to predict the extent of a right prior to litigation.

The uncertainty problem is exacerbated in the Midwestern states because most conflicts involve incompatible non-consumptive uses as opposed to incompatible consumptive uses. There are many cases dealing with the respective rights of riparians to "wharf out," erect piers and the use the surface of small lakes outside the vertical planes from the bed ownership boundaries. States generally regulate the placement of structures in navigable waters and the use of flood plains. There are few precedents that predict how a court would allocate water among competing consumptive uses.

Many experts recommended that the eastern states switch to the law of prior appropriation. Prior appropriation creates semi-exclusive rights in stream systems and aquifers by giving each user a fixed amount of water, provided that the water is continuously applied to a beneficial use. The term beneficial use is complex,⁴ but it basically means non-wasteful. A few states such as Indiana have adopted the concept as a statutory standard.

⁴ See Janet Newman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Law*, 28 *Envtl. L.* 919 (1998).

It now includes both consumptive and non-consumptive uses. Rights are "handed out" until the entire annual flow of the stream is allocated. In times of shortage, the use of water is curtailed by a scheme of temporal priorities. The most junior user (or users) must forego using water to satisfy the rights of the most senior user (or users).

II. THE MOVE TO REGULATED RIPARIANISM

All of the Great Lakes have enacted some form of statutory control over the use and enjoyment of the surface and ground waters within their boundaries by a mix of common law doctrines, general statutes and statutes that apply in limited situations or to specific bodies or classes of waters. Two weak evolutionary trends that emerge from the current state of the law of water allocation in the Great Lakes states: (1) There is a move to supplement common law allocation rules with state regulation, although this regulation falls short of comprehensive regulation in most states. (2) States have become more sensitive to the need to integrate environmental quality values into traditional state water management. This translates into greater attention on minimum flow maintenance and the protection of the entire aquatic ecosystem, watersheds and wetlands.

The best way to understand the evolution of water law in the midwest is to examine the various legal models of the control of

water use and enjoyment that have been proposed. There are many competing models of the role that the law should play in the use and enjoyment of a state's water. Most of these models are premised on the assumption that the state experiences short-term, prolonged or chronic drought periods. The models can be roughly divided into two classes: (1) common law and (2) administrative regulation. Regulated riparianism seeks to move states to the property model of water allocation. But, it also injects the idea that water resources are public resources in which individual rights to use can be obtained subject to the state's power to supervise and regulate these uses.⁵ Regulated riparianism has three primary components:

1. State water planning
2. An integrated permit system for ground and surface water use
3. The establishment of base or environmental flows and lake levels

⁵See 2 R. Beck, WATERS AND WATER RIGHTS ' 9 (1991).

The most comprehensive currently proposed code is the 1997 Regulated Riparian Model Water Code prepared by a task force of the American Society of Civil Engineers. The Code illustrates that regulated riparianism does not displace the common law of riparian rights, as most western states have done. Instead, it supplements it with a permit system. Iowa currently has the most comprehensive permit system of any eastern or humid state. Minnesota and Wisconsin have the most comprehensive permit systems among the Great Lakes states. Other states have studied the possibility of adopting more comprehensive permit systems but have not acted. After a severe drought, for example, Illinois commissioned a study of its water allocation law⁶, but took no action.

A. Common Law Primary Allocation Model

⁶ Planning and Management Consultants, Ltd, ASSESSMENT OF ILLINOIS WATER QUALITY LAW: FINAL REPORT (July, 1996)

The common law remains the primary allocation regime in several states subject to specific exceptions. Illinois relies on the law of riparian rights to resolve most lake and stream conflicts.⁷ The major exception is that the Department of has special authority to administer the United States Supreme Court decree in *Wisconsin v. Illinois*.⁸ By statute, Illinois has also adopted the reasonable rule for groundwater allocation. Michigan continues to rely on the common law as does Indiana, New York, and Ohio. Pennsylvania is somewhat similar to Illinois. It relies on the common law, but it has a permit system for the uses of two of its major rivers, the Delaware and Susquehanna, which are allocated by interstate compacts and cover about two-thirds of the state.

B. Registration or Information Permit Systems

Some eastern and midwestern states do not use permit systems to allocate water, but to collect information about water use. Michigan and Ohio have a water registration system for large users. Agricultural users can comply by filing an annual water conservation plan.⁹

⁷ See 6 WATERS AND WATER RIGHTS 335- 344

⁸ 615 ILCS 50.

⁹ Mich.Comp.Law s 324.32705 and 32705.

C. Common Law The Base With Selective General Regulation

The most common incremental common law reform is to give a state agency the power to restrict large uses in times of temporary shortage. Indiana uses the common law as the base, but has supplemented it with administrative regulation. For example, the state has the power to restrict the use of high capacity wells which interfere with lower capacity ones,¹⁰ and which cause environmental damage to public lakes.¹¹The state statutes which prohibit inter-basins transfers without the consent of all of the Great Lakes governors, enacted to implement the Water Resources Development Act (WRDA) fall within this category.

D. Real Regulated Riparianism

¹⁰ IC 14-25-5.

¹¹ IC 14-25-7.

As previously stated, "regulated riparianism refers to states which retain the common law baseline but have substituted a general permit system for post hoc litigation.¹² The permit systems usually exempt small withdrawals and require a permit for all withdrawals over a per gallon per day or year threshold. Minnesota is the most representative regulated riparian state among the Great Lakes states. Minnesota requires permits for all consumptive withdrawals of 10,000 gallons per day and for all groundwater withdrawals.¹³ Wisconsin has three separate permit regimes for surface withdrawals. The most general is Wis. Stat. '144.026 which requires a permit for withdrawals that average 2,000,000 gallons per day over a thirty day period. New York requires a permit for public water supplies, agricultural irrigation and trans-watershed diversions.¹⁴

¹² The constitutionality of regulated riparianism has been upheld against the charge that it constitutes a taking of property without due process of law. *Crookston Cattle Co. v. Minnesota Dep't of Natural Resources*, 300 N.W.2d 769 (Minn. 1980) and *Omerick v. State*, 218 N.W.2d 734 (1974).

¹³ Minn.Stat.Ann '105.

III. ENVIRONMENTAL REGULATION AND REVIEW

In the past thirty years, the potential adverse impacts of diversions and channel modifications have been recognized. Increasingly, experts argue that states should set environmental base flows, based on the natural hydrograph of the stream to the extent possible, and only allow diversions that do not exceed the base. This is fact the de facto allocation for the Great Lakes, although this regime has never been formally recognized. Indian, Michigan, Minnesota and Wisconsin Most states assess the environmental impacts of diversions and channel modifications on a case by case basis. There are two basic techniques by which can be done. The first is public interest review and the second is by the use of the public trust doctrine.

A. Public Interest Review

¹⁴New York Environmental Conservation law ' 15- 1501.

The concept originated in the prior appropriation states, and has occasionally been used to deny appropriations even though unappropriated water is available. In more recent times, public interest review has been used to assess the projected adverse environmental impacts of a withdrawal and to impose conditions on the new use. Most western states have the power to subject new appropriations to a public interest review and public interest review is now being extended to transfers. Wisconsin subjects large surface withdrawals to a public interest standard. The theory of public interest review is to provide a forum to accommodate all interests before the transfer. Statutes in California, Idaho, Montana, Nebraska, Texas and Wyoming give state water administrators the power to take public interest considerations into account in transfers.¹⁵ A Utah court recently interpreted Utah's transfer statute to include public interest review.¹⁶ An Idaho trial judge has ruled that state law¹⁷ allows

¹⁵ See Douglas Grant, *Public Interest Review in Water Allocation and Transfer in the West: Recognition of Public Values*, 1987 ARIZ. STATE L.J. 681 (1987).

¹⁶ *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

¹⁷ I.C. Section 42-211.

the Department of Water Resources to invite protests in change of place of diversion proceedings from third parties beyond those in the immediate area of the diversion, and this ruling was upheld on appeal.¹⁸

¹⁸ *Hardy v. Higginson*, Case No. 92599 (District Court of the Fourth Judicial District of the State of Idaho, July 25, 1990), *aff'd in part, rev'd in part* 123 Idaho 485, 849 P.2d 946 (1993), upheld the power of the State Engineer to impose conditions on diversions from the critical habitat of a candidate fish for listing under the Endangered Species Act.

Public interest review is seen by some states as a way to avoid *Sporhase v. Nebraska ex rel. Douglas*,¹⁹ in which the Supreme Court held that state water rights are subject to the dormant commerce clause. The *Sporhase* doctrine could prevent constraints on transfers because a statute that has the effect of restraining interstate transfers,²⁰ could be found to be unconstitutional.

B. The Public Trust

The Public Trust is a much discussed hybrid common law and constitutional doctrine that has many meanings. The narrowest and most common meaning is that the states own the beds of navigable waters- the Great Lakes- in trust for the public. Courts have interpreted this general doctrine to mean that the beds and overlying waters can only be used for trust uses. The historic trust uses are navigation, fishing and commerce. Modern trust uses include recreation and environmental protection. The broadest trust doctrine, advanced by environmentalists, is that the doctrine is a self-executing substantive doctrine that allows courts to determine that a public resource use choice is

¹⁹ 458 U.S. 941 (1982).

²⁰ *E.G., re. Rev. Stat.* ' 537.810 (some interbasin transfers above 50 cfs require legislative approval).

inconsistent with the protection of the environment.

The narrow or classic public trust is a doctrine that developed in 16th and 17th century England and was adopted as a rule of law by the Supreme Court after the Revolution. The core principle of the public trust is that the states own the beds of navigable waterways in trust for the public. The beds of bodies of waters that are navigable in fact and form a highway in the chain of interstate commerce are subject to public rights. These rights or trust uses include navigation, fishing, and now probably recreation. More generally, the public trust illustrates that some resources must remain permanently in the negative community and thus private rights may never be acquired in them. The core doctrine would not be a potential source of substantive rights to environmental quality were it not for the decision in *Illinois v. Illinois Central Ry.* *Illinois Central* was a suit to invalidate a state patent to the railroad for a large part of the Chicago lake front. The Supreme Court held that the state patent was void, with no citation to authority, because the public trust prevents the alienation of trust lands to private parties. State courts by this time had in fact held that land could be severed from the trust, but the size of the severance in *Illinois Central* was much greater than past individual severances and occurred when there were numerous largely successful efforts underway in Chicago to preserve the

lakefront from commercial development. Most of our coastal and Great Lakes cities are built on filled land.

All Great Lakes states hold that the state owns the beds of navigable waters in trust for the people.²¹ The difference among the states on the application of the doctrine. In several Great Lakes states, the public trust is simply a rule of bed ownership: the state owns the beds of navigable waters below the mean high water mark. In Minnesota, Ohio and Wisconsin the trust is a source of public rights in rivers capable of recreational use. In contrast, Illinois, Michigan and Pennsylvania have very restrictive tests of navigable for rivers (as opposed to the Great Lakes) and limit public recreational use. In some states, notably Illinois, the doctrine is a flat prohibition on the alienation of the bed of Lake Michigan. In other states, Wisconsin, for example, the state may sever land from the trust so long as the severance is for a trust purpose and the amount of the severance is small in proportion to the area of the waterbody.

²¹ Illinois, *People ex rel Scott v. Chicago Park Dist.*, 360 N.E.2d 7773 (Ill. 1973); Indiana, *Lake Sand Co. v. State*, 120 N.E. 714 (1918); Michigan, *Obrecht v. National Gypsum Co.*, 105 N.W.2d 143 (Mich. 1960); Minnesota, *State v. Slotness*, 185 N.W.2d 530 (Minn. 1971).

The more interesting question is whether the trust is a limitation on the use and enjoyment of water. Specifically, environmental advocates argue that the state has a trust duty to protect environmental values related to aquatic resources. In the 1960s, environmentalists used the holding to argue that the public trust stands for one of several propositions. One view, propounded by Professor Joseph Sax is that the public trust imposes procedural requirements on legislative and administrative decisions that alienate or impair trust resources. In a widely cited article, *The Public Trust Doctrine in Natural Resources Law*, Professor Joseph Sax developed the procedural theory that the trust incorporates a theory of legislative remand. He read *Illinois Central* and related state cases to stand for the proposition that decisions about public resources, not just the beds of navigable waters, have such long-term consequences they should only be made after a full legislative consideration of the consequences and alternatives. Others have gone further and argued that trust resources must be devoted exclusively to trust uses and these include the conservation of ecosystems. The broadest substantive reading is that the state must prefer environmental to developmental values for all public resources, including public lands, when there is a conflict. The *Mono Lake* case, *National Audubon Society v. Superior Court of Alpine County*, is the most liberal substantive judicial reading of the trust. *Mono Lake* was a challenge to water diversions by the city of Los Angeles to feed its Owens Valley Aqueduct. The

diversions, done under water rights perfected in the 1940s, lowered the lake level and threatened the stability of the Lake-s ecosystem. Basically, the lower levels increased the salinity of the Lake, which is a bed of a former inland sea, threatening the brine shrimp on which migrating birds fed. The California Supreme Court held that the public trust extended to environmental values and applied to vested water rights. But the court held only that the trust be accommodated with non-trust values and did not require that the lake be restored to pre-diversion levels. It did not decide what the particular accommodation should be.

The trust has several consequences for Great Lakes water use. First, the classic public trust doctrine reenforces the past and currents efforts to limit lake uses to non-consumptive uses except in when consumptive uses do not impair the integrity of the Great lakes ecosystem. The non-consumptive uses are the historic trust uses- navigation, fishing as well as the new ones of recreation and environmental protection. The trust is a clear source of state legislative authority to prefer non-consumptive to consumptive uses. Second, the trust be the basis for legislative implementation and expansion. I am not aware of any Great Lakes decision that uses the trust to either curtail existing uses that interfere with trust values or has relied on the public trust doctrine to support the denial of a new use of water. Third, the trust reenforces the power (if not the duty) of the Great Lakes states to use whatever existing regulatory

authority that they have to consider the impact of surface and groundwater withdrawals tributary to the lakes on the Great Lakes ecosystem. Fourth, if the resource is subject to the public trust, regulation that substantially precludes the enjoyment of an asserted property right may not be a taking of property without due process of law; the state is simply asserting a public property right which was a pre-existing limitation on the private right holder's title.

Michigan is the prime example of the legislative adoption of the public trust to limit the use and exploitation of natural resources for environmental reasons. Professor Sax helped to draft the 1970 Michigan Environmental Protection Act which prohibits the destruction or impairment of the states natural resources. MEPA applies to water diversions and other stream system alterations. Courts have not historically used the statute to limit water diversions,²² but the state Supreme Court has recently defined impairment broadly, *Nemeth v. Abonmarche Development Co.*, 576 N.W.2d 641 (1998), and a trial court has held that state approval of a golf course diversion violated the public trust. State constitutional provisions that guarantee a right to a healthful environment can also be used to achieve the same result. The Supreme Court of Montana recently held that its state constitutional provision, which guarantees a right to a

²² e.g. *Rush v. Steiner*, 373 N.W.2d 183 (Mich. 1983); *Friends of Crystal River v. Kuras Properties*, 554 N.W.2d 328 (Mich. 1996).

clean and healthy environment, requires that administrative agencies vigorously protect high quality waters from the risk of possible degradation.²³ Illinois, on the other hand, has held that its state constitutional provision does not apply to storage and diversion projects because it is limited to the protection of public health.²⁴

²³ Montana Environmental Information Center v. Department of Environmental Quality, 1999 Mt. 248 (Mont. 1999).

²⁴ Glisson v. City of Marion, 19999 WL 961399 (Ill. 1999).

IV. GREAT LAKES DIVERSION REGIME

Since the adoption of the Great Lakes Charter in 1985, the Great Lakes States and Canada have developed an increasingly tight management regime premised on the assumption that the lakes are fully allocated. This is the primary conclusion of the International Joint Commission²⁵, the United States federal government and the basin states have been engaged in an on-going process to implement the report's primary conclusions. Consistent with past practice, the federal government's role has been to enable the basin states to develop a diversion control strategy.

A. United States Federal Action

²⁵ International Joint Commission, PROTECTION OF THE WATERS OF THE GREAT LAKES (FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 2000).

The primary United States federal action has been to clarify the power of the states to control out of basin diversions.²⁶ A brief history of the evolution of Great Lakes diversion law is necessary to understand the context. Proposals to divert Lake Superior water to bail out the Ogallah aquifer produced the 1985 Great lakes Charter. Principle IV of the 1985 Great Lakes Charter requires that any signatory notify, consult and seek the consent of the other states or provinces for any new or increased diversion or consumptive use Aof the water resources of the Great Lakes Basin.@ Principle IV is triggered by any diversion in excess of 5,000,000 gallons (19 million litres) per day over a 30 day average. If the permitting state follows the Charter Consultation Procedures, it has the discretion to approve or disapprove the diversion subject only to the duty to notify other affected states and provinces.

²⁶ Canada has prohibited almost diversions from the Great Lakes. An Act to Amend the International Boundary Waters Treaty Act, S.C. 20001, c. 40.

The Charter was further implemented by the adoption of state laws that prohibited out of basin diversions.²⁷ The Charter and the anti-diversion laws apply both to interstate and intrastate diversions. Michigan is an exception it is the only Great Lake state or province whose territory lies wholly within the basin. Any state law which subjects interstate diversions to a higher standard is constitutionally suspect under United States federal constitutional law. Laws which per se discriminate against interstate commerce to be a violation of the judge made Dormant Commerce Clause. In contrast, the power to subject intrastate diversions to different standards does not raise as serious Dormant Commerce Clause problems. There is no discrimination against interstate commerce and states have long successfully asserted the power to protect areas of origin from trans-watershed diversions. In 1986, Congress prohibited all diversions from the Great Lakes or any United States tributary for use outside the basin. The Water Resources Development Act of 1986²⁸ [WDRA86] was intended as an express waiver of the Dormant Clause. Congress's power to waive the doctrine has never been seriously limited by the Supreme Court.

²⁷. E.g., Michigan Comp. Laws 324.32703; I.C. s 14-25-11-11

²⁸ 42 U.S.C. 1962d-20(d).

After its passage, WRDA was applied in several relatively small diversion proposals. A Wisconsin diversion was approved in 1989; Michigan vetoed a plant to augment the supply of a small Indiana community just outside the basin. Canada strenuously objected to an Illinois request that the U.S. Army Corps of Engineers increase the Chicago diversion to relieve barges stranded along the Illinois River in the drought summer of 1988, and the request was in fact denied. The jurisdiction of the Charter and WRDA were raised in the Crandon Mine proposal in Northern Wisconsin. The company planned to divert ground water from the Great Lakes to the Mississippi River drainage, and NGOs argued that this triggered WRDA. However, U.S. the Corps of Engineers ruled that the groundwater was not within WRDA.²⁹ These actions ultimately shaped the on-going dialogue about standards.

WRDA's ability to provide Dormant Clause immunity was questioned in a 1999 legal memorandum prepared for the Council of Great Lakes governors. It suggested that the Water Resources Development Act of 1986 violated the non-delegation doctrine and was not a sufficiently clear waiver of the Dormant Commerce Clause. The basin succeeded in obtaining new federal

²⁹ See James P. Hill, *The New Politics of Great Lakes Water Diversion: A Canada-Michigan Interface*, 2 *The Toledo J. of Great Lakes, Law, Science & Policy* 75 (1999).

legislation. Section 504 of the Water Resources Development Act of 2000 Section 504 directs the states, in cooperation with the two basin Canadian provinces, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.³⁰ WRDA standards reflects in part the position of Governor Engler of Michigan. In his 1992 veto of the proposed Lowell, Indiana diversion, Governor Engler suggested that diversions might be allowed if no imminent adverse health, safety and welfare risks were demonstrated, there was meaningful conservation and clean water was returned to the lakes after use.

B. State Actions

Shortly before the Commission issued its 2000 Report, the governors of the Great Lakes issued a statement that both re-committed them to the principles in the Charter and to the development of a new agreement to improve the collective management of the waters of the Great Lakes and the development of a common standard for reviewing water projects.³⁰

³⁰Council of Great Lakes Governors, AA Statement on Protecting the Great Lakes: Managing Diversions and Bulk Water Exports³⁰ (October 15, 1999), Chicago. The statement can be found

at <http://www.cglg.org/projects/water/press101599.html>.

The States adopted Annex 2001. Annex 2001 was the result of an open two year process that began in October, 1999. Annex 2001 is best seen as an interim step in the process of drafting a binding agreement. A preliminary draft was released on December 14, 2001. It committed the states to prepare binding agreements between the states and provinces within five years, guidelines for the development of a new withdrawal standard, modification provisions and a commitment to develop an information sharing system. It also contained an interim exemption for *de minimis* withdrawals which were defined as those of 1 million gallons per day or less. Environmental NGOs objected to the exemption and this was dropped from the final version. In response to both industry and environment comments, an express commitment to on-going public participation was added. The final version, signed on June 18, 2001, provides in part:

The 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. The purpose of the agreement(s) will be to further the Governors= and Premiers= objective to protect, conserve, restore, improve, and manage use of the Waters and Water-

Dependent Natural Resources of the Great Lakes Basin. The agreement(s) will retain authority over the management of the Waters of the Great Lakes Basin and enhance and build upon the existing structure and collective management efforts of the various governmental organization within the Great Lakes Basin.

The new set of binding agreement(s) will establish a decision making standard that the States and Provinces will utilize to review new proposals to withdraw water from the Great Lakes Basin as well as proposals to increase existing water withdrawals or existing water withdrawal capacity.

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; and
- # No significant adverse individual or cumulative impacts to the quantity or quality of the Waters and Water-Dependent Natural Resources of the Great Lakes Basin; and
- # An Improvement to the Waters and Water-Dependent Natural Resources of the

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In short, the evolving law of the Great Lakes recognizes that the Great Lakes are one of America's great fresh water reserves and as such are less vulnerable to the projected effects of global climate change.³¹ However, the amount of fresh water in them makes them a prime candidate, at least in the eyes of many in Canada and the United States, for transbasin diversions to augment supplies in water-short areas. Global climate change helps fuel the persistent regional fears that the lakes will be tapped to augment water supplies outside the basin. The "Law of the Lakes" and its most interesting feature is the preference it accords non-consumptive uses over consumptive ones. The law gives considerably more weight to the conservation of the lakes' ecological services compared to other allocation regimes. The littoral states and the two federal governments have evolved a weak legal regime to protect the most important regional component of the lakes, the maintenance of naturally fluctuating levels, that can be the basis for adapting to global climate

³¹See Stanley Chagnon, *Understanding The Physical Setting: The Great Lakes Climate and Lake Level Fluctuations*, in LAKE MICHIGAN DIVERSION AT CHICAGO AND URBAN DROUGHT 39 (Stanley Chagnon ed. 1994). The International Joint Commission recently survived the models and concluded that they suggest that "some lowering of water levels is likely to occur." International Joint Commission, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL INTERIM REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 17 (2002). 1999).

change. This regime has minimized conflicts by limiting and discouraging consumptive use, but it has also retarded the development of a firmer property rights regime for the lakes.