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# 1 2 One Issue, Two Voices

## Decision Time: Water Diversion Policy in the Great Lakes Basin

***Decision Time: Water Diversion Policy in the Great Lakes*** is the first publication in our *One Issue, Two Voices* series. Using expertise from both sides of the Canada–U.S. border, this series is our contribution to dialogue on policy issues relevant to the bilateral relationship. In this first paper, the issue is "water," specifically the developing policy on diversions from the Great Lakes. Our two authors are leading experts on the Great Lakes, who have willingly entered the debate to share their informed opinions.

Canada and the United States share one of the world's largest supplies of fresh water; how both countries choose to use that water has global consequences. On both sides of the Canada–U.S. border, important policy is being made which will have far-reaching consequences for the Great Lakes basin. The Annex 2001 Agreement, initiated by the Council of Great Lakes Governors and developed over the last few years, entered a 90-day public comment period on July 19, 2004. As a supplement to the Great Lakes Charter, the agreement will set a common standard for water diversions for both states and provinces in the basin. At the Canada Institute, we recognized the opportunity to initiate timely dialogue on this significant bilateral issue. We have not attempted to present all sides of this complicated issue but are sure that this publication will generate important dialogue. The publication of these papers will be marked by a forum with the two authors in Washington at the Woodrow Wilson International Center for Scholars on September 14, 2004, with interactive video-teleconferencing in Toronto, Ontario and Ann Arbor, Michigan.

This project has been made possible through the efforts of several organizations and people. First, I would like to thank The Canada Institute on North American Issues for their support of our *One Issue, Two Voices* series. I would also like to thank Adèle Hurley and the Program on Water Issues at the Munk Centre for International Studies, University of Toronto, for inspiring the first of our publications and for the efforts that have gone into organizing the September 14 forum. Most of all, a sincere thank you goes to Ralph Pentland in Canada and Jim Olson in the United States who met the tight deadlines most graciously. Their dedication to the development of appropriate policy to guide the use of the Great Lakes is clearly evident in their writing.

We hope that you enjoy this publication and that it encourages your personal participation in the debate.

**David N. Biette**
Director, Canada Institute
*September 2004*

# Ralph Pentland

## Great Lakes Compact—Water for Sale?

*"Whiskey is for drinkin', but water is for fightin'."*

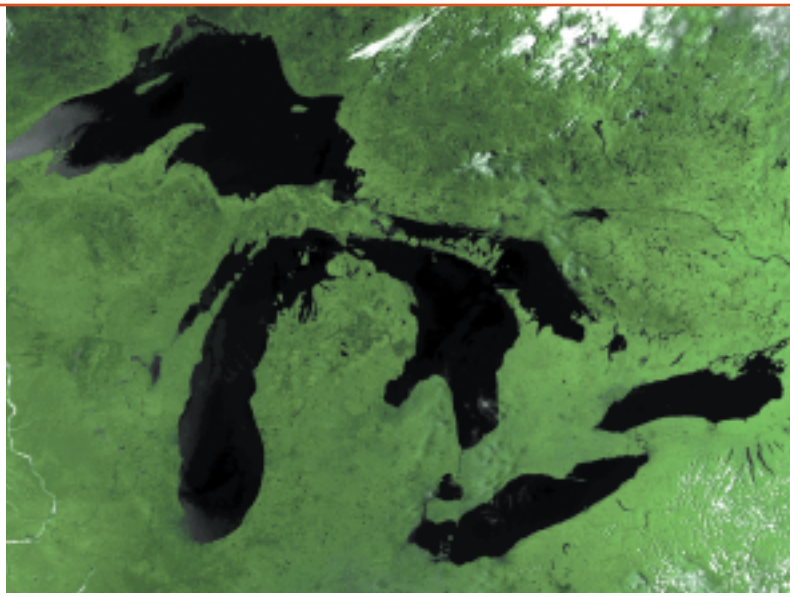
The Aral Sea in central Asia used to be the third largest lake in the world. Since 1960, its area has declined more than 60 percent and salinity levels have tripled. All native fish species have disappeared. Winds pick up millions of tons of toxic dust, poison nearby farmlands and contribute to respiratory illnesses. Drinking water from low river flows has become hazardous and incidences of fevers and diseases are alarming. Shrinking the size of the sea has also led to a more continental climate of hotter summers and colder winters, with a shorter growing season. It is critical that any approach adopted for managing the waters of the Great Lakes not start the region down the kind of slippery slope that caused the Aral Sea disaster, and numerous similar disasters around the world.

In this short opinion piece, I will be suggesting that **the recent proposals by the Council of Great Lakes Governors (CGLG) Working Group for managing Great Lakes water uses and removals represent a very high risk strategy**, and will discuss several other options. The views expressed are those of an interested and concerned citizen only.

Great Lakes net water supplies and water levels now face major uncertainties related to climate change, unpredictable future consumptive use patterns, potential diversions and other forms of bulk removal, and possible modifications to their connecting channels. What is most disconcerting is that each and every one of these factors is likely to diminish supplies and/or water levels in a cumulative way over the next several decades. For that reason, the International Joint Commission, in its year 2000 report on Protection of the Waters of the Great Lakes, concluded that there should be a bias in favour of retaining water in the system and using it more efficiently and effectively.

The draft Great Lakes basin Water Resources Compact and associated state-provincial arrangements are based primarily on concepts recommended by a Denver law firm in mid-1999. In essence, that firm suggested that decisions regarding new or increased withdrawals of water, either for use within the basin or for removals from the basin, should be based on a common "benefits" standard. The theory was that new or increased withdrawals, for whatever reason should be offset by an improvement in the basin to either the water resource or a related resource. At the time, a staff member in the office of the CGLG asked me for my personal views on that approach. I would like to reiterate four of the points that I made in an e-mail response dated 23 June 1999, because I believe they continue to have relevance:

- "It is absolutely impossible to compensate for bulk removals, in the sense of being able to maintain enough resilience to cope with future unpredictable stresses like climate change."
- "We cannot, at this time, quantify the negative effects of bulk removals in order that they could be mitigated. Consultants (like me) could make a case for almost anything, but they would in reality be meaningless."
- "One might argue that the Great Lakes ecosystem could be compensated by doing something else 'good' in the same or some other area, but that would merely



encourage harmful bulk removals, while at the same time excusing other 'bad' environmental actors from meeting their responsibilities. While environmentalists might like the idea initially, they would eventually realize that it is conceptually self-defeating environmental policy."

- "With respect to the primary (I assume) objective of discouraging or preventing large scale, irreversible southward diversions, it would have the opposite effect to what you intend i.e. it would end up being a 'water chasing dollars' approach. And once the public figured that out, it would become extremely bad politics."

Before the CGLG chose a specific way forward in the Great Lakes Charter Annex in 2001, they had not only the advice of the Denver law firm, but also the advice of the International Joint Commission (IJC). The IJC recommended a standard based on preserving "ecosystem integrity," as opposed to "benefits," and added other safeguards related primarily to return flow and cumulative impact. For Annex 2001, the CGLG chose a mixture of the two—the benefits standard combined with the IJC safeguards related to return flow (albeit a very much-watered down version) and cumulative impact. In private conversations with those involved about why they chose "benefits," since renamed "resource improvement" over "ecosystem integrity," the answer is always similar—they need the flexibility offered by the benefits approach (interpreted net benefit) to deal with demands from outside the basin. I am reminded of the political reality—that in the Great Lakes states, there are more voters outside the basin than inside.

Now that the draft agreements are out for public review, my concerns are even greater than they were in 1999 and 2001. The way I think the agreements will eventually be interpreted with respect to diversions and other forms of bulk removal, especially by international trade panels and the courts is as follows:

- The **resource improvement standard**, as defined, is tantamount to a "Water for Sale" sign. It necessarily implies an exchange of money, or at least bartering, with the proceeds going towards meeting the responsibilities of resource abusers, or to agencies dealing with resource abusers or abuses within the basin.
- The **return flow** requirements will discriminate, probably quite arbitrarily, between who gets to buy and who does not.
- The **cumulative impact** requirement is a very loose way of deciding when to stop selling, especially where the term impact is limited to only "significant."
- The four questions that I raised in 1999, plus the fact that the resource improvement standard encourages trade-offs between components of the ecosystem, and therefore requires comparing "apples and oranges," will make the selling "price" quite arbitrary. As well, because of substantial "wiggle-room" in the return flow provisions, the selection of "buyers" will also be quite arbitrary. Based on numerous studies and workshops over the past four years, it is also clear that the use of the cumulative impact concept in a regulatory or quasi-regulatory way in the Great Lakes water level context will pose serious conceptual problems (e.g. what is impact and what is meant by "significant"), as well as difficult scientific challenges. The fact that these

hurdles will not be overcome in the foreseeable future will create a third source of arbitrariness in the decision process.

I would prefer not to get into the nitty-gritty of the wording in the agreement, because that would detract from the real issues, which are at a conceptual level. Nevertheless, just a few examples of "wiggle-room" in the return flow provisions include:

- The fact that the term "applicable water use sector" is not fully defined;
- the fact that at least some uses will have little or no return flow;
- the fact that there would be nothing to stop a use from being approved in one sector, and later changing to another sector;
- the fact that diversions of less than 12 miles would be exempt and there would be nothing stopping them from being extended further after the fact;
- the fact that the source of return flow is unclear; and because of phrases like "except under exceptional circumstances," "it is understood that specific use situations may vary and that in some cases higher use amounts may be justified," and "the coefficients will be updated periodically." Arguably, the current wording may actually exempt the most serious threat of all, namely increases to the Chicago Diversion.

Why do I think the proposed regime could start the region down a slippery slope? In the first instance it would facilitate several small diversions to nearby communities right away—in fact some people suggest that maybe the "tail is wagging the dog." That, in and of itself, would not be a major problem. The amount of water involved would be very small—I would venture a guess that in total the net loss may be equivalent to about one percent of the Chicago Diversion. But, it will have established the respectability of new and formally sanctioned diversions. That precedent, combined with a conceptually flawed regime that will necessarily be applied quite arbitrarily, will eventually lead to larger diversions over longer distances.

But, the most serious problems will likely come about through legal challenges related to international trade agreements or the Dormant Commerce Clause in the U.S., combined with accelerated external demands due to climate change or other

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unforeseen factors. In order to comply with Commerce Clause and international trade rules prohibiting discriminatory restrictions, the adopted policy must be rationally related to legitimate local interests (such as preservation of basin water resources), be scientifically grounded, be clear and unambiguous, and be capable of being implemented in a consistent manner. In my opinion, the proposed regime does not meet any of those criteria.

Over the longer term, the slipperiness of the slope will also be accentuated by the fact that, by merely entering into the agreements, some existing safeguards will be weakened. For example, even though the relevant Boundary Waters Treaty provisions will continue to exist, they are less likely to be invoked where there is state-provincial agreement. And existing protections afforded by the public trust doctrine in the U.S. portion of the basin will be weakened because the agreements do not include any public purpose or other standards required by the public trust.

It seems to me there are at least five basic regimes that the CGLG could consider:

- No diversions or other forms of bulk removal combined with wise use in the basin
- The IJC recommendations
- The Nikiforuk proposal
- The status quo
- The draft Annex agreements that were recently released for public comment

The Nikiforuk proposal was recently developed by investigative journalist Andrew Nikiforuk after interviewing about 20 experts both within and outside the region. He proposed three simple standards for judging removal proposals:

- A public trust standard
- A conservation standard
- A no-net loss standard. No net loss of water would be achieved by limiting net losses via diversions and other forms of bulk removal to gains achieved through conservation within the basin.

The options are presented according to my assessment of the level of protection they would provide to the Great Lakes ecosystem, with the "no diversions or other forms of bulk removal" option providing the highest level of protection, and the draft CGLG agreements the lowest level. The IJC and Nikiforuk proposals would lie somewhere between the two extremes, but either would be preferable to both the status quo and the draft agreements.

I would like to clarify a few things about the rankings. Why do I rank the IJC recommendations well ahead of the draft agreements vis-à-vis level of protection? In the draft agreements, the resource improvement standard opens the door very wide for removals (by allowing trade-offs between different components of the ecosystem), and then selectively plugs some but not all of the leaks. In the IJC proposal, the ecosystem integrity standard only leaves the door slightly ajar, and then closes it even further with very "water-tight" return flow requirements.

With respect to withdrawals and consumptive use within the basin, I would rank "wise use" well ahead of the draft Annex agreement approach. Habitat protection is worth doing—so let's do it. Water quality enhancement is worth doing—so let's do it.

A 90-day call for comments, half over the summer months, with no attempt to inform the public of the seriousness of and risks associated with the proposals is entirely insufficient.

And water conservation is worth doing—so let's do it. But let's not waste the time and energies of the region's best water and environmental experts trying to equate buckets of water with dozens of ducks. Wise use will not come about by creating fiction and trying to fool people. And it will not come about by turning off local decision makers with questionable concepts from on high. But it will come about by dealing with 100 percent of the uses all the time, not just the one percent or so that are new or expanded each year. And it will come about by empowering all citizens, broadly defined, with the knowledge and policy frameworks they need to make responsible decisions, and by giving them the opportunity to act responsibly each and every day.

One last topic that I was asked to touch on briefly is the role of Canadians and Canadian Provinces in the Great Lakes policy environment. One way to approach that topic, even though it is admittedly superficial, would be to look back at prior issues such as eutrophication and acid rain. Typically, these issues mature over about a 25-year period. In the early years, Canadians tend to be somewhat more idealistic than their good neighbors to the south. During those early years, Canadians tend to try to lead by example, by moving more quickly with regulation and other incentives and disincentives. In the middle years, Canadians, in a variety of ways, try to influence public opinion south of the border. At some point, U.S. jurisdictions usually come on board, and do so with a vengeance, soon surpassing their idealistic neighbors to the north.

Is the current Great Lakes diversion and consumptive use issue typical from that perspective? Maybe, if it is actually dealt with as an environmental issue. The Canadian government and both provinces have already banned, or at least effectively banned major diversions, mainly for environmental reasons, while their U.S. counterparts appear to view diversions as an economic opportunity. We will have to wait and see if the rest of the 25-year maturing period unfolds as it has with other issues. If so, you might expect attempts by Canadians to influence U.S. public opinion to begin very soon, and with any luck, the "conversion" south of the border in about another decade.

On the other hand, this issue could turn out to be quite atypical. In essence what the proposed agreements do is turn an environmental issue into a resource trading issue, where market forces may eventually overwhelm public administration. The potential impact on the two national economies could be quite profound, and would almost surely be negative. There may simply be no prior model to rely on for guidance. At this time it is unclear how national interests are or will be reflected in the negotiating process.

I will just finish up with two specific suggestions.

There is an urgent need for a substantial and very public debate on whether the citizens of the Great Lakes basin, the region, and the two countries are ready to embark on the very high-risk strategy inferred by the draft agreements. A 90-day call for comments, half over the summer months, with no attempt to inform the public of the seriousness of and risks associated with the proposals is entirely insufficient. As part of the reconsideration, some independent group or groups should convene two major workshops—one on legal risks associated with all reasonable options, and one on risks and rewards more generally. Those workshops should include at least as many experts not now involved with the process as experts who are involved. They should also provide for much more substantive citizen involvement than has been the case to date.

# James M. Olson

## Annex 2001 and the Future of the Great Lakes: New Wine into Old Wine Skins

The value of Great Lakes basin water is found in its inexpressibly precious commons. While the value of the Great Lakes may be important to everyone on earth, this does not mean they are there for the taking, to be diverted and used to meet the needs of everyone, everywhere. Histories of civilizations have told us where that leads. Some view water as a *global resource*, the idea of allocation and shared use. But the word "resource" implies use, not necessarily protection. The right to use water is a qualified one; it must be reasonable in relation to others—including respect for the water itself, its biota, and the needs of ordinary citizens included. And, as with any public commons, shared use implies limits. Without limits the commons is doomed. The basic limits on the Great Lakes and their tributary waters spring from their very nature. A very small percentage of the water is renewed each year. Limits also stem from the roots of common law. "Water is a moveable thing, and must of necessity *continue common* by the law of nature."[1] Any agreement that fails to safeguard the naturally sustaining nature of this commons would betray the public trust that protects these Great Lakes basin waters for present and future generations.

On July 19, 2004, the Council of Great Lakes Governors released drafts of "The Implementing Agreements for Annex 2001" and announced a public comment period of 90-days because the "voice of the people" is "critical." Some circles are pushing hard for an immediate decision, "it'll be worse if we don't" or "this is our only chance." Those who have steered the draft Agreements this far have made a huge contribution, but the interests in the commons and ordinary citizens are paramount. I believe the magnitude of the values at stake and complexity of issues cautions us to go slowly and with utmost care. There are many questions that must be independently and thoroughly addressed beyond the scope of this essay. The following comments raise just a few of them. In order to put them in context, a brief summary of the policy and legal history leading up to the Agreements follows immediately below.

### The Public Trust Doctrine

The *Institutes of Justinian* recognized water was a commons for ordinary citizens to satisfy their basic needs— the *jus publicum*. Thanks to the Magna Carta, attempts by the Crown to transfer possession of sea beds to favorite Lords were nullified because they violated rights of citizens for fishing and navigation.[2] Courts of the states expanded these principles to sovereign ownership and public rights in water, believing water "common to all citizens." [3] In 1892, the U.S. Supreme Court extended the public trust doctrine to the Great Lakes and its tributary waters,[4] reserving a navigational easement to assure commerce and passage over these waterways. States, within the Great Lakes basin, have in some form adopted the public trust doctrine.[5] Under the public trust, waters are owned by the state in which they flow, and are held for the benefit of citizens for navigation, fishing, boating, swimming, domestic, or recreational purposes. Public trust waters can never be alienated, disposed of, or subordinated unless authorized by state statute and shown to meet the following standards:

- It must be for a primarily public, non-private purpose;

- It must be consistent with public trust uses or needs such as navigation, boating, swimming, fishing, or other recreational purposes;
- The present and future uses of the water must be protected; this means planning for the foreseeable and unpredictable future;
- It must not impair the public trust uses or resources; the *di minimis* harm rule does not apply; "nibbling effects" cannot be ignored.

Substantial public value is presumed. Those who seek to alienate or alter the commons in these waters have the burden of proof to show, affirmatively, that each of these standards will be satisfied before any authorization can be granted. In this sense, the public trust doctrine democratizes the public and citizen interests and internalizes the costs of those who seek to alter it.[6] Like the Magna Carta, the doctrine protects takeovers of the interests in the public trust of ordinary citizens. Not surprisingly, courts have called the public trust doctrine a "high, solemn, and perpetual" duty.

## Boundary Waters Treaty of 1909

The Treaty grants Canada and the United States, through the International Joint Commission, exclusive jurisdiction to resolve disputes over and protect the quality and quantity of surface waters of the Great Lakes and connecting waterways. As a matter of public policy and legal principle, the Treaty prohibited any further diversions of the Great Lakes unless authorized by both countries, and that even then a diversion could not "affect the natural flow or level" of the boundary waters nor interfere with domestic uses, boating, and navigation.

## The Great Lakes Charter of 1985

The Charter declared that, "The water resources of the Great Lakes basin are precious public resources, shared and held in trust." The Charter carried forward the policy against diversions of Great Lakes waters, and extended it to all water resources, including tributary streams and groundwater. It also extended water management programs to "consumptive uses," meaning water withdrawn or withheld that is lost to the basin by evaporation, incorporation into products, or other processes. But it ignored standards of the public trust doctrine completely, and foreshadowed a more lenient standard found more in regulations that govern private rights not public ones. Diversions would be prohibited only where there would be "significant adverse impacts."

## The Federal Water Resources Development Act (WRDA) of 1986 (amended 2000)

Recognizing that diversions of water from the Great Lakes and tributary waters would adversely impact domestic, industrial, electrical generating, the environment, and navigational uses in the basin, Congress passed a law that "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."[7] The word "export" was added by an amendment in 2000. Then Senator Abraham sought to limit WRDA to "bulk" diversions and exports. Senator Levin and others defeated the limitation. While WRDA failed to include the public trust as a standard, the non-diversion standard is consistent with its principles.

## Annex 2001

In June 2001, Annex 2001 was signed by the governors of the Great Lakes states and premiers of Ontario and Quebec to implement a decision-making standard for "withdrawals" of waters from the Great Lakes basin. Until finally implemented, the parties agreed to follow the consent requirement of WRDA and the consultation process of the Charter. The Great Lakes were found to be a bi-national treasure, held in trust by the states and provinces. But the Annex, too, abandoned public trust standards when it offered four of its own that required: (1) return flow and conservation measures; (2) again, a showing of no "significant adverse impacts;" (3) improvement of the waters and water resources; (4) compliance with state, provincial, federal laws and international treaties. Oddly, the Annex also abandoned the idea of regulating diversions altogether, choosing instead to focus only on withdrawals and impacts without regard to whether it is public or private or a diversion or consumptive use.

## The Michigan Citizens v. Nestlé Waters North America, Inc. Lawsuit

Nestlé constructed a large well-field to pump, divert and sell 210 million gallons of water a year from springs and groundwater that replenish a stream and lake system that turns into the West Branch of the Little Muskegon River—water that would have flowed to Lake Michigan. Michigan Citizens filed a lawsuit claiming that Nestlé's private diversion of water for sale out of the watershed violated water law and public trust principles. Nestlé argued for a lenient standard that would allow it to divert and sell water up to the point of "significant" or "unreasonable" injury.[8] But what is meant by serious injury? After a long arduous trial, the court ruled that Nestlé's extraction of water and diversion and sale out of the watershed was illegal under Michigan property law because it diminishes the flow of a stream and two lakes.[9] If the threshold of "significant" or "unreasonable" had been accepted, as Nestlé argued, it would have shifted Michigan's water common law in favor of diversion or export of water out of a watershed up to serious levels of impact, chilling any attempts to regulate them based on takings, Commerce Clause, and international trade agreement challenges. It would also adversely impact farmers, golf course or ski area operators, and the public whose water use within watersheds would be suddenly forced to compete with those who sought to sell the water elsewhere.

## The Draft Annex Implementing Agreements of 2004

The Council released its "Draft Annex Implementing Agreements" for 90-day public comment from Seattle. While there are two basic agreements covering the compact and sustainability (they are referred to in this essay collectively as "Agreement.") The governors, through their representatives and staff, met with stakeholders, in sometimes-closed meetings, to hammer out a proposed consensus. The Council's news release says the "voice of the people is a critical component." It is. Public comment can foster fresh ideas or insights, or test the waters of the Agreements themselves. While this is the first real opportunity for the general public to comment on the Agreements (drafts have been circulating since last year), it does not appear an extension will be granted.

The draft compact restates the finding that the water resources are a "public resource held in trust" by the states. Yet despite the recognition of this public trust, it has been abandoned in the Standard.

The concept of "multiple use" has resurfaced. The notion of "multiple use," built on Bentham's utilitarian idea of maximizing the greatest good for the greatest number,

The Implementing Agreements could be putting "new wine into old wineskins." As the parable warns, new wine will burst the old wine skins.

subjects the commons to the utilitarian value of competing users. Other values tend to be excluded. In practice, it means that applying multiple use ideas to a precious commons like the Great Lakes, would abdicate the precious value of the commons in favor of utilitarian ones. As a first priority, the trust and values that transcend competing uses should be placed beyond reach, or the basin's water will not meet the unanticipated needs of future generations.

The Agreement is based on the overriding goal of "protecting, conserving, restoring, and improving the Great Lakes." But the Standard in the Agreements does not accomplish this goal. The thresholds for application by the consent mechanism of the Council are one million gallons per day (gpd) for diversions and five million gpd for consumptive uses. For most proposals the consent requirement or WRDA or the Agreements will not apply. The aim of the thresholds seeks to prohibit only "bulk" diversions, but WRDA is not limited in this way. Indeed, the Senate dropped the "bulk" limitation in the 2000 amendment. A compact would effectively limit or repeal the WRDA.

Water diverted and shipped out of the basin in containers less than 5.6 liters will no longer be defined as a "diversion," but "consumptive use." Consumptive uses are not subject to the veto and consent mechanism unless it is above five million gpd, and in any event it won't apply for 10 years. There are only a few, if any, consumptive uses of water anywhere in the basin that exceed the threshold. The water marketing industry, in whatever form it takes with a world water crisis, has been handed over "liquid gold."

The Standard contains two standards, not found in WRDA, which, if adopted, will weaken WRDA and invite approval of various projects. First, the "no significant adverse impacts" standard is typically easy to show in most permit schemes in the United States. The Treaty imposed a "no affect" standard. WRDA banned diversions or exports. Under the *Michigan Citizens v Nestlé* ruling, the common law of riparian rights prohibits a diminishment of flow or levels. Public trust law, among other standards, forbids impairment and requires a public purpose. Allowing diversions or uses to the point of "significant injury" could shift property law from riparian and public trust standards in a way that would favor diversion and export. This would strengthen the hand of those out of the basin under Commerce Clause, takings, and international treaty arguments, which is contrary to goals of the Charter, WRDA, and the history of existing law and policy.

Second, the standard allows for an "improvement of the water or water-dependent resources." The improvement is not necessarily required to be made to offset the harm (less than "significant" but enough to require improvement) at the site of removal. Improvements elsewhere may be substituted for impacts to the persons, environment, or community where the water is removed.[10] Wetland mitigation or "no net loss" of wetlands ideas have had a dismal record. Such trading, like "bubble" trading in the air business, tends to treat the environment or a commons as a balance sheet without regard to real long-term or even immediate impacts.

The Charter, Annex, and Agreements rightly recognize that Great Lakes basin waters are a "public resource held in trust," but the public ownership and public trust are given lip service. As indicated above, the Standard weakens the public trust. Anyone with a true interest in preserving the water of the basin should incorporate the public trust doctrine as the basic line of protection.

There are some positive parts of Agreement. It moves toward conservation principles, although not strictly enough. It ties multiple levels of national and state governments to one mechanism and process, and requires notice, consultation, public participation, and

consultation with tribes and first nations. Judicial review and enforcement mechanisms are established, although in some instances court access is hampered by an exhaustion of administrative remedies hurdle and a short fuse (90 days) for filing lawsuits. Compliance with state law is required, but it is not clear how courts will respond if diverters claim the compact has modified or repealed state or other legal standards under doctrines of express or implied preemption; courts have the discretion to refuse to apply state standards that are more strict if it finds the federal law, or in this case a compact, has occupied the field. And, while a state can veto a diversion, if five of the eight states don't like what is going on they can "terminate" the compact Agreement altogether!

The Implementing Agreements could be putting "new wine into old wineskins." As the parable warns, new wine will burst the old wine skins. Out of fear of proposed diversions to America's western states and adverse impacts from withdrawals due to over-consumption, the 1985 Charter charged the states and provinces to implement regulations to manage "consumptive uses and diversions of basin water resources." Since that time, a world water crisis looms far beyond 1985 concerns. Investment or trade agreements, like NAFTA or WTO, have been signed. Science and technology have advanced. Global warming and climate change are no longer speculation, although their effects remain, alarmingly, unpredictable.[11] The value of water is worth more than a gallon of oil. Life can survive without oil, but not water. Ownership of water may well trump oil in terms of our national and international security.

## Great Lakes Diversions and Democracy

Beyond impacts, this Great Lakes basin water issue goes to the heart of citizens' liberty and freedom as members of communities that have evolved for centuries, all of them interdependent but dependent on the water as a secure public commons. The Agreement must be carefully evaluated for any risk of unintended subordination or privatization of this commons. When the commons is not respected or citizens' fundamental right to water is alienated or at the mercy of private interests, people rebel. They revolted in Bolivia, they organized in Plachimada, India to stop Coca-Cola from capturing a century old common water supply for bottles of soda pop. Citizens in Michigan and around the Great Lakes have successfully resisted efforts to remove or divert water that would shift property rights in favor of claims of private ownership of water. Does the Agreement allow for the possibility that others could turn communities into vast water farms to serve a global economy in which citizens have little say?

There is also a dimension that involves ethics. A first principle of ethics is "do no harm." But when it comes to water, it may be even more than ethics. Ontologically, just what is the beingness of water? I don't pretend to know the answer to this question. It is not necessary. What is necessary is to give room and life for this beingness, and all that this entails, in the Implementing Agreements so the most basic dimension is respected.

## Notes

1. Cooley, Thomas, Cooley's Blackstone, Vol I, Chpt 2, p. 16.
2. *Shively v. Bowlby*, 152 Us 1 (1894); *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821).
3. *Arnold v. Mundy*.
4. *Illinois Central Railroad v. Illinois*, 146 US 387, *aff'd* 154 US 225 (1894); Sax, Joseph, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970);
5. *Obrecht v. National Gypsum Co*, 361 Mich 399, 412, 105 NW2d 143 (1960); *Collins v. Gerhardt*, 237 Mich 38; 211 NW 115 (1927); *People ex rel Scott v. Chicago Park District*, 66 Ill 2d 65, 360 NE2d 773 (1976);

6. Olson, *Burden of Proof: How the Common Law Can Safeguard Nature and Promote an Earth Ethic*," 20 Env Law 891 (1990).
7. 42 USC 19662d-20(d).
8. Nestlé also argued that its use was no different than any other products that needed water, but the court ruled that putting water in a bottle, where water itself is the product, is a diversion.
9. Opinion and Order, Nov 25, 2003 (Appeal pending). To read or download opinions, go to www.envlaw.com.
10. In the *Michigan Citizens v. Nestlé Waters* case, representatives of the company touted a $500,000 contribution out of the watershed or source area for stream restoration or other programs as an example of meeting the spirit of the standard.
11. Schwartz and Randall, "Imagining the Unthinkable," *An Abrupt Climate Change Scenario and Its Implications for the United States National Security* (Oct. 2003).

## **Pentland** Response

I find Mr. Olson's essay to be both very eloquent and well reasoned. The following are a few more specific comments:

**1.** Mr. Olson's overall conclusion appears to be somewhat similar to mine. My overall conclusion is that the proposed agreements, if consummated in their current form could pose a significant risk to the waters of the Great Lakes. Mr. Olson suggests that the process should move forward very cautiously, and that considerable attention should be paid to preserving some very important existing safeguards. I must admit that I find many of his arguments related to the "commons" and "public trust" particularly appealing.

**2.** In a variety of ways, Mr. Olson contends that the Agreements would strengthen the hand of those in other jurisdictions and other countries who want to divert or export water from the Great Lakes basin. I would go even further. Whether by accident or by design, the Agreements seem to be actually constructed around a fundamentally flawed assumption that everyone in the world has the same right to Great Lakes water as basin residents, as long as they can find some loophole in a seemingly porous return flow regime. That inappropriate policy thrust probably originated with an analysis by a southwestern U.S. law firm five years ago. It has since been challenged by several lawyers who are more familiar with the legal regimes and traditions surrounding Great Lakes water and environmental management, as well as by many international trade and interstate commerce experts. Based on 40 years of national and international experience, I would suggest that a policy of essentially equal access by anyone anywhere in the world is entirely inconsistent with water management and environmental principles and practices as they are applied all around the globe.

**3.** Many of the very valid criticisms raised by Mr. Olson could have been avoided if negotiators had taken the year 2000 report by the International Joint Commission (IJC) more seriously. For example, his contention that, "The right to use water is a qualified one; it must be reasonable in relation to others—including respect for the water itself, its biota, and the needs of ordinary citizens" could have been better recognized by way of the IJC's ecosystem integrity requirements. Mr. Olson's concern that "Improvements elsewhere may be substituted for impacts to the persons, environment or community where the water flows" could likely have been overcome by the IJC's

recommendation of "no net loss from the area from which the water is taken…" In addition to Mr. Olson's observation that the Agreement's standard is considerably less stringent than (Boundary Waters) Treaty requirements, I would add the fact that negotiators ignored the IJC's advice that return flow should meet Great Lakes Water Quality Agreement standards, as well as the IJC's advice about avoiding the introduction of alien invasive species.

**4.** I would like to add to Mr. Olson's legal point that "courts have the discretion to refuse to apply state standards that are more strict if it finds the federal law, or in this case a compact, has occupied the field." Great Lakes governors, individually and collectively, presently have the legal right to veto diversions under the Water Resources Development Act. It seems to me that, once the Agreements are signed, any private interest could ask the courts to force states to exercise that veto power in strict accordance with the provisions of the agreement. Because of the amorphous and ambiguous nature of many of those provisions, the interpretations themselves are likely to end up in the hands of courts or trade tribunals. Do the basin jurisdictions really want to give up their existing veto power, and leave decisions regarding potentially irreversible diversions and water export to the vagaries of national and international judicial systems?

**5.** Finally, the notion of public trust is very prominent throughout Mr. Olson's essay. I would like to comment very briefly on that notion in the Canadian context. The public trust doctrine preserving the right of the public to use of water and other resources has played a central role in water and environmental protection in the United States for the past 20 to 30 years. For the most part, the doctrine has been notable in Canada only by its absence. Nevertheless, introduction of the public trust in at least two environmental protection statutes in our northern territories, plus frustrations with the limitations of other approaches, suggest that the time may be ripe for a re-examination of the concept and its broader potential throughout Canada.

## **Olson** Response

Ralph Pentland's essay answers the question "Water for Sale?" with clear, cogent arguments that the answer is "Yes." But he offers more than argument. He offers wisdom. Where I have suggested the Agreements are flawed and a direction to correct them, such as public trust and the commons in water, he has shown why the Agreements as proposed should be rejected.

**1.** In Mr. Pentland's view the Agreements are a "slippery slope" to water diversions out of the basin. Given the "flexibility" of the Standard, the slope may be inevitable.

**2.** It would seem that an "improvement" standard (or "common benefits") concedes that even those diversions that do not violate the "significant adverse impacts" standard, would cause sufficient impacts that merit compensation in some way. What this does is to require a "balancing" between harm and compensation. Mr. Pentland suggests this creates a framework for those outside the basin to obtain approval. It should be noted that to many who have worked on environmental problems over the years, the notion of "balancing" (e.g., National Environmental Policy Act) has been a common approach for addressing both the "good" and "bad" parts of a proposed proj-

ect. Perhaps, the real problem with this approach in the Agreements is that management of water resources, or as I prefer commons, involves more than "impact," "risk," and "cost-benefit" analysis. Public water quantity issues are not the same as pollution issues, and (as I indicated in my essay) should not be put in the same wine skins.

**3.** Mr. Pentland, like the recommendations in the IJC Report, favors protecting the *integrity* of the ecosystem over the "benefit" or "improvement" standard. This would at least assure that values beyond trading and just impacts would be accounted for in a decision. But even this does not address the structural flaw within the Decision Standard itself. Diversion of the Great lakes water is not like reviewing a wetlands, water quality, or zoning permit. The water is a commons, a public resource, which cannot be converted to private ownership for use beyond the basin except as a privilege on consent of the states or provinces in this case. The Standard for public resource or domain requests is more like "prohibited unless"—that is, the principles of the commons, public trust, and "no affect on flows or levels"—are a more accurate test of integrity and up to the discretion of the states and provinces without threat of a private right or claim of entitlement.

**4.** The ranking of standards by Mr. Pentland is useful for choosing the right policy. The draft Standard should be revisited with the idea that it may not be one or the other but a combination, depending on the public or private purpose, or whether it is a consumptive use.

**5.** Pentland suggests that either the IJC or Nikiforuk proposals would better protect the waters of the basin than the draft agreement approach. But before these can be utilized, as indicated above, I think it is necessary to consider the nature of diversions. One category of diversions is the supply of water to an expanding municipality that extends beyond the boundary. Another would be as proposal to improve navigation. Another would involve diversions for private ownership and sale. The first two could be more carefully defined and treated as public projects, then measured by the IJC or Nikiforuk standards. But the latter is a totally different kind of diversion, with a different set of questions. Mr. Pentland's "no diversion" standard would fit best for these, particularly because most of the states have not addressed this question directly through legislative authorization to allow a private license to sell water.

**6.** The "integrity of ecosystem" standard is important. If diversions are to be judged by a separate Standard, the suggestion of following the IJC approach, building on the "flows and levels" standard in the Treaty is more reasonably related to "integrity" than the current standards. As a general rule, diversions of surface water out of a watershed that measurably affect flows or levels are unlawful under common law principles. If diversions, that reduced flows and levels, are prohibited, then this would also address the tributary groundwater problem presented by the Nestlé type of a case. It would protect "integrity of the ecosystem" from the headwaters of a stream to the Great Lakes themselves.

**7.** Mr. Pentland, like others, points to the political pressure (votes and the whole area of historical conflicts between eastern and western state interests). But I think, too, the world water crisis, the global economy, and how countries begin to respond and either agree or fight over water will also influence decisions considerably. The assurance of the "integrity" of the Lakes must be shielded from policies that would treat the Lakes as a "resource" to meet the needs of the rest of the world, at least for all but emergency, single-event humanitarian needs.

**8.** Mr. Pentland believes "the most serious problems will come about through legal challenges related to international trade agreements or the Dormant Commerce Clause."

Given the history of water battles and protectionism in general, this seems inevitable. After all, until a state or provincial law states that water is an "article of commerce," such as the U.S. Supreme Court's *Sporhase* case, it should not be considered an "article of commerce" or "private good" under either basis for such a challenge. This is even more reason to make sure the water in the basin is public, subject to public trust, and not made available as a product itself. It is also a good reason to avoid the "flexibility" problem.

**9.** Probably it's a lack of fully understanding the full ramifications of the "no-net loss" standard, but at present I'm not convinced that it belongs or should be included as a standard for diversions, as opposed to consumptive uses. Tying diversions to conservation of water as an "offset" seems unfair to in-basin users, the waters, and water dependent natural resources.

**10.** I agree with Mr. Pentland's immediate recommendations at the end of his essay. I would only add that, irrespective of public comment, the Council should be encouraged to revisit the structural approach and standards for addressing diversions and consumptive uses.

## James M. **Olson**

Jim Olson has been practicing and writing about environmental law for over twenty-five years, and is a principal in the Olson & Bzdok, P.C. law firm in Traverse City, Michigan. Olson received a B.A. from Michigan State University, J.D. from Detroit College of Law, and LL.M. in environmental and law from University of Michigan Law School, concentrating on the law of publicly owned resources. In 1998, Michigan Lawyer's Weekly named him "Lawyer of the Year."

He and his firm have been involved in trial and appellate court decisions that have resulted in significant protection of water resources, wetlands, wilderness, rivers and lakes (including the Great Lakes) and the public trust, and a balanced approach to environmental regulation and takings of private property. He has also pioneered citizen suits in the development of law under Michigan's environmental citizen suit.

Currently, Olson represents Michigan Citizens for Water Conservation, who recently won a landmark lawsuit against Nestlé's Waters North America, Inc., in which the trial court ordered the company stop pumping and diverting water for sale out of a watershed and Great Lakes basin because the operation violated basic principles of water law and the integrity of riparian streams and lakes.

## Ralph **Pentland**

Ralph Pentland is currently president of Ralbet Enterprises Inc., where he is active in consulting on a variety of water and environmental policy issues. From 1978 to 1991, he was Director of Water Planning and Management in the Canadian Department of the Environment. In that capacity, he was responsible for negotiating and overseeing numerous Canada-U.S. and federal-provincial agreements and arrangements, and was a prime author of the Federal Water Policy that was tabled in Parliament in 1987.

With respect to Great Lakes issues, he served as Canadian Co-Chairman of the International Joint Commission's (IJC) International Great Lakes Diversions and Consumptive Uses Study Board (1978-1982), the IJC's Great Lakes Water Uses Study (1999-2000), and the IJC's International Great Lakes Water Uses Review Task Force (2002-2003). Since 1991, he has worked on water and environmental policy issues in a number of countries, including Canada, the United States, Venezuela, Indonesia, Poland, China and India.

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