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# Great Lakes, Weak Policy: The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of the Water "Products" Industry

Lauren Petrash

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## Great Lakes, Weak Policy: The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of the Water “Products” Industry

Lauren Petrash\*

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Water resource management in the Great Lakes basin has long been a cooperative effort among jurisdictions in Canada and the United States. Since the early 1900s, treaties, compacts,

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informal agreements, and common law have allocated water among the major stakeholders in the region.<sup>1</sup> Recent concerns over diversion of water outside the Basin (especially for irrigation in the American West) have spurred an onslaught of negotiations between Great Lakes states and provinces, culminating in the Great Lakes-St. Lawrence River Sustainable Resources Agreement and Compact, both signed in 2005.<sup>2</sup> While the Agreement and Compact (enforceable as federal law once approved by Congress) ban most “diversions” of water outside the basin, they permit a wide array of “withdrawals” and “consumptive uses” within the basin, subject to an extremely weak “overall reasonableness” standard.<sup>3</sup> As a direct result of the Agreement and Compact, private bottling companies continue to draw water from the Great Lakes and export it freely, despite opposition from citizens, tribes, and environmental groups.<sup>4</sup> Furthermore, the Agreement and Compact leave bottled Great Lakes water subject to the North American Free Trade Agreement (NAFTA) and the dormant Commerce Clause, which could open up the Great Lakes to exploitation by a broad range of remote interests.<sup>5</sup> Within this context, the Agreement and Compact’s allowance of withdrawal for bottling presents an urgent problem

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1. GOV'T OF CAN. & U.S. ENVTL. PROT. AGENCY, *THE GREAT LAKES: AN ENVIRONMENTAL ATLAS AND RESOURCE BOOK* 39-42 (3d ed. 1995).

2. See generally Council of Great Lake Governors, Great Lakes-St. Lawrence River Basin Sustainable Resources Agreement, 1-2, Dec. 13, 2005, [hereinafter Agreement], [http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Sustainable\\_Water\\_Resources\\_Agreement.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf) (“[r]ecognizing that, the waters of the basin” are a “renewable but finite” resource requiring conservation management); Council of Great Lake Governors, Great Lakes-St. Lawrence River Basin Sustainable Resources Compact, §1.3, Dec. 13, 2005 [hereinafter Compact], [http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Water\\_Resources\\_Compact.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf) (finding that the “Parties have a shared duty to protect . . . the renewable but finite Waters of the Basin”).

3. Agreement, *supra* note 2, at 7-10; Compact, *supra* note 2, at 11.

4. Recent cases challenging bottled water companies include *Little Traverse Bay Band of Odawa Indians v. Great Springs Waters of America, Inc.*, 203 F.Supp.2d 853 (W.D.Mich 2002) and *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*, 269 Mich.App. 25 (2005). The bottled water debate is also prevalent in the news. See Janet Ginsburg, *Where They're Boiling Over Water*, BUSINESSWEEK, May 27, 2002; Anonymous, *Using and Abusing*, CANADA & THE WORLD BACKGROUNDER, May 31, 2001; Michael Hawthorne, *War Over Bottled Water Could Leave Many Dry*, CHICAGO TRIBUNE, June 13, 2004, at Metro.

5. Bottled water is likely to be treated as a “good” under NAFTA, GATT, and the Commerce Clause. See generally Marcia Valiante, *Harmonization of Great Lakes Water Management in the Shadow of NAFTA*, 81 U. DET. MERCY L. REV. 525 (2004). Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 451-2 (2006).

for the ecologically sensitive and immeasurably important Great Lakes.

This article will discuss the major water use interests in the Great Lakes Basin and identify the major stakeholders in the bottled water debate. It will then examine prior treaties, statutes, and agreements among the parties involved to highlight the driving forces of Great Lakes policy. The article will provide a comprehensive analysis of the latest Great Lakes water use policy measures, the 2005 Agreement and Compact, with special attention to the treatment (or avoidance) of the bottled water industry. Finally, the article will summarize a recent court decision to extract some of the potential judicial mechanisms for enforcing restraints on the bottling and exporting of water from the Great Lakes Basin.

### I. COMPETING INTERESTS IN THE GREAT LAKES BASIN

The Great Lakes Basin contains 18 percent of the world's supply of fresh water, second in volume only to polar ice caps. The basin spans over 750 miles from west to east, covering parts of eight states and two Canadian provinces. One tenth of the population of the United States and one quarter of the population of Canada live in the Great Lakes Basin, totaling over 33 million people.<sup>6</sup> To residents of the Basin, the Great Lakes serve as an important provider of drinking water, sanitation, agriculture, industry, power, transportation, fish, and recreation. Not surprisingly, the lakes and adjacent land in the Basin promote a strong regional identity and emotional connection for local residents.<sup>7</sup>

The range of stakeholders in any debate regarding the Great Lakes is about as vast as the Basin itself. Great Lakes policy decisions come from national, state, provincial, and local governments and special administrative bodies on both sides of the border, each of which claims some degree of jurisdiction over Great Lakes water. Other stakeholders include Native American tribes and Canadian First Nations, user and environmental NGOs, and the general public.<sup>8</sup>

For many decades, the major concern about Great Lakes water had been water quality and pollution. Rapid settlement and industrialization left toxic and bacterial contaminants, the

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6. GOV'T OF CAN. & U.S. ENVTL. PROT. AGENCY, *supra* note 1, at 3-5.

7. Valiante, *supra* note 5, at 525.

8. Dan Tarlock, *Five Views of the Great Lakes and Why they Might Matter*, 15 MINN. J. INT'L L. 21, 27 (2006).

remedies for which were largely addressed in the Great Lakes Water Quality Agreement between Canada and the United States in 1972.<sup>9</sup> Although much pollution remains, more recent concerns have involved the *quantity* of Great Lakes water, as the various uses of the Great Lakes by a growing population conflict with one another. The possibility of large-scale diversion projects for irrigation in southwestern states is a well-known concern among Great Lakes residents, but newer threats hit closer to home. Specifically, a significantly sized bottled water industry threatens the use rights of numerous inhabitants of the basin who claim a superior right to the resource. Bottling companies pump water out of the ground from the same aquifer that feeds the lakes.<sup>10</sup> This water is packaged and sold outside the basin, never to return to the lakes, potentially causing a drop in water tables and lake levels.<sup>11</sup> As University of Arizona professor Robert Glennon puts it, "think of an aquifer as a giant milkshake that we drink with a straw. . . . If you put too many straws into the same glass, it's a recipe for disaster."<sup>12</sup> Threats of global warming, whether legitimate or not, further fuel concerns of decreasing average lake levels, since warmer temperatures mean increased evaporation and retention in the atmosphere.<sup>13</sup> As the National Oceanic and Atmospheric Administration explained in a recent report on Great Lakes water levels, Lake Michigan, Lake Huron, and Lake Erie are currently experiencing their lowest water levels in 35 years, due to a combination of lower precipitation, and high air temperatures.<sup>14</sup>

In February of 2000, the International Joint Commission (IJC), a six member, multi-jurisdictional group established by the 1909 Boundary Waters Treaty to study the Great Lakes and seek common solutions between the U.S. and Canada,<sup>15</sup> released its Final Report to the Governments of Canada and the United States regarding protection of the waters of the Great Lakes.<sup>16</sup> While the

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9. GOV'T OF CAN. & U.S. ENVTL. PROT. AGENCY, *supra* note 1, at 4.

10. Hawthorne, *supra* note 4.

11. *Id.*

12. *Id.*

13. GOV'T OF CAN. & U.S. ENVTL. PROT. AGENCY, *supra* note 1, at 9.

14. Lakes Michigan and Huron dropped by 3.4 feet and Lake Erie dropped by 3.13 feet in the past 35 years. National Oceanic and Atmospheric Administration, Great Lakes Environmental Research Laboratory, *Great Lakes Water Levels*, available at: <http://www.glerl.noaa.gov/data/now/wlevels/lowlevels.html> (last visited September 22, 2007).

15. GOV'T OF CAN. & U.S. ENVTL. PROT. AGENCY, *supra* note 1, at 41.

16. International Joint Commission, *Protection of the Waters of the Great Lakes*:

report recognized numerous potential threats to water quantity, including large-scale diversions, climate change, and consumptive uses generally, it stated the IJC's findings that the bottled water industry "appears to have no effect on water levels in the Great Lakes Basin as a whole," largely because many retailers and consumers in the Great Lakes Basin import bottled water that comes from sources outside the Basin.<sup>17</sup> The report went on to state, however, that "there could be local effects in and around the withdrawal sites."<sup>18</sup> Even if the bottled water industry does not decrease the total amount of water within the Great Lakes Basin, these local effects, including lower water tables, lower lake levels and the need to pump water higher, are the major source of frustration for many Basin residents.<sup>19</sup>

Even more cause for concern, the demand for bottled water is currently on the rise in the United States and the rest of the world. In 1990, a major business news source reported that "[a]t a prices six times that of gasoline, bottled water is the fastest-growing segment of the U.S. beverage industry."<sup>20</sup> By 2005, another source reported that consumption of bottled water has more than doubled in the U.S. in the past decade, and that in both the U.S. and Canada, close to one fifth of the population depends on bottled water.<sup>21</sup>

Proponents of water bottling operations in the Great Lakes basin argue that the industry is important in the economic development of the area.<sup>22</sup> Without a doubt, a water bottling plant provides a significant tax base, jobs, and income, all of which are especially needed in rural areas where such a plant is likely to be located. The basin's water increases in economic value as it is purified, packaged, and labeled, and many argue that this economic gain benefits Great Lakes basin residents, who fill the jobs

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*Final Report to the Governments of Canada and the United States* (Feb. 22, 2000), at "Water Uses in the Great Lakes: Removals," available at: <http://www.ijc.org/php/publications/html/finalreport.html#3> (last visited September 22, 2007).

17. *Id.* at §3.

18. *Id.*

19. Peter Luke, *Is Water a Resource or a Commodity? Governors, Environmentalists Debate Question and Issue of Diversion*, GRAND RAPIDS PRESS, Oct. 16, 2005, at State.

20. Patricia Sellers, *Perrier Plots its Comeback*, FORTUNE, April 23, 1990.

21. Tony Clarke, *Loophole Allows Bottlers to Take, Sell Water from the Great Lakes*, MERRILLVILLE POST-TRIBUNE, August 24, 2005.

22. Jerome Hinkle, *Troubled Waters: Policy and Action in the Great Lakes*, 20 T.M. COOLEY L. REV. 281, 315 (2003).

in plants that perform these functions.<sup>23</sup> But most industry supporters fail to see the impact of water withdrawals. Those who hope to halt bottling operations cite economic and ecologic losses associated with lower water levels: freighters must carry less cargo, hydro-electric power plants are less productive, fish and wildlife have to look for new spawning and feeding areas, boat docks have to be extended, and other water-pumping industries (including those feeding municipal water supplies) have to pump the water higher.<sup>24</sup> These effects derogate uses for other stakeholders. For instance, Native American tribes who have fished in the Great Lakes for generations claim that bottling plants threaten their treaty rights to access of lakes and tributaries in the Basin.<sup>25</sup>

Concerned citizens and environmental groups find a foundation for their arguments in the public trust doctrine. First applied to the Great Lakes and the lands thereunder in the 1892 case *Illinois Central R.R. v. Illinois*,<sup>26</sup> the public trust doctrine describes the “principle that navigable waters are preserved for public use, and that the state is responsible for protecting the public’s right to the use.”<sup>27</sup> In other words, a state holds certain types of resources in a trust for its citizens, and citizens may have a common law cause of action when the state fails to protect, or in some cases, threatens to give away its control of the resource in trust.<sup>28</sup>

State and federal courts treat Great Lakes Basin citizens as beneficiaries of the trust, thus protecting public access rights for navigation, fishing, and hunting fowl.<sup>29</sup> The Great Lakes states

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23. Luke, *supra* note 14.

24. Sally Cole-Misch, *Great Lakes Diversions: A Conflict Assessment, in Perspectives on Ecosystem Management for the Great Lakes*, in PERSPECTIVES ON ECOSYSTEM MANAGEMENT FOR THE GREAT LAKES 287, 289 (Lynton K. Caldwell, ed., 1988) (citing Nancy Webb Hatton, *The ‘Plot’ to Steal the Great Lakes*, DETROIT NEWS, November 28, 1982).

25. *Little Traverse Bay Bands of Odawa Indians v. Great Springs Waters of America, Inc.* 203 F.Supp. 2d 853, 854 (W.D. Mich 2002).

26. *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892).

27. BLACK’S LAW DICTIONARY (8th ed. 2004).

28. *Illinois Cent. R.R.*, 146 U.S. at 387.

29. *Collins v. Gerhardt*, 211 N.W. 115, 117 (Mich. 1927). In *Illinois Central Railroad v. Illinois*, the Supreme Court held that an ordinance granting a railroad company lakefront and adjacent lake-bottom property “was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof . . . There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.” *Illinois Cent. R.R. Co.*, 146 US at 460. See also James M. Olson, *Great Lakes Water*, MICH. B.J., Dec. 2001, at 33 (2001). The Canadian government has also recognized the Great Lakes as a public trust. Walpole Island

are charged with a fiduciary duty to protect this inalienable trust for citizens.<sup>30</sup> Bottling undermines the public trust by granting rights and access to private corporate interests. The mere mention of privatizing Great Lakes water and exporting it out of the basin inspires intense emotion in Basin residents who have made efforts to protect the waters. "The water [is] suddenly viewed as an economic commodity to be sold, rather than a life-sustaining resource to be protected."<sup>31</sup> Anti-commodity and especially anti-export sentiments explain the recent public outcry and press coverage afforded to the bottled water debate.<sup>32</sup>

Considering this disregard for the public trust, privatization of the Great Lakes may lead to problems with policy enforcement. As at least one Great Lakes scholar suggests, privatization undermines the important role of the government, thus "distancing citizens from legitimate rights," especially since goals of the private market often conflict with goals of the general public. Furthermore, privatization "ignores ecosystem impacts, water quality, and downstream users" and "avoids dispute resolution mechanisms," among other issues.<sup>33</sup>

The strong positions held by each stakeholder in the bottled water debate, plus the inter-jurisdictional nature of the Great Lakes themselves, require governing bodies in the Great Lakes Basin to consider the implications of their actions in an incredibly broad context. Without doubt, this places legislators in a difficult position, as many constituents may favor a less strict regulatory regime for the Great Lakes. Individual state regulatory regimes address the localized impacts of withdrawals of water. The IJC considers such local impacts to be the major threat from bottled water.<sup>34</sup> While some states may effectively conserve water resources through individual state regulations, other states' regu-

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First Nation v. Canada, 119 C.R.R. (2d) 79, para. 9 (Ontario 2004). Canadian courts have upheld the notion of "public rights in the environment that reside in the Crown," relying on European and American public trust analysis. *British Columbia v. Canadian Forest Products*, 2 S.C.R. 74, para. 74 (Can. 2004).

30. Scott D. Hubard, *Everything Old is New Again: Water Resource Protection in the 21st Century*, MICH. B.J., Nov. 2005, at 30.

31. Cole-Misch, *supra* note 24, at 290.

32. Recent news articles expose Nestlé Waters North America Inc.'s bottling operations in Michigan. See Luke, *supra* note 19; Hawthorne, *supra* note 4; Ginsburg, *supra* note 4. Other articles discuss Great Lakes policy in regards to bottled water. See *Great Lakes Deal Would Allow Water Bottling*, KITCHENER-WATERLOO REC., Nov. 24, 2005, at Front; Clarke, *supra* note 21; John Flesher, *Trade Debate Clouds Great Lakes Plan*, DULUTH NEWS-TRIB., Oct. 25, 2004, at Front.

33. Hinkle, *supra* note 22, at 294.

34. International Joint Commission, *supra* note 16, §3.



lations may favor consumptive water use, depending on the interest of the constituencies. Therefore, a purely state-level regulatory regime for the Great Lakes Basin will likely produce patchy results, with some states exhausting or otherwise affecting the resource disproportionately.

If conservation of the Great Lakes is a major concern, the inter-jurisdictional nature of the issue and of the Basin itself requires some degree of cooperation in policy-making. Legislators must consider the Great Lakes Basin as a complete ecosystem to best preserve the resource for future enjoyment by its their own constituents and for the Basin as a whole. Actions in one jurisdiction may diminish the water supply in another jurisdiction. Ecosystems do not respect political borders, but political borders must respect ecosystems. Unfortunately, "political borders often impede integrated cooperative action."<sup>35</sup> Even if the effects of the bottled water industry are localized in nature, that is, drops in the water table are specific to the watershed in which the withdrawal site lies, a single bottling facility may affect multiple jurisdictions because watersheds often straddle political boundaries.<sup>36</sup> Furthermore, even minute fluctuations in water levels can frustrate entire ecosystems, causing erosion and other shoreline changes, and modifying habitats for shoreline species, among other effects.<sup>37</sup>

## II. PRIOR TREATIES, LEGISLATION, AND AGREEMENTS

### A. *Boundary Waters Treaty (1909)*

At a broad level, Great Lakes states and provinces have in fact recognized the need for inter-jurisdictional policy and cooperation since the turn of the 20th century. The first major agreement allocating Great Lakes water between Canada and the United States is the Boundary Waters Treaty (1909).<sup>38</sup> Limited in scope to portions of lakes and rivers adjacent to the international boundary, the Treaty provides mechanisms for dispute resolution

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35. PAUL R. MULDOON, ET AL., *CROSS-BORDER LITIGATION: ENVIRONMENTAL RIGHTS IN THE GREAT LAKES ECOSYSTEM 2* (Carswell 1986).

36. For a map of American watersheds, including the Great Lakes Basin watersheds, see U.S. Environmental Protection Agency, *Surf Your Watershed*, <http://cfpub.epa.gov/suff/locate/index.cfm> (last visited Sept. 23, 2007).

37. See generally CHRISTINE MANNINEN & ROGER GAUTHIER, *LIVING WITH THE LAKES 29-30* (1999).

38. Multilateral Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 [Boundary Waters Treaty].

between the parties. The Treaty also lists a number of principles for Great Lakes governance, based on the view that either country may take unilateral action to exploit water resources so long as it does not directly injure the other. This vague reciprocal standard seems to avoid ecosystem-wide considerations of the entire Basin.<sup>39</sup>

Perhaps the most progressive of the Treaty's provisions, and the Treaty's major import in today's policy decisions, comes largely from its creation of the International Joint Commission (IJC). The IJC, which consists of three commissioners from the United States and three commissioners from Canada, has jurisdiction over the use, obstruction, and diversions of the Great Lakes.<sup>40</sup> While some maintain that the IJC is of little influence because of its limited adjudicative power,<sup>41</sup> the IJC's push towards an ecosystem-wide "precautionary principle" approach<sup>42</sup> to management paved the way for subsequent agreements, and continues to affect Great Lakes policy decisions.<sup>43</sup> The Boundary Waters Treaty, of course, makes no concession for bottled water or even a distinction between different types of withdrawals, but was an important first step towards later policy framework and is still in effect to this day.

### B. Great Lakes Basin Compact (1968)

Next in the series of cross-border agreements is the Great Lakes Basin Compact, approved by Congress in 1968. The 1968 Compact creates the Great Lakes Commission, comprised of commissioners from each of the eight Great Lakes states. The Commission has the power to study relevant water use data and make recommendations regarding water use to state and local legisla-

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39. Hall, *supra* note 5, at 417.

40. Boundary Waters Treaty, *supra* note 38. See also GOV'T OF CAN. & U.S. ENVTL. PROT. AGENCY, *supra* note 1, at 41.

41. Hall, *supra* note 5, at 418.

42. One example of the IJC's commitment to the "precautionary principle" is the IJC's calling for a phase out of persistent and bioaccumulative substances in the Great Lakes Basin due to the difficulty of eliminating these substances from the Great Lakes once they enter the ecosystem. See Joel Tickner, *A Commonsense Framework for Operationalizing the Precautionary Principle*, Prepared for the Wingspread Conference on Strategies for Implementing the Precautionary Principle, Jan. 23-25, 1998, available at: <http://www.johnsonfdn.org/conferences/precautionary/tick.html> (last visited Sept. 23, 2007).

43. Tarlock, *supra* note 8, at 32 (citing International Joint Commission, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* (Feb. 22, 2000), <http://www.ijc.org/php/publications/html/finalreport.html>).

tures.<sup>44</sup> As the recommendations put forth by the Commission are not binding, the 1968 Compact lacks force in today's policy-making arena, but the Commission nonetheless exemplifies early attempts at making Great Lakes policy inter-jurisdictional (or at least interstate).<sup>45</sup>

### C. *Great Lakes Charter (1985)*

The Great Lakes Charter, signed in 1985 by the eight Great Lakes states and two Great Lakes provinces, is another important step towards today's policy of thwarting large diversions and consumptive uses, but letting smaller-scale consumptive uses escape regulation. The Charter is a mere good-faith agreement,<sup>46</sup> but attempts to implement notice provisions for major diversions, transparency among jurisdictions, information exchange, consultation procedures, and a new Water Resource Management Committee.<sup>47</sup> Despite its lack of enforceability, the Charter serves to regulate massive diversions of water from the basin to the extent that decision-makers take other states' interests into consideration before approving a diversion.<sup>48</sup> The Charter, like more recently signed agreements, draws a distinction between withdrawals based on the size of the operation, requiring consultation only for withdrawals that exceed an average of five million gallons per day for a 30-day period.<sup>49</sup> The Charter also distinguishes between existing withdrawals and new or increased withdrawals and, in broad terms, calls for more stringent regulation of new or increased withdrawals. This distinction is particularly noteworthy, as it re-appears in the 2005 Agreement and Compact.<sup>50</sup>

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44. Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414, 414-415 (1968).

45. "Provided that no action of the Commission shall have the force of law in, or be binding upon, any party state." *Id.*, at 418. See also Hall, *supra* note 5, at 423.

46. The rights of each State and Province under this Charter are mutually dependent upon the good faith performance by each State and Province of its commitments and obligations under the Charter." Council of Great Lakes Governors, Great Lakes Charter, Feb. 22, 1985, <http://www.cglg.org/pub/charter/index.html>.

47. *Id.*

48. "It is the intent of the signatory States and Provinces that no Great Lakes State or Province will approve or permit any major new or increased diversion or consumptive use of the water resources of the Great Lakes Basin without notifying and consulting with and seeking the consent and concurrence of all affected Great Lakes States and Provinces." *Id.* at 2.

49. *Id.* at 4.

50. *Id.* at 2 ("The signatory State and Provinces agree that *new or increased* diversions and consumptive uses of Great Lakes Basin water resources are of serious concern" (emphasis added)); Compact, *supra* note 2; Agreement, *supra* note 2.

*D. Water Resources Development Act (1986)*

The U.S. Congress enacted the Water Resources Development Act (WRDA) of 1986 to address concerns over withdrawals from the Great Lakes and other water use issues throughout the nation. WRDA's major import is its approval provision; each Great Lakes state governor may veto any other state's new withdrawal (including diversion or export) from the basin.<sup>51</sup> Unlike more recent agreements, WRDA does not install a blanket prohibition on certain types or sizes of diversions or withdrawals, but provides an alternative mechanism for checking the activities of other states. WRDA also falls short of complete and comprehensive management because, among other barriers, it lacks a private right of enforcement.<sup>52</sup> However, WRDA presents an innovative approach to management and another instrument in a state's growing arsenal of interstate enforcement possibilities.

*E. Great Lakes Charter Annex (2001)*

The final step towards the 2005 Compact and Agreement was the Great Lakes Charter Annex of 2001. Signed by the governors of each Great Lakes State and by premiers of "associate member" provinces,<sup>53</sup> the Annex supplements the 1985 Great Lakes Charter and outlines directives for enacting future binding agreements, setting an appropriate decision making standard for assessing withdrawals, encouraging public participation, and reviewing projects under WRDA. The Annex avoids specific guidelines restricting water uses but expresses a commitment to investigate and set such guidelines in a future agreement.<sup>54</sup> Like its predecessors and successor, the Annex's key directives apply only to new or increased withdrawals.<sup>55</sup>

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51. Water Resources Development Act, 42 U.S.C. §1962d-20(d) (1986).

52. In *Little Traverse Bay Bands of Odawa Indians*, the US District Court applied the Cort factors for an implied private cause of action to the WRDA and held that no such cause of action exists. *Little Traverse Bay Bands of Odawa Indians v. Great Springs Waters of America, Inc.*, 203 F.Supp.2d 853, 863 (W.D. Mich 2002) (citing *Cort v. Ash*, 422 U.S. 66 (1975)). See also Charles F. Glass, Jr., *Enforcing Great Lakes Water Export Restrictions Under the Water Resources Development Act of 1986*, 103 COLUM. L. REV. 1503, 1513 (2003).

53. Council of Great Lakes Governors, Great Lakes Charter Annex, June 18, 2001, 4, <http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf>. The Charter Annex does not explain what "associate status" entails.

54. *Id.* at 1, 3.

55. "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

III. THE GREAT LAKES-ST. LAWRENCE RIVER BASIN  
SUSTAINABLE WATER RESOURCES AGREEMENT  
AND COMPACT

A. *How the Agreement and Compact Work*

On December 13, 2005, each of the eight Great Lakes governors and two Great Lakes premiers signed The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (Agreement), and the U.S. Governors also signed a counterpart Great Lakes-St. Lawrence River Basin Sustainable Water Resources Compact (Compact).<sup>56</sup> Together, these documents serve as the implementation agreements for the earlier Great Lakes Charter Annex.<sup>57</sup> Although the Agreement uses language similar to that of a treaty, it is in fact non-binding.<sup>58</sup> Because of Constitutional restraints, and Congress's previous exercise of its treaty power over the Great Lakes in the Boundary Waters Treaty of 1909, the parties to this agreement may enact only a good-faith agreement.<sup>59</sup>

The Compact, on the other hand, is a binding agreement and requires each state to enact legislation to implement the Compact's standards.<sup>60</sup> A compact allows for collaborative and dynamic action among states without the rigid requirements of a

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withdraw water from the Great Lakes Basin as well as proposals to increase existing water withdrawals or existing water withdrawal capacity." *Id.* at 2.

56. Council of Great Lakes Governors, Projects: Great Lakes Water Management Initiative, <http://www.cglg.org/projects/water/annex2001Implementing.asp> (last visited Sept. 23, 2007).

57. *See id.*

58. John R. Crook, *Eight U.S. Great Lakes States, Ontario, and Quebec Conclude New Agreements to Limit Diversions of Water from the Great Lakes Basin*, 100 AM. J. INT'L L. 467 (2006).

59. The Compact Clause of the US Constitution states that "[n]o State shall, without the Consent of Congress. . . enter into any Agreement or Compact with another State, or with a foreign Power. . . No state shall enter into any Treaty, Alliance, or Confederation." U.S. Const. art. I, § 10, cl. 3. The likelihood of Congress approving a Compact between the states and foreign provinces is slim, as Congress denied Compact status to the original Great Lakes Compact in 1968. Also, because a treaty already governs the Great Lakes (the Boundary Waters Treaty), Congress is likely to deem any attempt by states to enter into a binding agreement an impermissible attempt at entering into a treaty. The parties to the Agreement avoid Constitutional scrutiny by adopting a non-binding, cooperative approach. Hall, *supra* note 5, at 445-446.

60. Section 7.3 of the Compact provides enforcement mechanisms to compel compliance. Section 8.7 states that the "Compact shall continue in force and remain *binding* upon each and every Party unless terminated." Compact, *supra* note 2, at §7.3. Section 8.7 states that the "Compact shall continue in force and remain *binding* upon each Party unless terminated." *Id.* at §8.7.

federal mandate.<sup>61</sup> According to the Council of State Governments, interstate compacts are “among the most powerful, durable, and adaptive tools for ensuring cooperative action among states.”<sup>62</sup> Once approved by Congress, a Compact becomes binding as federal law and is enforceable as a contract between the parties.<sup>63</sup> The Compact becomes effective when ratified through legislation of each of the party states, thus placing a duty upon these states to draft and enact appropriate policy.<sup>64</sup> As of January 2008, Minnesota and Illinois had enacted the Compact into law; New York had passed a bill in two Chambers; and Michigan, Indiana, Ohio and Pennsylvania had bills under active consideration.<sup>65</sup>

The Agreement and Compact draw a clear distinction between water diversions and withdrawals or consumptive uses. The term “diversion” refers to transfer of water from the Basin to another watershed. “Withdrawal” refers to any taking of surface or groundwater, including water that stays in the basin and consumptive uses (water withdrawn or withheld from the Basin that is lost to evaporation, incorporation into products, or other processes).<sup>66</sup>

### *B. Regulatory Distinctions and the “Product” Loophole*

The major provision of the Agreement and the Compact is a ban on new or increased large-scale water *diversions* from the basin, with minor exceptions based on emergency or to provide water to municipalities that straddle the border of the basin.<sup>67</sup> The Agreement and Compact also call for management of new or increased withdrawals and consumptive uses. These withdrawals and consumptive uses are subject to a decision-making standard

61. Council of State Governments- National Center for Interstate Compacts, Frequently Asked Questions: Compacts Generally, 1, [http://www.cglg.org/projects/water/CompactEducation/FAQ—Compacts\\_GenerallyCSGNCIC.pdf](http://www.cglg.org/projects/water/CompactEducation/FAQ—Compacts_GenerallyCSGNCIC.pdf) (last visited Sept. 23, 2007).

62. *Id.*

63. *Texas v. New Mexico*, 428 U.S. 124, 128 (1987).

64. Compact, *supra* note 2, § 9.4.

65. Council of Great Lakes Governors, Great Lakes-St. Lawrence River Basin Water Resources Compact Implementation, <http://www.cglg.org/projects/water/CompactImplementation.asp> (last visited Sept. 29, 2007); *see also* COUNCIL OF GREAT LAKES GOVERNORS, GREAT LAKES COMPACT MOVES FORWARD, THE COMPASS, Sept. 2006, <http://www.cglg.org/news/TheCompass/Compass-2006-Issue3.pdf> (discussing the stage of the legislative process at which the compact is in several Great Lakes states).

66. Agreement, *supra* note 2, art. 103; Compact, *supra* note 2, §1.2.

67. Agreement, *supra* note 2, at arts. 200-01; Compact, *supra* note 2, §§4.8-4.9.

based upon riparian common law,<sup>68</sup> that requires that the proposed use is “reasonable,” based upon consideration of other parties’ rights.<sup>69</sup> Other, more minor provisions of the Agreement and Compact include the creation of a Regional Body (Agreement) and Council (Compact) to determine whether proposed projects meet the standards and to study and monitor results,<sup>70</sup> public participation and tribal consultation requirements,<sup>71</sup> and alternative dispute resolution mechanisms.<sup>72</sup> The Agreement and Compact represent huge progress in “both the substantive legal rules for water use in the Great Lakes basin and the cooperative management among the states and provinces that share this resource.”<sup>73</sup> Policy-makers, the public, and even environmental groups praise the Agreement and Compact, mostly citing its ban on large-scale diversions, but overlook or underestimate other implications.<sup>74</sup>

The most dangerous of these overlooked implications is the classification and treatment of water bottling operations under the Agreement and the Compact. While the prohibition of water diversions may protect the Great Lakes from demands by drier states in the Southwest, the lack of a strong standard for other types of water uses continues to threaten Great Lakes water levels. The Agreement and Compact’s language, particularly in defining the types of withdrawals it regulates, describing the decision making standard and scope, and exempting existing water withdrawals from regulation, opens a loophole for the bottled water industry to pump and export Basin water. While the Agreement and Compact effectively address the harms of large-scale diversion, they fall short in regulating smaller consumptive uses, which in the future may collectively amount to massive amounts of water removed from the Basin.

As previously stated, the Agreement and the Compact pro-

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68. Hall, *supra* note 5, at 435.

69. Agreement, *supra* note 2, at art. 203; Compact, *supra* note 2, §4.11.

70. Agreement, *supra* note 2, at ch. 4; Compact, *supra* note 2, at art. 2.

71. Agreement, *supra* note 2, at arts. 503-504; Compact, *supra* note 2, at arts. 5-6.

72. Agreement, *supra* note 2, at art. 601; Compact, *supra* note 2, §7.2.

73. Hall, *supra* note 5, at 435.

74. *Great Lakes Deal Would Allow Water Building*, KITCHENER RECORD, Nov. 24, 2005, at Front; Press Release, Gov. George E. Pataki of New York, Gov. Pataki Proposes Legislation to Enact Historic Great Lakes Compact (May 25, 2006), 2006 WLNR 9039504; Doug Draper, *Water Ban a Good Step: Rigby*, NIAGARA THIS WEEK, Dec. 23, 2005, at B; Steve Erwin, *Pact Shuts Great Lakes Export Tap; Ontario, Quebec, Eight States Sign Deal*, HAMILTON SPECTATOR, Dec. 14, 2005, at Canada/World.

hibit “diversions.”<sup>75</sup> A diversion is defined as “a transfer of water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer.”<sup>76</sup> The definitions in both documents specifically state that water withdrawn to be incorporated into a “product” does not constitute a diversion.<sup>77</sup> A “product,” according to the Agreement and Compact is “something produced in the Basin by human or mechanical effort. . . and used in manufacturing, commercial, or other processes or intended for immediate or end use by consumers.”<sup>78</sup> Clearly, bottled water is a “product” and therefore the ban on diversions does not equate to a ban on bottling water. Bottled water and other “products” fall under the “withdrawal/consumptive use” category, defined as “that portion of the Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to. . . incorporation into processes.”<sup>79</sup>

The Agreement and Compact again exempt bottled water from strict regulation and let bottled water escape the ban, so long as the water is removed in containers holding less than 5.7 gallons. Although the practice of bottling water and sending it outside the basin for sale would clearly constitute export, neither the Agreement nor the Compact regulate such exports when kept to small enough containers.<sup>80</sup> This provision, combined with specific classifications as “consumptive use” (falling under “withdrawals”), precludes any attempt to argue that water bottling and export is effectively a “diversion,” even where the bottled water is exported to localities outside of the Basin.

With bottled water falling under the Agreement and Compact’s less stringent regulatory regime for withdrawals and consumptive uses, the effects on the bottled water industry are uncertain and subject to individual state and provincial policy

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75. Agreement, *supra* note 2, at art. 200; Compact, *supra* note 2, § 4.8.

76. Agreement, *supra* note 2, at art. 103; Compact, *supra* note 2, § 1.2.

77. This definition, however, “. . . does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed.” Agreement, *supra* note 2, at art. 103; Compact, *supra* note 2, § 1.2.

78. Agreement, *supra* note 2, at art. 103; Compact, *supra* note 2, § 1.2.

79. Agreement, *supra* note 2, at art. 103; Compact, *supra* note 2, § 1.2.

80. “A Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons shall be treated under this Compact in the same manner as a Proposal for a Diversion. Each Party shall have the discretion, within its jurisdiction, to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container of 5.7 gallons or less.” Agreement, *supra* note 2, at art. 207(9); Compact, *supra* note 2, § 4.12(10). *See also* Clarke, *supra* note 21.



decisions. The Agreement and Compact provide that each party shall create a program for the management of such withdrawals and consumptive uses "by adopting and implementing Measures consistent with the 'Decision-Making Standard.'"<sup>81</sup> Furthermore, states and provinces are charged with setting their own threshold levels for regulation of withdrawals and consumptive uses.<sup>82</sup> The vague scope of the documents allows a state or province to omit the bottled water industry from its water management program.

Even vaguer than the Agreement and Compact's scope of applicability is the "Decision Making Standard" itself. Both the Agreement and the Compact list five criteria for any type of water use management. First, "all water withdrawn should be returned. . . to the Source Watershed *less an allowance for consumptive use.*"<sup>83</sup> Since bottling water constitutes an entirely consumptive use, the first criterion contributes nothing to the regulation of bottled water.

Second, the withdrawal or consumptive use "shall be implemented so as to ensure that the Proposal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters."<sup>84</sup> Without a definition of "significant impacts," this criterion may be very easily manipulated and avoided.

Third, the withdrawal or consumptive use shall incorporate "Environmentally Sound and Economically Feasible Water Conservation Measures."<sup>85</sup> In considering a project's conservation measures for the purposes of the standard, states and provinces are to make decisions that are not only environmentally sound but also technically and economically feasible and cost effective.<sup>86</sup> Considerations of cost and availability will likely relax the technology requirements and overall restrictions on water bottling plants.

Fourth, the withdrawal or consumptive use shall be implemented in compliance with "all applicable municipal, state, and federal laws, as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909."<sup>87</sup>

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81. Agreement, *supra* note 2, at art. 206; Compact, *supra* note 2, § 4.10.

82. Agreement, *supra* note 2, at art. 206; Compact, *supra* note 2, § 4.10.

83. Agreement, *supra* note 2, at art. 203(1); Compact, *supra* note 2, § 4.11(1) [emphasis added].

84. Agreement, *supra* note 2, at art. 203(2); Compact, *supra* note 2, § 4.11(2).

85. Agreement, *supra* note 2, at art. 203(3); Compact, *supra* note 2, § 4.11(3).

86. Agreement, *supra* note 2, at art. 203(3); Compact, *supra* note 2, § 4.11(3).

87. Agreement, *supra* note 2, at art. 203(4); Compact, *supra* note 2, § 4.11(4).

The import of this criterion is likely to be marginal since, as described above, the state, federal, and international laws (especially the Boundary Waters Treaty) do little to regulate bottled water in the first place.

The fifth and arguably most malleable criterion is a simple reasonableness standard. This requires a consideration of the “balance between economic development, social development and environmental protection.”<sup>88</sup> By failing to prioritize environmental protection above economic and social development, the Agreement and Compact add weight to arguments for bottling water; after all, exploitation of the resource means more jobs for local citizens. The Agreement and Compact’s puny decision making standard for withdrawals and consumptive uses makes enforceability of regulation of the bottled water industry nearly impossible.

Moreover, the Agreement and Compact’s ban of diversion and “Decision Making Standard” for withdrawals and consumptive uses apply only to *new or increased* diversions or withdrawals.<sup>89</sup> A limited number of additional but less operative provisions have potential to influence existing water use projects, including existing water bottling plants. Under the Compact, the parties are required to develop a water resources inventory within five years of the effective date of the Compact.<sup>90</sup> Under both the Agreement and the Compact, any person (or corporation) who withdraws at least 100,000 gallons per day on average must register with the state or province. Each state or provincial party must report the information gathered pursuant to the inventory and registration provision to an international database of water uses in the basin.<sup>91</sup> While an inventory and registration program are certainly an important step towards a holistic regulation of water uses in the basin, the Agreement and Compact do not require the states or provinces to directly or immediately restrict water uses based on this information.<sup>92</sup>

Another potential restraint on existing water uses, the parties are required to develop individual water conservation and effi-

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88. Agreement, *supra* note 2, at art. 203(5)(c); Compact, *supra* note 2, § 4.11(5)(c).

89. Agreement, *supra* note 2, at art. 200 and art. 203; Compact, *supra* note 2, § 4.8, § 4.10.

90. Compact, *supra* note 2, § 4.1(1).

91. Agreement, *supra* note 2, at art. 301; Compact, *supra* note 2, § 4.1.

92. The Compact states that such information gathered by the parties shall be put forth to develop a mechanism by which cumulative impacts of withdrawals, consumptive uses, and diversions shall be assessed. Agreement, *supra* note 2, at art. 301(4); Compact, *supra* note 2, § 4.1(6).

ciency goals and implement either a voluntary or mandatory water conservation and efficiency program.<sup>93</sup> The Agreement and Compact do not provide stringent guidelines for such programs, and parties are left entirely to their own devices.<sup>94</sup> Finally, the parties are required to conduct periodic assessment of the cumulative impacts of withdrawals, diversions, and consumptive uses. The assessments are meant to set a baseline standard of review for new or increased withdrawals or consumptive uses.<sup>95</sup> In this sense, state and provincial policy makers are urged to consider existing uses indirectly in setting the requirements for the Agreement and Compact's operative standards for new or increased uses. However, this provision lacks specificity and again leaves the responsibility up to the state and provincial parties to set the final baseline;<sup>96</sup> this lack of uniformity and accountability to other jurisdictions arguably places Basin-wide goals of resource conservation further out of reach. The provision appears to be extremely difficult to monitor by other parties, and is therefore unlikely to be enforced. The Agreement and Compact's weak and confusing framework for regulation of existing diversions, withdrawals, and consumptive uses avoids stepping on states' and provinces' individual regulatory schemes and interests. In other words, existing water uses are subject only to the state or province's regulations, and states and provinces may regulate or not regulate as they see fit, upsetting notions of a state's responsibility and accountability to the rest of the Basin.<sup>97</sup>

While permitting states and provinces to regulate water uses on a case-by-case basis promotes flexibility and consideration of state or province-specific problems and goals,<sup>98</sup> the ecosystem-wide approach to Great Lakes management requires some degree of uniformity of enforcement and basin-wide regulation, or at least

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93. Agreement, *supra* note 2, at art. 304; Compact, *supra* note 2, § 4.2.

94. Each party is to develop its own goals and objectives, consistent with the basin-wide goals, and is responsible for assessing its programs in meeting the party's goals and objectives. Agreement, *supra* note 2, at art. 304(2); Compact, *supra* note 2, § 4.2(2).

95. The Agreement requires that parties list existing water withdrawals approvals or list the capacity of existing systems, with these volumes constituting the baseline volume for regulations of new or increased uses. Agreement, *supra* note 2, at art. 207(1) and 209. The Compact employs a more general "assessment" requirement. Compact, *supra* note 2, § 4.15.

96. "The Parties have the responsibility of conducting this Cumulative Impact assessment." Agreement, *supra* note 2, at art. 203. Compact, *supra* note 2, § 4.15(2).

97. See Hall, *supra* note 5, at 436.

98. Marlissa S. Briggert, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751, 767 (1991).

state responsibility for promoting basin-wide goals.<sup>99</sup> The Agreement and Compact's deference to state policy with respect to new or increased withdrawals or consumptive uses and with respect to existing water diversions, withdrawals, or consumptive uses could present a threat to this valuable resource if states and provinces seek to protect the interests of industry within their borders.

More specifically, with respect to bottled water, the Agreement and Compact leave existing water bottling plants virtually untouched,<sup>100</sup> and new or increased bottling operations subject only to a weak "reasonableness" standard,<sup>101</sup> so long as water is removed from the basin in containers holding less than 5.7 gallons.<sup>102</sup> As the bottled water industry continues to pump, bottle, and export Great Lakes water out of the Basin, citizens feel the positive short-term economic impacts paired with the negative long-term environmental impacts of such a patchy regulatory regime.

#### IV. IMPLICATIONS AND CONSIDERATIONS OF A NON-REGULATORY REGIME FOR BOTTLED WATER AND OTHER "PRODUCTS"

##### A. NAFTA

The consequences associated with this failure to restrict export of bottled water from the Great Lakes intensify in the context of North American Free Trade Agreement (NAFTA) and the Commerce Clause. NAFTA requires that nation parties afford each other "treatment no less favorable than it accords to like goods. . . of any other country."<sup>103</sup> Furthermore, a nation party may not apply any standards-related measure that creates an unnecessary obstacle to trade unless it overcomes the burden of

99. Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 209 (2002). See also Muldoon, *supra* note 35, at 2 (explaining that any method of identifying areas by group is inherently insufficient due to the interdependency of the ecosystem as a whole); GOV'T OF CAN. & U.S. ENVTL. PROT. AGENCY, *supra* note 1, at 5 (discussing the complexities of ecosystem management). See generally George Francis, *The North American Experience Managing International Transboundary Water Resources: The International Joint Commission and the International Boundary and Water Commission Part 2*, 33 NAT. RESOURCES J. 315 (1993) (discussing ecosystem management issues).

100. Agreement, *supra* note 2, at art. 203; Compact, *supra* note 2, § 4.10.

101. Agreement, *supra* note 2, at art. 203(5); Compact, *supra* note 2, § 4.11(5).

102. Agreement, *supra* note 2, at art. 207(9); Compact, *supra* note 2, § 4.12(10).

103. North American Free Trade Agreement, art. 904(3), Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

proving that the measure is meant to achieve a legitimate objective.<sup>104</sup> These provisions serve NAFTA's primary function of promoting free conditions of fair competition in the free trade area and eliminating barriers to trade.<sup>105</sup> The United States and Canada, as nation parties to NAFTA, may not treat either each other or Mexico differently with respect to import and export regulations. This may mean that exports cannot be subject to quantitative restrictions or an export ban.<sup>106</sup> Canadians in particular fear that by allowing US-based private interests to draw and bottle water (treated as a commodity and therefore subject to NAFTA), the Agreement and Compact open up the possibility of a variety of commercial interests entering the Basin to export water to all corners of the globe virtually without restriction.<sup>107</sup>

NAFTA Chapter Eleven highlights the ban on discriminatory regulation that is relevant to water bottling in the Great Lakes. No party to NAFTA may "directly or indirectly nationalize or expropriate an investment of an investor or another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment [expropriation], except: a) for a public purpose, b) on a non-discriminatory basis, c) in accordance with due process of law and the general principles of treatment provided in [NAFTA] Article 1105(1), and d) upon payment of compensation in accordance with paragraphs 2 through 6."<sup>108</sup> Therefore, in allowing domestic bottled water companies to pump from the Great Lakes and distribute bottled water about the U.S. and Canada, the Agreement and Compact preclude the "non-discriminatory basis" exception to Chapter Eleven's prohibition on regulation of the good. If the U.S. can pump, bottle, and export water in the Great Lakes Basin, investors (private interests) from other signatory nations may bring suit if they are denied the similar opportunity to pump and bottle in the Basin.<sup>109</sup>

To be subject to the free trade provisions of NAFTA, a product or export must be considered a "good" or part of an "investment"

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104. *Id.* at art. 904(4).

105. *Id.* at art. 102.

106. Valiante, *supra* note 5, at 533.

107. "By classifying water as a product instead of a publicly owned natural resource, he (James M. Olson, attorney) says it makes it an article of commerce. And that, he says, opens the door to lawsuits claiming that denying outsiders access to Great Lakes water gives an unfair competitive advantage to businesses within the basin." John Flesher, *Attorney Warns of Dangers in Water Protection Plan*, DULUTH NEWS TRIBUNE, Dec. 24, 2005, at Local.

108. NAFTA, *supra* note 103, at art. 1110.

109. See Hinkle, *supra* note 22, at 303.

measure.<sup>110</sup> By allowing bottled water to be exported from the Great Lakes Basin, the Agreement and Compact impliedly treat bottled water as a good. It is noteworthy that the drafters of the Agreement and Compact avoid using the words “good” and “commodity” to describe exports, instead opting for the terms “product” and “consumptive use.”<sup>111</sup> Nevertheless, bottled water will likely be treated as such, as it had been prior to the Agreement and Compact.

NAFTA commentators agree that water in its natural state is generally not regarded as a “good,” and therefore not subject to NAFTA free trade requirements. When water is pumped, packaged, and placed into the stream of commerce in the form of bottled water, however, few would dispute that it has become a “good” with respect to the agreements.<sup>112</sup> Both the U.S. and Canada list tariffs for certain types of water exports in their tariff and customs schedules, indicating treatment of bottled water as a good which can be traded internationally.<sup>113</sup> Because of the almost inevitable classification of bottled water as a “good,” Great Lakes policy-makers have already incorporated and will continue to incorporate non-discriminatory treatment into all decisions regarding withdrawals from the basin.<sup>114</sup> In practical effect, any future restriction on water uses and export within the Basin will likely be subject to a stricter scrutiny as a result of the “good” classification.

Fortunately for Great Lakes governors and premiers seeking to protect water resources, NAFTA permits certain exceptions to this anti-discrimination requirement for measures necessary to protect human, animal or plant life or health and measures in relation to the conservation of exhaustible natural resources.<sup>115</sup> However, these exceptions have been strictly interpreted by the

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110. NAFTA, *supra* note 103, at art. 300 (“This Chapter applies to trade in goods of a Party”). NAFTA also applies to any other investments of a party within the Great Lakes Basin.

111. Agreement, *supra* note 2, at art. 103; Compact, *supra* note 2, § 1.2.

112. “[G]oods of a Party means domestic products as these are understood in the General Agreement on Tariffs and Trade or such goods as the Parties may agree, and includes originating goods of that Party.” NAFTA, *supra* note 103, at art. 201(1); *see also* Valiante, *supra* note 5, at 533-34 (discussing the implications for the categorization of water under the NAFTA agreement).

113. Hinkle, *supra* note 22 at 301 (citing United State International Trade Commission, Harmonized Tariff Schedule of the United States § 2201).

114. Valiante, *supra* note 5, at 534.

115. *Id.* at 534-35.

World Trade Organization (WTO).<sup>116</sup> The likelihood of a future regulatory regime for the export of bottled water in the Great Lakes region surviving NAFTA scrutiny depends on demonstrating that the primary purpose of such regulation is conservation and applying similar prohibitive regulations and enforcement to jurisdictions within the Basin itself.<sup>117</sup>

In their non-regulation of a bottled water “good,” the Agreement and Compact avoid run-ins with NAFTA’s prohibitions on quantity-based or discriminatory regulations of the international market.<sup>118</sup> While the Agreement and Compact may not intensify the effects of NAFTA on the bottled water regime, beyond acknowledging that bottled water is in fact a good subject to free trade agreements and by perpetuating the status quo of non-regulation, they provide an excellent illustration of the context of the bottled water debate. If water is continually treated as a good or commodity and policy makers cannot define restrictions with the primary purpose of conservation, bottled water will remain the great loophole in Great Lakes water use management.

### B. *Dormant Commerce Clause*

The Commerce Clause, which allows the U.S. Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes,”<sup>119</sup> and the dormant Commerce Clause, which prevents states from so regulating beyond the limits of their police powers, also warrant consideration in the bottled water discussion. In *Sporhase v. Nebraska, ex rel. Douglas*, the U.S. Supreme Court applied constitutional Commerce Clause scrutiny to a state’s attempts to regulate intrastate water resources for conservation and preservation purposes and held that groundwater was in fact an article of commerce, thus striking down state policy of restricting transfers of groundwater.<sup>120</sup> The case sets a precedent for Great Lakes states, stripping them of the opportunity to restrict the export of water from the basin unless

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116. The WTO is the successor to GATT. The exceptions at issue originated in GATT but have been adopted by NAFTA. See *id.* at 535.

117. *Id.* at 535-36.

118. Maude Barlow, chairwoman of the Council of Canadians explains that “the [Canadian] federal government can’t legally ban bulk water exports because water is included in NAFTA.” Dennis Bueckert, *Pressure to Export Water to U.S. Likely to Grow*, KITCHENER RECORD, Dec. 23, 2005, at Front.

119. U.S. CONST. ART. I, § 8, CL. 3.

120. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 1954 (1982).

the state is similarly regulating its own use of the resource.<sup>121</sup>

Once approved by Congress, however, the Compact takes the force of federal law and removes Commerce Clause restraints, which allows for more stringent regulation.<sup>122</sup> The Compact's ban on large-scale diversions, for instance, should withstand constitutional scrutiny. If the Compact had similarly banned smaller-scale consumptive uses, including bottled water, this prohibition would theoretically withstand such scrutiny as well, at least with respect to the Commerce Clause. However, the failure to regulate bottled water with the interstate agreement creates what seems like a hopeless situation for state and local governments attempting to keep Great Lakes water in the Great Lakes. Any attempt by a state to regulate water as commerce *beyond* the limited scope of the Compact – a cap on quantity pumped and bottled, for example – will likely present a dormant Commerce Clause problem.

#### V. PRIVATE JUDICIAL ACTION: ALL THAT'S LEFT FOR GREAT LAKES STAKEHOLDERS?

While the Agreement and Compact garner praise from policymakers, commentators, and environmentalists for their no-nonsense ban on large-scale water diversions, the virtually non-existent regulatory regime for certain consumptive uses, including bottling, provokes an opposite feeling among many other affected parties.<sup>123</sup> For citizens concerned by this lack of regulation, a few prospects remain at least partially available to protect the resource. First, the public trust doctrine, which citizens have relied on for decades to protect certain natural commons, remains untouched by the Agreement and Compact and available as a potential cause of action.<sup>124</sup> But as one scholar suggests, the public trust doctrine is merely a background principle, not a strict doctrine that promises to succeed in all cases.<sup>125</sup> Second, common

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121. Hall, *supra* note 5, at 452; see also Julia R. Wilder, *Questions of Ownership and Control*, in PERSPECTIVES ON ECOSYSTEM MANAGEMENT FOR THE GREAT LAKES 243, 260-61 (Lynton K. Caldwell, ed., 1988) (discussing the constitutional implications of state water management).

122. Hall, *supra* note 5, at 451.

123. John Flescher, *Bottled Water Exports OK Under Proposed Compromise*, DULUTH NEWS TRIBUNE, Dec. 13, 2005, at Local.

124. "An approval by a Party or the Council under this Compact does not give any property rights, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to or over any land belonging to or held in trust by a Party." Compact, *supra* note 2, § 8.1(4); see also Tarlock, *supra* note 8, at 40 (discussing the Public Trust doctrine); Olson, *supra* note 29, at 36.

125. Tarlock, *supra* note 8, at 40.



law water rights may still apply.<sup>126</sup> These rights include riparian rights, “a system in which water is not capable of ownership but owners of land bordering watercourses have rights of access to water that cannot be transferred to non-riparians.”<sup>127</sup> Common law also provides a scheme of rights regulating the use of groundwater, which varies depending on the state.<sup>128</sup> A very recent and “highly publicized”<sup>129</sup> Michigan case provides an in-depth analysis of each of these approaches employed in litigation, as well as a state law with a citizen suit provision.<sup>130</sup>

A. *Common Law, the Public Trust Doctrine, and State Statutes in Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*

In December 2000, Great Spring Waters of America, Inc. (Great Springs), the predecessor to Nestlé Waters North America Inc. (Nestlé), purchased rights to pump groundwater from property owned by a private party in Mecosta County, Michigan.<sup>131</sup> Beginning in early 2001, Great Springs installed four wells at that location, constructed its bottling plant twelve miles away from the site, and prepared to pump 400 gallons of groundwater per minute from the Great Lakes Basin.<sup>132</sup> The Michigan Department of Environmental Quality (MDEQ) issued permits to use the four wells in August 2001 and February 2002.<sup>133</sup>

Concerned about Great Spring's presence in the Basin, a group of local citizens organized to challenge Great Springs and

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126. “Nothing contained in this Compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective Parties relating to common law Water rights.” Compact, *supra* note 2, § 8.1(2).

127. Valiante, *supra* note 5, at 540.

128. Hall, *supra* note 5, at 427.

129. See generally *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*, 737 N.W.2d 447 (Mich. 2007).

130. The lower court opinion in *Michigan Citizens for Water Conservation* also provides pertinent and interest analysis on these questions, though, the case does not specifically address the 2005 Agreement and Compact, it serves as an example of the other potential regulatory approaches for bottled water in the Great Lakes Basin. *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*, 709 N.W.2d 174 (Mich. Ct. App. 2005), *aff'd in part and rev'd in part*, *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*, 737 N.W.2d 447 (Mich. 2007).

131. *Michigan Citizens*, 709 N.W.2d at 184.

132. *Id.* at 184-85.

133. *Id.* at 184.

prevent groundwater removal from that region.<sup>134</sup> Calling itself Michigan Citizens for Water Conservation (MCWC), the citizen group brought action against Great Springs in Michigan state court in September 2001.<sup>135</sup> MCWC alleged six counts. Count I sought an injunction against construction of wells, wellhouses, and a pipeline between the wells and the bottling plant. Count II challenged the defendant's withdrawal as unlawful under common law riparian water rights. Count III alleged that the withdrawal was unlawful under common law groundwater rights. Count IV asserted the public trust doctrine, which states the defendant may not withdraw or use the water in a way that conflicts with the public's title. Similarly, count V alleged an unlawful taking of public resources. Count VI alleged the defendant's violation of the Michigan Environmental Protection Act (MEPA).<sup>136</sup>

The trial court granted summary disposition in favor of defendant Nestlé for Count II, on the belief that the plaintiff's common law claims should not be based on riparian water rights but instead on groundwater law.<sup>137</sup> The trial court also granted summary disposition to Nestlé for Count IV, the public trust allegations, reasoning that because the stream from which Nestlé planned to pump was not navigable, the public trust doctrine did not apply.<sup>138</sup> Later, the trial court dismissed Count V for failure to state a claim.<sup>139</sup> Fortunately, MCWC's Counts III and VI, based on common law groundwater rights and MEPA, respectively, survived summary disposition.<sup>140</sup>

After testimony from numerous technical experts before the bench, the trial court determined that the defendant's pumping "had harmed and will continue to harm" the plaintiffs' interests in

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134. *Id.* at 184; *see also* Michigan Citizens for Water Conservation website, <http://www.savemewater.org> (stating that the group was "[o]rganized for educational and scientific purposes, MCWC's goal is to conserve, preserve and protect Michigan's water, natural resources and the public trust in those resources for the benefit of the public.") (last visited November 19, 2006).

135. *Michigan Citizens for Water Conservation*, 709 N.W.2d at 185.

136. *Id.* at 185. MEPA allows jurisdiction for the attorney general or any person to maintain action where "the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, and destruction." MICH. COMP. LAWS §324.1701 (2007).

137. *Michigan Citizens for Water Conservation*, 709 N.W.2d at 185.

138. *Id.*

139. *Id.* at 186.

140. *Id.*

their property and water use.<sup>141</sup> The trial court also concluded that the defendants had violated MEPA by unlawfully diminishing the stream and removing water from a wetland.<sup>142</sup> The court held that these violations warranted an injunction halting Great Springs (now Nestlé's) bottled water operations at that location.<sup>143</sup> Nestlé subsequently filed an emergency application for leave to appeal and the court granted a stay of the injunction, but prohibited any pumping from that site beyond a 250 gallons per minute monthly average.<sup>144</sup>

The Michigan Court of Appeals found that the trial court erred by applying a hybrid rule of its own making for groundwater rights disputes.<sup>145</sup> After describing the history of groundwater law in Michigan, the appellate court concluded that the appropriate test was a reasonable use balancing test.<sup>146</sup> Applying this test to the record, however, the appellate court reached the same point as the trial court: that Nestlé's operations in Mecosta County did in fact and will continue to interfere with the rights of other users in the region.<sup>147</sup>

In ascertaining relevant factors to be considered in a balancing test for reasonable use, the appellate court highlighted three underlying principles of common law in that area.

First, the law seeks to ensure a 'fair participation' in the use of water for the greatest number of users. Hence, the court should attempt to strike a proper balance between protecting the rights of the complaining party and preserving as many beneficial uses of the common resource as is feasible under the circumstances. Second, the law will only protect a use that is itself reasonable . . . Third, the law will not redress every harm, no matter how small, but will only address unreasonable harms."<sup>148</sup>

With these principles in mind, and some guidance from prior cases applying a similar balancing test, the appellate court listed several factors to consider: the use, its extent, duration, necessity, application, the nature and size of the stream, other uses of the

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 186 n. 16.

145. *Id.* at 193-94.

146. *Id.* at 201.

147. *Id.* at 206.

148. *Id.* at 202 (citing *Dumont v. Kellogg*, 29 Mich. 420 (1874); *People v. Hulbert*, 91 N.W. 211, 218 (Mich. 1902); *Bernard v. City of St. Louis*, 189 N.W. 891, 893 (1922); *Thompson v. Enz*, 154 N.W.2d 473, 484-85 (Mich. 1967)).

stream, the extent of injury to one party at the benefit of the other, the benefits obtained and the detriments suffered, the interests of the state, and others.<sup>149</sup>

The appellate court highlighted MCWC's members' other uses of the water at the Mecosta County site, including recreational boating, wildlife observation, swimming, fishing, plus the aesthetic value of their riparian lands, and determined that these uses were in fact reasonable.<sup>150</sup> The court next looked to the defendant's use of bottling water, and determined that this too was a reasonable use, citing increased employment and tax revenue for the county.<sup>151</sup> Since the plaintiff's uses were directly related to the use and enjoyment of their adjacent land, and the defendant's use was not directly related to the land the water is pumped from, the plaintiffs enjoyed some preference with respect to the "type of use" factor.<sup>152</sup> MCWC emphasized its concern for "use of water for farming, business, industry, recreation, and local communities," emphasizing that "the evaluation and regulation of these uses and their impacts should not be confused with the authorization to withdraw and sell or transfer raw water for the sake of selling it outside the scope of reasonable use."<sup>153</sup> In terms of the detrimental effects of Nestlé's use, the court found a high degree of harm to the stream, including loss of aesthetic value, usefulness as a fishery, and navigability.<sup>154</sup>

Perhaps the deciding factor, however, was the lack of necessity of such a high pumping volume at Nestlé's pumping site. The record contained some evidence that Nestlé had augmented the supply of water at other plants by shipping the water in to its bottling plant.<sup>155</sup> The court reasoned that because Nestlé had already successfully explored other sources for water, it did not need to maintain its previously higher pumping volume.<sup>156</sup> Applying the reasonable use balancing analysis affirmed the conclusion that pumping 400 gallons per minute from the Mecosta site for bottled water was an unreasonable use of the basin's groundwater.<sup>157</sup>

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149. *Michigan Citizens for Water Conservation*, 709 N.W.2d at 185.

150. *Id.* at 205.

151. *Id.*

152. *Id.* at 206.

153. James M. Olson, Testimony before the Senate Committee on Natural Resources and Environmental Affairs 2, Nov. 26, 2001, <http://www.savemiwater.org/news/JMO-Testimony-11262001.pdf>.

154. *Michigan Citizens for Water Conservation*, 709 N.W.2d at 206.

155. *Id.* at 207.

156. *Id.*

157. *Id.* at 207.

While the appellate court refused to grant an injunction over the entirety of the pumping project, it remanded to determine an appropriate maximum pumping volume to enforce against Nestlé.<sup>158</sup>

Nestlé also appealed the trial court's finding that their pumping violated MEPA per se, by violating both the Inland Lakes and Streams Act (ILSA) and the Wetlands Protection Act (WPA).<sup>159</sup> The appellate court reversed, on the basis that neither ILSA nor the WPA provided appropriate standards for MEPA analysis because neither of the statutes is a pollution control statute.<sup>160</sup> Because MEPA does not provide specific standards, the "judicial development of a common law of environmental quality, as envisioned by the Legislature," must be ascertained.<sup>161</sup> Therefore, MEPA standards can either come from similar pollution control statutes or from judge-made common law. The appellate court disagreed with the trial court's reasoning but remanded to determine whether Nestlé violated MEPA based on some other standards.

Finally, MCWC appealed the trial court's dismissal of Count IV of its Complaint, based on the public trust doctrine.<sup>162</sup> The appellate court cited cases from the Michigan Supreme Court in upholding the notion that the public trust doctrine applies only to navigable waters.<sup>163</sup> The plaintiff's evidence to support a finding of navigability was not sufficient to reach this requirement and the court refused to expand protection under the public trust doctrine.<sup>164</sup> However, the court provided very specific instructions as to how to overcome this prerequisite to asserting public trust protection – with evidence that the body of water is capable of floating rafts or logs, which sheds light on how future cases can proceed under this doctrine.<sup>165</sup>

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158. *Id.* at 209.

159. *Id.* at 212.

160. *Id.* at 216.

161. *Id.* at 212 (citing *Ray v. Mason Co. Drain Comm'r.*, 224 N.W.2d 883, 889 (Mich. 1975)).

162. *Id.* at 217.

163. *Id.* at 218. "The public-trust doctrine applies only to navigable waters and not to all waters of the state." *Id.* (citing *Bott v. Dep't of Natural Res.*, 327 N.W.2d 838, 846 (Mich. 1982)).

164. *Michigan Citizens for Water Conservation*, 709 N.W.2d at 219-22.

165. The court addressed a dispute over the appropriate test for navigability and supported the log-flotation test used in *Bott*, 327 N.W.2d at 838. "Hence, plaintiffs could have shown that the Dead Stream was navigable by presenting evidence that the stream was historically used to float logs, by demonstrating through tests that the stream can actually support the flotation of logs, or through comparison with streams

Despite support from the State of Michigan and numerous other environmental organizations,<sup>166</sup> MCWC took an even harder blow when the Michigan Supreme Court held that MCWC lacked standing to challenge the effects of Nestlé's bottling operations on certain affected waters within the Basin.<sup>167</sup> The Supreme Court effectively divided the waters at issue into two categories to resolve the standing issue: waters that members of MCWC owned and/or used and waters for which MCWC never alleged ownership or use. Specifically, the court noted that MCWC "failed to demonstrate that they use the Osprey Lake Impoundment and Wetlands 112, 115, and 301."<sup>168</sup> According to the Michigan Supreme Court, because MCWC lacked ownership and never alleged use of Osprey Lake and particular wetlands, it also lacked a "concrete, particularized injury in fact," which was "fatal to plaintiffs' standing" to bring claims over those wetlands.<sup>169</sup> Reversing only in part, however, the Michigan Supreme Court held that MCWC *did* enjoy standing over those wetlands owned or used by members of MCWC:

To be clear, we are refining, not dismissing, plaintiffs MEPA claim. Plaintiffs enjoy the full protection that MEPA affords to vindicate their riparian property interests. Thus, they have standing insofar as Nestlé's pumping activities inflicted an injury in fact with respect to the Dead Stream and Thompson Lake. However, plaintiffs cannot similarly establish standing with respect to Osprey Lake and Wet-

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already determined to be navigable." *Michigan Citizens for Water Conservation*, 709 N.W.2d at 219.

166. The State of Michigan filed an amicus brief in the Michigan Supreme Court asserting the state's "inherent and constitutional authority" to regulate water use in the "public's paramount interest." Brief of Amicus Curiae Michigan Department of Environmental Quality at 6, *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*, No. 254202 (Mich. Ct. App. May 19, 2005), available at <http://www.deq.state.mi.us/documents/deq-wb-nestle.brief.pdf>. Over 100 organizations and individuals also signed a letter to the court in support of MCWC. Open Letter Regarding the Case of *Michigan Citizens for Water Conservation v. Nestlé Waters North America*, Now Before the Michigan Supreme Court, available at <http://www.savemewater.org/news/An%20Open%20Letter%20regarding%20the%20case%20of%20Michigan%20Citizens%20for%20Water%20Conservation%20vs.mht> (last visited Sept. 30, 2007).

167. *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*, 737 N.W.2d 447, 463 (Mich. 2007).

168. *Id.* at 449.

169. *Id.* at 456. To successfully allege standing, a plaintiff must prove 1) injury in fact; 2) a causal connection between the injury and the conduct complained of; and 3) redressability. *Id.* at 444-45 (citing *Nat'l Wildlife Federation v. Cleveland Cliffs Iron Co.*, 684 N.W.2d 800, 813-14 (Mich. 2004)).

lands 112, 115 and 301.<sup>170</sup>

MCWC's complaint therefore survived the Michigan Supreme Court decision in that it successfully alleges the elements of standing with respect to at least some bodies of water.

The Michigan Supreme Court refused to address the merits of the case, and remanded to the trial court for further proceedings consistent with its opinion on standing.<sup>171</sup> Bound by Supreme Court's opinion on standing and the Court of Appeals' opinion on the appropriate test to be employed to reach the merits (the "reasonable use balancing test" described above), the trial court must reconsider the merits with respect only to those wetlands for which MCWC has proper standing, and must apply the Court of Appeals' test to do so.

For the parties to this particular litigation, the question remains whether the trial court will determine that MCWC's interest in the portion of wetlands that its members do in fact own and/or use outweighs Nestlé's interest in its bottling operation and that such a weighing of interests still warrants an injunction. For other parties interested in water rights in the Basin, however, the decisions of the Court of Appeals and the Michigan Supreme Court answer a number of questions.

While not binding on other state or provincial jurisdictions, the *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.* decisions exemplify several judicial approaches to tackling water rights issues at work. Specifically, the Court of Appeals decision describes the applicability and scope of the public trust doctrine and provides a clear-cut test for determining whether a water resource falls within the public trust.<sup>172</sup> The Court of Appeals also describes its "reasonable use balancing test" which may be relied upon or similarly employed in other jurisdictions.<sup>173</sup> Of course, the Michigan Supreme Court describes the prerequisites to bringing such a suit in the first place in its discussion of standing. As standing remains a universal concern among jurisdictions, courts of other states, provinces, or federal governments will likely employ a similar standing test and reach similar outcomes as the Michigan Supreme Court.<sup>174</sup> In a broader

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170. *Id.* at 456.

171. *Id.* at 449 ("Hence, we limit our decision to the issue of standing. We do not pass on the merits of the other issues raised on appeal.")

172. *Michigan Citizens for Water Conservation*, 709 N.W.2d 174, 218-19 (Mich. Ct. App. 2005).

173. *Id.* at 201-202.

174. Standing in U.S. federal courts, for instance, requires the same three elements

sense, the numerous and lengthy opinions of the various courts to address the case paint a picture of the complexities of water rights litigation in the Basin or elsewhere.

As it stands, the case represents the (albeit narrow) prospect of certain judicial mechanisms for regulation of water uses in the Basin. The limited applicability of common law (riparian or groundwater law), however, makes such action a last resort to check large companies that hope to exploit Great Lakes water for commercial interest in bottling and exporting the water. Similarly, the public trust doctrine can be a useful tool, although its applicability is limited to cases where the plaintiff can prove that the affected body of water is navigable.<sup>175</sup> Finally, a state environmental regulation with a citizen suit provision, such as MEPA, might be a useful tool, but may be restrained in itself by NAFTA and the dormant Commerce Clause.<sup>176</sup> Moreover, because state regulations serve primarily local interests, they may threaten the now-favored notion of basin-wide cooperative effort, especially if they undermine the policy or water uses of other jurisdictions in the basin.

On a broader level, the resort to judicial action amounts to mere case-by-case regulation and ad-hoc determinations, rather than address the basin as a whole. Perhaps of more concern, the standing issue described by the Michigan Supreme Court presents a major barrier to parties seeking to challenge water use in the future.

Despite their shortcomings and limited scope, the judicial mechanisms of common law, the public trust doctrine, and statutory challenges via a citizen suit provision are crucial in light of the Agreement and Compact's failure to set clear and enforceable restrictions on the water "products" industry. With hope, this combination of common law riparian and/or groundwater principles, protection of navigable waters under the public trust doctrine, and

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described by the Michigan Supreme Court: 1) injury in fact; 2) causation; and 3) redressability. *See, eg.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). While standing requirements in Canada may differ significantly from those in federal or state courts in the U.S., the mere existence of a standing threshold will likely create a barrier to plaintiffs in either country: "[a]lmost any jurisdiction faces similar concerns about breadth of standing. . . these are not nation-specific issues; they are universal." Rebecca Lefler, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165, 175 (2001).

175. *Michigan Citizens for Water Conservation*, 709 N.W.2d at 218.

176. NAFTA, *supra* note 103; *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941 (1982).



some degree of state or province-level regulation will fill the gaps left open by the Agreement and Compact.

## VI. CONCLUSION

Considering the background of lax policy against water bottling operations in the Great Lakes Basin and the constraints on parties imposed by free trade agreements and the Constitution, it is no surprise that the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact effectively disregard this major concern of many Great Lakes stakeholders. Certainly, a more comprehensive policy approach is needed to ensure protection of a natural resource so important to so many stakeholders. On a positive note, although failing to sufficiently regulate the bottled water industry, the Agreement and Compact employ strict measures to restrict other detrimental water uses and recognize the need for inter-jurisdictional cooperation for Great Lakes management.

Until a more holistic statutory mechanism is available, Great Lakes stakeholders may take some relief in lasting common law notions of riparian and groundwater rights and also the public trust doctrine. In combination with the Agreement and Compact, these judicial mechanisms may serve an important purpose in regulating the bottled water industry and other water uses in the immediate future. However, as described above, these rights are not absolute and may be limited in their applicability. Total protection of the Great Lakes waters requires a more concrete, enforceable, and uniformly recognized restriction on previously avoided water uses, including bottling.