



# GREAT LAKES

*By James M. Olson*

**Michigan *needs a comprehensive water diversion and use law to address the looming world water crisis, threatened privatization, and low water levels.***



# WATER

**A**t the beginning of the 21st century, we realize that freshwater is in critically short supply. The causes are many and complex, such as global climate change; pollution and lack of conservation; failed irrigation projects in the Tigris, Euphrates, and Yangtze Rivers; and the urban demands in China's northeast, Mexico City, California, and Las Vegas.<sup>1</sup> The looming worldwide water crisis will make Jack Nicholson's tribulations in the movie *Chinatown* seem trivial.

The Great Lakes represent one-fifth of the world's surface freshwater, but only one percent of the Great Lakes water is renewed every year.<sup>2</sup> With global water demand doubling every 20 years, states, countries, and private companies understandably covet the Great Lakes. This article provides an overview of the federal and state diversion laws and agreements that currently govern the withdrawal and removal of water from the Great Lakes Basin.

## United States Supreme Court

There are eight inter-Basin and six intra-Basin diversions.<sup>3</sup> Most of them involve navigation projects, such as the Erie, Welland, and Portage Canals. The rest have involved diversions for municipalities. In 1899, the

Secretary of Army had issued a permit for Chicago to divert up to 10,000 cubic feet per second (cfs) to reverse the flow of the Chicago River to the Mississippi Basin. The Supreme Court eventually limited the diversion to 3,200 cfs because of the threatened impact on navigation.<sup>4</sup> The Chicago Diversion has been jealously watched by Michigan, and while the flow of the water out of Lake Michigan and the basin has exceeded the Supreme Court's limit from time to time, at a reported average of 3,439 cfs it has remained relatively close to the mark.<sup>5</sup>

## Federal Water Resources Development Act

Two decades ago, a Texas company announced plans to divert water from Wyoming to transport coal by pipeline slurry to Arkansas. South Dakota and Minnesota flirted with the idea of piping water from Lake Superior to Wyoming for the project, but failed to generate serious interest because of political and economic obstacles. Not long afterwards, fickle weather over the Central United States lowered the Mississippi River to unprecedented levels. Speculation abounded that the Corps of Engineers would approve diversions of water from Lake Michigan to the Mississippi River.

Political leaders and citizens mobilized Congress to pass the Water Resources Development Act of 1986 to ban any diversion or removal of water from the Great Lakes Basin until a comprehensive policy and legal analysis could be completed and an institutional framework for considering the future of water removals from the basin could be implemented. The WRDA declared:

*No water shall be diverted from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes states.<sup>6</sup>*

Michigan adopted a similar prohibition with the Great Lakes Preservation Act in 1995:<sup>7</sup>

*Subject to section 32704, the waters of the Great Lakes within the boundaries of this state shall not be diverted out of the drainage basin of the Great Lakes.*

In 1999, a company called Nova Group obtained a permit from the province of Ontario to ship 159 million gallons of water per year by supertanker to Asia. After public outcry and prompt action by Michigan's Congressional leadership, Ontario cancelled the permit. Former Senator Spencer Abraham introduced a bill to add a new section to the WRDA that would impose a moratorium on the "bulk export of freshwater."<sup>8</sup> Senator Carl Levin voiced concerns about the implication that the amendment would permit "exports" within the United States but outside the basin. He believed the existing language banning any "diversion" was "legally sufficient."<sup>9</sup> Senator Abraham's proposed amendment was modified to simply add the word "exported":

*No water shall be diverted or exported from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lakes states.<sup>10</sup> (Emphasis added.)*

Since the enactment of WRDA, two diversions have been approved by the Great Lakes governors. In 1998, Akron, Ohio,



## Fast Facts:

Over half of the world's population will be without adequate drinking water by 2150.

One-fifth of the world's freshwater is within the Great Lakes Basin.

Other states and countries have their eyes on the Great Lakes and Michigan's water.

Michigan needs to assert its common law interest and public trust in these waters and set the parameters of when and under what circumstances it can be removed or diverted.

which straddles the drainage divide between the Ohio River and Lake Erie, won approval to withdraw water from Lake Erie with a promise to return an equivalent amount. The governors then approved a similar request by Pleasant Prairie, Wisconsin to divert water from Lake Michigan. The governors consented to these diversions largely because the diversions were relatively small, hinged on a

waters that feed a public stream that flows into Lake Michigan, divert it through a pipeline to a bottling plant 11 miles away, and sell most of it outside of the basin.

In September 2001, Michigan's attorney general, Jennifer Granholm, sent letters to Governor Engler and legislators,<sup>12</sup> concluding that the proposal was subject to the WRDA. She urged the governor to implement the

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return of water equivalent to the amount diverted, and served immediate needs of local governments located fairly close to the boundaries of the basin.

WRDA's ban on diversions or exports of Great Lakes water will likely be tested far beyond a few local municipal exceptions. Parts of six counties in the Chicago area face serious water shortages because of warming trends and urban sprawl, restricting shipping, use of marinas, and expansion of cities.<sup>11</sup> In Michigan, a foreign company wants to tap up to 210 million gallons per year of spring

WRDA consensus process and urged the legislature to adopt a comprehensive water use law before Michigan's water resources were compromised. This proposal will likely be the first large scale private effort to claim ownership of perpetual supplies of water for sale outside Michigan. The International Joint Commission appears open to privatization of water, at least for municipal purposes. Others believe that privatization will cripple the ability of Great Lakes states and Canada to protect their water resources because of the implications of international trade agreements.<sup>13</sup>

## Boundary Waters Treaty of 1909

In 1909, the United States and Canada signed the Boundary Waters Treaty that governs the use of Great Lakes waters.<sup>14</sup> The treaty prohibits diversion of Great Lakes waters, but, unlike the WRDA, the treaty covers only the surface waters of the Great Lakes that include an international boundary. Lake Michigan is not governed by the treaty, nor are connecting lakes and tributaries. This shortcoming surely led to the WRDA and prompted the provinces and Great Lakes states to sign the Great Lakes Charter of 1985.<sup>15</sup>

## Great Lakes Charter

The Great Lakes Charter is a non-binding, voluntary arrangement signed by the Great Lakes states and provinces that provides that no new or increased diversion or consumptive use of Great Lakes water resources will be approved without notice to and agreement by all affected states and provinces. The charter declares, "It is the intent of the signatory states and provinces that diversions of basin water resources will not be allowed if individually or cumulatively they would have any significant adverse impacts on lake levels, in-basin uses, and the Great Lakes Ecosystem." The charter stipulates that the water resources of the basin should be treated as a single hydrologic system that transcends political boundaries in the basin, and that water resources of the basin include all of the Great Lakes, lakes and streams, and tributary (hydraulically connected) groundwaters.

## Annex 2001

Because of the increased pressures on the Great Lakes since 1985, the premiers and governors in late 2000 released Annex 2001 to supplement the Great Lakes Charter in an effort to promote fundamental principles of cooperation and to protect, conserve, and improve the waters. The annex gives the provinces and states three years to enter into formal binding agreements and enact legislation.<sup>16</sup> Section II of Annex 2001 calls for a new standard that "no State or Province will allow a new or increased withdrawal of Waters of the Great Lakes Basin, except for

those withdrawals deemed to have de minimis impact," unless the applicant establishes that its proposal meets four standards:

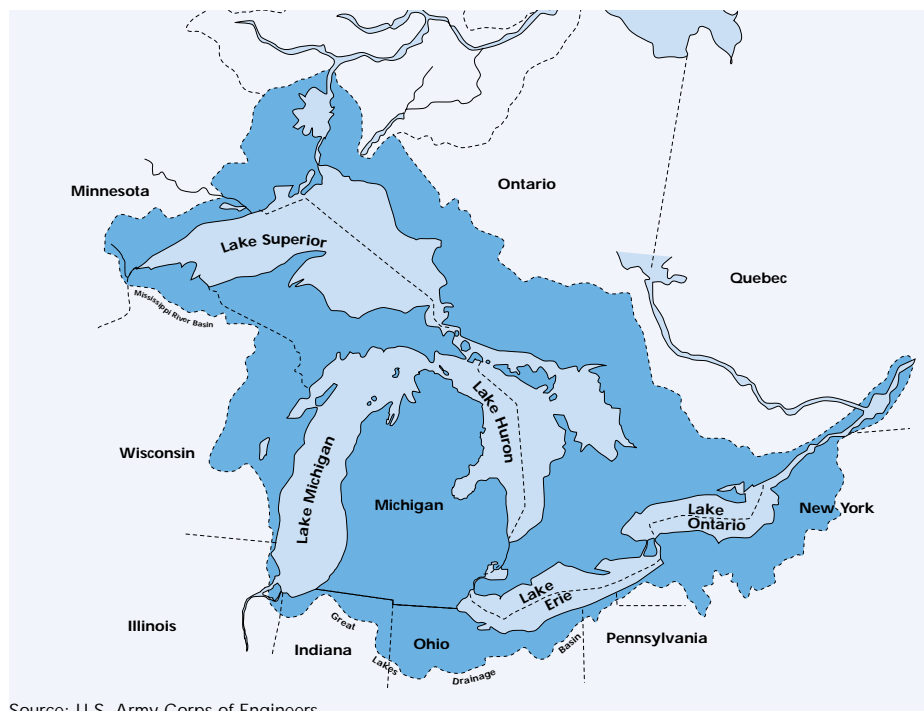
- a. *Includes all reasonable and appropriate water conservation measures; and*
- b. *Does not, individually or cumulatively, ... cause significant adverse impact to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and*
- c. *Results in an Improvement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

Until the new standards are implemented, Section III calls for similar interim criteria for review of proposals that are subject to the WRDA. Governor Engler considers the de minimis exception inappropriate because it would compromise the integrity of WRDA.<sup>17</sup> Michigan may also have a legal basis to challenge the de minimis provision under the public trust doctrine.<sup>18</sup> Moreover, it is not at all clear whether an "improvement," such as a financial contribution to fund a river bank restoration project, could be used to justify a withdrawal. Such a sweeping interpretation could literally open the floodgates for the diversion or exportation of Michigan's waters.

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

### "Reasonable Use" under Riparian Law

Michigan follows the reasonable use rule for riparian rights in lakes and streams. Under this rule, any riparian owner may use water from lakes and streams for domestic, fishing, hunting, swimming, or agricultural purposes.<sup>19</sup> A riparian owner also may use the water from lakes and streams for non-traditional purposes, such as for municipal water supplies, industrial, development purposes, subject to the correlative rights of other riparians and the public.<sup>20</sup> A basic principle of riparian law holds that a riparian owner cannot divert the water from a lake or stream for use on off-premises, non-riparian property.<sup>21</sup> Michigan courts appear to recognize, but have not yet decided, the off-premises question. However, off-premises diversion or use may under some narrow circumstances be considered reasonable where the use is necessary, involves a primarily public benefit, such as supplying municipal water, and would not harm other riparians or diminish the rights of the public.<sup>22</sup>



Source: U.S. Army Corps of Engineers

## “Reasonable Use” under the American Rule of Groundwater

The Michigan Supreme Court adopted the American Rule of reasonable use of groundwater in *Schenk v Ann Arbor*, presumably including the limitation on off-tract diversion unless for a municipal purpose.<sup>23</sup> The court of appeals has recommended, but not ruled, that courts should follow sections 850 and 850A of the Restatement of Torts 2d, which looks at either the unreasonable use of the watercourse or the harm such use causes to others without respect to whether the water is used to benefit the surface estate or off-tract.<sup>24</sup> However, in *Schenk* the Michigan Supreme Court relied on New York and New Jersey cases that prohibited off-tract diversions of groundwater that would diminish the waters of an adjacent stream.<sup>25</sup>

## The Public Trust

Michigan's lakes and navigable streams are impressed with a public trust that grants citizens, as beneficiaries of this trust, the paramount right to access and use these lakes and streams for boating, fishing, swimming, and recreation.<sup>26</sup> The public trust in these waters cannot be disposed, alienated, or subordinated for purely private purposes,<sup>27</sup> and even if deemed a public purpose, only if “in accordance with the regulatory assent of the State” consistent with the public interest in the public trust, and the present or future use of the waters by the public.<sup>28</sup> To protect public trust waters and bottomlands from incremental (or “nibbling”) effects of cumulative individual projects, Michigan has rejected a de minimis rule.<sup>29</sup>

## Conclusion

Michigan has not adopted a comprehensive water diversion and use law. Given our historical perception of unlimited abundance, this is not surprising. The looming world water crisis, threatened privatization, and low water levels, with consequent impacts on marinas, navigation, boating, and fishing, dispel this perception. There is a demonstrated urgency for a comprehensive solution. The WRDA and Annex 2001 to the Great Lakes Charter provide a start to managing Michigan's treasured water resources, but a more fundamental implementation is called for. It is time for a fully developed water use law that recognizes the state's interest, the public trust, and the reasonable and conservation-minded use of these waters to meet Michigan's current and future needs for drinking water, water-dependent natural resources, tourism, recreation, agriculture, and industry. ♦

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## Footnotes

1. Postel, Sandra, *The Last Oasis, Facing Water Scarcity* (1992); *Pillars of Sand* (1999); see also Engleman, Robert, *Sustaining Water: Population and the Future of Renewable Water Supplies* (1993); Reisner, Marc, *Cadillac Desert* (1986).
2. International Joint Commission, *Final Report on Protection of Waters of the Great Lakes* 6 (Feb 22, 2000) (“*IJC Report*”).
3. *IJC Report* 13, Figure 2 (see Appendix 1).

4. *Sanitary District of Chicago v United States*, 266 US 405 (1925); *IJC Report* 12, 17.
5. *IJC Report* 12.
6. 42 USC 1962d-20(d).
7. MCL 324.32701.
8. 106th Congress, 1st Session, S1667.
9. 146 Cong Rec S9151–9152 (Sept. 25, 2000).
10. 42 USC 1962d-20(d), as amended.
11. “Near Vast Bodies of Water, Land Lies Parched,” *NYTimes.com*/2001/08/12/national/12WATE.html.
12. Letter from Attorney General Jennifer M. Granholm to Governor John Engler, dated September 13, 2001 (Re Great Spring Waters of America, Inc.); Letter from Attorney General Jennifer M. Granholm to Senator Charles Dingell and Representatives Julie Dennis and William O’Neal, dated September 13, 2001 (Re Great Spring Waters of America, Inc.).
13. *IJC Report* 18, 32, and Appendix 9 at 67. Barlow “Blue Gold” (International Forum on Globalization, June 1999); Graham, “A Hundred Rivers Run Through It,” *Harper’s Magazine* (June 1998).
14. 36 Stat 2448 (1910).
15. Great Lakes Governors Task Force on Force on Water Diversion and Great Lakes Institutions, *Final Report and Recommendations* 40–45 (January 1985).
16. Draft, December 14, 2000, Annex 2001, A Supplementary Agreement to the Great Lakes Charter, Section I.
17. Letter from Governor John Engler to Governor Tom Ridge, Pennsylvania, dated April 18, 2001; see also Granholm letters to Engler and Senator Dingell et al., n 12.
18. n 28, *infra*.
19. *Collins v Gerhardt*, 237 Mich 48, 211 NW 115 (1927).
20. *Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967).
21. Sax, et al., *Legal Control of Water Resources, Cases and Materials* 38, 83 107–109 (7th Edition 1991).
22. *Schenk*, n 26, *infra*; *Thompson v Enz*, *supra*, 379 Mich at 686; Cameron, *Michigan Real Property Law* 2nd, Section 3.8.
23. 196 Mich 75; 163 NW 109 (1917). See *Meeker v East Orange*, 77 NJ Law 623; 74 A 379 (1909).
24. Restatement of Law Second Torts 2nd, Section 850A, Reasonableness of the Use of Water; *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982).
25. *Meeker*, n 22; *Smith v City of Brooklyn*, 160 NY 357, 54 NE 787.
26. *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1927); *Moore v Sanborne*, 2 Mich 520 (1853).
27. *Illinois Central Railroad v Illinois*, 146 US 387, *aff’d* 154 US 225 (1894); *Obrecht v National Gypsum Co*, 361 Mich 399, 105 NW 143 (1960); *People v Babcock*, 38 Mich App 336, 351; 196 NW2d 489 (1972); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970).
28. *Netdweg v Wallace*, 237 Mich 14, 20; 208 NW 51 (1927); *Obrecht*, *supra*, 361 Mich at 413; see also section 1703(1) of the Michigan Environmental Protection Act, MCL 324.1701 et seq.; The Public Trust Doctrine, *Michigan Environmental Law Deskbook* (Haynes and Smary, eds, 1992).
29. *People v Broedell*, 365 Mich 201, 204–205 (1961).