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MANAGING GREAT LAKES WATER DIVERSIONS: A DIVERSION MANAGER'S VIEWPOINT

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I. INTRODUCTION

Ten years ago the Great Lakes region geared up for a water fight that never happened. The defensive build up began when a coal slurry pipeline company included an option in a draft report that would have directed approximately 11 million gallons per day (mgd) of Lake Superior water to Gillette, Wyoming in order to transport coal from Gillette to the Great Lakes region.¹ While that option was short-lived, the region's efforts to establish a strong defense against diversions of Great Lakes water continues to this day. Actions including, but not limited to, political, institutional, legal, and technical maneuvers have resulted in a bewildering array of policies, laws, activities, and viewpoints on whether the Great Lakes region should manage or prohibit new diversions of Great Lakes water.

Today the Great Lakes region stands at a crossroads. The Great Lakes Charter,² which was signed by the eight Great Lakes states' governors and two Canadian premiers in January 1985, established criteria by which the region would review proposals for significant new or increased diversions or consumptive uses. Less than one year later, however, Congress passed section 1109 of the Water Resources Development Act (WRDA) of 1986.³ This section provided the governors of each Great Lakes state with an absolute veto power over any new diversion of region water out of the basin. Nevertheless, this legislation neglected to include any criteria regarding diversion, size, for what purpose the water would be diverted, or any other conditions upon which

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1. Great Lakes Governors Task Force, *Water Diversion and Great Lakes Institutions: A Report to the Governors and Premiers of the Great Lakes States and Provinces* 4 (1985).

2. *Id.* at app. III.

3. Water Resources Development Act of 1986, Pub. L. 99-662, 100 Stat. 4082 (1986)(codified at 33 U.S.C. §§ 2011 (1990)).

to base a diversion decision.

This paper will discuss two proposals for out-of-basin diversion since the adoption of the Charter and the passage of the WRDA. Both propositions have been in favor of domestic water usage and have been suggested by one of the Great Lakes states. The difficulty the Great Lakes region experienced in reviewing these proposals clearly reveals that the two managerial approaches of the Charter and the WRDA are incompatible and yield inconsistent results when applied in similar situations.

II. BACKGROUND

Until the 1980s, proposals for large-scale diversions of Great Lakes water were handled through either direct negotiation between the governments of the United States and Canada, as in the Long Lac/Ogaki and Welland Canal diversions in Canada, or through litigation before the United States Supreme Court, as in the Chicago diversion.⁴ The 1980s however brought a new realization that although the Great Lakes represent a vast hydrologic system, the region needed to be managed as a single entity. This recognition coincided with a general worsening of the economic climate in the Great Lakes region, recently labelled as the "rust belt." When the coal slurry pipeline issue became public, the region's political response quickly declared that waters of the Great Lakes were not for sale to other regions of the United States.⁵ However, political declarations did little to reassure the region's legal experts of the region's ability to prevent an unwanted diversion of water to another area of the country—nor was there anything in federal permit processes to provide assurance that the Great Lakes states would be able to intervene and halt an unwise diversion of region water. Finally, it was also around this time that the U.S. Supreme Court issued its famous *Sporhase* decision, reaffirming that states may not place a ban or embargo on the interstate transfer of water.⁶

The region began to develop a plan for dealing with the possibility of diversions. Because Congress possessed the authority to regulate

4. See DIVISION OF WATER RESOURCES, ILL. DEPT OF TRANSP., GREAT LAKES WATER DIVERSIONS AND CONSUMPTIVE USES: CHARTING A COURSE FOR FUTURE PROTECTION, A REPORT TO THE GREAT LAKES GOVERNORS (1983).

5. *Id.* at app. I. Appendix 1 contains the resolutions that were adopted on November 17, 1983 by the Council of Great Lakes Governors on diversions and consumptive uses.

6. *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

interstate commerce, the region's strategy was to seek federal legislation requiring the concurrence of the Great Lakes states and the International Joint Commission for any diversion of region water for use outside of a Great Lakes state.⁷ At the same time, the Council of Great Lakes Governors appointed a task force, ultimately leading to the development of the Great Lakes Charter. The objective was to develop a management program that would apply equally to diversions and consumptive uses and would "conserve and protect the water resources of the Great Lakes basin for the use, benefit, and enjoyment of all citizens of the Great Lakes states and provinces."⁸

Although a detailed review of the Great Lakes Charter is beyond the scope of this paper, it is significant that all eight Great Lakes governors and the two Canadian premiers agreed that major diversions and consumptive uses of Great Lakes basin resources (greater than 5 mgd average in any thirty day period) should be subject to regional consultation procedures and criteria drafted in recognition of the Commerce Clause, and court decrees such as the *Sporhase* decision.⁹

At the federal level, legislation was introduced and attached to a Water Resources omnibus bill (eventually becoming section 1109) requiring the concurrence of the Great Lakes governors for any diversion of region water for use outside a Great Lakes state.¹⁰ The legislation was ultimately amended to provide that any Great Lakes diversion, regardless of its destination, required the concurrence of all eight Great Lakes governors.¹¹ Thus, what began as complementary legislation to strengthen the region's ability to resist the threat of a diversion for use outside of a Great Lakes state now effectively rendered the Great Lakes Charter process obsolete.

In 1987, a follow-up committee of the Council of Great Lakes Governors prepared a more comprehensive prior notice and consultation process for the region to utilize in reviewing diversion or consumptive

7. Several congressional initiatives were made in the 98th Congress. See H.R. 4366, 98th Cong., 1st Sess. (1983); S. 2026, 98th Cong., 1st Sess. (1983).

8. GREAT LAKES GOVERNORS TASK FORCE, *supra* note 1, at 23.

9. *Id.* at app. III.

10. See H.R. 6, 99th Cong., 1st Sess. § 1185 (1985); S. 1567, 99th Cong., 1st Sess. § 337 (1985).

11. 134 Cong. Rec. S. 2865 (daily ed. Mar. 12, 1986)(Amend. by Sen. Metzenbaum No. 1677).

use proposals falling under the requirements for consultation in the Great Lakes Charter.¹²

III. GREAT LAKES DIVERSION MANAGEMENT: THE GREAT LAKES CHARTER AND THE EFFECT OF SECTION 1109

A. *Case Study: Pleasant Prairie, Wisconsin Diversion Proposal*

On September 2, 1987, Wisconsin Governor Tommy Thompson sent correspondence to the other Great Lakes governors and premiers requesting approval of a proposed diversion of Lake Michigan water for the town of Pleasant Prairie. The town's groundwater supplies exceeded federal standards for radioactivity, and, as a solution, proposed to purchase Lake Michigan water from the nearby town of Kenosha. The projected diversion (3.2 mgd) was well below the Great Lakes Charter trigger level of 5 mgd, however, it did require approval of all the Great Lakes governors pursuant to Section 1109 of the Water Resource Development Act. Initially, efforts of the Council of Great Lakes Governors' Water Resources Management Committee focused on the implications Section 1109, requiring unanimous approval for any diversion, imposed upon the Great Lakes Charter, and attempted to resolve these differences. Once it became clear that an early resolution would not be forthcoming, Wisconsin withdrew its proposal and encouraged local officials to further investigate alternative approaches to resolve their water supply problem. That search failed to uncover any economical alternatives for Pleasant Prairie, therefore, Governor Thompson again initiated the prior notice and consultation process required under the Great Lakes Charter. A formal request including a fact sheet describing the proposed diversion was drafted and signed by the chairman of the Council of Great Lakes Governors. A formal consultation meeting of the governors never convened, although there were a number of conference calls, and substantial correspondence was exchanged. Ultimately, most states approved the proposed diversion with letters from their respective governors. However, one state did not respond until mid-December of 1989 and its approval was from a state agency rather than the governor's office. For this reason, it has been questioned whether the Pleasant Prairie diversion was ever properly authorized by all the eight Great Lakes states as required under Section 1109.

12. See WATER RESOURCE MGMT. COMMITTEE, *MANAGING THE WATERS OF THE GREAT LAKES BASIN: A REPORT TO THE GOVERNORS AND PREMIERS OF THE GREAT LAKES STATES AND PROVINCES* (1987).

The process in securing the Pleasant Prairie diversion was lengthy, stretching from September 1987 to the end of 1989. Unfortunately, the region never developed a consensus on how to handle diversion requests under both Section 1109 and the Great Lakes Charter. Nor has the controversy regarding this individual diversion gone away. In 1992, there were investigations into the Pleasant Prairie diversion regarding alleged additional unauthorized diversions, and questions whether the initial diversion commenced without the approval required under Section 1109.¹³

B. Case Study: Lowell, Indiana Diversion Proposal

On October 31, 1990, Governor Evan Bayh of Indiana requested approval of a small diversion of Lake Michigan water for the town of Lowell, Indiana. The situation was similar to the Wisconsin case in that Lowell's current groundwater supply violated federal water quality standards, placing Lowell under a compliance order of the United States Environmental Protection Agency to correct the violation. In its analysis of proposed options, Lowell concluded that the most cost-effective, long-term water supply solution would be to purchase water from the Gary-Hobart Water Company, which withdraws water from Lake Michigan. The proposed diversion was smaller than Pleasant Prairie's, starting out at 600,000 gpd, and increasing to about 1.1 mgd.¹⁴ After initial comments by states, provinces, and other interested groups, the Water Resources Management Committee held a consultation meeting pursuant to the prior notice and consultation process. Thereafter, the matter was elevated to the Executive Committee of the Council of Great Lakes Governors for further discussion and resolution. Over the next year, there were numerous conference calls and negotiations between Indiana and other interested states. Finally, on May 5, 1992, a role call vote was taken under both Section 1109 and under the Charter. The State of Michigan cast a negative vote under Section 1109 which immediately killed the proposal. All other states present voted affirmatively. For the role call vote under the Charter (now a mute point following the vote under section 1109), Michigan and the provinces of Ontario and Quebec voted against the diversion. All of the other states supported the proposal with the exception of New York, which was absent. After almost two years of exchange of information,

13. Arlene Jensen, *DNR Investigating Lake Water Diversion*, KENOSHA NEWS, Dec. 21, 1991, Local/State at 30.

14. TOWN OF LOWELL, LAKE MICHIGAN WATER DIVERSION PROPOSAL (1991).

correspondence, discussion and negotiation regarding specifics of the proposal, the region could not come to a consensus over whether a very small diversion for public water supply purposes should be allowed.

IV. PERSPECTIVE OF A DIVERSION MANAGER

Illinois has been diverting water from Lake Michigan for almost 150 years. What began as a small diversion to allow navigation between the Great Lakes system and the Illinois and Mississippi River system has expanded so that today over five and a half million residents of northeastern Illinois depend on Illinois' diversion of Lake Michigan water to meet their water supply needs. The Chicago metropolitan region is in a location where the Lake Michigan drainage area is very small. It was inevitable as the Chicago area grew and prospered that Lake Michigan water would be required to supply needs outside the basin. In addition, the water quality impacts resulting from a growing population along the southern end of Lake Michigan, which has no natural outlet, necessitated the diversion of sanitary effluent away from the Lake. While the quantity aspects of the Chicago diversion have been discussed through the years, little has been said regarding the water quality benefits resulting from the diversion. Imagine what the water quality of the southern half of Lake Michigan would be today if over the last 90 years the Chicago metropolitan area, with a population base exceeding 5 million people, had discharged its treated effluent into that closed basin area. There is no question that had Illinois not reversed the flow of the Chicago and Calumet Rivers, thus beginning one of the most controversial water resource projects of this century, the Chicago area would not have grown and prospered.

Illinois' diversion has been and will continue to be solely for the benefit of its citizens. The current water conservation requirements imposed upon all users of Lake Michigan water¹⁵ are in full conformance with the goals and principles outlined in the Great Lakes Charter calling for the efficient and wise use of Great Lakes water resources.

The region needs to refocus its efforts on restoring the original strategy that led to the development of the Charter, that is, the states should look to Congress to strengthen the ability of the region to resist any unwise use of Great Lakes water for diversion to another part of the country. The principles and guidelines of the Great Lakes Charter and the prior notice and consultation process provide an excellent

15. Ill. Dep't of Transp., Rules and Regulations for the Allocation of Water from Lake Michigan, ILL. ADMIN. CODE tit. 92, § 730.307 (1990).

mechanism for the region to review proposals for larger diversions and consumptive uses within the Great Lakes region. Allowing any Great Lakes governor to have an absolute veto over every proposed diversion regardless of its size or impact will guarantee continued diversion of the region and will hamper its ability to cooperatively address far more significant problems than whether a town just outside the basin should be allowed to use Great Lakes water to meet its domestic water supply needs.

