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# Muddy Waters: Congressional Consent and the Great Lakes–St. Lawrence River Basin Water Resources Compact

by SONYA F. PALAY\*

After nearly a century of negotiations among the Great Lakes states, tribes, and provinces, a promising new agreement was recently ratified by the parties and recognized by Congress, this is the Great Lakes–St. Lawrence River Basin Water Resources Compact<sup>1</sup> (“GLC”). Interstate compacts, like the GLC, may serve as a particularly useful tool for solving regional environmental problems which the federal government lacks the interest to resolve.<sup>2</sup> However, due to constitutional strictures, interstate compacts are not binding unless Congress grants consent to the compact. This Note will focus on the GLC as a means to examine the current state of the law surrounding the Compact Clause of the United States Constitution.<sup>3</sup> Part I briefly describes the necessary background information to understand the GLC and the 2000 amendment to the Water Resources Development Act<sup>4</sup> (“2000 WRDA”). Part II introduces the Compact Clause.<sup>5</sup> Part III will examine why it is an agreement that is subject to the consent requirement of the Compact Clause. Part IV will discuss whether Congress

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1. Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3740 (2008) [hereinafter GLC].

2. *See, e.g., id.*

3. U.S. CONST. art. I, § 10, cl. 3.

4. Water Resources Development Act, 42 U.S.C. § 1962d-20 (2000).

5. U.S. CONST. art. I, § 10, cl. 3.

explicitly or implicitly granted prior consent to the compact, when it passed the 2000 WRDA or the Weeks Act of 1911.<sup>6</sup>

## I. Introduction to the 2000 WRDA and the GLC

### A. The Unique Geography and History of the Great Lakes Region

It is helpful to begin with a brief history of Great Lakes management to best understand both the GLC and whether the 2000 WRDA constitutes “consent of Congress,”<sup>7</sup> thereby rendering the GLC enforceable.<sup>8</sup>

Ironically, previous management efforts have been compromised by the same political and ecological peculiarities of the Great Lakes drainage basin (“the Basin”) that create the imperative to manage the lakes. These aspects can be roughly grouped into three categories.<sup>9</sup>

The first peculiarity is the sheer volume of water the lakes contain in relation to local demand.<sup>10</sup> The Great Lakes—Superior, Michigan, Huron, Erie, Ontario—and the St. Lawrence River form the world’s largest surface fresh water resource,<sup>11</sup> and constitute nearly twenty percent of the surface fresh water of the world, and ninety percent of the surface fresh water of the United States.<sup>12</sup>

Second, this massive amount of water is subject to the laws of multiple governments—Canada, the United States, as well as Tribes, First Nations and local governments.<sup>13</sup> The Basin includes the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York as well as by the Canadian Provinces of Ontario and Quebec.<sup>14</sup> Roughly forty million people rely on the Basin for their drinking water.<sup>15</sup>

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6. Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (codified as amended in scattered sections of 16 U.S.C.).

7. U.S. CONST. art. I, § 10, cl. 3.

8. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

9. See Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 414–16 (2006).

10. *Id.* at 414–15.

11. See Michael J. Donahue et al., *Great Lakes Diversion and Consumptive Use: The Issue in Perspective*, 18 CASE W. RES. J. INT’L L. 19, 20 (1986).

12. Mark J. Dinsmore, *Like a Mirage in the Desert: Great Lakes Water Quantity Preservation Efforts and Their Punitive Effects*, 24 U. TOL. L. REV. 449 (1993).

13. See Hall, *supra* note 9, at 415.

14. See CHRISTINE MANNINEN & ROGER GAUTHIER, *LIVING WITH THE LAKES* 6 (Roger Gauthier & Michael J. Donahue eds., 2000) (1999).

15. INT’L JOINT COMM’N, *PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES* 6 (2000), available at <http://www.ijc.org/php/publications/html/finalreport.html>. Moreover, the Great Lakes have been

Finally, on the whole, Great Lakes citizens feel overwhelming pride for the lakes.<sup>16</sup> This pride shows in the tendency of these citizens to zealously guard the water from out-of-Basin diversions.<sup>17</sup> Yet, generally, when the state legislatures address the lakes, they pass what amounts to “bold proclamations about the Great Lakes” rather than creating legal obligations for Great Lakes citizens and businesses.<sup>18</sup>

## B. Previous Great Lakes Management Efforts

### 1. *Boundary Waters Treaty of 1909*

The first major attempt to spell out the obligations of Canada and the United States to manage and share the water of the Great Lakes was the bilateral Boundary Waters Treaty of 1909.<sup>19</sup> The treaty created the International Joint Commission (“IJC”) to oversee the management of the lakes and handle trans-boundary disputes.<sup>20</sup> The IJC is comprised of six members—three from each country.<sup>21</sup>

Despite the cooperative nature of the Boundary Waters Treaty of 1909,<sup>22</sup> it suffers significant deficiencies preventing it from being an effective tool to protect and manage Great Lakes water. The primary problem is that the power of the IJC is limited; it only has binding arbitral

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the foundation of the region’s economy. *Id.* And the lakes are critical to the manufacturing industry of the region. See *Great Lakes Regional Collaboration’s Strategy to Restore and Protect the Great Lakes: Hearing Before the S. Comm. on Environment & Public Work: 109th Cong.* (2006) (statement of Andy Buchsbaum, director, National Wildlife Federation’s Great Lakes Office and Co-Chair Healing Our Waters® Great Lakes Coalition), available at [http://epw.senate.gov/109th/Buchsbaum Testimony.pdf](http://epw.senate.gov/109th/Buchsbaum%20Testimony.pdf). [hereinafter Buchsbaum testimony]. *Great Lakes Regional Collaboration’s Strategy to Restore and Protect the Great Lakes: Hearing Before the S. Comm. on Environment & Public Work: 109th Cong.* (2006) (statement of George Kuper, President, Council of Great Lakes Industries, Great Lakes Regional Collaboration’s Strategy to Restore and Protect the Great Lakes), available at [http://epw.senate.gov/hearing\\_statements.cfm?id=252774](http://epw.senate.gov/hearing_statements.cfm?id=252774).

16. Buchsbaum testimony, *supra* note 15 (quoting Tom Kiernan, President of the National Parks Conservation Association: “The Great Lakes are national icons, a beautiful natural treasure you can see even from space. Like the majestic Grand Canyon and Everglades, these inland oceans help define the soul of a region and the landscape of a nation.”).

17. See Bob Downing, *National Treasure: As More Regions Suffer Droughts, the Great Lakes Are Becoming a Highly Sought Source for Water*, AKRON BEACON J., Dec. 23, 2007.

18. Hall, *supra* note 9, at 415.

19. Boundary Waters Treaty, Jan. 11, 1909, U.S.-U.K., 36 Stat. 2448 (U.K. entered treaty on behalf of Canada) [hereinafter Boundary Waters Treaty]; Daniel K. Dewitt, Note, *Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, 69 IND. L.J. 299, 309 (1993).

20. Boundary Waters Treaty, *supra* note 19, art. VII, 36 Stat. at 2451.

21. *Id.*

22. Mark L. Glode & Beverly Nelson Glode, *Transboundary Pollution: Acid Rain and United States-Canadian Relations*, 20 B.C. ENVTL. AFF. L. REV. 1 at 14–15, (1993).

power in a dispute if both countries consent to its jurisdiction for that dispute.<sup>23</sup> Furthermore, the IJC can only make recommendations regarding pollution control to the United States and Canada.<sup>24</sup> Moreover the Boundary Waters Treaty of 1909 only deals with four of the lakes; Lake Michigan, the second largest of the five lakes by volume, is not covered by the treaty, because it is wholly within the borders of the United States.<sup>25</sup>

## 2. *The Great Lakes Basin Compact of 1968*

Although it was the first interstate compact regarding Great Lakes management to be approved by Congress, the Great Lakes Basin Compact of 1968<sup>26</sup> did very little to contribute to the regulation of the lakes.<sup>27</sup> Similar to the Boundary Water Treaty of 1909, the Great Lakes Basin Compact of 1968 created a body to conduct research and make recommendations regarding water management; this was the Great Lakes Commission (“Commission”).<sup>28</sup> The Commission could only act in a purely advisory role—according to the compact, “No action of the Commission shall have the force of law in, or be binding upon, any party state.”<sup>29</sup>

Because of this, the Great Lakes Basin Compact of 1968 has garnered its fair share of criticism. Professor Dellapenna has commented that the Great Lakes Basin Compact of 1968 is typical of the “we’ll keep in touch approach” of eastern interstate water compacts.<sup>30</sup> This approach “failed to accomplish much towards protecting the biological, chemical, and physical integrity of the rivers and lakes addressed in the particular compacts.”<sup>31</sup>

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23. Boundary Water Treaty, *supra* note 19, art. VII, 36 Stat. at 2453.

24. *Id.* at 2450; see also Gregory Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89, 134 (1984) (discussing IJC authority). However, this does not mean that the IJC has entirely neglected issues of pollution control. See Dewitt, *supra* note 19, at 320–23 (evaluating the IJC’s actions regarding pollution management).

25. Boundary Waters Treaty, *supra* note 19, at 2448; see also Hall, *supra* note 9, at 416–19.

26. Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968) [hereinafter 1968 Great Lakes Basin Compact].

27. Hall, *supra* note 9, at 423–24.

28. 1968 Great Lakes Basin Compact, *supra* note 26, art. VI(N) (providing that “no action of the commission shall have the force of law in, or be binding upon, any party state [or province]”); see also Christine A. Klein, *The Law of the Lakes: From Protectionism to Sustainability*, 2006 MICH. ST. L. REV. 1259, 1268–69 (2006).

29. 1968 Great Lakes Basin Compact, *supra* note 26, art VI(N).

30. Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the “Hooch”*, 12 N.Y.U. ENVTL. L.J. 838–39 (2005); see also Hall, *supra* note 9, at 423; Klein, *supra* note 28, at 1268–69.

31. Dellapenna, *supra* note 30, at 839.

### 3. 1980s Diversions

The mid 1980s saw several proposals to divert Great Lakes water for uses in other states such as recharging the Ogallala Aquifer and “[improving] navigation on the Mississippi River.”<sup>32</sup> Public outrage over these proposed diversions led to the enactment of an interstate agreement, the Great Lakes Charter in 1985, and national legislation, the Water Resources Development Act of 1986.

#### i. The Great Lakes Charter of 1985

The Great Lakes Charter of 1985<sup>33</sup> (“Charter”) was a good faith agreement between the eight Great Lakes states and the provinces of Ontario and Quebec.<sup>34</sup> Because the Charter is an agreement between states and lacks the consent of Congress, it also lacks the force of law.<sup>35</sup> The Charter nonetheless represents a “successful shift in focus” by conceiving of the lakes as a single hydrological system, including Lake Michigan.<sup>36</sup> The Charter commits its members to regulate new and increased consumptive uses of water as well as diversions more than two million gallons per day, provides for a prior notice and consultation procedure for new and/or increased uses and diversions greater than five million gallons per day. It also commits its members to gather and report data on new and increased withdrawals greater than one hundred thousand gallons per day.<sup>37</sup>

But because the Charter is non-binding, the above commitments have been largely ignored or neglected.<sup>38</sup> Professor Hall has posited that had the

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32. Chris A. Shafer, *Great Lakes Diversions Revisited: Legal Constraints and Opportunities for State Regulation*, 17 T.M. COOLEY L. REV. 461, 463 (2000); see also James M. Olson, *Environmental Law: Great Lakes Water: Michigan Needs a Comprehensive Water Diversion and Use Law to Address the Looming World Water Crisis, Threatened Privatization and Low Water Levels*, 80 MICH. B. J. 32, at 33–34 (2001).

33. The Great Lakes Charter, Feb. 11, 1985, reprinted in Great Lakes Governors’ Task Force, Council of Great Lakes Governors, Final Report and Recommendation on Water Diversion and Great Lakes Institutions (1985), <http://www.cglg.org/pub/charter/index.html> (last visited Mar. 5, 2008).

34. Hall, *supra* note 9, at 424.

35. *Id.* at 426; see also U.S. CONST. art. I, § 10, cl. 3; see also Dellapena, *supra* note 30, at 854 (stating that “the lack of congressional consent makes the charter utterly unenforceable on its own”).

36. It recognized that “water-withdrawal decisions and actions had to consider this interconnectivity.” Jessica A. Bielecki, *Managing Resources With Interstate Compacts: A Perspective From the Great Lakes*, 14 BUFF. ENVTL. L.J. 173, (2007); see also Council of Great Lakes Governors, The Great Lakes Charter of 1985, Feb. 11, 1985.

37. Hall, *supra* note 9, at 424.

38. See Stephen Frerichs & K. William Easter, *Regulation of Interbasin Transfers and Consumptive Uses from the Great Lakes*, 30 NAT. RESOURCES J. 561, 566–68 (1990); see also Hall, *supra* note 9, at 424–25.

Charter used the constitutional compact process and become binding law, “it would have been an important first step toward comprehensive water management of the Great Lakes.”<sup>39</sup> As it stands though, the Charter has done little to achieve meaningful management of the Great Lakes.

ii. *1986 Water Resources Development Act*

Congress enacted section 1109 of the Water Resources Development Act (hereinafter “1986 WRDA”) in 1986.<sup>40</sup> Like the Charter, the 1986 WRDA was primarily concerned with preventing out-of-basin water diversions. The legislation provides:

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or tributary within the United States of any of the Great Lakes for use outside the Great Lakes basin unless such diversions or export is approved by the Governor of each of the Great Lake [sic] States.<sup>41</sup>

Unfortunately, the 1986 WRDA provides no standards for the governors to use to determine which diversions should be approved.<sup>42</sup> This has the potential to lead to approvals based more on interstate politics than what is ecologically beneficial or sustainable for the Great Lakes. This is also problematic because all of the Great Lakes states have most of their territory outside of the Basin, except for Michigan. This means that Michigan can veto all diversions, without consequence to itself, an effect which does not encourage productive negotiations nor meaningful policy development between signing states.<sup>43</sup>

Fourteen years after its enactment, Congress amended the WRDA to include the following declared Congressional purpose and policy:

to take immediate action to protect the limited quantity of water available from the Great Lakes system for use by the Great Lakes States . . . to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource

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39. Hall, *supra* note 9, at 426.

40. Water Resources Development Act, Pub. L. No. 99-662, 1109, 100 Stat. 4082, 4230 (codified as amended at 42 U.S.C. § 1962d-20 (2000)).

41. *Id.*

42. Hall, *supra* note 9, at 430–31.

43. *Id.*

improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.<sup>44</sup>

Part IV of this Note will discuss the significance of this provision at length.

#### 4. *Great Lakes Charter Annex 2001*

The Great Lakes Charter Annex 2001 (“Annex 2001”) is the latest in a long series of handshake agreements between the Great Lakes states, tribes, and provinces.<sup>45</sup> Like the Charter,<sup>46</sup> Annex 2001 was signed by the eight Great Lakes governors, and the premiers of Ontario and Quebec.<sup>47</sup> It acts as “a mechanism to bridge the gap between the charter [sic] and the WRDA. It buil[t] on the 1985 Charter and focus[ed] on a standard for reviewing all water withdrawals, not only diversions.”<sup>48</sup> Annex 2001 builds on prior agreements and commits its signatories to:

Further implementing the principles of the [Great Lakes] Charter by developing an enhanced water management system that is simple, durable, efficient, retains and respects authority within the [Great Lakes] Basin, and, most importantly, protects, conserves, restores, and improves the Waters and Water-Dependent Natural Resources of the Great Lakes Basin . . . . In order to adequately protect the water resources of the Great Lakes and the Great Lakes ecosystem, the Governors and Premiers commit to develop and implement a new common, resource-based conservation standard and apply it to new water withdrawal proposals from the Waters of the Great Lakes Basin. The standard will also address proposed increases to existing water withdrawals and existing withdrawal capacity from the Waters of the Great Lakes Basin.<sup>49</sup>

Annex 2001 explicitly covers both surface and groundwater, and contains a “resource-based conservation standard” to judge improvement.<sup>50</sup>

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44. Water Resources Development Act of 2000, 42 U.S.C. § 1962d-20(b)(2) (2000).

45. Annex to the Great Lakes Charter, June 18, 2001, <http://www.cglg.org/1pdfs/Annex2001.pdf> (last visited Mar. 5, 2008) [hereinafter Annex 2001].

46. The Great Lakes Charter, Feb. 11, 1985, *reprinted in* Great Lakes Governors’ Task Force, Council of Great Lakes Governors, Final Report and Recommendation on Water Diversion and Great Lakes Institutions (1985), <http://www.cglg.org/pub/charter/index.html> (last visited Mar. 5, 2008).

47. *Id.*

48. See Jeffery E. Edstrom et al., *An Approach for Identifying Improvements Under the Great Lakes Charter Annex 2001*, 4 TOL. J. GREAT LAKES’ L. SCI. & POL’Y 335, 336 (2002).

49. Annex 2001, *supra* note 45.

50. Hall, *supra* note 9, at 431.



Furthermore, Annex 2001 directs the Great Lakes states and the provinces of Ontario and Quebec to enter into a binding interstate-compact that is consistent with the goals and directives of Annex 2001.<sup>51</sup> In this way, Annex 2001 and the 2000 WRDA provided the foundation for the GLC.

5. *The Great Lakes–St. Lawrence River Basin Resources Compact*

In 2005, the Great Lakes governors and premiers signed the GLC and a companion agreement—the Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement (“Agreement”).<sup>52</sup> In the following three years, the state legislatures of the eight states ratified the GLC and the Agreement.<sup>53</sup> The GLC is distinct from other Great Lakes agreements and laws in that it governs both surface and groundwater,<sup>54</sup> provides Basin-wide minimum decision-making standards for both withdrawals and consumptive uses,<sup>55</sup> and yet leaves each of the signatory states with the flexibility to design their own water management programs.<sup>56</sup>

The only requirement under the GLC applicable to the states’ water management programs is that they must, at a minimum, be consistent with decision-making standards enumerated in the compact to oversee and regulate new or increased withdrawals and consumptive uses.<sup>57</sup> To comply with the decision-making standards, a program must meet five criteria.<sup>58</sup> First, withdrawn water (minus an allowance for consumptive use) must be returned to its source watershed.<sup>59</sup> Second, withdrawals and consumptive uses of water may not result in “significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources and the applicable Source Watershed.”<sup>60</sup> Third, withdrawals and consumptive uses must also “incorporate Environmentally Sound and Economically Feasible Water Conservation Measures.”<sup>61</sup> Fourth, withdrawals and consumptive uses

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51. Annex 2001, *supra* note 45.

52. *See* Bielecki, *supra* note 36, at 184.

53. Press Release, Council of Great Lakes Governors, Great Lakes–St. Lawrence River Basin Water Resources Compact Congressional Consent Status (Oct. 3, 2008), <http://www.cglg.org/projects/water/CompactConsent.asp#FederalLegislativeActivity>.

54. GLC, *supra* note 1, § 1.2.

55. *Id.* § 4.10.

56. *See id.*

57. *Id.*

58. *Id.* § 4.11.

59. *Id.*

60. *Id.*

61. *Id.*

must comply with all applicable laws and international agreements.<sup>62</sup> And fifth, the use of the water must be “reasonable.”<sup>63</sup>

Thus, the common decision-making standard effectuates the declared purpose of 2000 WRDA, namely by providing a common standard for managing water withdrawals and water use that is consistent with principles of water conservation and resource improvement.<sup>64</sup>

That the compact would address both groundwater and surface water is “critical to [its] eventual success . . . since ground water comprises more than fifteen percent of the total water supply in the Great Lakes basin.”<sup>65</sup> Consumptive uses, withdrawals and diversions of water, which predate the enactment of the GLC, however, are only governed by the compact if they are increased or altered, so as to constitute a new use, diversion, or withdrawal.<sup>66</sup> Despite this limitation, for the people of the Great Lakes region, the tools that lead to preservation and restoration of the lakes are sources of hope—that the economy will rebound, that their environment will be restored, and that their way of life will be preserved.<sup>67</sup>

All of these benefits are no better than gratuitous promises, however, unless the GLC is binding law.<sup>68</sup> In other words, its provisions must be enforceable.<sup>69</sup> In order for the GLC to be an enforceable compact, it had to be ratified by the legislatures of all of the Great Lakes states, and consented to by Congress.<sup>70</sup>

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62. *Id.*

63. *Id.* (A determination of “reasonable” is based on the following factors: (1) does the use minimize waste of water?; (2) are existing uses efficient?; (3) what is the balance between economic and social development, and environmental protection of the proposed use and existing uses?; (4) what is the quantity, quality, reliability of the water source, and the safe yield of interconnected water sources?; (5) what is degree and duration of adverse impacts to the water source, and other uses of water?; (6) what is potential for mitigation of those effects?; and (7) does the proposal include plans for restoration of hydrologic conditions of the source watershed?).

64. Water Resources Development Act of 2000, 42 U.S.C. § 1962d-20(b)(2) (2000) (stating in relevant part, “to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.”).

65. Hall, *supra* note 9, at 435.

66. GLC, *supra* note 1, § 1.2.

67. See Buchsbaum testimony, *supra* note 15.

68. See *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

69. See Joseph W. Dellapenna, *International Law's Lessons for the Law of the Lakes*, 40 U. MICH. J.L. REFORM 747, 796 (2007).

70. U.S. CONST. art. I, § 10, cl. 3.

## II. Introduction to the Compact Clause of the U.S. Constitution

In order to better understand whether the GLC already had the consent of Congress through the 2000 WRDA, or if it was necessary for Congress to take some further action, it is useful to begin with a brief introduction to the Compact Clause of the United States Constitution, including an investigation of its purposes.

The Compact Clause prohibits states from entering into interstate compacts without the consent of Congress.<sup>71</sup> The full text of Article I, Section 10, Clause 3 of the U.S. Constitution provides:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.<sup>72</sup>

The Compact Clause of the U.S. Constitution was modeled closely after a similar clause in the Articles of Confederation,<sup>73</sup> and it is generally accepted that the primary purpose of the clause at the time of its naissance was to resolve border disputes between states.<sup>74</sup> Since that time, however, interstate compacts have come to cover a much broader subject range than border disputes.<sup>75</sup> In addition to being used for managing interstate bodies of water, compacts have been used for everything ranging from interstate dairy agreements,<sup>76</sup> to air pollution prevention,<sup>77</sup> and managing ocean thermal energy conservation facilities.<sup>78</sup>

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71. *Id.*

72. *Id.*

73. Felix Frankfurter & James M. Landis, *The Compact Clause—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 691–95 (1925); JEROME C. MUYS, *INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 242* (1971).

74. MUYS, *supra* note 73, at 242; Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL'Y REV. 163, 169–70 (2005); *see also* Frankfurter & Landis, *supra* note 73, at 692–95.

75. *See generally* Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105 (2003) (discussing three major interstate water allocation compacts in the West).

76. Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (1999) (consenting to a compact and adding limitation on period of consent).

77. 42 U.S.C. § 7402 (2008) (granting consent to states to negotiate and enter into compacts for air pollution prevention, declaring compact non-binding without the approval of Congress).

78. *Id.* § 9115(c) (2008) (granting consent to states to negotiate and enter into compacts for developing and managing ocean thermal energy conservation facilities, explicitly declaring such a compact to be binding “without further approval by the Congress”).

Interstate compacts are particularly useful because they provide benefits beyond what “ordinary state regulation” allows.<sup>79</sup> The primary benefit is that interstate compacts that have the consent of Congress are treated as federal law, and so preempt contrary state laws.<sup>80</sup>

### A. Purpose of the Consent Requirement

The purpose of the Compact Clause can be described grossly as falling into two separate but interrelated categories: (1) protecting interests of non-compacting states, and (2) protecting the supremacy of the federal government.<sup>81</sup>

#### 1. *Protecting Interests of Non-Compacting States, the Early Days of the Compact Clause*

The Supreme Court’s initial interpretations of the Compact Clause came in these boundary dispute cases.

In 1838, the Court heard a border dispute case between Massachusetts and Rhode Island.<sup>82</sup> In its decision the Court opined that,

[Interstate border disputes were within the scope of the Compact Clause] not to prevent the States from settling their own boundaries, so far as merely affecting their relations to each other, but to guard against the derangement of their federal relations with the other States of the Union and the federal government; which might be injuriously affected if the contracting States might act upon their boundaries at their pleasure.<sup>83</sup>

Two decades later, in another boundary dispute between states, the Court declared that “[the Compact Clause] is obviously intended to guard the rights and interests of other States, and to prevent any compact or agreement between two States which might injuriously affect the interests of others.”<sup>84</sup>

Thus, in the early Compact Clause conflicts, the Court interpreted the purpose of the clause as being a procedural barrier to harming, whether purposefully or accidentally, the interests of non-compacting states. In

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79. JOSEPH L. SAX, BARTON H. THOMPSON, JOHN D. LESHY & ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 842–43 (West, 4th ed. 2006).

80. *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)).

81. *See* MUYS, *supra* note 73, at 242–51.

82. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

83. *Id.* at 726.

84. *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1855).

later cases, however, the Court focused less on protecting the interests of states, and more on protecting the supremacy of the federal government.

## 2. *Protecting the Supremacy of the Federal Government*

In 1893, the Court reexamined the purpose and scope of compact clause in *Virginia v. Tennessee*.<sup>85</sup> In this boundary dispute case the Court examined the underlying purposes the clause.<sup>86</sup> Consistent with its prior interpretations of the purpose of the Compact Clause, in *Virginia v. Tennessee*, the Court described the role of the Compact Clause as being “essentially protective in nature.”<sup>87</sup> The Court quotes heavily from Justice Story’s Commentaries, reiterating that “the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.”<sup>88</sup> More recently, in *Cuyler v. Adams*, the Court held that intent of the Compact Clause is to “ensure that Congress . . . maintain ultimate supervisory power over cooperative state action that may otherwise interfere with the full and free exercise of federal authority.”<sup>89</sup>

### III. Is the Consent of Congress Necessary for the Compacting States of the GLC to Enter Into the Compact?

#### A. Scope of the Compact Clause

Although the plain language of the Compact Clause would lead one to believe that the consent requirement applies to all agreements between states, the Court has interpreted it otherwise.<sup>90</sup> Rather the consent requirement applies to “all forms of interstate agreement but not every kind of subject matter.”<sup>91</sup>

Justice Field in *Virginia v. Tennessee* suggests, without definitively holding, that the Compact Clause cannot be read literally, and so, not all agreements made between states are subject to the consent requirement.<sup>92</sup> In that case he stated, “[i]t is evident that the prohibition is directed to the

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85. *Virginia v. Tennessee*, 148 U.S. 503 (1893).

86. MUYS, *supra* note 73, at 245.

87. *Id.* at 258.

88. *Virginia*, 148 U.S. at 520 (internal quotations omitted).

89. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

90. Note, *State Collective Action*, 119 HARV. L. REV. 1855 (2006).

91. MUYS, *supra* note 73, at 250.

92. *Virginia*, 148 U.S. at 503.

formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”<sup>93</sup> Although Justice Field did not provide an exclusive list of exceptional areas, he did provide some examples:

(1) an agreement by one State to purchase land within its borders owned by another State; (2) an agreement by one State to ship merchandise over a canal owned by another; (3) an agreement to drain a malarial district on the border between two States; and (4) an agreement to combat an immediate threat, such as invasion or epidemic.<sup>94</sup>

In 1978, the Court again had occasion to uphold its interpretation of the Compact Clause in *United States Steel Corp. v. Multistate Tax Commission*.<sup>95</sup> In that case, Justice Powell repeated Justice Field’s categories of agreements that “in no respect [could] concern the United States.”<sup>96</sup> And so, there are at least four subject areas of agreements that are not subject to the Compact Clause.

## B. GLC and the Compact Clause

The GLC, however, is of course subject to the requirements of compact clause.<sup>97</sup> It affects the rights and interests of other non-compacting states, because the GLC would prevent out-of-basin withdrawals.<sup>98</sup> For example, a neighboring Ogallala Aquifer state may have been anticipating being able to use Great Lakes water for irrigation and planned to use up their aquifer reserves accordingly.<sup>99</sup> Moreover even if the GLC would not affect the rights of non-compacting states, it touches

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93. *Id.* at 519. However, the Supreme Court did explicitly hold that the Compact Clause cannot be read literally decades later, in *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976).

94. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468 (1978) (rephrasing Justice Field’s exceptions).

95. *Id.*

96. *Id.*

97. There is some support for the proposition that there may be compacts which are not subject to the Compact Clause of the Constitution. See MUYS, *supra* note 73, at 251 (analyzing Justice Field’s opinion to indicate that “a formally executed compact dealing with a subject of concern only to the compacting states and not touching an area of federal concern is probably outside the coverage of the clause.”).

98. *Id.*

99. This hypothetical is not as outlandish as it might seem at first. See MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 10–11 (Penguin Books 1986) (1993).

two areas of federal concern: United States-Canadian relations; and navigability of public waterways.

Although it is unlikely that the GLC would *negatively* impact the relationship between the United States and Canada, in large part because Ontario and Quebec were parties to Annex 2001 which laid the foundations for the GLC,<sup>100</sup> implementing the GLC would affect relations between the United States and Canada.<sup>101</sup> Because international relations are an area of federal concern, the GLC is not exempt from the requirements of the Compact Clause. Even if the GLC would not affect United States-Canadian relations, it still touches another area of federal concern—navigation of public waterways.<sup>102</sup> And, interstate agreements regarding navigation of public waterways are subject to the requirements of the Compact Clause.<sup>103</sup> Therefore, it is highly doubtful that the GLC is an agreement outside the scope of the Compact Clause.

### C. Enforceability

If the Great Lakes states had assumed that the GLC was outside the scope of the Compact Clause, and chose to not seek the consent of Congress, they would create significant enforceability problems for its implementation. Without the consent of Congress, an interstate agreement is neither given the force nor stature of federal law.<sup>104</sup> It would, therefore, not be enforceable in federal court. Instead it would be treated the same way that the Great Lakes Charter and Annex 2001 were treated—as unenforceable handshake agreements.<sup>105</sup> As such, the GLC would have no teeth, and would not be an effective tool to manage the Great Lakes ecosystem.<sup>106</sup> Considering this, regardless of whether a case could be made that the GLC is not subject to the requirements of the Compact Clause, it is still wise for the signatories to obtain congressional consent.<sup>107</sup>

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100. Annex 2001, *supra* note 45.

101. It is worthwhile to remember that it was the threat of a Canadian company withdrawing water from the Great Lakes that drove Congress to pass the 2000 WRDA. See Charles F. Glass, Jr., Note, *Enforcing Great Lakes Water Export Restrictions Under the Water Resources Development Act of 1986*, 103 COLUM. L. REV. 1503, 1508–09 (2003).

102. GLC, *supra* note 1.

103. See MUYS, *supra* note 73, 252; see also Wharton v. Wise, 153 U.S. 155, 171 (1894).

104. *C.f.* Cuyler v. Adams, 449 U.S. 433, 438 (1981).

105. Hall, *supra* note 9, at 445.

106. Dellapenna, *supra* note 69, at 796.

107. See *id.*

#### IV. Methods of Consent and the GLC

Congressional consent for interstate compacts may be implied and consent can be granted before or after the compact is negotiated and ratified.<sup>108</sup> Traditionally though, Congress has granted its explicit consent to interstate compacts by passing legislation which says as much.<sup>109</sup> In addition to giving consent to a fully formed compact, Congress frequently uses legislation to encourage states to enter into compacts. The most prevalent form of this type of encouragement is seen in explicit consent to negotiate. Generally the language of this type of legislation goes as follows: “The consent of Congress is given to [specified states] to negotiate and enter into agreements or compact, not in conflict with any law or treaty of the United States [for specified purpose of the compact] . . . .”<sup>110</sup> Generally, though not always, Congress adds boilerplate language to such legislation, which casts doubt on whether “consent to negotiate or enter into compacts” satisfies the Compact Clause requirement. There are two main categories of this type of boilerplate language. In the first, Congress reserves its right to alter or amend the nascent compact.<sup>111</sup> The second more clearly preserves Congress’s role as the final authority on interstate compacts by stating that any such compact is ineffective without further review or approval by Congress.<sup>112</sup> Yet, there is no case law on point that clarifies whether or not explicit consent of Congress to negotiate and enter into an interstate compact is sufficient to satisfy the Compact Clause requirement.

##### A. Did Congress Explicitly Consent to the GLC, Prior to its Ratification?

###### 1. *Weeks Act and Explicit Consent*

In 1911, Congress passed the Weeks Act, which, among its many purposes, was meant in part to encourage conservation of fresh water

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108. MUYS, *supra* note 73, at 255.

109. See Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (2008) (“Congress hereby consents to the Northeast Interstate Dairy Compact”); 16 U.S.C. § 1204 (2008) (“Congress consents to any compact [for the control of jellyfish]”).

110. See, e.g., 33 U.S.C. § 1508(d) (2007).

111. MUYS, *supra* note 73, at 257. If Congress chooses to do this, it tends to use the following terms: “The right to alter, amend, or repeal . . . is expressly reserved.” 16 U.S.C. § 262(b) (1943).

112. MUYS, *supra* note 73, at 259. For an example of a statute that grants consent to negotiate see 16 U.S.C. § 17m (granting consent to States to negotiate and enter into compacts for managing parks, declaring compact ineffective without approval of Congress); see, e.g., 33 U.S.C. § 567a (1940) (granting consent to specific states to negotiate and enter into compacts for flood and pollution control, declaring compact non-binding without approval of Congress).



sources.<sup>113</sup> It states that

[the c]onsent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving . . . the water supply of the States entering into such agreement or compact.<sup>114</sup>

The Weeks Act has all of the modern characteristics that demonstrate the explicit consent of Congress to a compact.<sup>115</sup> It follows the linguistic formula, using the words “[c]onsent of Congress . . . given to [particular states] to enter into [a compact to do something specific].”<sup>116</sup> It appears to grant congressional consent for an interstate compact to conserve water, so long as it does not conflict with “any law of the United States.”<sup>117</sup>

The GLC is a compact between states to conserve water in the Great Lakes Basin, which does not appear to conflict with any law of the United states.<sup>118</sup> So, it is possible that the Weeks Act of 1911 granted congressional consent to the GLC of today; this, however, is unlikely. More than thirty years ago, Jerome Muys argued that the Weeks Act is so broad that it “would appear to constitute practical abandonment [by Congress] of its constitutional responsibility to review all interstate compacts in order to protect and promote the national interest.”<sup>119</sup> And, to date, the consent articulated in the Weeks Act has not been used to enforce a subsequent interstate compact. Therefore, despite the Weeks Act’s usage of the “magic words of consent,” it very likely does not constitute congressional consent to the GLC for constitutional purposes.

## 2. *The 2000 WRDA and Explicit Consent*

Because the 2000 WRDA led to the creation of Annex 2001 and the GLC, it is a natural place to begin looking for evidence of Congressional

113. Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (codified as amended in scattered sections of 16 U.S.C.); *see also* MUYS, *supra* note 73, at 257. The Weeks Act also gave the Secretary of Agriculture authority to acquire lands to protect water sources, produce timber and exchange federal lands. *See* Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961.

114. Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (codified as amended in scattered sections of 16 U.S.C.).

115. *See, e.g.*, Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (2008).

116. Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (codified as amended in scattered sections of 16 U.S.C.).

117. *Id.*

118. *See generally* GLC, *supra* note 1; Hall, *supra* note 9.

119. MUYS, *supra* note 73, at 258.

consent to the GLC.<sup>120</sup> Instead of using boilerplate language to grant consent, or consent to negotiate, the 2000 WRDA states

To encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and *implement* a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.<sup>121</sup>

“[A] mechanism that provides a common . . . standard” is a description of an interstate agreement or compact. At minimum, Congress is encouraging particular states to enter into such a compact. Yet the 2000 WRDA lacks all of the language of modern legislation that grants consent—most notably the word “consent.”<sup>122</sup> Rather the 2000 WRDA looks similar to legislation wherein Congress grants consent to negotiate.<sup>123</sup> The 2000 WRDA specifies the states that can participate, the subject matter that Congress wants the states to deal with, and encourages the states to act to achieve a particular goal.<sup>124</sup>

But the specific wording of the 2000 WRDA sets it apart from other legislation that simply encourages states to enter into a compact. The 2000 WRDA encourages states to go beyond forming a compact, and “implement” the terms of the agreement.<sup>125</sup> Moreover the 2000 WRDA lacks any language that explicitly reserves the right of Congress to amend the compact; nor does it include language that declares the compact to be ineffective without further approval from Congress.<sup>126</sup> By the plain language of the statute, Congress instructs, without mandating, the Great Lakes states to enter into and begin implementing a compact to manage the water resources of the area. Considering that no “magic words” are necessary for Congress to express its consent to a compact,<sup>127</sup> this declaration can be interpreted as congressional consent to a subsequent

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120. Water Resources Development Act, 42 U.S.C. § 1962d-20 (2000).

121. *Id.* (emphasis added).

122. *Id.*

123. 16 U.S.C. § 17m (1936) (granting consent to States to negotiate and enter into compacts for managing parks, declaring compact ineffective without approval of Congress).

124. Water Resources Development Act, 42 U.S.C. § 1962d-20 (2000).

125. *Id.* (emphasis added).

126. *Id.*

127. See Prochaska, *Low-Level Radioactive Waste Disposal Compacts*, 5 VA. J. NAT. RESOURCES L. 383, 389–90 (1986).

compact between those states to manage Great Lakes water, so long as the management is consistent with the 2000 WRDA provisions.

## B. Implied Consent

The 2000 WRDA is, however, incongruent with legislation that explicitly grants the consent of Congress to states to enter into interstate compacts,<sup>128</sup> and there is no analogous case where a court found explicit Congressional consent to a compact where the word “consent” was not employed in the language. As such, there is support for a conclusion that Congress has not explicitly granted consent to the GLC. However, there is support for a conclusion that Congress implicitly granted consent.

Although there is no clear test available to decipher when the consent of Congress has been impliedly granted, in two nineteenth-century cases, the Court gave some guidance on how to determine whether Congress has implicitly consented to an interstate agreement.

In *Virginia v. Tennessee*, the Court held that “[consent of Congress for an interstate compact] is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them . . . .”<sup>129</sup> In other words, if Congress (1) helps to enforce the provisions of a compact, and (2) in some undefined way acts to legitimize its goals, then Congress has implicitly granted its consent for the purposes of Article I, Section 10, Clause 3 of the U.S. Constitution. *Green v. Biddle*, clarified this test, holding that “[w]hen determining whether Congress has consented to the agreement, the relevant inquiry is has Congress, by some positive act in relation to such agreement, signified the consent of that body to its validity.”<sup>130</sup> Like *Virginia v. Tennessee*, the signal for consent in this test is whether Congress has taken an action that “sanctions” the interstate agreement.

### 1. The 2000 WRDA and Implied Consent

There is significant evidence that Congress has acted to sanction the GLC. As noted above, the 2000 WRDA encourages the states that were involved in forming the GLC to form a compact.<sup>131</sup> And the 2000 WRDA uses particularly strong language—“encourage the Great Lakes States . . . to develop and *implement* a [compact]”—which sanctions an agreement

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128. Compare *id.*, with Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (2008), and Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (codified as amended in scattered sections of 16 U.S.C.).

129. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

130. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 85–86 (1821) (internal quotations omitted).

131. Water Resources Development Act, 42 U.S.C. § 1962d-20 (2000).

among the Great Lakes states to manage the water of the region.<sup>132</sup> Also significant is that the GLC effectuates the congressional purposes of the 2000 WRDA. The GLC is at its core “a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.”<sup>133</sup> This is demonstrated in its common decision-making standard, which at a minimum mandates that withdrawals and uses of water be consistent with criteria based on principles of conservation and sustainability as described by section 4.11 of the GLC.<sup>134</sup>

## 2. *The Weeks Act and Implied Consent*

The Weeks Act provides supporting evidence to the 2000 WRDA that Congress has acted to consent to the GLC prior to its formation. As noted above, the Weeks Act appears to grant the consent of Congress for interstate compacts that would conserve fresh water resources—like the Great Lakes.<sup>135</sup> This bolsters the argument that Congress has acted to support the compact.<sup>136</sup>

The question then becomes, is this enough evidence of implicit congressional consent to make the GLC an enforceable agreement?<sup>137</sup> There is enough evidence between the 2000 WRDA and the Weeks Act for a judge to hold that Congress has implicitly granted its consent to the GLC.<sup>138</sup> But such an outcome is uncertain at best.

## 3. *Legislative History of 2000 WRDA*

The 2000 WRDA is an unstable means to prove congressional consent to the GLC. As discussed above, 2000 WRDA does not expressly grant blanket consent to the GLC.<sup>139</sup> Moreover, the legislative history of 2000 WRDA weakens the argument that 2000 WRDA is evidence of implied

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132. See *supra* note 127 and accompanying text.

133. *Id.*; see also Hall, *supra* note 9, at 435–46.

134. GLC, *supra* note 1, § 4.11.

135. Weeks Act of 1911, Pub. L. No. 61-435, 36 Stat. 961 (codified as amended in scattered sections of 16 U.S.C.).

136. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

137. See U.S. CONST. art. I, § 10, cl. 3; see also *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

138. See MarliSSa S. Briggett, Comment, *States Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751 at 761 (1991) (“[C]ompacts will be sustained whenever possible.”).

139. See *supra* Part IV.E.2.

consent to the GLC.<sup>140</sup> The sponsors of the 2000 WRDA, Senators Levin and Baucus, stated in the Senate,

Mr. LEVIN. Would the chairman and ranking member also concur that it is not the intent of this provision to pre-empt the need for future appropriate congressional actions in this area?

Mr. BAUCUS. I would concur. This language should not be interpreted as pre-empting the authority of Congress to approve or disapprove an interstate compact, international agreement, or other such mechanisms of implementation which properly fall under congressional authority. It is simply the intent of the conferees to encourage the States to promptly take such actions to implement these standards as fall within their authority for management of the water resources of their respective states and within the authority vested in them by the Water Resources Development Act of 1986 for making decisions regarding diversions of Great Lakes water.<sup>141</sup>

Based on the above statements of Senators Levin and Baucus, one could conclude that the 2000 WRDA is not constitutionally sufficient anticipatory consent to the GLC.<sup>142</sup> The obvious counter to this statement is that remarks by two senators are not equivalent to congressional consent, nor for that matter congressional denial.<sup>143</sup>

## V. Conclusion

After more than a century of haphazard water management of the Great Lakes, the GLC gives hope of providing a unified approach to managing the Great Lakes and preventing out-of-basin withdrawals of water.<sup>144</sup> But, any implementation of the GLC is only as effective as it is enforceable.<sup>145</sup>

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140. Dellapenna, *supra* note 69, at 761.

141. 46 CONG. REC. S. 11405.

142. Dellapenna, *supra* note 30, at 863 Professor Dellapenna is the only scholar to have commented on this aspect of the legislative history of 2000 WRDA in relation to the GLC. He concludes, based on the comments of the two senators, that the 2000 WRDA is not anticipatory consent to the GLC. *Id.*

143. For a short discussion of Justice Scalia's general disgust with the use of legislative history, see Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 at 254-55 (1992); see generally Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239 (1995).

144. See generally Hall, *supra* note 9.

145. See Dellapenna, *supra* note 69, at 761.

The GLC is an interstate compact that is subject to the requirements of Article I, Section 10, Clause 3 of the U.S. Constitution, because it deals with areas of federal concern.<sup>146</sup> In order for the GLC to be enforceable, it must have the consent of Congress.<sup>147</sup> As long as the GLC has the consent of Congress, it is treated as federal law.<sup>148</sup>

Consent of Congress for interstate compacts can be implied or express.<sup>149</sup> Although the 2000 WRDA encourages the formation of something akin to the GLC,<sup>150</sup> it is a stretch to say that it is evidence of Congress explicitly consenting to the GLC. That said, the 2000 WRDA and the Weeks Act may have been sufficient evidence to suggest that Congress has implicitly consented to the GLC, despite the views of Senators Levin and Baucus.<sup>151</sup>

Yet, even if it were possible, or even probable, that Congress has implicitly consented to the GLC—because it is essential for the GLC to be enforceable in order to be effective—the Great Lakes states were wise not to rely solely on that possibility if they wish to prevent out-of-Basin water withdrawals and diversions.

The fear of that the citizens of the Great Lakes region that water from the lakes will be taken from the Basin and used for the gain of others is not an unreasonable one.<sup>152</sup> Massive diversions and withdrawals from the lakes have been proposed before.<sup>153</sup> There have been proposals to use the water of the Great Lakes to increase the navigability of the Mississippi River<sup>154</sup> and to recharge the Ogallala Aquifer.<sup>155</sup> More recently, the Great Lakes have faced a more insidious threat of water withdrawals, through companies bottling water, and selling it out of the Basin.<sup>156</sup> And, proposals

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146. GLC, *supra* note 1; see MUYS, *supra* note 73, at 252, 257.

147. U.S. CONST. art. I, § 10, cl. 3.

148. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852); see also *Cuyler v. Adams*, 449 U.S. 433, 442 (1981).

149. MUYS, *supra* note 73, at 255.

150. Water Resources Development Act, 42 U.S.C. § 1962d-20 (2000).

151. 46 CONG. REC. S. 11405.

152. See *Super Tuesday State Legislators Challenge Candidates to Restore Great Lakes, Outlaw Water Diversions*, PR NEWSWIRE, Jan. 31, 2008.

153. See *Great Lakes: State Leaders Reach Agreement on Water Use, to Hold Final Vote*, GREENWIRE, Nov. 21, 2005, at Spotlight vol. 10 no. 9.

154. See *Canada Sends US Note About Stance on Water Diversion*, WALL ST. J., July 11, 1988, § 1 at 12.

155. See *Saving the Great Lakes*, CHICAGO TRIBUNE, Feb. 16, 1985, at 8C.

156. See *Assessing the Environmental Risks of the Water Bottling Industry's Extraction of Groundwater: Hearing Before the Subcomm. on Domestic Policy of the H. Oversight & Government Reform Comm.*, 110th Cong. (2007) (statement of Noah D. Hall, Professor, Wayne State University Law School).

for massive water projects still come up the national political scene, as when Governor Bill Richardson, while campaigning in the Southwest, suggested to a Las Vegas, Nevada newspaper that perhaps the Great Lakes region should provide water to desert regions where there is insufficient water to support population expansion.<sup>157</sup>

Although there have been no major water projects recently, this fact does not lead to an inevitable conclusion that no more will be developed or proposed in the future. During times of water shortage, proposals for massive water diversion tend to proliferate.<sup>158</sup> And, as a consequence of global climate change, water shortages in the United States will increase in frequency and severity.<sup>159</sup>

Three decades ago, Jerome Muys argued that interstate compacts were an essential tool for effective trans-boundary water management.<sup>160</sup> He advised that, because the strength of an interstate compact was dependant on its status as federal law, "Congress should enact legislation stating its policy with respect to water compacts" so that the states can anticipate whether or not they need to take further action to have consent.<sup>161</sup> As demonstrated in this Note, what constitutes congressional consent for constitutional purposes<sup>162</sup> can be quite clear if Congress uses boiler plate language, but there are other methods that Congress may use to consent to a compact. These other methods may be promising alternatives to explicit consent. But if the compacting states want certainty that a compact is binding law, they would need to present the compact to Congress for its explicit approval.<sup>163</sup>

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157. See Catherine McClure, *At the Water's Edge: Great Lakes Compact Critical to Protecting our Resources*, ANN ARBOR NEWS, Jan. 20, 2008.

158. See generally REISNER, *supra* note 99.

159. RICHARD M. ADAMS & DANNELE E. PECK, DROUGHT AND CLIMATE-CHANGE: IMPLICATIONS FOR THE WEST (2002), available at <http://www.economics.noaa.gov/topics/climate.htm>.

160. MUYS, *supra* note 73, at 323–24.

161. *Id.* at 371.

162. See U.S. CONST. art. I, § 10, cl. 3.

163. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).