Aaron Rauh

**Literature Review II**

The Great Lakes-St. Lawrence River Basin Water Resources Compact is a legally binding agreement between the eight U.S. Great Lakes states – Wisconsin, Illinois, Indiana, Ohio, Pennsylvania, Michigan, Minnesota, and New York, that ran into some issues during its creation. The skeptics said that these states would never agree on anything.  But in December 2005, after a thorough public process that generated over ten thousand citizen and stakeholder comments, all eight Great Lakes governors put aside partisan and geographic differences and reached a deal.  State lawmakers carefully considered the Great Lakes compact and gave it nearly unanimous support.  Congress acted quickly and with strong bipartisan leadership both the Senate and House approved the Great Lakes compact.  President Bush signed it into law on October 3, 2008.

Most states and Canadian provinces had no issues at all in passing the compact; after all, it was designed to help protect the Great Lakes region’s water and indirectly, its economic future. As one can surmise, the Great Lakes region has been directly hit economically by the globalization of the regions multinational corporations that once drove the economy. Great cities like Cleveland, Pittsburgh and Detroit have fallen under hard times economically due to the significant decline in production – whether that is from steel mills or rubber factories or more recently, the American auto industry. The Great Lakes compact is designed to protect this regions greatest resource – its water.

The Great Lakes, as most know, hold a very significant amount of the world’s freshwater, and via the St. Lawrence River, the lakes are accessible to the Atlantic Ocean. The leaders of this region has realized that they need to protect this ultra-valuable commodity – both from exportation and from the federal government redirecting this freshwater to needy areas of the United States (i.e. the southwest and California). In theory, this Compact has numerous benefits and zero negative side effects. Other than protecting the region’s water as described above, the Compact also created new standards for water conservation and environmental protection for water use within the region.

“The significance of the Great Lakes compact goes beyond water protection.  It sets a precedent for the region coming together around our common values and interests.”

Unfortunately, the Compact ran into some resistance and issues on its way to being passed in a couple states primarily in Ohio and Wisconsin. I will be focusing on Ohio’s issues (at least for now) due to my strong ties to that area (I have lived in Ohio for my entire life). The main issue that arose during the Compacts time in the Ohio State legislature relate to the language of its preamble:

"Waters of the Basin are precious public natural resources shared and held in trust by the States"

The concern with this statement, or the “Held in Trust” issue, is that it could potentially affect the rights of property owners to a reasonable use of water. Many key actors involved in the creation and passage of the compact argued that this statement, again in the preamble, is **not** an operative part of the compact. The Compact prohibits diversions with limited exceptions and creates a flexible framework for each State to regulate water withdrawals using a common conservation standard as a floor. Because there are no operative provisions in the Compact concerning the public trust doctrine or the uses protected under the doctrine, the finding would not be considered by courts.

Many key players also cite Section 8.1.1 and section 8.1.2 to offset what the preamble might imply. Under Section 8.1.1 of the Compact, "[n]othing in this Compact shall be construed to affect, limit, diminish or impair any rights validly established and existing as of the effective date of this Compact under State or federal law governing the Withdrawal of Waters of the Basin." And under 8.1.2, “n]othing 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."

However, the creation of such an important compact must be completely sound as was argued by those who were concerned by the “Held in Trust” issue. Ohio State Senator Tim Grendell had been the leading opponent of the proposed Great Lakes compact, arguing that the compact would lead to a “taking” of private groundwater rights by extending the public trust doctrine to groundwater. Enacting the Compact as written, this would potentially **convert ground water and non-navigable surface water** that flows through or under one’s property **to public trust water**, giving the state and/or Council overreaching power to regulate Ohio property owners access to water that which they held a right to reasonable use. The main intention of this paper is to tie together all the significant opinions held by the people who were directly involved in the compact to forever close the door on this issue. This is my intention so that in the future, say 50 or 100 years from now when people read this piece of law who had no part in creating it and cannot access those who did cannot interpret this issue the wrong way. Tying all of these opinions together and ultimately publishing this would provide clear evidence of the intentions of the Compact and specifically how the Compact is **not** supposed to be interpreted.

The second part of my paper, which just recently came to my attention, is the new plan President Obama and the White House have - published in an official report - aimed at tackling national water rights. While ambitious, and using the passage of the Great Lakes Compact as a basis for reasoning, my view is that structuring, organizing, and ultimately passing such a law will be incredibly difficult and possibly ineffective. If a handful of states took several years to pass a mutually beneficial water rights law, how does the federal government intend to pass a national water rights law that must satisfy the needs and interests of all 50 states? The report preliminarily cites the key themes:

• The need for a strong, clear, overarching policy mandate and the setting of national ocean priorities;

• The need for high-level direction and policy guidance from a clearly designated and identifiable authority;

• The need for more consistent and sustained senior-level participation and attention on ocean-related issues from all member agencies and departments;

• The advantages of stronger linkages between management and science;

• The need for an improved, clear structure for ongoing and active engagement with State, tribal, and local authorities, and regional governance structures to address relevant issues; and

• The need for improved coordination with other Executive branch policy committees

Issues for my Professors and Peers to consider:

There currently is not a significant amount of literature on Obama’s project, as it is a new issue. As of now, I intend to relate the issues and problems that the states of the Great Lakes compact came across on its way to be passed and predict how this would translate to President’s hopes for a national water rights law. I surmise that as time progress this semester, more and more opinions of key actors in this issue will come to bear and I plan to again interview key figures that were involved in the passage of the Great Lakes Compact to get their opinions on the troubles that Obama’s plan could endure. As of right now, I feel that this is the best way to tie my first part of my paper to the second part. Any input on this plan would be much appreciated. Also, as we move forward in this process to the outline and first draft, it is likely that my aim will be to get the first part of my paper completed first and try to put off the new Federal water law until December so I can accumulate as many new resources as possible that will surface on this issue over the course of this fall. If this is not acceptable, I can come up with a more approvable plan.

Bibliography

Clayton, Mark. “Obama Administration Announces New Plan to Save Oceans, Will it Be Enough?” *The Christian Science Monitor*, September 24, 2009. http://www.alternet.org/‌water/‌142866/‌obama\_administration\_announces\_new\_plan\_to\_save\_oceans,\_will\_it\_be\_enough/‌?page=entire (accessed September 24, 2009).

Downing, Bob. “National Treasure.” *Akron Beacon Journal*, December 23, 2007. http://www.ohio.com/‌news/‌12783007.html (accessed August 13, 2009).

Gosman, Sara. “Testimony of Sara Gosman, Water Resources Attorney, National Wildlife Federation: Senate Bill 291.” Paper presented at Ohio Senate Environment and Natural Resources Committee, April 23, 2008.

“Great Lakes Compact.” Great Lakes Environmental Law Center. http://www.greatlakeslaw.org/‌glelc/‌great-lakes-compact.html (accessed September 30, 2009).

Great Lakes Law. http://www.glelc.org/‌blog/

Henry, Tom. “Great Lakes Water-Compact Backers, Foes Stand on Water Diversion Limits.” *Toledo Blade*, November 19, 2007. http://www.toledoblade.com/‌apps/‌pbcs.dll/‌article?AID=/‌20071119/‌NEWS06/‌711190388 (accessed August 13, 2009).

Kilbert, Kenneth K. “Response to Compact Section 1.3.1.a Concerns.” Kenneth K. Kilbert to Sean D. Logan, September 14, 2007

Logan, Sean D. “Great Lakes-St. Lawrence River Basin Water Resources Compact.” Power Point, Great Lakes Water Conference, University of Toledo College of Law, November 14, 2008. http://law.utoledo.edu/‌LIGL/‌Logan%202008.ppt (accessed August 14, 2009).

Myers, Cathleen. Interview by author, E-Mail, Summer 2009.

Scott, Michael. “Great Lakes Water Compact Weighs on Region’s Future.” *The Cleveland Plain Dealer*, April 6, 2008. http://blog.cleveland.com/‌metro/‌2008/‌04/‌great\_lakes\_water\_compact\_weig.html (accessed August 13, 2009).

THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY. *Interim Report Of The nteragency Ocean Policy Task Force*. Washington D.C., 2009.

http://www.whitehouse.gov/‌assets/‌documents/‌09\_17\_09\_Interim\_Report\_of\_Task\_Force\_FINAL2.pdf