

OUR SOVEREIGNTY AT RISK

The governors of the Great Lakes states have a plan for diverting water from the Great Lakes Basin. Under their scheme, neither Canada nor the provinces would have any right to approve or veto the diversion of Great Lakes waters regardless of their duration, scale or impact on the waters of this shared ecosystem.



Steven Shrybman

This is the conclusion I came to in a legal opinion commissioned by The Council of Canadians regarding the diversion of Great Lakes waters.

The governors' plan, which has implicit Congressional approval, also ignores the role of the International Joint Commission (IJC), which is supposed to approve significant diversions of Great Lakes waters.

In terms of binational relations, their scheme represents a unilateral approach for dealing with an international problem. This reflects a problematic trend by the U.S. to reject or marginalize international agreements, particularly those concerning the environment.

The governors' plan clearly presents a serious challenge to Canadian sovereignty. It would also open the door to NAFTA

claims based on the come-one-come-all rights accorded to foreign investors under that trade agreement.

Moreover, despite claims to the contrary, the governors' plan would allow large-scale water diversions to serve not just consumers located in their states, but industries, farms and communities located far from the basin.

WHAT'S ON THE TABLE

On July 19, 2004, the Council of Great Lakes Governors, along with the governments of Ontario and Quebec, published two draft agreements. Both concern the regulation of Great Lakes Basin waters, including large-scale diversions for use outside the basin.

One agreement is billed as a good-faith agreement among the eight Great Lakes states and two provinces regarding management of waters in the basin.

The other is a compact among the U.S. Great Lakes states to collaborate on approvals for the use and diversion of water from the Great Lakes. Unlike the agreement with the provinces, the compact will be binding and enforceable.

While these initiatives present a bilateral face, it is clear that the push for both the agreement and the compact comes from the U.S., where pressure is mounting to approve water diversions from the Great Lakes Basin to serve nearby communities.

Although some elements of the Annex may seem appealing at first glance, when considered in context, these positive features are eclipsed by the potential of the scheme to facilitate wholesale water diversions.

These would threaten the ecological integrity of the Great Lakes and seriously challenge Canadian sovereignty.

In simple terms, the U.S. compact would establish a scheme for authorizing diversions of Great Lakes waters, but impose no explicit limit on the quantity of water that may be diverted from the basin, the duration or term for such diversions, the purposes for which such waters may be used, or the geographic region that might be served by such diverted waters.

CHALLENGING CANADIAN SOVEREIGNTY

When it comes to the Great Lakes, the cornerstone of Canada-U.S. relations is the Boundary Waters Treaty of 1909, which establishes a binational regime for dealing with the lakes and other waters shared by the U.S. and Canada.

Under the treaty, which enshrines the principle of equality of access and use to Great Lakes waters, significant water diversions are approved by the International Joint Commission.

But the compact makes no reference to this critical IJC role, while proposing an independent approvals scheme based on procedures and standards that are in many ways incompatible with those of the treaty. This result would reduce the IJC to playing a bystander role, if indeed it is to play any role at all.

Certainly, co-operation among the states and provinces is vital if the ecological integrity of the Great Lakes is to be protected. But that co-operation must respect the constitutional and sovereign authority of both nations.

continued on page 6

OUR SOVEREIGNTY AT RISK

CONTINUED FROM PAGE 5

The scheme proposed by the governors, and supported in part by two provinces, fails both tests. First, it ignores the constitutional role of Canada's federal government. Second, it would establish an approvals scheme for out-of-basin water diversions that would be extraneous to the treaty and marginalize the role of the IJC.

TIME FOR CANADA TO TAKE A STAND

In fact, the federal government raised sovereignty concerns in early 2002 when commenting on the Great Lakes Charter Annex of 2001, which provided the template for the governors' and premiers' present plans. Ottawa complained that the standard proposed for water removals from the Great Lakes was too permissive and would open the door to long-distance, large-scale removals from the basin.

It also worried that implementing the Annex could "clash" with the Boundary Waters Treaty, thereby undermining the role of the IJC and weakening the protections the treaty affords.

But the governors and premiers proceeded in spite of these concerns and similar objections voiced by the IJC.

It is now time for our federal government to speak for Canada by making it clear that the U.S. compact and the companion agreement with the provinces should be scrapped.

Instead of the essentially unilateral regime now proposed by U.S. governments, Canada and the U.S. should negotiate to strengthen the Boundary Waters Treaty

by extending its application to all waters in the basin, including groundwater and tributaries to the five Great Lakes.

In addition, binational control over use and diversion of Great Lakes waters should be strengthened and the supremacy of the treaty clearly established in the event of conflicts with NAFTA or other international trade agreements.

Until such safeguards are in place, the moratorium on water diversion approvals advocated by the IJC in its 2000 report should remain in place.

Steven Shrybman is a partner in the law firm Sack Goldblatt Mitchell, who prepared a legal opinion on the diversion of Great Lakes water for the Council of Canadians. This editorial was originally printed in the Toronto Star.

THE FEDERAL GOVERNMENT NEEDS TO ENFORCE GREAT LAKES WATER PROTECTION

On January 11, the federal government released a statement that does nothing but reaffirm its position as an outsider in the negotiation of the protection of the Great Lakes. Moreover, the government's statement is significantly weaker than when it first expressed opposition to the Annex in 2001.

The Council of Canadians asserts that actions, not words, are needed from the federal government to protect the Great Lakes from imminent diversion threats and affirm Canada's jurisdiction over these shared waters.

While the federal government's statement "encouraged" that the Annex ban water diversions on both sides of the border, it made no commitment to stop the Annex from endangering the Great Lakes. Although Canada has essentially banned water diversions, there is nothing in place to prevent the U.S. from diverting water without limit under the Annex agreement.

Already, Waukesha, Wisconsin is trying to use the Annex process to divert water from the Great Lakes Basin. If this happens, the floodgates will be opened, and neither Canadian provinces nor the federal

government can stop the U.S. diversions.

The Council of Canadians is asking citizens to phone, fax, or e-mail the government to express their concerns and to demand action to stop the Great Lakes Annex.

Go to www.canadians.org to download your petition to protect the Great Lakes, and for other information on how to lobby on this important issue.

Sara Ehrhardt is the Water Campaigner for The Council of Canadians.