

January 2002

Fresh Water: Environment or Trade

Sanford E. Gaines

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

Sanford E. Gaines, *Fresh Water: Environment or Trade*, 28 Can.-U.S. L.J. 157 (2002)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol28/iss/25>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

FRESH WATER: ENVIRONMENT OR TRADE?

Sanford E. Gaines[†]

There is a bottle of water on the speaker's stand. The brand is called "Sahara Burst." It sounds like it could have come from North Africa, but if you take a close look at the label, the water in that bottle comes from Canada, from a spring in Ontario. Although the water was bottled in Canada, the company that packaged it is based in Houston. So, there you have it: water in the globalized marketplace.

Bottled water has been, from the beginning, clearly recognized in NAFTA (and it would presumably be recognized in the WTO) as a "good" in trade. Therefore, the way that either Canada or the United States manages access to that commercial good – that is, the import or export of that product – is subject to all of the familiar requirements of the international trade regime. I also believe that the distinction that has been drawn by the NAFTA parties in their statement between water as a resource and water as a good is a distinction that has only a small element of validity.¹ For most all practical purposes, I think it would break down rather quickly.

Nevertheless, that distinction was maintained in the U.S. government response to the International Joint Commission.² The IJC asked the Office of the U.S. Trade Representative to comment on the trade-related aspects of water management in the Great Lakes. The USTR response includes the following statement from a deputy trade representative: "The WTO simply has nothing to say regarding the basic decision by governments on whether to permit extraction of water from lakes and rivers . . ."³

That is actually, I think, a fair statement, but we must be careful about the limitations that are embedded in that statement. It says that the WTO has nothing to say about a decision whether to permit the extraction in the first place. Fair enough; if you want to have a national, provincial or local policy

[†] Law Foundation Professor of Law, University of Houston Law Center, Houston, Texas. B.A., *magna cum laude*, Harvard College; M.A., J.D., *cum laude*, Harvard University. Additional biographical information available at page xii.

¹ See Milos Barutciski, *Trade Regulation of Fresh Water Imports: The Phantom Menace Revisited*, 28 CAN.-U.S. L.J. 143, 144-46 (2002).

² INTERNATIONAL JOINT COMMISSION, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES, Appendix C, at 65 (2000), available at <http://www.ijc.org/boards/cde/finalreport/finalreport.pdf> [hereinafter IJC REPORT].

³ *Id.*

that says nobody may take any water out of this spring, lake or river; that is okay. Why would the WTO care? The policy does not, in and of itself, have any influence on trade or trade relationships. The U.S. statement discusses at some length the fact that decisions about management – especially the management of transboundary lakes and rivers such as those covered under the Boundary Waters Treaty⁴ that the United States has with Canada or the comparable treaties with Mexico⁵ – are covered by a whole body of international law on the use and allocation of international water courses, and this law has never been called into question by the international trade system.⁶ Thus, basic resource management decisions such as those concerning where water in its natural state goes, what the quality of the water should be, which types of users (as between agricultural and industrial users and so forth) are allowed to withdraw, whether a dam can be built and what consequences might follow for downstream users, are covered by the international law of water courses and do not impinge on trade relationships.

But, of course (just to be clear): if at some point you decide that your water resources can be privately appropriated and put into the stream of commerce – if Ontario allows the water from a spring to be withdrawn, bottled, and sold – then the management of the water resource may become an issue in terms of the international trade regime. Then, as Milos pointed out, you are in a system where the principles include the rule that you should not discriminate between local users and foreign users or between users from the United States and Bahrain, and you cannot, as part of that process, prohibit the exportation of that water. Even so, governments have substantial authority, unconstrained by trade rules, to manage their water resources. Even certain trade restrictions may be applied in the resource management context. GATT Article XX(g)⁷ provides a great deal of flexibility for resource conservation or limitation of access management rules to be put into place, so long as they do not violate the chapeau of Article XX, which says that trade restrictive measures to conserve natural resources should not arbitrarily or unjustifiably discriminate against other nations.⁸

⁴ Treaty Relating to Boundary Waters, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, T.S. No. 548.

⁵ Treaty Relating to the Waters of the Rio Grande, May 21, 1906, U.S.-Mex., 34 Stat. 2953, T.S. No. 455 (covering the upper Rio Grande basin); Treaty Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219, T.S. No. 994.

⁶ IJC REPORT, *supra* note 2, at 65.

⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(g), 61 Stat. A-11, A-61, 55 U.N.T.S. 194, 262 (incorporated into the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1154 (1994)).

⁸ *See id.*, art. XX(1).

In my remaining time, I would like to consider not where we are today but where we might be in the future in terms of the Great Lakes in particular, and to give you a view from the South. In that, I do not refer to the south shore of Lake Erie, but the southern border of the United States and the northern part of Mexico. It is a region, like many others in the world, where water is scarce, and allocation and use of water are life-and-death issues and have been for centuries. I will analogize what is going on in water management along the southern border to what is happening here in the Great Lakes Basin. I hope it gives you a different perspective on water issues, one that is germane to the U.S.-Canada and Great Lakes context.

WATER AND RESOURCE MANAGEMENT: DIMENSIONS OF CHANGE

The southern border water issues were the genesis of the infamous Harmon Doctrine. Mr. Judson Harmon was an attorney general of the United States in the late 19th Century.⁹ In the context of some burgeoning disputes between the United States and Mexico over our common rivers or shared rivers (the Colorado and the Rio Grande), Attorney General Harmon pronounced that waters in the United States were subject to the absolute sovereign control of the United States, which thus could unilaterally decide what it wanted to do with that water. Specifically, according to Harmon, the United States held no obligation at all to Mexico in terms of the amount of water available at or along the border because the upstream waters were exclusively U.S. resources. This Doctrine was abandoned not too long thereafter, and is now held in disrepute by modern-day international water lawyers.¹⁰ But I mention the Harmon Doctrine because it strikes me that the IJC recommendation for a presumptive policy that the Great Lakes governments “should not permit any proposal for removal of water from the Great Lakes Basin”¹¹ sounds of Harmon Doctrine overtones — this is our resource, and we alone will decide how it is used. The fact that two nations have joined in enunciating this version of the Harmon Doctrine does not automatically rescue it from “unilateralism.” The fresh water in the Great Lakes has world significance and potential beneficial users come from as far away as Asia.

⁹ Judson Harmon (1846-1927), a Cincinnati attorney, served as Attorney General from 1895-97 in the second Grover Cleveland administration. He later became governor of Ohio from 1909 to 1913. See *Judson Harmon*, at <http://www.ohiohistory.org/online/doc/ohgovernment/governors/harmon.html> (last visited Sept. 27, 2002).

¹⁰ The Harmon Doctrine has been almost universally rejected. See *Kasikili/Sedudu Island (Bots. v. Namib.)*, 39 I.L.M. 309, 381 (2000).

¹¹ IJC REPORT, *supra* note 2, at 47.

One commentator on the Rio Grande has observed: "We are slow to define the dimensions of change, slower to agree that it demands adaptation, and slowest of all in implementing needed adjustments, which are nearly always complex and difficult, requiring new political consensus and institutional change."¹²

There are three dimensions of change facing the U.S. and Canada even here in this water-rich northern region: (1) the increasing scarcity of fresh water in the world at large; (2) the increasing interconnectedness of the world communities (globalization, if you will); and (3) the changing awareness of the complex interactions between ecosystems and the complexities of different legal and management tools for managing those interactions. To implement a "no-export" or "no inter-basin transfers" policy is a rather simple-minded approach that ignores all three aspects of change. I am certainly *not* saying the U.S. has some right to Canadian water and that Canadians should make that water available. Rather, I will argue that how we frame the debate determines, in large part, the options that we will consider and the way that the debate will be resolved. Let us put it in academic terms as one writer did: "Discursive themes and strategies deployed in public debates shape ways that conflicts over . . . water resources are defined."¹³ The governments of the Great Lakes region, with IJC blessing, have deployed the "no export" strategy.¹⁴ That, in my view, is a strategy that will only provoke conflict and emotion rather than careful assessment and resolution. A prohibition on inter-basin transfer may be a necessary interim step. I think it is unsustainable as a long-term solution. To be fair, even the governments seem to recognize this, carefully avoiding an

¹² William deBuys, *Navigating the River of Our Future: The Rio POCO-Grande*, 41 NAT. RESOURCES J. 265 (2001).

¹³ Kathleen M. Sullivan, *Discursive Practices and Competing Discourses in the Governance of Wild North American Pacific Salmon Resources*, in REFLECTIONS ON WATER: NEW APPROACHES TO TRANSBOUNDARY CONFLICTS AND COOPERATION 163, 179 (Joachim Blatter & Helen Ingram eds., 2000).

¹⁴ The United States Congress initiated this strategy with a provision in the 1986 Water Resources Development Act, 42 U.S.C. § 1962d-20(d), that states that no diversion of the waters of the Great Lakes basin may occur without the unanimous approval of all the basin state governors. A 2000 amendment specifically applied this approval provision to bulk exports of water. Thus empowered, the eight U.S. governors and their counterpart Canadian provincial premiers adopted The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter, June 18, 2001, available at <http://www.cglg.org/projects/water/Annex2001.pdf>. The Annex includes a commitment not to approve any "withdrawals" of water from the Great Lakes basin (including groundwater) that are inconsistent with four announced principles. See *id.* at Directive No. 3. "In other words, the Great Lakes region has said, in effect, 'we're going to make some new rules, and anybody wanting to take our water has to follow those rules.'" Gary Ballasteros, *Great Lakes Water Exports and Diversions: Annex 2001 and the Looming Environmental Battle*, 32 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,611 (2002).

absolute “no exports” policy in their formal policies. I will return later to the nuanced conditions on exports or withdrawals in these pronouncements.

Relative Water “Scarcity” in the U.S. and Mexico

Imagine for a moment, if you can, the United States as a disadvantaged party here. It is disadvantaged in that it has rather less water per capita than does Canada. It is inconsistent with sustainable development concepts to ignore that element of disadvantage. Professor Alan Boyle defines “sustainable development” as development that benefits the disadvantaged without disadvantaging the needs of the future.¹⁵ Perhaps you will have an easier time appreciating this argument if I include the third North American partner, Mexico, which has inadequate supplies of fresh water throughout the country, but especially in the northern regions bordering on the United States (and the U.S. water supply is itself considerably constrained by our legal and equitable water obligations toward Mexico.). Should Mexico, which is taking steps to help protect Great Lakes water quality, be denied any access to that relatively abundant resource?

To be sure, inadequacy of supply to meet current needs is not a litmus test for an equitable claim for access to new resources. As Robert Adler has observed, “The regional water supply crisis, especially in the West, stems in part from a mismatch between water supplies and disproportionate water demands. . . . Per capita water use is considerably higher in the western states generally than in the East and Midwest . . .”¹⁶ Wasteful usage militates against an equitable claim. On the other hand, the West’s high per-capita use stems from widespread irrigation, so the equities and comparative benefits of agriculture and the opportunities for western irrigators to conserve water would then also need to be considered, and compared with the industrial and municipal uses and conservation opportunities that obtain within the Great Lakes region.

Equity and sustainable development aside, I think it is just impractical to imagine that the IJC can build a “Chinese wall” around the Great Lakes Basin, and then say that there will never be any transfer outside of this basin for any reason, or only on terms dictated by the governments within the region. Further, such a notion ignores the general norms of international law that nations or governmental entities have transboundary responsibilities and should, at a very minimum, consult with its neighbors before making

¹⁵ See generally Alan Boyle & David Freestone, *Introduction*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES* 12-14 (Alan Boyle & David Freestone eds., 1999).

¹⁶ Robert W. Adler, *Fresh Water — Toward a Sustainable Future*, in *STUMBLING TOWARD SUSTAINABILITY* 197, 215-16 (John C. Dernbach ed., 2002), *reprinted in* 32 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,167, 10,182 (2002).

irreversible resource management commitments. You cannot wall yourself off from the world.

The boundaries of the basin are more relevant than national boundaries in environmental terms but, ultimately, I do not think they can be maintained as impermeable boundaries. The boundaries are not impermeable even today. In fact, for the last hundred years, there have been and continue to be substantial diversions of water out of the Basin. The Chicago diversion is the largest example of water leaving the Basin, but there are many other diversions of water from *outside* of the Great Lakes Basin *into* the Great Lakes, particularly the Long Lake and Ogoki hydroelectric projects in Western Ontario (actually, they bring in more water than Chicago takes out, so there is a net gain).¹⁷ The reality is that the Great Lakes Basin is not a closed system, and it would be unwise to make policy based on that fallacious premise.

Regional Interconnectedness

I think we need a new concept for thinking about the relationship between the interests within the Great Lakes Basin and those outside the Basin that may have some legitimate claim for access to Great Lakes water. One concept that fits this situation well is the idea of a “hydrocommons.” A hydrocommons is defined as a “hybrid basin” encompassing the watersheds of both the sending (exporting) and receiving (importing) basins, “tied together by man-made plumbing.”¹⁸

What differentiates the hydrocommons approach from watershed based approaches to water quality management is that hydrocommons governance recognizes the environmental links between the region that sends or exports water and the region that receives water imports. In addition, a hydrocommons approach recognizes the environmental links between water transfers, water pollution of surface and ground waters, and aquatic ecosystems degradation.¹⁹

The notion of the hydrocommons focuses attention on the second element of change that I identified: the idea of increased interconnectedness. We need both legal strategies and institutional devices to enhance collaborative decisionmaking among the multiple stakeholders. Unilateral decisions – and

¹⁷ IJC REPORT, *supra* note 2, at 13.

¹⁸ Suzanne M. Michel, *Defining Hydrocommons Governance Along the Border of the Californias: A Case Study of Transbasin Diversions and Water Quality in the Tijuana-San Diego Metropolitan Region*, 40 NAT. RESOURCES J. 931, 934 (2000).

¹⁹ *Id.* at 932.

by unilateral I include declarations by the IJC or the Great Lakes Charter states and provinces, even though they are regional, bilateral entities – prohibiting exports or setting unilaterally-established conditions on withdrawals are simply incompatible with the multiple-stakeholder, interconnected view of the world. How broadly to define the group of stakeholders that have a legitimate interest in the water resources of the Great Lakes is a significant and complex question in itself,²⁰ to which I will return in the conclusion. But for now, I maintain that a self-imposed limitation of stakeholders to those with interests within the basin is in any case too narrow.

Conducting the discourse in hydrocommons terms does not necessarily mean that exports of Great Lakes water outside the basin should be permitted. As experts have observed, even though the Great Lakes store vast quantities of fresh water, that water is replenished only slowly, and withdrawals for consumptive use within the basin are already near the capacity of the system to sustain such withdrawals indefinitely.²¹ A hydrocommons discourse, though, at least enables consideration of the nature of existing and future uses within and outside the basin, the opportunities for conservation both within and outside the basin, and the environmental costs and benefits for any receiving basin as well as for the Great Lakes regime itself.

Resource Management Schemes

In an interconnected world where fresh water is scarce, the challenge for all parties is to devise and implement management schemes to make the available fresh water go as far as possible and to get it to the users most in need. A couple of examples from the arid southern regions may suggest

²⁰ Ballasteros notes that “the debate over water exports and diversions from the Great Lakes comes down to a question of ‘where do you draw the line?’ In other words, where is the boundary at which we say: ‘On this side of the line you are entitled to use Great Lakes water; and on that side of the line you are not.’” Ballasteros, *supra* note 14, at 10,612. See also Leticia M. Diaz & Barry Hart Dubner, *The Necessity of Preventing Unilateral Responses to Water Scarcity — The Next Major Threat Against Mankind this Century*, 9 CARDOZO J. INT’L & COMP. L. 1, 7, in which the authors distinguish between “equitable” use and “sustainable” use and then asking:

For example, if the Great Lakes are managed by Canada and the United States on an equitable and/or sustainable basis and another area of the world is in need of potable water, is it equitable to take water from the Great Lakes in order to assist that other region, even if it causes serious environmental consequences to the Great Lakes?

²¹ IJC REPORT, *supra* note 2, at 6 (noting that on average less than one percent of the water supply is renewed annually). Interestingly, the IJC Report also comments that large-scale diversions into and out of the basin and various man-made structures within the basin have had a much more significant effect on lake levels than water withdrawals. *Id.* at 20.

options other than the current Great Lakes model of political oversight of water withdrawals based on pre-determined criteria.

Customary international law on fresh water management is built on the concept of equitable uses, which has two aspects: (1) efficiency of uses, and (2) a system of equitable allocation or distribution of the resource amongst the various communities and interests that might be affected by it or have some need for it.

If we think about efficiency, the idea of market-based approaches comes into play. As soon as we talk about market-based approaches, however, we start to tiptoe back into the possibility that water might become a commodity with an economic value, and under some circumstances that value would come from its worth as a potable resource or irrigation resource for sale to someone outside the basin — the dreaded notion of exports.

But in modern environmental law, the sale and purchase of a resource through the “market” is not the only way to use a market-based approach. In fact, there is an ever-growing experience base in the U.S. west and southwest with market-based strategies for management of water as a resource. One commentator has classified these into three distinct strategies according to the interest involved in the “market” and the representative of that interest: “public good markets” in which government agencies or private parties can acquire in-stream flows; “ecosystem service markets” in which governments or others acquire interests in elements of the watershed ecosystem (such as forest lands or wetlands) so as to preserve their ecosystem service values; and a third strategy, in which the environmental managers/regulators become brokers for public or private transactions to accomplish environmental objectives in the region.²²

The leading example of the brokerage approach is the so-called CALFED Project in Central California.²³ CALFED was established as a true hydrocommons management entity, with the principal objective of assuring the environmental health of the San Francisco Bay-San Joaquin Delta estuary but with the recognition that much of the water that would naturally flow into that estuary is diverted far and wide outside the basin to city dwellers and agricultural irrigators from northern California all the way to San Diego. CALFED, as an institution, is a consortium of 15 state and federal agencies, and its planning process included many representatives for the competing ecological, agricultural and municipal interests at stake. An important element of the CALFED approach that has emerged from this planning are mechanisms that allow different participants in this system to buy and sell

²² See generally Barton H. Thompson, *Markets for Nature*, 25 WM & MARY ENVTL. L. & POL'Y REV. 261 (2000).

²³ See Glen Martin, *Northern California*, in ITT INDUSTRIES, GUIDE TO GLOBAL WATER ISSUES 23 (2001). For detailed analysis of CALFED, see Michel, *supra* note 18, at 954-64.

rights to water, with CALFED acting as the broker of the transactions. This is so that, presumably, the water will be allocated to the more efficient users — efficient not only in consumptive terms but also in terms of ecological improvements and ecosystem services. In CALFED and in other examples from the American West, participants in such water rights markets include government land and resources managers (such as the U.S. Fish and Wildlife Service), public and private consumptive users, and even environmental NGOs who may want to assure or restore natural in-stream flows. There is a system in California, Oregon and other places for governmental entities to acquire water rights for in-stream use or *in-situ* use for environmental benefits in terms of fisheries or other environmental aspects. In this way, the environmental uses are permitted to play along with the potential consumptive issues in terms of a market-based mechanism.

Another market-based or economic approach focuses more specifically on the many ecosystem services that hydrologic systems provide. Let me use the example of flooding, in both senses. On one hand, watersheds can be flood prevention devices; in the upper reaches of the watershed, the absorption capacity of undeveloped forest or grassland or wetlands helps prevent downstream flooding. Thus, options such as conservation easements, outright land purchases, or land use regulations can become part of watershed management for purposes of maintaining flow and protecting water quality.²⁴

In other systems, such as in the Colorado River Delta along and south of the U.S./Mexico border at the head of the Gulf of California, the ecosystem needs flooding. The typical seasonal pattern of the Colorado River, before man engineered the river, included annual spring floods from the snowmelt coming off the Rocky Mountains. Those floodwaters carried sediment that was spread out over the Colorado River Delta, and those nutrients supported a very rich biological regime, including substantial fisheries resources in the Gulf of California.²⁵ We need to recapture those ecosystem services. There are various ways to do that; some might be regulatory, while others might be market-based. The point is that if we stay focused on the hydrologic basin system in terms of ecosystem considerations, then simply saying no inter-basin transfers is a very simplistic and probably inadequate approach to a very complex situation. Inter-basin transfers might, in fact, *enhance* environmental quality in the basin, depending on how you manage those transfers and how you account for them. A system of transfers could capture beneficial transfers in one place and allow non-environmentally degrading

²⁴ For some examples, see Thompson, *supra* note 22, at 293-300.

²⁵ For more on the Colorado River Delta, see Jennifer Pitt et al., *Two Nations, One River: Managing Ecosystem Conservation in the Colorado River Delta*, 40 NAT. RESOURCES J. 819 (2000).

diversions in another. Of course, inter-basin transfers may not be part of the answer in all, or even in many, cases. Nevertheless, they should be included among the many potential strategies in devising an overall hydrocommons management regime.

I come back to the question of equity in the distribution. Equity, in itself, implies that there needs to be open decision making within the hydrocommons and recognition of the interests of multiple stakeholders. Markets may be one device to accomplish this goal, but you need other decisionmaking devices to capture *nonmarket* values and interests. Again, we have had some experience on the southwestern border with capturing or recognizing some of these interests. These interests may include, for example, those of indigenous peoples in terms of water rights that may be partly for consumptive use or associated with other traditional uses of the environment, such as fisheries or agriculture. These interests are not necessarily reflected in the market, but certainly they need to be reflected in the decisionmaking structures that are created around a water regime. In a transboundary context like the Great Lakes Region, this would include the need for both multi-jurisdictional local, state, governments and NGO collaboration across the border to make sure that the shared resource is managed through an open-door, participatory process. One model to look at is the CALFED process, which includes a Bay-Delta Advisory Council with more than 30 representatives “from the Native American tribes and the state’s leading urban, agricultural, business, environmental and fisheries interests.”²⁶ Ultimately, such collaborative decisionmaking may both stimulate and depend for its success on its “transformative” effect on redefining the interests of the parties, the preferences of the affected people, and indeed the decisionmaking process itself.²⁷

Henry King was waxing eloquent last night about the difficulty of getting people in the United States to even acknowledge the significance of our relationship with Canada and take it seriously. That may be true in terms of what goes on in Washington D.C. or what is printed in *The New York Times*, but I think those of you who live in this part of the country recognize that, at the state and local levels, there is a rich and relatively robust network of collaborative relationships across the border, in the Great Lakes context and in other contexts, that needs to be and can be captured to make this process reality.

²⁶ Michel, *supra* note 18, at 960.

²⁷ For an interesting examination of these institutional issues in the context of another complex water basin — the Chesapeake Bay — see Jon Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 379, 419-25 (2000).

CONCLUDING REMARKS

Let me conclude by coming back to the question of the Harmon Doctrine: should the peoples and governments of the Great Lakes Region, with its vast fresh water resources that are significant not only locally but internationally in terms of the total fresh water resources of the world, be allowed to view this resource as their own (albeit that these resources are in two countries)? Should the regional governments be permitted to demand that access be granted to that resource strictly on their own terms, in a kind of quasi-Harmon Doctrine? Or should not the region be considering the equitable interests, rights, or potential beneficial uses that others outside the region might have or want to make of this resource?

Knowledgeable people will immediately point out that both the Great Lakes Charter Annex 2001 and the IJC recommendations do, in fact, set forth equitable and technical criteria under which withdrawals from the Great Lakes may be allowed, and these criteria make no distinction between applicants for withdrawals from within the basin and those from more distant locations.²⁸ The larger question I am raising, however, is not whether the Great Lakes governments have established reasonable criteria for judging whether withdrawals or diversions should be permitted, but whether those governments should set themselves up as the sole and final arbiters of what the criteria should be and whether any particular proposal meets those criteria. The hydrocommons concept and notions of participatory, decisionmaking and collaborative institution building, developed in regions where water is scarcer, provide a more politically legitimate and environmentally sustainable approach.

In the long term, responsible resource management needs to reflect and incorporate a broader sense of obligation and consideration than the Great Lakes governments have evinced in their recent policies. Environmental groups, and the anti-globalization environmentalists most especially, are fond of talking about “community” and “culture” and the need to preserve these values. I think that is absolutely correct; those are important values. If we were to simply turn fresh water into a market commodity that is bought and sold to the highest bidder, we would run the risk of undermining or threatening those community and cultural values that are bound up in the context of the availability of and the traditional uses of water and the ecological values and services that the water and its associated resources

²⁸ Gary Ballasteros makes a point of emphasizing that Annex 2001, “by establishing a common conservation-based decisionmaking standard . . . rejects an outright ban on water diversions” and “makes no distinction on its face between in-basin and out-of-basin diversions.” Ballasteros, *supra* note 14, at 10,615.

represent.²⁹ We do not want to become beholden to what one writer called the “gospel of efficiency.”³⁰ Yet the scarcity of the Earth’s freshwater resources and its vital importance for life, environment, and culture makes efficiency in the use of water an inescapable consideration.

I leave you, at the end, with the larger question to which I think there is no easy answer but that must be answered by Great Lakes citizens and leaders as they think about how to oversee and conserve the unique water resources of their region: *whom* should we include as part of the community in which we live? The answer to that question has important consequences, for everyone in our community, both near and far, should be within the compass of legal and institutional consideration when making decisions that affect their interests and their lives.

²⁹ In his book review, David Yoskowitz reports on the work of Maria Rosa Garcia-Acevedo: “She argues strongly that the commodity view of water will only increase the problems between the two governments [Mexico and the United States] and the inhabitants of the region. When water begins to be defined by its cultural and community significance, then health change can begin.” David W. Yoskowitz, Book Review, 41 NAT. RESOURCES J. 540, 540 (2001) (reviewing REFLECTIONS ON WATER: NEW APPROACHES TO TRANSBOUNDARY CONFLICTS AND COOPERATION (Joachim Blatter & Helen Ingram eds., 2001)).

³⁰ See generally SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (U. Pitt. Press, 1999) (referring to turning policy decision-making over to a group of elite scientists and intellectuals, as opposed to allowing grassroots impulses to join in the process through their elected representatives).