

Improving Interstate Water Compacts One ADR Provision at a Time

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I. INTRODUCTION

Water is the most precious resource in the world, and there is no doubt that it is necessary for the continued existence of all life on Earth. Yet, water supplies across the world have been pushed to their limits by the overuse and poor management of available water sources. For some time now, countries around the world, the United States included, have experienced more frequent instances of water shortage and water scarcity. As the global environmental crisis grows in severity and scope, these problems will only be amplified. Clashes over water rights and use between neighbors have been a common occurrence for time immemorial. In today's interconnected global economy, the scale of these clashes has grown exponentially as the disputes are more often between cities, states, and countries.

In the United States—as aquifers, springs, lakes, and rivers begin to run dry or become so polluted as to no longer be usable—water shortages are on the rise across the country.¹ Water scarcity issues have long plagued the arid West and Southwest; now, the more lush northern and eastern states are beginning to feel the pinch.² For years, states have haggled over water rights and apportionment in America's federal courts, and many of these battles have made their way to the Supreme Court, which holds original jurisdiction over such interstate disputes.³ But the Supreme Court's docket is limited, lower courts across the country are over-extended, and many states do not have the time or resources for protracted legal battles over water rights and apportionment.⁴

Alternative dispute resolution (“ADR”) mechanisms to traditional, expensive, and lengthy litigation are desperately needed by both states and the judiciary. Multi-jurisdictional interstate water compacts are one such alternative.⁵ These negotiated compacts between one or more states specify terms of water usage and serve as binding agreements that become federal law after receiving approval from Congress.⁶ Interstate water compacts have long been favored as an effective alternative to traditional court litigation. Because the compacts allow states to set their own terms and conditions depending on their individual needs rather than rely on a sweeping all-or-nothing court

¹ Raymond Dake, *The Great Compromise: Overcoming Impasse in Interstate Water Compacts Through the Use of Alternative Dispute Resolution*, 77 UMKC L. REV. 789, 789 (2009) [hereinafter Dake, *The Great Compromise*].

² *Id.* at 789.

³ *Id.* at 789–90.

⁴ *Id.*

⁵ *Id.* at 790.

⁶ *Id.* at 790–91.

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ruling, they provide a more flexible resolution not available in a traditional litigation forum. However, time and again, these compacts have been ineffective in providing long-term solutions to water allocation because the agreements have lacked mechanisms to properly resolve interstate conflicts over water rights when they arise. Without an alternative forum to resolve a breach of the compact, parties are forced back into the courts to litigate their disagreement the traditional, adversarial way. Specifically, interstate water compacts need to contain provisions requiring parties to participate in some form of alternative dispute resolution process in order to resolve their differences collaboratively.

This note will begin in Part I by considering the history of water scarcity and the disputes resulting from that scarcity. Part II will analyze the effectiveness of and problems with current water compacts. Part III will further explore these benefits and drawbacks by studying the Great Lakes Compact between the U.S. and Canada. Lastly, Part IV will set forth suggestions for improvements to the water compacts through an ADR lens.

II. PART I: HISTORY OF WATER SCARCITY AND DISPUTES

A. *Global Water Availability*

Earth is often referred to as the ‘Little Blue Planet’ because 71% of its surface area is covered in water.⁷ Such a high number certainly sounds impressive, and yet so often we hear about droughts that have spanned decades, or people who have to walk for miles to reach the nearest water source, or communities in all parts of the world struggling daily to get enough water for subsistence. How can this be? If so much of our world is water, how can so many people be struggling to get enough?

The simple answer is that we humans cannot use most of the world’s water. About 97% of Earth’s water is saline, and of the 3% available to us, 68% is trapped in icecaps and glaciers, while another 30% is underground.⁸ Only less than 1% of the world’s freshwater is ‘readily’ available for human use and consumption.⁹ While modern technology has made drilling for groundwater easier and cheaper, it has also enabled humans to prematurely

⁷ Water Science School, *How Much Water is There on Earth?*, UNITED STATES GEO. SURVEY (Nov. 13, 2019), <https://water.usgs.gov/edu/earthhowmuch.html>.

⁸ *Id.*

⁹ PETER ANNIN, *THE GREAT LAKES WATER WARS* 3 (2018).

over consume and exhaust these—often nonrenewable—groundwater sources.¹⁰

B. *American Water Availability*

America is an affluent country by any measure, and in terms of freshwater resources, it is the third richest country in the world.¹¹ Home to the mighty Great Lakes, which hold 21% of the world's surface freshwater, and the Ogallala Aquifer, one of the largest in the world, the U.S. has approximately 3,069 cubic kilometers of freshwater at its disposal.¹² Given that the average American uses about 80–100 gallons of water per day, the U.S. has enough water for over 312 million people living a typical American lifestyle to have sufficient fresh water every day of his or her life.¹³

However, like all American wealth, water is not evenly distributed. Eastern states, which are provisioned by the Great Lakes and their connecting rivers, have the easiest access to freshwater, while the western and southwestern states have more frequently dealt with water scarcity because their sources are mainly below ground.¹⁴ For the continental United States, more than 95% of the country's freshwater can be classified as interstate because the bodies of water cross several state lines.¹⁵ Accordingly, managing this precious resource has always been a matter of interstate cooperation . . . at least in theory.¹⁶

¹⁰ Adam Reimer, *U.S. Water Policy: Trends and Future Directions*, NAT'L AGRIC. & RURAL DEV. POL'Y CTR. 1, 16 (2012), <https://aese.psu.edu/nardep/publications/working-papers/u-s-water-policy-trends-and-future-directions>.

¹¹ John Misachi, *Which Country Has the Most Fresh Water?*, WORLDTLAS (Sept. 24, 2018) <https://www.worldatlas.com/articles/countries-with-the-most-freshwater-resources.html>.

¹² *Id.*; Theresa R. Castor, *Discursively Constructing the Great Lakes Freshwater*, in *ADVANCES IN RESEARCH USING THE C-SPAN ARCHIVES* 33, 33–35 (Robert X. Browning ed., 2016); *see generally* PETER ANNIN, *UNDERCURRENTS: BENEATH THE OBVIOUS, A BRIEF HISTORY OF THE GREAT LAKES CHARTER* (2006).

¹³ Water Science School, *Water Q&A: How Much Water Do I Use at Home Each Day?*, UNITED STATES GEO. SURVEY (June 20, 2019), https://www.usgs.gov/special-topic/water-science-school/science/water-qa-how-much-water-do-i-use-home-each-day?qt-science_center_objects=0#qt-science_center_objects.

¹⁴ *See* Edward Janecek III, *Review of American Indian Water Rights and the Limits of Law*, 17 AM. INDIAN L. R. 677 (1992).

¹⁵ Connor B. Egan, *Shaping Interstate Water Compacts to Meet the Realities of the Twenty-First Century*, 6 KY. J. EQUINE, AGRI., & NAT. RES. L. 327, 327 (2014).

¹⁶ *See id.*

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C. *Water Compacts Overview*

Over the past several decades, as the effects of climate change have become more pronounced, and as humans have continued depleting and polluting existing water sources, water scarcity has led to many interstate conflicts over water usage.¹⁷ The majority of these conflicts have resulted in years-long federal court suits.¹⁸

Interstate water compacts (“IWCs”) offer an alternative solution to resolving interstate water conflicts. By providing signatory states with a set and final division of the water source or sources shared between them, these compacts allow states to avoid lengthy and costly water apportionment litigation.¹⁹ Such compacts typically include a designation of minimum flow levels that the upper states must maintain to the lower state(s).²⁰ In 1922, the Colorado River Compact became the first IWC to be ratified and enacted in the United States.²¹ Since then, over thirty IWCs have been ratified across the country, and they remain a popular method for allocating water supplies and determining water rights, particularly for western states.²² And yet, these compacts have often failed to live up to their promise of being a reasonable alternative to traditional litigation. The reasons for these failures will be further explored in Parts II and IV, but suffice to say, many compacts fail because they lack a proper alternative dispute resolution mechanism.²³

III. PART II: EFFECTIVENESS AND PROBLEMS WITH INTERSTATE WATER COMPACTS

Interstate water compacts have a number of benefits and drawbacks, and the following section will delve into some of the most common benefits and drawbacks seen in modern IWCs.

¹⁷ Raymond Dake, *Trout of Bounds: The Effects of the Federal Circuit Court of Appeals’ Misguided Fifth Amendment Takings Analysis in Casitas Municipal Water District v. United States*, 36 COLUM. J. ENVTL. L. 59, 113 (2011) [hereinafter Dake, *Trout of Bounds*].

¹⁸ *Id.* For example, in *Arizona v. California*, California spent over fifty million dollars over the course of ten years while litigating a water dispute with Arizona. *See* 547 U.S. 150 (2006).

¹⁹ Dake, *Trout of Bounds*, *supra* note 17, at 114.

²⁰ Dake, *Trout of Bounds*, *supra* note 17, at 114.

²¹ Dake, *Trout of Bounds*, *supra* note 17, at 114.

²² Dake, *Trout of Bounds*, *supra* note 17, at 114.

²³ Dake, *The Great Compromise*, *supra* note 1, at 796; *see infra* Parts II and IV.

A. *Water Compact Benefits*

The primary aims of an IWC are: (1) resolving future water disputes between signatories, (2) apportioning shared water resources, and (3) “bar[ing] non-contracted use of water without explicit permission.”²⁴ These compacts have many attractive qualities, the most prominent of which is the autonomy they grant states in determining their own water apportionment agreements. IWCs provide states with “the best opportunity” to resolve their water disputes outside of the court system, thus allowing them to maintain personal control over interstate water resources.²⁵ During the twentieth century, IWCs gained favor over judicial resolutions because they allowed states to jointly determine the efficient use and equitable apportionment of shared rivers, lakes, aquifers, and other water resources.²⁶

By empowering states to handle interstate water management among themselves rather than automatically turning to the courts, IWCs “avoid the uncertainties and costs of litigation and the vagaries of congressional legislation,”²⁷ while also promoting interstate cooperation.²⁸ The Supreme Court itself has made its own belief that states should resolve interstate water conflicts among themselves abundantly clear on several occasions.²⁹ Because interstate water conflicts are “more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of . . . the States . . . than by proceedings in any court,” states should look to IWCs first and litigation second.³⁰ States have a vital interest in their own waters and their citizens’ access to those water sources, as well as intimate knowledge of any unique regional variables.³¹ Having vital interest and intimate knowledge make states, in many ways, more qualified than courts to resolve interstate water disagreements.³²

²⁴ Egan, *supra* note 15, at 332.

²⁵ Dake, *The Great Compromise*, *supra* note 1, at 793.

²⁶ Egan, *supra* note 15, at 334.

²⁷ Jerome C. Muys et al., *Utton Transboundary Res. Center Model Interstate Water Compact*, 47 NAT. RES. J. 17, 23 (2007).

²⁸ Egan, *supra* note 15, at 334.

²⁹ George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time to Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764, 767 (2005); see, e.g., *New York v. New Jersey*, 256 U.S. 296, 313 (1921) and *Texas v. New Mexico*, 462 U.S. 554, 575 (1983).

³⁰ Sherk, *supra* note 29, at 767–68 (quoting *New York v. New Jersey*, 256 U.S. at 313).

³¹ Sherk, *supra* note 29, at 768 (citing *Texas v. New Mexico*, 462 U.S. at 575).

³² Sherk, *supra* note 29, at 768 (citing *Texas v. New Mexico*, 462 U.S. at 575).

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Economic protections are central to any IWC, and these protections are intrinsically linked to states maintaining their autonomy.³³ IWCs prevent signatory states from overusing and depleting shared water resources by creating set allocations and usually instituting some form of sanction in the event that those allocated amounts are exceeded.³⁴ Since each state has a certain amount of water over which they typically have sole control and rights, they can develop water infrastructure and use their water resources as they see fit.³⁵ Likewise, ‘slower’ states, states that have not developed as robust a water infrastructure, do not have to worry about the ‘faster’ state(s) completely depleting their shared water resources.³⁶

B. *Water Compact Drawbacks*

And yet, despite the many benefits offered by IWCs, the last half-century has seen a steady rise in conflicts over IWCs.³⁷ One study found that the administrative bodies tasked with overseeing some IWCs were effective only in implementing operational-level changes and floundered when asked to “address more complex issues, such as ‘deep-seated conflicts’ between states.”³⁸ In cases where the conflict involved multiple states making a collective choice, the issue consistently made its way to the Supreme Court for resolution.³⁹ As a result, the same study concluded “that judicial venues might be better equipped ‘for revising and adapting compacts to better fit changing circumstances.’”⁴⁰

One of the primary reasons states continuously end up turning to litigation is the fact that many IWCs lack alternative dispute resolution mechanisms for overcoming impasses between compact signatories.⁴¹ In fact, of the thirty-plus IWCs in the United States, “fewer than ten contain

³³ Egan, *supra* note 15, at 332.

³⁴ Egan, *supra* note 15, at 332

³⁵ Egan, *supra* note 15, at 332

³⁶ Egan, *supra* note 15, at 332

³⁷ Egan, *supra* note 15, at 332

³⁸ Egan, *supra* note 15, at 334 (analyzing the effectiveness of fourteen different water compacts in the American West through a study in 1999 by Edella Schlager and Tanya Heikkila).

³⁹ Egan, *supra* note 15, at 334.

⁴⁰ Egan, *supra* note 15, at 334.

⁴¹ Dake, *The Great Compromise*, *supra* note 1, at 793; *see, e.g.*, Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105–105, 111 Stat. 2233 (1997); Apalachicola-Chattahoochee-Flint River Basin Compact, 111 Stat. 2219 (1997); Pecos River Compact, Pub. L. No. 81–91; 63 Stat. 159 (1949); Arkansas River Compact, Pub. L. No. 81–82, 63 Stat. 145 (1949); Colorado River Compact, Pub. L. No. 70–642, 45 Stat. 1057, 1058–59, 1064–65 (1922).

mechanisms of ADR to resolve disputes due to impasse.”⁴² This number includes the Great Lakes Compact, which, as will be discussed later, can easily fall prey to stalemates because the Great Lakes Resources Council has eight voting members and no way to break a tie should one occur.⁴³

Furthermore, even in cases where states are able to resolve complex issues amongst themselves, there is no guarantee that these conflicts will remain resolved.⁴⁴ Since IWCs are made by states, some people have suggested that the Reserved Powers Doctrine may allow those states to later withdraw from existing compacts if “the state’s compact obligation interferes with its continuing ability to protect public water uses within its borders.”⁴⁵ If states can so easily withdraw themselves from water compacts, it brings into question whether drafting them in the first place is even worth it.

Another weakness of IWCs—exposed by the Pecos River Compact—is the potential for stalled or laboriously sluggish negotiations.⁴⁶ When a dispute arose between Texas and New Mexico under their IWC, for example, it took them over twenty years to resolve the issue.⁴⁷ This is a completely unacceptable amount of time in the event of an emergency or crisis situation, both of which are becoming more likely to occur as time goes on and climate change continues. Moreover, the Pecos River Compact dispute revealed that an IWC’s adoption as enacted federal law means that the Supreme Court cannot amend or alter any faulty provisions.⁴⁸ While a lack of federal judicial review may not spark immediate alarm, but where states can amend their compacts without any judicial oversight, there is possibility of unchecked amended compact disputes burdening the courts.

IV. PART III: THE GREAT LAKES COMPACT: A CASE STUDY

A. *Great Lakes Overview*

Encircled by eight American states and two Canadian provinces, the five Great Lakes of Superior, Michigan, Huron, Erie, and Ontario form about

⁴² Dake, *The Great Compromise*, *supra* note 1, at 796.

⁴³ Great Lakes—St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, 122 Stat. 3739, 3744 (2008) [hereinafter Great Lakes Compact]. For full discussion and analysis of the Great Lakes Compact, see also *infra* Part III.

⁴⁴ Sherk, *supra* note 29, at 818–19.

⁴⁵ Sherk, *supra* note 28, at 819 (quoting Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105 (2003) (noting that a state’s IWC ratification could potentially be reversed by a subsequent legislature)).

⁴⁶ Egan, *supra* note 15, at 336.

⁴⁷ Egan, *supra* note 15, at 336.

⁴⁸ Egan, *supra* note 15, at 336.

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2,000 miles of the over 5,000-mile-long border between the U.S. and Canada.⁴⁹ Two-thirds of the Great Lakes, which cover around 95,000 square miles, fall within U.S. jurisdiction, and of the 300,000 square miles of drainage basin surrounding the lakes, 59% lies within U.S. borders.⁵⁰ The Great Lakes collectively hold 90% of the freshwater in the U.S., 84% of the freshwater in North America, and 21% of the freshwater in the *world*, making them the largest surface area of freshwater on planet Earth.⁵¹ However, only about 1% of all that water is renewed each year through rainfall, snowfall, and groundwater.⁵² The Great Lakes are “a primary influence on the quality of life in the [basin] region,”⁵³ and for the forty million U.S. and Canadian citizens relying on the Great Lakes for their drinking water, “nothing defines their relationship with the environment more than [. . .] their sacred ‘Sweet Water Seas.’”⁵⁴

The lakes have long played a vital role in the U.S. and Canada’s national economies, as well as the basin’s regional economies.⁵⁵ The Great Lakes basin supports the third largest economy in the world, with a GDP of about \$6 trillion.⁵⁶ Industries such as trade, education and health, and manufacturing provide over 51 million jobs, and 65 million pounds of fish are harvested from the lakes each year.⁵⁷ Farmers within the watershed produce corn, soybeans, hay, milk, and other food products, and the area is known for its steel and chemical industries.⁵⁸ Annually, over 200 million tons of cargo is shipped via the lakes, and over 50% of U.S.-Canadian trade occurs in the

⁴⁹ Richard B. Bilder, *Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation*, 70 MICH. L. REV. 469, 473 (1972).

⁵⁰ *Id.*

⁵¹ *Great Lakes Ecoregion*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN. (Feb. 2019), [https://www.noaa.gov/education/resource-collections/freshwater/great-lakes-ecoregion#:~:text=Threats%20to%20the%20Great%20Lakes%20ecosystems%2C%20include%20invasive%20species%2C,industrial%20areas%20reduce%20water%20quality;Castor,supra note 12, at 33, 35](https://www.noaa.gov/education/resource-collections/freshwater/great-lakes-ecoregion#:~:text=Threats%20to%20the%20Great%20Lakes%20ecosystems%2C%20include%20invasive%20species%2C,industrial%20areas%20reduce%20water%20quality;Castor,supra%20note%2012,at%2033,35).

⁵² ANNIN, *supra* note 9, at 13.

⁵³ Peter V. MacAvoy, *The Great Lakes Charter: Toward a Basinwide Strategy for Managing the Great Lakes*, 18 CASE W. RES. J. INT’L L. 49, 50 (1986).

⁵⁴ Scott Gordon, *The Battles That Shaped Great Lakes Water Politics*, WISCONTEXT (Apr. 24, 2018, 11:50 AM), <https://www.wiscontext.org/battles-shaped-great-lakes-water-politics>; ANNIN, *supra* note 9, at 12.

⁵⁵ MacAvoy, *supra* note 53, at 50.

⁵⁶ Jeff Desjardins, *The Great Lakes Economy: The Growth Engine of North America*, VISUAL CAPITALIST (Aug. 16, 2017), <https://www.visualcapitalist.com/great-lakes-economy/>.

⁵⁷ *Id.*

⁵⁸ *Great Lakes Ecoregion*, *supra* note 51.

basin.⁵⁹ Canada is the top global customer for the Great Lakes states' goods, while America is that for Ontario and Quebec's goods.⁶⁰

B. *History of the Great Lakes Compact*

For over a century, state governors and provincial premiers have collaborated to protect and preserve the Great Lakes, resulting in landmark treaties and legislations, including the Boundary Waters Treaty of 1909, the Great Lakes Charter of 1985, the Great Lakes Annex of 2001, and the Great Lakes Agreement of 2005.⁶¹ The Great Lakes Compact of 2008 and its parallel Canadian legislations are the culmination of all of these efforts.

Proposed by the Canadians, the International Boundary Waters Treaty of 1909 was meant to prevent either the U.S. or Canada from removing water from the lakes without permission from the other party.⁶² To this end, the Treaty created the International Joint Commission of the United States and Canada ("IJC") to arbitrate water apportionment disputes between the two nations.⁶³ The IJC, which has an equal number of Canadian and U.S. representatives, was granted jurisdiction to decide disputes over obstructions and diversions on either side of the border affecting the lakes' natural levels and flows.⁶⁴ The IJC still exists today, and under the Great Lakes Compact of 2008, it continues to fulfill its original arbitrating function in conjunction with the Great Lakes Resources Council.⁶⁵

The Boundary Waters Treaty remained the primary agreement between the U.S. and Canada governing the Great Lakes for decades after 1909. It was not until the latter part of the century that the Great Lakes states and provinces realized they needed additional measures to protect the lakes. Numerous water diversion schemes and proposals eventually spurred the Great Lakes U.S. governors and Canadian premiers to establish the Great

⁵⁹ Desjardins, *supra* note 56.

⁶⁰ Desjardins, *supra* note 56.

⁶¹ *A Brief History of the Great Lakes Charter*, WORDPRESS (Dec. 2, 2006), <https://waterwars.wordpress.com/2006/12/02/a-brief-history-of-the-great-lakes-charter/>; ANNIN, *supra* note 9, at 75; see *Our Waters: The Great Lakes Compact*, UNIV. OF WISCONSIN-MILWAUKEE & THE GREAT LAKES WATER INST. (Mar. 2009), <https://milwaukeekeeper.org/wp-content/uploads/2015/04/Great-Lakes-Compact-History.pdf>.

⁶² Jacqueline Phelan Hand, *Protecting the World's Largest Body of Fresh Water: The Often Overlooked Role of Indian Tribes' Co-Management of the Great Lakes*, 47 NAT. RES. J. 815, 823 (2007).

⁶³ *Id.*

⁶⁴ *Id.*; Mark Squillace & Sandra Zellmer, *Managing Interjurisdictional Waters Under the Great Lakes Charter Annex*, 18 NAT. RES. & ENV'T. 8, 9 (2003).

⁶⁵ Squillace & Zellmer, *supra* note 64, at 9.

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Lakes Governors' Taskforce on Water Diversion and Great Lakes Institutions ("Taskforce").⁶⁶ Staffed with representatives from all ten U.S. and Canadian jurisdictions, the Taskforce was assigned to create an agreement that would enable the Great Lakes governors and premiers to veto and regulate future proposed diversions.⁶⁷

The Taskforce's work culminated in the Great Lakes governors and premiers signing the Great Lakes Charter on February 11, 1985 in Milwaukee, Wisconsin.⁶⁸ The Charter codified Lake Michigan's status as a "border-water," something the Boundary Waters Treaty failed to do since Lake Michigan is wholly within U.S. jurisdiction, and it provided the Great Lakes states and provinces with a mechanism for resolving water disputes too small to trigger the Boundary Waters Treaty.⁶⁹ However, the Charter was ultimately only a good-faith declaration of principles and lacked both legal authority and enforcement mechanisms.⁷⁰ Yet despite this glaring weakness, the Charter managed to protect the Great Lakes for thirteen years.⁷¹

In 1998, a Canadian company acquired permits from Ontario to annually withdraw 160 million gallons of water from Lake Superior to be shipped to Asia.⁷² Under the existing agreements and laws, the permit was perfectly legal, and Ontario was able to issue its permits without informing or gaining approval from the other states and provinces.⁷³ However, when the news of the permit went public, leaders on both sides of the border were incensed, and the Great Lakes governors and premiers realized that they would need more than a good-faith agreement to protect the lakes. Three years later, on June 18, 2001, the Great Lakes governors and premiers signed the Great Lakes Charter Annex of 2001 at Niagara Falls, New York.⁷⁴ The Annex amended the Charter and officially committed the states and provinces to developing a new, legally binding policy for the collective management of the Great Lakes.⁷⁵

This commitment soon led to the 2005 Great Lakes Agreement, which the Great Lakes governors and premiers signed on December 13, 2005 in

⁶⁶ MacAvoy, *supra* note 53, at 53–54.

⁶⁷ MacAvoy, *supra* note 53, at 54.

⁶⁸ MacAvoy, *supra* note 53, at 55.

⁶⁹ ANNIN, *supra* note 9, at 75–76.

⁷⁰ MacAvoy, *supra* note 53, at 57.

⁷¹ Alan M. Schwartz, *The Canada-US Environmental Relationship - Calm Waters but Slow Sailing*, 60 INT'L J. 437, 441 (2005).

⁷² *Id.*

⁷³ ANNIN, *supra* note 9, at 196.

⁷⁴ *A Brief History of the Great Lakes Charter*, *supra* note 61.

⁷⁵ *See Our Waters: The Great Lakes Compact*, *supra* note 61.

Milwaukee, Wisconsin.⁷⁶ The Agreement provided a framework for how the Great Lakes states and provinces would regulate water use and withdrawals within their jurisdictions, protect and restore their freshwater resources, and codify the terms of the Agreement into their respective nation's laws.⁷⁷ However, similar to the Charter, the Agreement lacked legal standing because it was a contract between regional leaders rather than national governments.⁷⁸ Of course, the inability to create an international treaty did not preclude governors and premiers from adopting parallel water legislation on either side of the border in order to surround the Great Lakes with a standard set of water-management policies.⁷⁹

Shortly after signing the Agreement, the state governors submitted the Great Lakes Compact to their respective legislatures for approval so that it could then be sent to Congress and then to the president for ratification.⁸⁰ While substantively identical to the Agreement, the Compact was an American directive that would only apply to the Great Lakes states and not the provinces and, if adopted by all eight state legislatures and Congress, could become federally binding law.⁸¹

Since Ontario and Quebec could not be included in the U.S. Compact, the premiers drafted their own pieces of legislation to codify the terms of the Agreement into provincial law.⁸² In Ontario, the Legislative Assembly ratified the Safeguarding and Sustaining Ontario's Water Act in 2007, and Quebec's National Assembly passed National Assembly Bill 92 in 2008.⁸³ Like the U.S. Compact, Ontario's Act and Quebec's Bill were virtually indistinguishable

⁷⁶ *Id.*; *A Brief History of the Great Lakes Charter*, *supra* note 61.

⁷⁷ Noah Hall, *Québec National Assembly Considers Comprehensive New Water Law; Affirms Surface Water and Groundwater are Part of the Common Heritage of the Québec Nation and Safe Water is a Human Right*, GREAT LAKES L. (June 2008), <https://www.greatlakeslaw.org/blog/2008/06/qu%C3%A9bec-national-assembly-considers-comprehensive-new-water-law-affirms-surface-water-and-groundwater-are-part-of-the-common-heritage-of-the-qu%C3%A9bec-nation-and-safe-water-is-a-human-right.html>.

⁷⁸ ANNIN, *supra* note 9, at 212 (U.S. federal law forbids individual states from signing treaties with foreign powers).

⁷⁹ ANNIN, *supra* note 9, at 212.

⁸⁰ Press Release, Donna Cansfield, Minister of Nat. Res., Ontario Applauds U.S. Ratification of Great Lakes Water Compact (Oct. 16, 2008), <https://news.ontario.ca/en/release/87493/ontario-applauds-us-ratification-of-great-lakes-water-compact>; Susan Saulny, *Ban Near on Diverting Water from Great Lakes*, N.Y. TIMES (Sept. 22, 2008), <https://www.nytimes.com/2008/09/23/us/23lakes.html>.

⁸¹ ANNIN, *supra* note 9, at 212.

⁸² Press Release, *supra* note 80; Hall, *supra* note 77.

⁸³ Press Release, *supra* note 80; Hall, *supra* note 77.

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from the Great Lakes Agreement regarding their goals, provisions, and procedures. These pieces of legislation served as a way to transform an international good-faith agreement into obligate national policy.

C. *The Great Lakes Compact*

Three years after the Great Lakes Agreement was signed, Congress ratified the Great Lakes Compact, and President George W. Bush signed it into law on October 3, 2008.⁸⁴ While the Compact has numerous provisions, five stand above the rest. First, the Compact bans all future diversions and withdrawals from the Great Lakes to areas outside the basin, with only a few strict exceptions.⁸⁵ Second, the Compact establishes the Standard of Review and Decision, which requires all the states to follow a common system for managing water resources.⁸⁶

Third, the Compact commits the states to developing strategies to “strengthen the scientific basis for sound Water management decision-making.”⁸⁷ Fourth, the Compact creates the Great Lakes Resources Council (“Council”), which serves as the Compact’s body politic and consists of the eight Great Lakes state governors.⁸⁸ The Canadian premiers serve as “associate members of the council’s board of directors” and hold power similar to their American counterparts.⁸⁹ And fifth, Article 7, Section 7.2 of the Compact requires states to settle disputes via alternative dispute resolution (“ADR”) methods, the procedures for which are decided by the Council.⁹⁰

⁸⁴ Press Release, *supra* note 80.

⁸⁵ Great Lakes Compact, *supra* note 43, at 3752. In the rare cases that exceptions are made, those exceptions would require the unanimous approval of the eight governors in consultation with the two premiers. *Id.* at 3746.

⁸⁶ Great Lakes Compact, *supra* note 43, at 3752 (hoping that the standard will lessen future squabbles over appropriate water use).

⁸⁷ Great Lakes Compact, *supra* note 43, at 3742–43 (establishing a “shared duty to protect, conserve, restore, improve and manage” the lakes’ water “for the use . . . of all their citizens, including generations yet to come”).

⁸⁸ Great Lakes Compact, *supra* note 43, at 3744.

⁸⁹ Press Release, *supra* note 80.

⁹⁰ Great Lakes Compact, *supra* note 43, at 3760–61 (“Desiring that this Compact be carried out in full, the Parties agree that disputes between the Parties regarding interpretation, application and implementation of this Compact shall be settled by alternative dispute resolution . . . The Council, in consultation with the Provinces, shall provide by rule procedures for the resolution of disputes pursuant to this section”).

1. *COMPACT POSITIVES*

The Great Lakes Compact's recognition of "the importance of using ADR as an alternative to litigation" provides insights into current trends towards using ADR in interstate water compacts.⁹¹

Generally, ADR avoids the time and expense incurred by litigation, proactively addresses disputes, and provides a forum in which a wide range of interested groups may participate.⁹² Within the specific context of the Compact, and all IWCs generally, the ADR mechanism allows the parties to select a water-apportionment expert as a mediator or arbitrator.⁹³ These experts bring the benefit all mediators do—serving as a neutral party to assist in reaching the most equitable remedy for all parties involved, and their water expertise makes them uniquely qualified to assess the situation in a way judges and lawyers cannot.⁹⁴

The Compact and its Canadian counterparts provide broad and comprehensive dispute resolution procedures that go beyond a general agreement to engage in ADR.⁹⁵ In addition to entitling any aggrieved person—including states and provinces—to a hearing before the Council or pursuant to relevant administrative procedures and laws, the Compact also provides for public participation, consultation with federally recognized tribes, and negotiations between parties.⁹⁶

The Compact's provision that the Council will decide the ADR mechanism by which disputes are resolved has a twofold benefit. First, by allowing the Council to determine the ADR procedure, the disputing parties do not need to struggle and haggle with each other over that aspect of the process.⁹⁷ This removes one major stumbling block in the ADR process by making it less likely that the parties will become locked in a standoff.⁹⁸ With that particular point of contention and frustration removed, parties can direct their focus towards actually resolving their dispute and hopefully come to the mediation or arbitration table with a less hostile frame of mind.⁹⁹ This in turn increases the chance of success in reaching an ADR-driven solution and

⁹¹ Dake, *The Great Compromise*, *supra* note 1, at 799.

⁹² Dake, *The Great Compromise*, *supra* note 1, at 794.

⁹³ Dake, *The Great Compromise*, *supra* note 1, at 794–95.

⁹⁴ *See* Dake, *The Great Compromise*, *supra* note 1, at 795.

⁹⁵ Austen L. Parris, *Mixed Blessings: The Great Lakes Compact and Agreement, the IJC, and International Dispute Resolution*, 2006 MICH. ST. L. REV. 1299, 1304 (2006).

⁹⁶ Great Lakes Compact, *supra* note 43, at 3761; Parris, *supra* note 95, at 1304.

⁹⁷ Dake, *The Great Compromise*, *supra* note 1, at 801.

⁹⁸ Dake, *The Great Compromise*, *supra* note 1, at 801.

⁹⁹ Dake, *The Great Compromise*, *supra* note 1, at 801..

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decreases the likelihood of future litigation.¹⁰⁰ Second, because the Council acts as a semi-objective third party, it is better equipped than the disputing parties to decide which ADR procedure to use.¹⁰¹ While the Council certainly has a stake by virtue of its members and its role in the Great Lakes basin, it can still consider the benefits and drawbacks of different ADR methods more clearly than the conflicting parties.¹⁰² Were the decision left to the parties, they might naturally be tempted to find a method that favors their side, while also being reluctant to choose a binding ADR method for fear of obligating themselves to an unfavorable resolution.¹⁰³ Moreover, the governors and premiers have both an intimate understanding of the basin and are better able to relate to the disputing parties than an intervening federal decisionmaker.¹⁰⁴

2. COMPACT NEGATIVES

The Compact and its ADR provision are not without their flaws. For one thing, the Compact itself weakens the IJC's powers by creating a regional authority with equal, if not greater, power than the previously established international authority.¹⁰⁵ The Compact also provides only a "very weak enforcement mechanism for the Council's decision."¹⁰⁶ In fact, the only method by which the Council can force compliance is through the courts.¹⁰⁷

As for the ADR provision, while allowing the Council to determine the ADR method has its benefits by not providing any framework or requirements for what methods may be used and considered, the Compact leaves the decision entirely in the hands of ten individuals.¹⁰⁸ This means that a simple majority of six governors and premiers determines "whether the procedure for resolving the dispute will be a binding or non-binding mediation or arbitration."¹⁰⁹ Moreover, the Compact does not provide a procedure for handling a split or tie decision within the Council, which is a distinct possibility with an even number of members.¹¹⁰ By not providing a mechanism

¹⁰⁰ Dake, *The Great Compromise*, *supra* note 1, at 801.

¹⁰¹ Dake, *The Great Compromise*, *supra* note 1, at 801.

¹⁰² Dake, *The Great Compromise*, *supra* note 1, at 801.

¹⁰³ Dake, *The Great Compromise*, *supra* note 1, at 801.

¹⁰⁴ Dake, *The Great Compromise*, *supra* note 1, at 801.

¹⁰⁵ Parris, *supra* note 95, at 1314.

¹⁰⁶ Dake, *The Great Compromise*, *supra* note 1, at 802; *see also* Muys, *supra* note 27, at 50 n.30 (noting that "compacts typically do not grant [their governing bodies] broad enough authority" to effectively enforce their decisions).

¹⁰⁷ Great Lakes Compact, *supra* note 43, at 3760–61.

¹⁰⁸ Dake, *The Great Compromise*, *supra* note 1, at 800.

¹⁰⁹ Dake, *The Great Compromise*, *supra* note 1, at 800.

¹¹⁰ Dake, *The Great Compromise*, *supra* note 1, at 801.

for overcoming a deadlock, the Compact leaves the door wide open for signatories to turn to the courts for a solution.¹¹¹

The Council's weak enforcement powers also hamper its ability to decide the ADR mechanism, since either of the disputing parties may dispute the chosen ADR method.¹¹² In most dispute situations, binding ADR mechanisms are the most sensible method for avoiding future litigation, but—as noted above—disputing parties are naturally reluctant to forfeit future recourse.¹¹³ Since the Compact does not provide proper enforcement mechanisms, disputing parties can easily “take the Council and other parties on a long and winding road of judicial intervention,” which is completely antithetical to the ADR provision's purpose.¹¹⁴

V. PART IV: METHODS FOR IMPROVING INTERSTATE WATER COMPACTS

As discussed in Part II and as demonstrated through the case study in Part III, interstate water compacts are not without their weak points and failings. Thankfully, these issues are not without solutions. This section will first briefly outline the primary reasons that IWCs fail, then it will discuss solutions for remedying those problems. While the solutions proposed are by no means exhaustive—nor are they perfect by any metric—they provide sound and feasible methods for making future IWCs more effective and successful.

A. *Root of Failure*

An interstate water compact's failure can almost always be attributed to (1) poor drafting, (2) insufficient foresight on the part of signatory states, or (3) some combination of the two.¹¹⁵ These issues most often and clearly manifest as “the absence of a mechanism to overcome an impasse between the feuding states,” which often results in such disputes going to court.¹¹⁶ Therefore, a method for resolving such impasses, without involving the courts, is essential to the success of future compacts.¹¹⁷

¹¹¹ Dake, *The Great Compromise*, *supra* note 1, at 802.

¹¹² Dake, *The Great Compromise*, *supra* note 1, at 802. For further discussion on improved enforcement power and methods, see *infra* Part IV, Section B.

¹¹³ Dake, *The Great Compromise*, *supra* note 1, at 802.

¹¹⁴ See Dake, *The Great Compromise*, *supra* note 1, at 802.

¹¹⁵ Dake, *The Great Compromise*, *supra* note 1, at 791.

¹¹⁶ Dake, *The Great Compromise*, *supra* note 1, at 791–92.

¹¹⁷ Dake, *The Great Compromise*, *supra* note 1, at 792.

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B. *Suggested Solutions*

Despite their flaws, most agree that IWCs “are the best alternative to litigation” for resolving water disputes and regulating water rights between states.¹¹⁸ However, it is also clear that current methods for resolving impasses between signatory states are inadequate.¹¹⁹ Solutions to this issue include “federally mandated tie-breaking votes for deadlocked commissions, resolution by a federal agency, and/or the inclusion of clauses in all future water compacts binding the signatories to engage in arbitration before resorting to litigation.”¹²⁰

Considering the context of why states choose to enter into IWCs—to handle water disputes themselves without unnecessary federal interference—one solution would be for Congress to require all IWCs to contain a mandatory alternative dispute resolution (“ADR”) clause before signing new compacts into law.¹²¹ Given that all IWCs must first be ratified by Congress before becoming federal law and taking full effect, this mandate could be easily enforced. However, the ADR clause must retain a certain amount of flexibility, both to avoid discouraging states from entering into IWCs and to ensure the ADR process maintains its flexible ability to adapt to a particular dispute.¹²² As such, while an ADR clause is by far the best method for making IWCs more viable,¹²³ this clause should rightly include all ADR mechanisms, not merely binding ones.¹²⁴

This mandatory ADR provision could be modeled off of both the Utton Transboundary Resources Center’s Model Interstate Water Compact (“MIWC”) and the ADR provision of the Great Lakes Compact.¹²⁵ Within the clause should be provisions that (1) grant explicit and strong enforcement power, (2) provide a clear mechanism for choosing an ADR method, (3) provide a mechanism for breaking ties and resolving stalemates, and (4) provide a mechanism through which the compact may be revised and adapted in the future.

¹¹⁸ See Dake, *The Great Compromise*, *supra* note 1, at 792.

¹¹⁹ Dake, *The Great Compromise*, *supra* note 1, at 792.

¹²⁰ Dake, *The Great Compromise*, *supra* note 1, at 793–94.

¹²¹ Dake, *The Great Compromise*, *supra* note 1, at 792.

¹²² Dake, *The Great Compromise*, *supra* note 1, at 792.

¹²³ Dake, *The Great Compromise*, *supra* note 1, at 792 (including traditional negotiation, mediation, arbitration, the use of magistrates, and settlement conferences).

¹²⁴ While allowing non-binding ADR methods admittedly allows some problems to remain—such as parties specifically choosing non-binding methods so they can avoid their future obligations—entirely disallowing such methods would create even more problems and perhaps even stop states from entering into IWCs at all.

¹²⁵ Dake, *The Great Compromise*, *supra* note 1, at 792.

First, providing an IWC's governing body with sufficient enforcement authority is key to an effective ADR clause. The Great Lakes Resources Council's inability to properly enforce its own decisions poses several problems, particularly the fact that the only method by which the Council can force compliance is through the courts.¹²⁶ In contrast, the MIWC's governing commission possesses significant enforcement authority, and the MIWC itself contains detailed mechanisms for exercising that authority.¹²⁷ This includes requiring disputes with council orders to be resolved using ADR before turning to the courts.¹²⁸

Second, the mandatory ADR provision should either contain a set ADR method for resolving disputes, or include well-defined mechanisms for choosing an ADR method.¹²⁹ Between these two options, providing rules and structures for how compact-governing bodies—or the disputing parties—should select an ADR method is a more favorable solution. By not mandating a specific form of ADR, states and compact-governing bodies retain flexibility, which allows them to choose the ADR method that best fits a particular situation or even develop a new form of ADR to handle a novel issue.¹³⁰

The Great Lakes Compact offers only a bare framework for choosing an ADR method, meaning conflicts over selection of the ADR method are inevitable. In contrast, the MIWC not only required parties to engage in ADR before resorting to the courts, it set forth specific procedures for choosing an ADR method and imposes sanctions on parties violating those procedures.¹³¹ The MIWC requires disputing parties to bring their complaints first to the governing commission, and if the commission cannot resolve conflicts within a set time frame, then ADR procedures are instituted . . . *all* before even considering litigation.¹³² Regarding sanctions, a party that fails to follow the ADR procedures set forth, fails to engage in ADR in good faith, or fails to

¹²⁶ Great Lakes Compact, *supra* note 43, at 3760–61.

¹²⁷ Muys, *supra* note 27, at 89–90.

¹²⁸ Muys, *supra* note 27, at 90.

¹²⁹ The well-defined mechanism should include a method for resolving disputes that arise when choosing an ADR method.

¹³⁰ Dake, *The Great Compromise*, *supra* note 1, at 808.

¹³¹ Muys, *supra* note 27, at 90–91.

¹³² Muys, *supra* note 27, at 90–91. Setting timeframes for all these processes—commission review, ADR method choosing, etc.—has the added benefit of removing the possibility of stalled or overly long negotiations.

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exhaust all of their administrative remedies before litigating, must pay the other parties' future litigation costs regardless of that litigation's outcome.¹³³

Included in the MIWC's ADR procedures is a proverbial middle step that the Great Lakes Compact 'skips.' The MIWC allows the disputing parties the opportunity to choose an ADR method for themselves once ADR procedures are initiated.¹³⁴ Only if the parties fail to choose an ADR method within a set timeframe does the governing commission select the ADR method.¹³⁵ In contrast, the Great Lakes Compact leaves the decision wholly in the hands of the Council, which is the preferable procedure.¹³⁶ While the MIWC's middle step "might facilitate productive discussions between the parties," it is ultimately inefficient.¹³⁷ Giving the disputing parties a chance to decide their own ADR method not only creates an unnecessary opportunity for a deadlock that the compact's governing body will have to resolve, it runs the risk of the parties choosing an ADR method that is not binding. By taking the decision out of the disputing parties' hands from the beginning, the Great Lakes Compact streamlines the process and removes an unnecessary hurdle from the path of proper resolution.

Third, including a system for resolving impasses that may arise when deciding on an ADR method is paramount, especially if the compact's governing body or the disputing parties are allowed to select an ADR method. One way to resolve such impasses is by requiring a majority vote, which both the GLC and MIWC do.¹³⁸ However, in cases where a compact's governing body has an equal number of members, this still leaves the possibility of a tie vote. Considering many IWCs are between just two states and the bodies governing them tend to have equal representation, tie votes are both possible and probable. Some form of tie breaking voting mechanism is needed, and it should be determined before the IWC is signed and ratified.

Fourth, mechanisms for revising and adapting IWCs must be included in order to meet ever-changing needs and circumstances. Compacts cannot account for every possibility and changing circumstance, so there needs to be a way to amend them. Such an amendment procedure should take ADR into account, assuming it is not actually contained within the ADR provision.

¹³³ Muys, *supra* note 27, at 90 (assuming the subsequent litigation results from the violating party not properly pursuing ADR solutions).

¹³⁴ Dake, *The Great Compromise*, *supra* note 1, at 808.

¹³⁵ Muys, *supra* note 27, at 91.

¹³⁶ Great Lakes Compact, *supra* note 43, at 3761. Although the Council should be given more structure in how they choose an ADR method.

¹³⁷ Dake, *The Great Compromise*, *supra* note 1, at 809.

¹³⁸ See Great Lakes Compact, *supra* note 43, at 3763; see also Muys, *supra* note 27, at 91.

Revising a compact provides a prime opportunity for disputes, since signatories will likely be hesitant to alter certain terms. Considering the likelihood of conflict, strong ADR mechanisms are necessary for resolving amendment-related conflicts swiftly and fairly. Linking amendment procedures with the ADR provision will also assist in ensuring settled disagreements remain settled. This will also hopefully mitigate the possibility that states will try to withdraw from a compact when their obligations become inconvenient.

The Utton Transboundary Resources Center's Model Interstate Water Compact offers clear guidance for how to draft an effective ADR clause, and the Great Lakes Compact's ADR provision offers insights both into beneficial measures and problems to avoid. Taken all together, the MIWC's detailed ADR procedures are superior to the short provisions found within the Great Lakes Compact. The MIWC provides its governing commission with greater enforcement power as well as methods for exercising that power. However, the Great Lakes Compact's ADR provision is more streamlined in that it does not give disputing parties the chance to determine their own ADR method. By taking that decision away from the disputing parties, the likelihood that the resolution will be binding increases. Therefore, a good ADR provision should incorporate the clear procedures found in the MIWC while also placing ultimate responsibility and authority in the hands of the IWC's governing body the way the Great Lakes Compact does. Additionally, an even better ADR provision will have both of those provisions as well as clear methods for resolving stalemates and amending the compact itself.

VI. CONCLUSION

Water is the world's most precious resource, and as a nation, the United States has always been water rich. But times of scarcity are already upon us, and disputes arising from that scarcity can be found across the country. As water demand increases and supplies dwindle, compounding disputes are inevitable, which is why finding methods to resolve these disputes surrounding water use and allocation is becoming more and more paramount with each passing day. The courts are already overflowing with cases from all stripes, making finding alternatives to litigation in water disputes all the more necessary.

By far, interstate water compacts have proven themselves the best alternative to litigation. They preserve state sovereignty and autonomy, as well as the country's long-standing preference to allow states to resolve water conflicts among themselves. However, the years have exposed a glaring problem inherent in most interstate water compacts: most fail to provide an

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effective and efficient means of resolving interstate conflicts. By not including a proper method of dispute resolution, compact signatories fall prey to the very thing the compacts were meant to avoid: lengthy and costly litigation.

That is why mandatory ADR clauses are so necessary for the drafting of future water compacts, and why measures should be put in place to require them in all future compacts. ADR processes are a viable option for resolving water disputes and avoiding the substantial costs and time required by traditional litigation, while also allowing states to maintain their autonomy.

Future ADR clauses must have strong and effective enforcement mechanisms, including a way by which stalemates can be broken. There must be a prescribed method for choosing which ADR method disputing parties will use, since only providing for one single method detracts from ADR's naturally appealing flexibility. And these clauses must remain flexible enough that future problems may be satisfactorily resolved without needing to draft an entirely new compact or involve the courts.

