

INTRODUCTION TO THE SPECIAL ISSUE ON UPPER GREAT LAKES POLICY AND
LAW

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I. WORDS MATTER

“Words count. Words matter and clever people know this,” said Lana Pollack, chair of the United States Section of the International Joint Commission, to the crowd gathered in Duluth, Minnesota on a brisk day in March 2016.²

As a keynote speaker at the *Upper Great Lakes Law and Policy Symposium*, Pollack urged attendees to think of people ... people like herself who work in government ... as public servants, not bureaucrats. Talking about the Flint, Michigan water calamity and why it caught America’s attention, she said, “It’s because the vector for poisoning was water, not paint, and because those who fell down on the job were public servants. People have grown used to blaming government, rather than supporting it, seeing rules as burdensome rather than protective. A culture that has convinced itself that regulations are burdensome will quickly find itself without regulations and without protection.”

¹ Sharon Moen co-organized the *Upper Great Lakes Law and Policy* symposium and is the senior science communicator for Minnesota Sea Grant. The author thanks the organizations whose support, financial and other, made this conference, and therefore, this special issue of collected papers possible. Foremost is the National Sea Grant Law Center, which provided the core funding for this initiative. This was matched with support from Minnesota Sea Grant and the University of Minnesota Law School. I extend thanks to my co-organizers Dale Bergeron, maritime extension educator with Minnesota Sea Grant, and Brad Karkkainen, the Henry J. Fletcher Professor of Law at the University of Minnesota, as well as all of the members of the Symposium Steering Committee who helped in the development and organization of the symposium, which, in addition to myself, Dale, and Brad, included Catherine Janasie, Senior Research Counsel for the National Sea Grant Law Center; communication associate Jennifer Gasperini; Adam Reinhardt, pre-law student at the University of Minnesota Duluth; and Gretel Lee, law student at the University of Minnesota. Additional thanks goes to Joel Wessman of the Canadian Consulate General in Minneapolis for his cooperation in making the symposium a truly multinational project. Finally, I thank the presenters, members of the discussion panels and the authors of the papers who contributed to this special issue of the SEA GRANT LAW & POLICY JOURNAL along with journal editor Catherine Janasie and symposium moderator John A. Downing, director of Minnesota Sea Grant.

² Videos of most of the presentations delivered at the Upper Great Lakes Law and Policy Symposium can be accessed at: <http://www.seagrants.unn.edu/news/managingwater#videos> (last visited August 2, 2018).

Pollack was one of 17 compelling speakers at the symposium and not the only one to reference the weight of words. Michael (Mic) Isham, chairman of the Great Lakes Indian Fish and Wildlife Commission, recommended calling the Great Lakes “multinational” rather than “binational” resources, thereby acknowledging that their governance requires forums and policies that incorporate Native American and First Nation perspectives.

Brad Karkkainen, the Henry J. Fletcher Professor of Law at the University of Minnesota, suggested the lakes be called natural endowments, not commodities. “It is an interesting intellectual challenge to put a value to ecosystem services,” he said. “But this accounting can only go so far. Putting a dollar value on these lakes almost trivializes them.”

Karkkainen commended Great Lakes states and provinces for the policies and regulations that govern these boundary waters, and called for policy makers to step up even further to ensure the protection of the Great Lakes saying, “Be more ambitious and high-minded.”

Each of the presentations at the *Upper Great Lakes Law and Policy Symposium*, which was co-hosted by Minnesota Sea Grant, the University of Minnesota Law School, and the National Sea Grant Law Center, was provocative. Supporting the claim that this was indeed an exceptional symposium, 100% of survey respondents (n=41) said that they would be eager to attend a similar conference. At the symposium, Isham said to a local Duluth reporter, “This is one of the best collaborations I’ve seen in my twenty-five years in environmental protection.”³

II. WATER DIVERSIONS

The *Upper Great Lakes Law and Policy Symposium* happened at an interesting time in Great Lakes history. Noah Hall, Associate Professor of Law at Wayne State Law School, needed to recuse himself from presenting days before the symposium, having accepted an opportunity to represent one of the parties involved in a contentious debate over whether the City of Waukesha, Wisconsin, would win a permit to use Great Lakes water beyond the Great Lakes watershed.

³ The footage containing this quote aired on the local FOX television station during the evening and late news on March 24, 2016.

It was the first test of the Great Lakes Compact⁴ and many people attending the symposium were riveted by the process and passionate about the outcome. Keynote speaker Peter Annin, co-director of Northland College's Burke Center for Freshwater Innovation, explained that the compact limits the consumption of Great Lakes water to communities within the Great Lakes basin with one exception – communities in a county that straddles the lake's drainage basin can apply for a diversion. Since Waukesha is located in a county straddling the subcontinental divide between the Great Lakes and Mississippi River drainage basins, the city was eligible to apply for a diversion. The Great Lakes Compact was referenced multiple times at the symposium, particularly by Annin; Pollack; Karkkainen; Peter Johnson, Deputy Director of the Conference of Great Lakes and St. Lawrence Governors and Premiers; Cameron Davis, Senior Advisor to the Administrator, U.S. Environmental Protection Agency; and Michael Goffin, Regional Director General, Environment and Climate Change Canada.

About two months after the symposium, the eight Great Lakes states unanimously approved Waukesha's request for lake water.⁵ The approval, absent legal challenges, means that Waukesha is poised to become the first United States community located entirely outside the Great Lakes drainage basin to receive a diversion of lake water under terms of the compact. This approval allows Waukesha to cease drawing water from radium-contaminated wells when it switches to pipelines and pumping stations connected to a Lake Michigan supply in 2023. The 2016 approval of Waukesha's request requires the city to return an equal amount of the water to the lake as fully treated wastewater. To do that, the city will build a separate wastewater pipeline to the Root River, a Lake Michigan tributary.

In addition to the Waukesha diversion, the Great Lakes Compact garnered additional public attention in 2017 when it was announced that Foxconn, a Taiwan-based electronics manufacturer, planned to construct a 20-million square foot complex in Mount Pleasant, Wisconsin, which would likely use millions of

⁴ Great Lakes-St. Lawrence River Basin Water Resources Compact (2005), available at <http://www.glscompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Water%20Resources%20Compact.pdf> (last visited Aug. 28, 2018).

⁵ Press Release, Mark Dayton, Governor of Minnesota, Statement from Governor Dayton on Waukesha Diversion Project (June 21, 2016), available at <https://mn.gov/governor/newsroom/?id=1055-246479>; *City of Waukesha Water Diversion*, Wis. Dept. of Natural Res., available at <http://dnr.wi.gov/topic/EIA/waukeshadiversionapp.html> (both sites last visited Aug. 28, 2018).

gallons of Lake Michigan water per day.⁶ Under the Great Lakes Compact, utilities with access to the Great Lakes are allowed to pump a pre-determined amount of water from them each day. Some of this water is technically allowed outside of the basin as long as an equivalent volume is returned. Individual states have discretion as to how they enforce the Great Lakes Compact and locating the Foxconn factory in Mount Pleasant might be testing the limits of that discretion.⁷

III. RESILIENCE

Though Lake Ontario is classified as a lower Great Lake, its near record-high levels in 2017 and associated \$45 million and more in government aid⁸ illuminates two important points made at the symposium. The first is that the United States and Canada have very little control over Great Lakes water levels. Lauren Fry, Civil Engineer with the U.S. Army Corps of Engineers Detroit District (Corps) and symposium panelist, explained that the Corps and Environment Canada operate control structures at the instruction of the International Joint Commission. The outflow of Lake Superior is managed by the International Lake Superior Board of Control to balance the water levels of Lake Superior and the Michigan-Huron complex relative to their long-term averages.⁹ The water from Lake Superior flows through a collection of structures that stretch across the St. Marys River, including three hydropower plants, five navigation locks, and a dam known as the Compensating Works. The International Lake Superior Board of Control, under the authority of the International Joint Commission, regulates the outflow from Lake Superior but that does not mean that full control of lake levels is possible. Precipitation, evaporation, and runoff can cause significant changes in the water levels of the Great Lakes, and these

⁶ *How Foxconn Could Affect the Great Lakes Compact*, WIS. PUB. RADIO, <https://www.wpr.org/how-foxconn-could-affect-great-lakes-compact> (last visited Aug. 28, 2018).

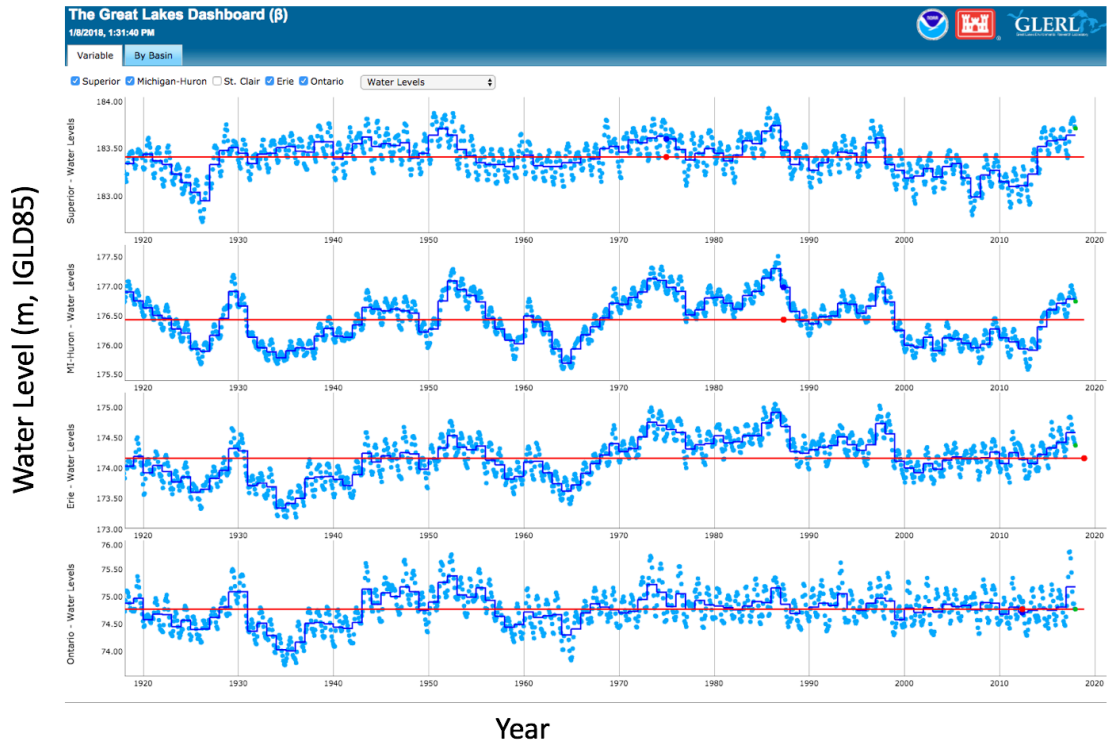
⁷ Arthur Thomas, *Foxconn, Supplier Water Use Could Top Out at 12 Million Gallons Per Day*, BIZTIMES, www.biztimes.com/2018/ideas/government-politics/foxconn-supplier-water-use-could-top-out-at-12-million-gallons-per-day/ (last visited Aug. 28, 2018).

⁸ Steve Orr, *Monroe, Cayuga are in the Money: FEMA Amends Shoreline Disaster Area*, DEMOCRAT AND CHRONICLE, www.democratandchronicle.com/story/news/2018/01/19/fema-amends-shoreline-disaster-area-include-monroe-and-cayuga-counties/1048909001/ (last visited Aug. 28, 2018).

⁹ *Lake Superior Regulation Plan 2012*, INT'L LAKE SUPERIOR BD. OF CONTROL, http://ijc.org/en/_ilsbc/International_Lake_Superior_Board_of_Control (last visited Aug. 28, 2018).

variables are difficult to accurately predict. Figure 1 below shows changes in Great Lakes water levels from 1920-2017.

Figure 1: Graph of Great Lakes water levels from 1920 – 2017 generated through the NOAA GLERL Great Lakes Dashboard Project. Lake Ontario communities are still recovering from the high waters of 2017.



The second point is that people and coastal communities need to embrace the concept of resilience. The concept holds that floods and other disasters are unavoidable, and may well be more frequent and destructive in the future, so it is wise to rebuild and plan accordingly. A case-in-point occurred months after the symposium when a passing storm swamped a wide swath of Lake Superior's

south shore with up to fourteen inches of rain in just a few hours, creating floodwaters that killed three people and caused \$26 million in damages.¹⁰ Though not targeting water level fluctuations and extreme weather events per se, presentations during the symposium's panel on contaminants, climate, and emerging challenges dealt with the importance of planning for resilience in changing political, social, physical, and ecological systems. These presentations were delivered by Jason MacLean, Assistant Professor and Bora Laskin Faculty of Law; Wenona Singel, Associate Professor of law and Associate Director of the Indigenous Law and Policy Center; and Gretel Lee, a law student at the University of Minnesota Law School.

Lee cautioned that cumulative impact assessments are crucial. Singel lobbied for engaging and deploying multicultural and multidisciplinary expertise and for linking scientific analysis with deliberation. McLean said we need to move beyond episodic, reactive modes of public response to environmental challenges and create a sustained public interest and participation in policy. "So far," he said, "we've been making bad projects a little less bad. We need to move beyond that in our environmental impact assessments. What is our vision of sustainable development and how do we get more people to care and sustain their level of caring?"

IV. AQUATIC INVASIVE SPECIES

It would be difficult to hold a meeting about law and policy in the Great Lakes without talking about aquatic invasive species. *The Upper Great Lakes Law and Policy Symposium* included a panel of speakers on the subject, including pre-law student Adam Reinhardt's summary of why the Great Lakes Ballast Water Collaborative might serve as a model for addressing multinational Great Lakes challenges. Managing the ballast water of ships to control invasive species entering the Great Lakes has been the focus of environmental lawsuits and many policy debates in the United States. After Reinhardt, Craig Middlebrook, Deputy Administrator of the Saint Lawrence Seaway Development Corporation and co-

¹⁰ Danielle Kaeding, *Communities, Businesses Continue to Rebuild 1 Year After Northwestern Wisconsin Flooding*, WIS. PUB. RADIO, www.wpr.org/communities-businesses-continue-rebuild-1-year-after-northwestern-wisconsin-flooding (last visited Aug. 28, 2018).

creator of the Great Lakes Ballast Water Collaborative, offered perspectives on policy decisions affecting commerce in the Great Lakes.

Mark Burrows, Physical Scientist and Project Manager for the International Joint Commission's Great Lakes Regional Office, talked about using science to inform invasive species policies. Marc Gaden, Communications Director and Legislative Liaison for the Great Lakes Fishery Commission focused on strategies to keep Invasive Carp from causing environmental and economic damage to the Great Lakes. "It's open season on Asian Carp," said Gaden. Both Gaden and Burrows suggested that pre-approval of tools to combat aquatic invasive species could speed up management responses.

V. CONCLUSION

Words matter, but so does will. Jon Allen, Director, Office of the Great Lakes, Michigan Department of Environmental Quality, spoke at the symposium saying that political and public will are essential. "Funding is solely and strictly a matter of will," he said. Burrows echoed that sentiment, saying, "You need good science but you also need the weight of evidence (practicality) and political will."

Karkkanin spoke of the Great Lakes Compact as representing a basin-wide commitment to keeping water in the Great Lakes to function as systems rather than viewing them as exportable commodities. "It's remarkable that this consensus exists," he said, remarking that a sense of place is the animating spirit giving rise to the Great Lakes Compact and its companion Agreement.

Davis and Goffin, representing the U.S. Environmental Protection Agency and Environment and Climate Change Canada, respectively, talked about next steps. Both of their presentations emphasized multinational cooperation, the importance of science-based decision-making and engaging the public. *The Upper Great Lakes Law and Policy Symposium* involved United States, Canadian, and tribal perspectives, and this diversity of perspectives and content begat deep discussions. Additionally, the symposium attracted delegates from the U.S. Department of State's International Visitor Leadership Program representing China, Israel, Mexico, Russia, Tanzania, and Vietnam. These international visitors attended to assess U.S. transboundary water management programs and discuss cooperative strategies to establish bilateral, regional, and global dialogues on shared water resources.

By examining ideas for tackling Great Lakes transboundary issues like aquatic invasive species, climate, contamination, and water diversions, *The Upper Great Lakes Law and Policy Symposium* created a forum for a reasoned exploration of how policies and laws might better reflect science and citizen engagement as they work toward sustainable solutions across jurisdictions.