



ADVANCING PUBLIC TRUST SOLUTIONS
TO SAVE THE GREAT LAKES

Group says public trust doctrine may help solve Great Lakes water level problems

By The North Woods Call
Volume 59 Number 3
Late October 2012

The FLOW Public Trust Policy Center (FLOW) in Traverse City has told the International Joint Commission (IJC) that principles of public trust can help find solutions to problems with Great Lakes water levels.

In comments submitted to the IJC, FLOW said such principles can be applied to compliment and help the IJC in both current and future decisions affecting the flows, levels, environment, public uses, private uses and benefits of the Great Lakes.

“We’re trying to demonstrate to decision makers how we might begin to think about the issues we face in the 21st Century and how we might find more effective solutions,” said Jim Olson, chairman of FLOW and an environmental law attorney. “We’re taking each threat issue and looking at it through the Public Trust Doctrine to see whether those principles can actually help solve those problems and move us toward a solution.”

The prolonged period of low water levels seen in the lower and upper Great Lakes poses serious threats to wetlands, fish and aquatic habitat, shipping and navigation, boating, recreation, power generation and agriculture, according to a document submitted to the IJC.

“These factors have increased competition and conflict between various uses of the Great Lakes, most of which are dependent on both water quality and quantity, as the two are inextricable connected,” the document says.

Activities affecting Great Lakes water levels—such as the Chicago diversion and dredging in Lake St. Clair that has significantly lowered levels in Lake Michigan and Lake Huron—could be addressed through the Public Trust Doctrine, Olson said.

“When we have a conflict, those types of uses would be subordinate to public trust uses, such as navigation, fishing, boating, swimming and other forms of recreation,” Olson said.

Public trust principles can be traced from Rome to the present through both civil law and common law systems. These principles—which have become known as the Public Trust Doctrine—deem water a public resource, unlike land that can be transferred with exclusive rights of possession. As a result, water is generally considered to be in the public domain in Canada, and for the benefit and welfare of citizens in the United States.

According to the comments submitted to the IJC by FLOW, courts in all eight American states and two Canadian provinces surrounding the Great Lakes basin have recognized the public trust doctrine in regard to the lakes, as well as connected or tributary waters. These principles have been routinely applied to the public’s paramount right and use of public or navigable waters and offer an established “multi-generational standard” to aide the IJC in sorting out and making decisions on management and protection of water flows, levels and pollution threats, now and in the future, for the waters of the Great Lakes ecosystem.

FLOW said that public trust principles can serve as an overarching umbrella framework for the IJC, its staff and the diverse public interests to balance priorities among uses and various courses of action. The systemic threats to flows, levels, ecosystem, and public and private uses of the Great Lakes boundary waters pose complex and multi-layered challenges, they said.

“The public trust offers a substantive methodology and set of established principles for common bodies of water, like the Great Lakes and its tributaries, to assure long-term protection and management of these waters, their quality, quantity, and public and private uses,” the FLOW document says.

As of this writing, no official decisions had been made regarding these recommendations and Olson said that dialog with the IJC was continuing.