

International Joint Commission
Canada and United States



Commission mixte Internationale
Canada et États-Unis

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**Remarks by Hon. Joe Comuzzi, Chair, Canadian Section,
International Joint Commission**

**Topic: Is Water the New Oil? Tales from the Battle over
Transborder Water Resources in North America.**

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Ladies and Gentlemen,

I want to thank the American Bar Association for inviting me to be with you today to share my perspective regarding the topic of today's discussion.

At the outset, I would like to say that I certainly understand why our discussion has been entitled, "Is Water the New Oil? Tales from the Battle over Transborder Water Resources in North America". It's certainly more provocative than a discussion entitled, "The International Boundary Waters Treaty 1909-2011—More than a Century of Harmony."

The latter title, while less enticing, may be a more accurate depiction of where things stand as it regards Canada and the United States and our mutual interest in preserving, protecting and serving as responsible stewards over our shared waters. I call them our shared waters because while the waters overseen by the International Joint Commission are called "boundary waters" in the Treaty, that term boundary refers to a line that separates two parties; the unique and highly successful approach adopted in our enabling Treaty is very different. In fact, our view is that these waters are not what separates us, but what joins us together.

Our responsibility at the IJC is to cooperatively oversee the shared waters of the 5,525 mile-long border between Canada and the United States. In addition to seeing that those waters are free from pollution and safe to use for drinking, bathing, navigation, irrigation, power generation and a host of other uses. We also oversee the Canada-U.S. Air Quality Agreement and the Great Lakes Water

Quality Agreement as part of our responsibilities to protect the trans-boundary environment.

When I was first elected as a Member of Parliament representing Thunder Bay, Ontario, I found that I had a great deal in common with the Congressman who represented the district just to our south in Duluth, Minnesota, my good friend Jim Oberstar. We both cared deeply about the health of Lake Superior. Lake Superior, “Gitchigumi”, as the people of one of our continent’s First Nations—the Ojibwe, call it, has been, and continues to be, the dominant feature of the landscape for those who live near there. It’s an indispensable resource providing water for drinking and irrigating farmland, recreation for boaters and fishermen, and a method of marine transportation that opens the agricultural and industrial heartland of both nations to international commerce while making a smaller environmental footprint compared any other mode of freight transportation.

That understanding of our shared interest in the long term health and sustainability of the all of our shared waters are in even sharper focus for me in my position as Chair of the Canadian Section of the International Joint Commission. Working side by side with my fellow Commissioners and our counterparts in the United States, we are a unique group bound by the charges of our respective federal governments to work “jointly” to *resolve* and, even more importantly, *prevent* disputes before they arise. While I am the Chair of the Canadian Section, my responsibility is to look at boundary water issues, jointly. My U.S. counterparts have the same charge and for the most part, we all do a pretty fair job of looking at these issues not as battlegrounds but as opportunities for cooperation and constructive dialogue.

Now I realize it sounds like I’m painting a pretty rosy picture, but its part of the beauty and the genius of a treaty that has stood the test of time for more than a century. If you are looking for at least part of the reason why the United States and Canada share the longest unfortified border in the world, you need look no further than the Boundary Water Treaty of 1909 which brought about the formation of the International Joint Commission.

Having said all this, are there challenging issues facing us? You bet there are.

One area where both Canada and the United States have struggled in the past is in the prevention of the introduction of aquatic invasive species in the Great Lakes and other boundary waters. The introduction of the European lamprey in the 1960s did serious harm to the whitefish and perch populations of the Great Lakes. The introduction of the zebra mussel has caused uncounted headaches for municipal water treatment intake systems, recreational boaters and riparian landowners. Now the task of keeping the Asian carp from coming up the Mississippi River into Lake Michigan has caused the State of Michigan and others to sue the State of Illinois and the U.S. Army Corps of Engineers to close the locks of the Chicago Sanitary and Ship Canal in what may be a vain attempt

to prevent the carp from getting into the Great Lakes. I say a vain attempt because in recent weeks, Canadian Customs Enforcement officers have stopped truckloads of live Asian carp that smugglers were trying to bring into Canada.

We can all agree that it makes sense to try to stop invasive species from entering our shared waters. In fact, the U.S. and Canadian governments have designed a program to inspect the ballast tanks of every ship coming into the St. Lawrence Seaway from overseas ports. That program has prevented any new invasive species from entering the Great Lakes since 2006.

That cooperative bi-national program is something that both governments have a right to be proud of. However, within the last two years, some state governments have decided to propose their own *state* ballast water regulations which threaten to confuse the international maritime community, restrict interstate and international maritime commerce, and effect the cooperation that has been the foundation of the approach that both nations have taken on boundary water issues.

One of the more confusing aspects of this whole issue from a legal standpoint is the issue of preemption. I understand how federal law pre-empts a state law or regulation. The doctrine of preemption helps to define the contours of the relationship between the federal government and state governments. Any student of the U.S. civil rights movement understands that the laws of the federal government pre-empted the discriminatory state laws and regulations of that era.

What many don't really fully grasp is the situation in which a state might be given the regulatory latitude to pre-empt, in a de facto sense, the federal government on an issue of environmental regulation and, by extension, the regulation of foreign commerce. I understand that your history of federalism and the Tenth Amendment to your Constitution reserves many powers to the states. However, your policy makers and courts must see the practical sense in allowing the federal government to make national standards as it relates to protecting the environment, especially as it relates to trading relations with other nations. Otherwise, it seems you run the risk of putting together such a patchwork of laws and regulations that it becomes impossible to work out exactly which rules are to be followed.

So you can see where if farmers in Ontario are hoping to ship wheat to Nigeria, they might be perplexed by a ballast water regulation, issued by one of the Great Lakes states, which effectively prohibits them from doing so. What is to stop New York, Pennsylvania, Ohio, Indiana, Michigan, Illinois, Wisconsin and Minnesota from each having their own set competing or even conflicting regulations? The practical effect of this would be ship owners "voting with their feet" and heading to a more hospitable and less confusing environment in which to do business.

In fact, this seems to get at what I understand to be one of the legs upon which the doctrine of the federal preemption of state law stands in U.S. jurisprudence. That is, your Supreme Court has decided that federal law prevails when it, *“touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject.”* (Rice v. Santa Fe Elevator Corp. 331 US 218, 230 1947) I think it would seem to any lay observer that rules applying to foreign ships in U.S. waters might easily meet this test.

Additionally, the “every state for itself” approach would also seem to contravene one of the most important mandates articulated in Article I of the Boundary Waters Treaty which says,

“the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.”

Now I’ve admitted that I’m no expert on federalism and the U.S. Constitution, but it seems to me the conditions for issuance of federal permits to certify compliance with federal laws might be a federal, rather than a state responsibility. I know that there are lots of people who are believers in “state’s rights” arguments, but not when it relates to responsibilities under a treaty duly signed and ratified. It seems to me that maybe this would be where the Supremacy clause, which I understand is embedded in Article VI paragraph 2 of your Constitution, would come into play. That is, if a treaty is truly considered the Supreme law of the land as it says in that paragraph, which reads,

“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

Now, I know a good lawyer can make almost any argument, but this language is pretty clear, as far as constitutional language goes.

By this summer, I understand that the U.S. Coast Guard will issue a final federal rule on ballast water standards, reasserting the federal government’s central role in this issue. Additionally, I understand that in the next several weeks, the U.S. National Academies of Science will issue a report which clarifies the science underlying the question of ballast water regulation and protection of our waters from aquatic invasive species.

All of this, I hope, will remove any ambiguity that exists and bring some clarity to this question so we can engage each other on this issue and engage all of the relevant stakeholders in our efforts to serve as good stewards of our shared waters.

Speaking of our shared stakeholders brings me back to a point that I raised earlier. We should include as key stakeholders in our discussions the peoples of our continent's First Nations. Historically, culturally, in some cases literally, our shared waters are our lifeblood. Canadians and Americans have much to learn from our indigenous people about being good stewards of our waters. To lose sight of their interests is to lose sight of the value and richness that their heritage has brought to all of the people of our continent. We must all understand, that we haven't inherited these waters from our mothers and fathers; we're borrowing them from our children.