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Protecting the World's Largest Body of Fresh Water: The Often Overlooked Role of Indian Tribes' Co-Management of the Great Lakes

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ABSTRACT

It has been said that water will be the oil of the twenty-first century in that struggles to acquire or retain water will be the primary factor in diplomacy and military aggression and in economic growth and decline. The struggle to acquire or retain water will be important in both the national and international arenas. The recent development of the Great Lakes Compact and Agreement provides an instructive example of cooperative efforts to create mechanisms to manage water and the amenities it provides. The development of these agreements also provides a paradigmatic example of the tendency of the dominant culture to ignore or marginalize the legitimate claims of indigenous people, in this case Native Americans, to the resource. This article sets forth the background for the Compact as well as explaining the process under which eight states and two provinces reached agreement on an approach to protect the water in place. It also explains the legal basis for the claims of Native Americans to the water and their history of success in managing the resource, as well as the way they were effectively shut out of the negotiation process. Finally, the article explains the practical and legal approach the tribes used to assert their rights while focusing on the protection of this resource for all, Indian and non-Indian alike.

> Our ancestors have inhabited the Great Lakes Basin since time immemorial, long before the current political boundaries were drawn. Our spiritual and cultural connections to our Mother earth are Manifest by our willingness to embrace the responsibility of protecting and preserving the land and waters.
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> Statement of Mother Earth Water Walkers

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The women who form the Water Walkers held their first walk around Lake Superior in April 2003. "Several women from different clans came together to walk around the Great Lakes...to raise awareness that our clean and clear water is being constantly polluted."[1] The women have since walked around Lake Michigan in 2004, Lake Huron in 2005, and Lake Ontario in 2006, carrying a bucket of water to symbolize its importance to life.

The system for management and protection of natural resources in the United States is bifurcated as a natural consequence of the federal system. Until the Environmental Decade of the 1970s, the states had primary jurisdiction over most natural resources issues, with a few exceptions relating to shared resources or federal land. As a strong constituency for environmental protection developed, a variety of federal statutes were passed. Many of these statutes involved a form of "co-operative federalism," through which the federal government set minimum standards for the states. This symmetry is compromised because the federal government and the states are not the only sovereigns with rights and responsibilities for protection of the land and its resources. The sovereign governments of the American Indian nations also have inherent rights and duties to protect and manage natural resources. Recent agreements between the Canadian provinces and states were negotiated without the participation of these sovereign co-tenants of the Great Lakes, effectively weakening the protection those agreements provide this irreplaceable ecosystem.

SOVEREIGN STATUS OF TRIBES:[2] A BRIEF EXPLANATION

When Europeans first made contact with the indigenous people of the Americas, the relationship was legally one of substantial equality between sovereign nations. As waves of European settlers arrived, the position of the tribes was relatively weakened. By the colonial era, the American government utilized the Indian Commerce Clause of the Constitution[3] and the various Trade and Intercourse Acts to assert the primacy of the federal government in dealing with Indian tribes.[4] This was

1. Welcome to the Mother Earth Water Walk Homepage, http://www.motherearthwaterwalk.com (press "enter site" button) (last visited July 10, 2006).

2. The bulk of this discussion will focus on American Indian tribes, but many of the same principles also apply to the First Nations of Canada.

3. U.S. CONST. art. I, § 8, cl. 3.

4. The Trade and Intercourse Acts regulate trading with Indians and limit land acquisition from Indian tribes solely to the federal government (leaving out both non-Indian individuals and states). Indian Trade and Intercourse Acts, ch. 33, 1 Stat. 137 (1790); ch. 13, 2 Stat. 139 (1802); ch. 161, 4 Stat. 729 (1934).

confirmed by Justice John Marshall in *Johnson v. M'Intosh*[5] and *Worcester v. Georgia*.[6] The most significant U.S. Supreme Court ruling was *Cherokee Nation v. Georgia*, which recognized that, while Indian tribes are not foreign nations with the power to conduct their own foreign relations, they are nevertheless a new type of sovereign, designated "domestic dependent" sovereigns.[7] As such, they retained powers of self-government despite their location within the territorial boundaries of the United States.[8] The "dependent" nature of the tribes, which Justice Marshall describes as a guardian-ward relationship, is the source of the federal government's trust responsibility to the tribes.[9]

In the years following *Worcester*, the federal government continued to acquire land for the growing populations of Europeans by a series of land cessation treaties, such as the Washington Treaty of 1836,[10] under which the Great Lakes tribes granted land in Michigan, Wisconsin, and Minnesota to the American government. In these treaties, the tribes often reserved usufructuary rights to hunt and fish on the ceded property.

During this period, federal Indian policy changed repeatedly. First, the U.S. policy was removal, to separate Indians and non-Indians by moving as many tribes as possible to newly formed reservations west of the Mississippi River. Then, in the 1880s, U.S. policy switched to one of assimilation into the national community, with the Dawes Act allocating reservation land to individual Indians, with the "excess" land opened up to homesteaders.[11] In the early twentieth century, the realization that the break up of Indian land was a mistake led to the passage of the Indian Reorganization Act of 1934.[12] This Act reflects the third national policy of preserving tribes as self-governing entities.

After another largely unsuccessful effort at forcing assimilation through terminating tribes in the 1940s, the federal government turned to its fourth and present policy of tribal self-determination. President Reagan articulated this policy in 1983, when he affirmed the policy encouraging economic self-sufficiency and control, and indicated that the appropriate

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5. 21 U.S. 543 (1823).
6. 31 U.S. 515 (1832).
7. 30 U.S. 1, 17 (1831) (state laws have no legal effect on Indian reservations).
8. *Worcester*, 31 U.S. 515.
9. *Cherokee Nation*, 30 U.S. at 13.
10. Treaty with the Ottawa, etc., Mar. 28, 1836, 7 Stat. 491, Proclamation May 27, 1836.
11. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (formerly codified at 25 U.S.C. §§ 331–333). This act had the practical effect of reducing the tribal land base by almost two-thirds, from 138 million acres to roughly 48 million areas. Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90 n.12 (2002).
12. Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

relationship between the federal government and Indian tribes is as "government to government."[13]

EPA EMBRACES SELF-DETERMINATION POLICY

In 1984, the Environmental Protection Agency (EPA) became the first federal agency to articulate its own Indian policy. The EPA's policy statement not only expressed a willingness to deal with Indian tribes on a government-to-government basis, but also provided, among other things, that

> [t]he Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with agency standards and regulations
> ....
> [t]he Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.
> ...
> [t]he Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.[14]

In fact, the EPA began treating tribes as states well before this policy was issued by delegating to tribes the authority to act under the Clean Air Act's Prevention of Significant Deterioration provisions.[15] The EPA further implemented the policy of tribal self-government by encouraging Congress to amend the various statutes the EPA administers to include explicit provisions for treating tribes as states (TAS). In addition, language instructing the EPA to "treat tribes as states" has generally been inserted in new environmental statutes.[16]

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13. Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983). The government-to-government policy was reaffirmed by the EPA in 1991. Memorandum on EPA Indian Policy from Christine Todd Whitman, Administrator, EPA, to All EPA Employees (July 11, 2001), *available at* http://www.epa.gov/tribalportal/pdf/reaffirmindpol01.pdf.

14. William D. Ruckelshaus, EPA Policy for the Administration of Environmental Programs on Indian Reservations 2, 4 (Nov. 8, 1984), http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf. The American Indian Environmental Office was established by the EPA to coordinate the various tribal programs. For information on the office, see U.S. Environmental Protection Agency, American Indian Environmental Office (AIEO) homepage, http://www.epa.gov/indian/ (last visited Jan. 29, 2008).

15. Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (upholding the delegation of authority to tribes even in the absence of explicit statutory authorization).

16. *See* JUDITH V. ROYSTER & MICHAEL BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 219-54 (2002).

In order to qualify for TAS treatment, tribes must meet statutory and regulatory criteria specific to the act or even an individual program under the statute, although the first and third criteria for most statutes overlap.[17] For example, the criteria for acting as a state under the Clean Water Act require a tribe to demonstrate that (1) it is a federally recognized tribe that has a governing body that exercises substantial governmental duties and powers; (2) the functions that the Indian tribe will exercise pertain to the management and protection of water resources that are held by the tribe, held by the United States in trust for the tribe, or held by a member of the tribe, if this property is subject to a trust restriction on alienation, or otherwise within the boundaries of an Indian Reservation; and (3) it is reasonably capable of carrying out the functions necessary to implement the act within the terms and purposes of the statute.[18] These policies both reflect and enhance the growing institutional competence of tribes to manage their own natural resources.[19] For example, the EPA recently gave the Tohono O'odham an award for creating a water distribution system, including well improvements and increased water storage capacity, to a village on tribal land. In the same ceremony, the Karuk Tribe of California was honored for discovering and providing a "timely response" to toxic algae blooms in the Klamath basin.[20] Similarly, a recent $600,000 grant to the Conservation Department of the Little River Band of Ottawa Indians of Michigan for restoration of the Manistee River Watershed illustrates the development of sophisticated infrastructures to deal with environmental issues within the Great Lakes. The grant supports a project by tribal scientists and technicians to study the life cycle of the endangered sturgeon in the river.[21]

TRIBAL OFF RESERVATION HUNTING AND FISHING RIGHTS

While the TAS policy focuses on the control by tribes of the reservation environment, tribal property claims are often not limited to

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17. *Id.* at 229. Generally, if a tribe meets the requirements for federal recognition and exercise of sufficient government power under one act, that will carry over to all acts with TAS provisions.

18. 33 U.S.C. § 1377(e) (2000).

19. Some tribes are too poor or have too small a land base to realistically participate in the TAS program.

20. Brenda Norrell, *EPA Honors Tribes as Environmental Heroes*, INDIAN COUNTRY TODAY, Apr. 24, 2006, at A5, *available at* http://www.indiancountry.com/content.cfm?id=1096412876. (Honors were also given to the Ak Chin Indian Community of Arizona and to the Groundwater Protection Department of the Navajo Nation.).

21. Allison Batdorff, *Little River Gets $.6 Million Grant for Restoration Projects* and *Little River Spearheads Sturgeon Larva Study in Manistee River*, TRIBAL OBSERVER (Saginaw Chippewa Indian Tribe, Mt. Pleasant, Mich.), July 2003, at 3.

reservation land. Many of the treaties under which Indian tribes ceded land to the federal government include reserved, rather than transferred, hunting and fishing rights on off reservation lands.[22] Although the exact nature of the reserved right depends on the precise language of the treaty, generally tribal members exercising the right to hunt or fish may not be required by the state to pay a license fee.[23] The treaties in the Pacific Northwest, principally those concerning salmon, generally reserve the right to fish at "all usual and accustomed places."[24] This language, combined with treaty language recognizing that the Indians' right to fish is secured "in common with all citizens of the territory," led to many years of bitter litigation over exactly what portion, if any, of the yearly salmon run was to be allocated to the tribes.[25] The U.S. Supreme Court finally resolved the matter, holding that the Indian fishermen should have a right to up to 50 percent of the available fish, limited by the state's right to determine how many fish could be safely harvested without endangering the resource.[26]

A comparable struggle in Michigan resulted in the judicial recognition of the rights of Michigan tribes to fish in the Great Lakes. The struggle began when the state charged a Chippewa tribal member with failing to secure a commercial fishing license and using a gill net. The Michigan Supreme Court upheld the tribal member's right to fish without a license, but also upheld the State of Michigan's right to subject him to gill net regulations because it believed that preservation of the fishery required that the regulation be applied to Indians as well as non-Indians.[27] The state decision was soon trumped by the federal district court decision in *United States v. Michigan*, which held that the tribes have a sovereign right to fish in the Great Lakes. Therefore, the state has no power to regulate the manner or exercise of Indian fishing rights in the Great Lakes.[28]

Similarly, other Great Lakes tribes hold fishing rights under a series of cessation treaties under which the bulk of Michigan, Wisconsin, and Minnesota were conveyed to the federal government in the first half of the nineteenth century.[29] These off reservation treaty rights were affirmed by

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22. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

23. Tulee v. Washington, 315 U.S. 681 (1942).

24. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979).

25. *See* ROYSTER & BLUMM, *supra* note 16, at 508–37.

26. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658.

27. People v. Leblanc, 248 N.W.2d 199 (1976). The practical political issue was the competition between tribal commercial fishermen and non-Indian sport fishermen.

28. 471 F. Supp. 192 (W.D. Mich. 1979). Similarly, fishing rights of the Milles Lacs Band under the 1837 treaty were affirmed by the U.S. Supreme Court in *Mille Lacs Band*, 526 U.S. 172.

29. Treaty of Washington, art. 4, 6 Stat. 491 (1836).

a series of state and federal court decisions recognizing rights to fish in various areas of the Great Lakes. In effect, the various Great Lakes tribes are co-tenants with the states and provinces bordering the lakes and in matters of fishing often take priority over them.

COOPERATIVE TRIBAL INSTITUTIONS PROTECTING FISHERIES IN THE GREAT LAKES

It is important to note that the effective transfer of control of much of the fishery to the tribes has not led to its degradation, as many critics suggested it would in the period prior to the Supreme Court's *Michigan* decision. In fact, the Great Lakes tribes have developed institutions that have effectively protected the fisheries and the waters on which they depend as well as protecting off reservation hunting and fishing rights. An examination of two such cooperative tribal institutions not only supports tribal assertions of the right to act as parties to decisions involving protection of Great Lakes water but also suggests mechanisms for implementing such participation.

The first of these is the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), which was formed in 1984 after *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*[30] reaffirmed the treaty rights of Wisconsin tribes. Ten individual bands of Ojibwa[31] in three states formed an inter-tribal organization whose purpose was to jointly manage the water resource and fish harvests. The individual tribes have issued comprehensive regulations establishing fishing seasons and harvest quotas as well as biological monitoring programs. GLIFWC, in conjunction with tribal game wardens, enforces tribal regulations. These regulations are generally enforced by both tribal and GLIFWC game wardens.

GLIFWC is a conservation and management institution with 60 full-time employees who work to conserve natural resources and manage fisheries in both inland waters and the Great Lakes, particularly the commercial fishery in Lake Superior. The Ecological Services Division includes an Environmental Section, which focuses on the health of the ecosystems that support the fish and other natural resources. For example, the Environmental Section has recently produced studies of the potential impacts of mining on the lakes as well as on levels of mercury in fish. In carrying out its activities, GLIFWC works not only in cooperation with the

30. 700 F.2d 341 (7th Cir. 1983).

31. Member tribes are Bay Mills Indian Community, Keweenaw Bay Indian Community, and Lac Vieux Desert Band (Michigan); Bad River, Lac Courte Oreilles, Lac du Flambeau, Mole Lake/Sokaogon, Red Cliff, and St. Croix Bands (Wisconsin); and Fond du Lac and Mille Lacs Bands (Minnesota).

individual tribes, but also extensively with state and local resource departments.[32]

The second example of cooperative tribal resource management institutions is the Chippewa Ottawa Resource Authority (CORA), which includes six Michigan tribes.[33] CORA retained off reservation rights through the 1836 treaty in Lakes Huron, Michigan, and Superior. CORA operates a comprehensive program of fishery management and enhancement and studies environmental issues such as water quality and invasive species.[34] It also enforces conservation regulations in treaty waters in cooperation with the Michigan Department of Natural Resources and the U.S. Coast Guard. As with GLIFWC, violators are tried in the appropriate tribal courts.

The Great Lakes tribes' sovereign claim to the lakes, which arises out of the treaties and rights reserved (not transferred) under them, does not require proof of their governmental efficiency. Nevertheless, the existence, development, and demonstrated competency of GLIFWC and CORA suggest a practical as well as spiritual concern for protecting the ecosystem and a willingness to expend energy and resources for their protection. This demonstrated competence at cooperative management highlights the lack of wisdom in the failure of the American states and Canadian provinces to draw the tribes into the Annex 2001 process for protecting the Great Lakes, which is examined below.

THE GREAT LAKES AGREEMENTS

The five Great Lakes, Erie, Huron, Michigan, Ontario, and Superior, form much of the boundary between the eastern United States and Canada. The Great Lakes, along with the St. Lawrence River and all connecting channels, comprise the Great Lakes Basin. The Great Lakes Basin is the largest freshwater system in the world, constituting nearly 20 percent of the world's supply of fresh water and providing drinking water for more than

32. H. JAMES ST. ARNOLD & SUE ERICKSON, OJIBWE TREATY RIGHTS: UNDERSTANDING & IMPACT 22 (GLIFWC 5th ed. 2005), *available at* http://www.glifwc.org/Publications/otrui2006.pdf.

33. Member tribes are Bay Mills Indian Community, Grand Traverse Band of Ottawa, and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Band of Odawa Indians, and the Sault Ste. Marie Tribe of Chippewa Indians (notice that Bay Mills is a member of both organizations.). Chippewa Ottawa Resource Authority Homepage, http://www.1836cora.org/ (last visited Jan. 20, 2008).

34. *See* CORA, About Us, http://www.1836cora.org/aboutus.html (last visited Jan. 29, 2008).

30 million people.[35] The Basin also provides a home for a wide range of flora and fauna.

Because this resource is critical to both the United States and Canada, efforts at cooperation to conserve it began very early. The Boundary Waters Treaty of 1909 was the first of these efforts.[36] The Treaty established the International Joint Commission, which consists of an equal number of Canadian and American representatives[37] that adjudicate matters between the parties, which continues to operate to this day. It also recognizes that one of the parties' primary concerns was limiting removal of the water from the lakes without permission of the other parties who share the resource.

For many years following the Boundary Waters Treaty, the perceived abundance of water meant that usage, including that which was detrimental to the ecosystem, remained substantially unregulated.[38] Beginning in the 1950s, proposals began to surface for large scale diversions of water from the basin. However, these were repeatedly abandoned as economically infeasible. By the 1980s, proposals to divert water from the basin to the increasingly populated arid Western states appeared more imminent and viable.[39] In the same decade, the U.S. Supreme Court ruled that water is an article of interstate commerce, the export of which cannot be prohibited by the states.[40] The Supreme Court ruling raised the specter of unlimited exploitation of the region's key resource by outside interests. Recognition of this lack of regulatory protections combined with increased concern that large quantities of water could be removed from the basin led

35. GREAT LAKES COMM'N, TOWARD A WATER RESOURCES MANAGEMENT DECISION SUPPORT SYSTEM FOR THE GREAT LAKES–ST. LAWRENCE RIVER BASIN 9 (2003), full report *available at* http://www.glc.org/wateruse/wrmdss/finalreport.html (last visited Jan. 29, 2008); executive summary *available at* http://www.glc.org/wateruse/wrmdss/finalreport/pdf/WR-ExSum-2003.pdf; *see, e.g.*, U.S. POLICY COMM., EPA, GREAT LAKES STRATEGY 2002 – A PLAN FOR THE NEW MILLENNIUM, A STRATEGIC PLAN FOR THE GREAT LAKES ECOSYSTEM, *available at* http://www.epa.gov/docs/grtlakes/gls/ (last visited Jan. 22, 2008).

36. Boundary Waters Treaty, Jan. 11, 1909, U.S.-U.K. (for Canada) 36 Stat. 2448, U.K.T.S. 1910 No. 25. In general, since Lake Michigan is located within the United States, it is not covered by the treaty.

37. *Id.* art. VII, 36 Stat. at 2451.

38. For example, until late 2006, with the passage of the Water Legacy Act, Michigan had no system for limiting removal of ground water. For a thoughtful description of the role that the Great Lakes play in the culture and identity of the people of the Great Lakes, see Marcia Valiante, *Harmonization of Great Lakes Water Management in the Shadow of NAFTA*, 81 U. DET. MERCY L. REV. 525, 527 (2004).

39. *See, e.g.*, Michael J. Donahue et al., *Great Lakes Diversions and Consumptive Use: The Issue in Perspective*, 18 CASE W. RES. J. INT'L L. 19 (1986) (describing several proposals).

40. Sporhase v. Nebraska, 458 U.S. 941 (1982).

the Great Lakes states and Canadian provinces[41] to adopt the Great Lakes Charter.[42] The Charter, created under the auspices of the Great Lakes Governors, is a non-binding, good faith agreement intended to provide the basis for a co-coordinated regime aimed at protecting the region as a whole. Charter signatories agreed to three key principles: (1) The states and provinces agree to regulate new or increased removals from the Great Lakes, whether consumptive or diversions, that are more than two million gallons per day.[43] (2) The parties agree to notify and consult with all other parties for all new or increased diversions or consumptive uses of water greater than 5,000,000 gallons per day.[44] (3) The parties commit to gathering and reporting information on all new or increased withdrawals of more than 100,000 gallons per day.[45]

Although the Charter on its face provides that diversions will be limited to those consistent with the long-term preservation of the resource, it clearly reflects a strong preference for no diversions at all.[46] The Charter embodies the commitment of the states and provinces to develop a joint strategy to manage and protect the waters of the basin.[47]

The joint approach of the Charter was approved and reinforced by the U.S. Congress in 1986 with the passage of section 1109 of the Water Resources Development Act (WRDA).[48] The WRDA provides that any state governor can veto any diversion from the United States' side of the border:

> No water shall be diverted or exported from any portion of the Great Lakes, within the United States, or from any tributary within the United States, of any of the Great Lakes, for use outside of the Great Lakes basin unless such diversion

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41. The Great Lakes States are Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. The Canadian Provinces are Ontario and Quebec.

42. Council of Great Lakes Governors, Great Lakes Charter, Principles for the Management of Great Lakes Water Resources (Feb. 11, 1985), http://cglg.org/projects/water/docs/GreatLakesCharter.pdf.

43. *Id.* at 2. A "diversion" is defined as a "transfer of water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another." *Id.* at 6. A "consumptive use" is defined as "that portion of water withdrawn or withheld from the Great Lakes Basin and assumed to be lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products or other processes." *Id.*

44. *Id.* at 4. *See, e.g.*, Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 424–26 (2006) (The other parties' rights are limited to consultation. If the state or province chooses to go ahead, there is no practical remedy.). For a detailed discussion of the practical and political challenges facing the Great Lakes, see PETER ANNIN, THE GREAT LAKES WATER WARS (2006).

45. Council of Great Lakes Governors, *supra* note 42, at 6.

46. Valiante, *supra* note 38, at 528.

47. *See* Peter V. MacAvoy, *The Great Lakes Charter: Toward a Basin-wide Strategy for Managing the Great Lakes*, 18 CASE W. RES. J. INT'L L. 49 (1986).

48. 42 U.S.C. § 1962d-20(d) (2000).

> or export is approved by the Governor of each of the Great Lake States.[49]

A key impetus behind the passage of this section of the WRDA was to insulate the Governors' decisions from attack under the Commerce Clause of the Constitution.[50]

In the years immediately following the passage of the WRDA, proposals for large-scale out-of-state diversions essentially dried up, but a number of proposals were put forward that contemplated the use of the Great Lakes water outside the watershed but within one of the Great Lakes states.[51] A typical example was the proposal for a small "temporary" diversion from Lake Michigan to Pleasant Prairie, Wisconsin, located immediately outside the basin, to provide the town with drinking water because its prior source had been contaminated by radium.[52]

As time went on, awareness of the weaknesses and shortcomings of the regime created by the WRDA and the Great Lakes Charter grew. It did not cover consumptive uses or groundwater removal. Lacking enforcement provisions, the Charter provided neither a limitation to the vetoes by individual states over other states' projects nor did it provide a remedy for failure to follow the Charter's consultation provisions. In addition, it did not cover the Canadian provinces even in a voluntary way. Finally, it did not indicate any awareness of the status of tribal nations as sovereign co-owners of the lakes.

IMMEDIATE RESPONSE TO GREAT LAKES WATER REMOVAL SCHEMES

In the 1990s, several events occurred that brought to the fore concerns about large exports of water from the Great Lakes Basin to other regions. First, in 1992, the United States, Canada, and Mexico signed the North American Free Trade Agreement (NAFTA).[53] Although it was supplemented by the North American Agreement on Environmental Cooperation in 1993,[54] fears remained that trade policy would trump the

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49. *Id.* Diversions approved prior to passage of the WRDA are not covered. *See* 42 U.S.C. § 1962d-20(f) (2000).

50. *See* Valiante, *supra* note 38, at 529.

51. *Id.*

52. *Id.* at 530.

53. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

54. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1993) (entered into force Jan. 1, 1994). This agreement purports to provide the environmental protections that were omitted from NAFTA.

power of the states and provinces to prohibit such exports.[55] These fears were exacerbated in 1998 when the Nova Group applied for and initially received a permit from the Province of Ontario to export water from Lake Superior to Japan. The permit was rescinded after a vociferous and near universal outcry, but the reality check created by the incident led to broad recognition that more explicit protections were needed.

Several entities immediately responded to the Nova Group proposal. First, the U.S. Congress passed an amendment to the WRDA[56] that extended its coverage explicitly to "exports" from the Great Lakes and encouraged the states to cooperate with the Canadian provinces to create "common conservation standards" to control withdrawals of Great Lakes waters.[57] Additionally, the Canadian government passed comparable legislation encouraging the Canadian provinces to prohibit export of water from, among others, the Great Lakes Basin.[58] Most importantly, the Great Lakes Governors and Premiers began negotiations that resulted in the agreement known as Annex 2001.[59]

ANNEX 2001: THE NEGOTIATION PROCESS

Annex 2001, a subsidiary to the Great Lakes Charter, reflected a commitment to working toward the development of a binding agreement to control exports from the Great Lakes Basin that would be acceptable to all ten jurisdictions by 2004.[60] The agreement built its strategy around the establishment of a common standard for all withdrawals from within the basin, not simply diversions. Larger withdrawals were to be regulated by decisions of a regional decision maker. The withdrawal standard was meant to incorporate not merely maintenance of the resources, but also principles of conservation, ecosystem protection, and improvement. This standard was

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55. In an effort to quash such fears, the governments of the three countries issued a joint statement asserting that "water in its natural state in lakes, rivers, reservoirs, aquifers, waterbasins and the like is not a good or product" and therefore is not covered by trade agreements. *Statement by the Governments of Canada, Mexico and the United States*, FREE TRADE OBSERVER, NO. 51, Dec. 2, 1993, at 855.

56. 42 U.S.C. § 1962d-20 (2000).

57. *Id.*

58. *See* Water Resources Preservation Act, S.Q., ch. 63 (1999), amended by ch. 48, 2001 S.Q. (Can.); *Water Taking and Transfer* 285/99 R.O. § 3. *See, e.g.*, Valiante, *supra* note 38, at 531-32.

59. Council of Great Lakes Governors, The Great Lakes Charter Annex, A Supplementary Agreement to the Great Lakes Charter, June 18, 2001, *available at* http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf.

60. *Id.* at 2, Directive No. 1.

expected to be applied to all withdrawals from the basin, with larger withdrawals to be regulated by decisions of a regional decision maker.[61]

The Annex 2001 signatories used the Council of Great Lakes Governors to implement its directives. The Council established a Water Management Working Group, consisting of state, local, and federal officials, which was supplemented by an Advisory Group of representatives of various water user sectors and conservation organizations. The only stakeholders not allocated a role were representatives from any of the many American Indian tribes and First Nations that hold a sovereign interest in the Great Lakes.

After the Working Group produced its first draft of the proposed agreement on July 19, 2004, in an effort to make the process transparent to the public, more than 30 public hearings were held on both sides of the border. The tribes and First Nations were invited to attend and make comments[62] as members of the public, but not as sovereigns with inherent claims to the water.

The end result of this process was two separate but coordinated agreements. The first, the Great Lakes-St. Lawrence River Basin Resource Compact,[63] will go into effect if ratified through legislation by each of the state legislatures, followed by consent of the U.S. Congress.[64] The second was a non-binding companion agreement, called the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement.[65] The Annex 2001 signatories initially intended to create one document that would bind both states and provincial governments. However, concerns

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61. *Id.* Directive No. 3.

62. Over 30,000 comments were received. *See* Welcome to the Council of Great Lakes Governors Homepage, http://www.cglg.org/ (search Annex 2001 Public Comments, or follow "comments" hyperlink; then follow "view comments" hyperlink) (last visited Jan. 22, 2008).

63. Great Lakes-St. Lawrence River Basin Resource Compact, Dec. 13, 2005, *available at* http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf. The Great Lakes-St. Lawrence River Basin Resource Compact will remain a proposed compact until approved by the legislatures of all eight states and the U.S. Congress. *Id.* As of August 22, 2007, Illinois and Minnesota have ratified the Compact, *see* Great Lakes-St. Lawrence River Basin Resources Compact Implementation, http://www.cglg.org/projects/water/CompactImplementation.asp (last visited Oct. 16, 2007).

64. Great Lakes-St. Lawrence River Basin Resource Compact, *supra* note 63, § 9.4, at 26-27. The Compact, once effective, will remain in force unless five of the eight states vote to terminate. *Id.* § 8.7, at 26.

65. Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, http://www.mnr.gov.on.ca/mnr/water/greatlakes/Agreement.pdf.

about the constitutionality of such a pact led to the development of this non-binding companion agreement.[66]

The system set up by the two agreements, while far from perfect, is substantively a great improvement on previous efforts to protect the Great Lakes. However, the processes by which it was reached and under which it is projected to be implemented are seriously defective because they do not effectively recognize the role of the Native American tribes and First Nations in managing the resource.

The Indian tribes as sovereign nations are effectively co-tenants with the states in claims to Great Lakes waters.[67] Nevertheless, when the Annex 2001 process began, the relevant tribes were effectively ignored, shutting them off from the practical development of the compact and the agreement.[68] A partial explanation for their exclusion may be found in the history of efforts to deal with the issue of water diversion. For almost 100 years, the allocation of Great Lakes water was either an international or an interstate concern. The institutions that developed to manage allocations of water, such as the International Joint Commission and later the Great Lakes Council of Governors, were by definition creatures of the states and provinces. For the greater part of the twentieth century the tribes in the East and Midwest were desperately poor and essentially powerless. In the United States, tribes were not in a position to assert their pre-existing rights until the 1970s. Thus, during this period when the initiatives that ultimately resulted in the Annex 2001 process were developing, it is likely that the claims of the tribes were outside the frames of reference of the state and provincial decision makers. As a result, when the effort to create binding government-to-government agreements began, the necessary role of the tribes in Annex 2001 itself, or in the mechanism set up to accomplish the task, was ignored.

It was apparently assumed that states would represent tribes whose lands are within their boundaries.[69] However, this arrangement was

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66. For an excellent discussion of the history and content of both agreements, see Hall, *supra* note 44.

67. At the initial meeting of the Working Group on March 15, 2002, when asked how tribes would be addressed, the response was that each state and province would work individually with tribes. Joint Water Management Working Group/Advisory Committee Meeting, Meeting Summary Memorandum, Mar. 15, 2002, *available at* http://www.cglg.org/projects/water/GroupSummaries.asp (last visited Oct. 21, 2007). Both the states and the tribes are subject to the superior power of the federal government under the Commerce Clause and the Indian Commerce Clause of the U.S. Constitution and tribes are not subject to state jurisdiction.

68. *See infra* note 82.

69. In Michigan this approach was implemented by an Intergovernmental Accord Between the Federally Recognized Indian Tribes in Michigan and the Governor of the State of Michigan Concerning Protection of Shared Water Resources (May 12, 2004), *available at*

inconsistent with the sovereign status of the tribes, which are subject only to the federal government. In addition, often there is substantial tension between state natural resources staff and tribes with whom the state shares resources. In so far as the tribes were included, they were invited to participate as members of the public at large, not as sovereigns who had property interests in the water in question. In particular, while the Water Management Working Group and the Advisory Group[70] included not only federal, state, and local officials, but also representatives of particular water use sectors and environmental groups, neither body contained a single tribal representative.[71]

TRIBAL RESPONSE TO ANNEX 2001

It is unclear precisely when tribal leaders on both sides of the border began to protest, but soon after the first draft of the Agreement was made public on July 19, 2004, the tribal response was swift and unambiguous. While generally supportive of its goals, the response unanimously attacked the exclusion of the tribes from the process by which the draft was developed. In addition, Indian commentators generally believed that its provisions were not sufficiently protective of the waters of the Great Lakes. With regard to the flaws in the process, the August 30, 2004 letter of Jane TenEyck, Acting Executive Director of CORA, was typical.

> [I]t is unfeasible to expect that one or two individuals could represent all of the Great Lakes Tribes and First Nations. Instead, CORA has repeatedly requested that the Council give the opportunity for each and every sovereign Tribe within the Great Lakes Basin to participate at the highest decision-making level....
> The Council's decision was to allow each State to "deal" with the Tribes that reside within its respective border. While I recognize and appreciate the State of Michigan's outreach to the tribes within its border, it must be conceded that no State has jurisdiction on Tribal lands nor to water within Tribal jurisdiction.[72]

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http://www.michigan.gov/documents/Accord_91058_7.pdf (last visited Oct. 21, 2007) (committing both parties to meeting at least twice a year to review the quantity and quality of water resources and to develop strategies).

70. Council of Great Lakes Governors, Projects Page, http://www.cglg.org/projects/water/CompactImplementation.asp (last visited Oct. 21, 2007) (Lists of the membership of the two groups are available under the heading "Development Rosters.").

71. *See infra* note 82.

72. Letter from Jane TenEyck, Acting Executive Director of CORA, to David Naftzger, Executive Director of the CGLG, at 2 (2004) (on file with author and the GLCG). In the letter, TenEyck notes:

Similarly, the letter of Laura Spurr, Tribal Chairperson of the Nottawaseppi Huron Band of Potawatomi, dated October 13, 2004, was equally explicit:

> The little consideration given to Tribes [in the process] occurred in the Great Lakes Basin Water Resources Compact. Section 3.8 calls for "appropriate consultations" with federally recognized Tribes. The ability to submit comments as a member of the general public concerning new or increased diversions is not an "appropriate" level of Tribal input.
> ...
> At no time were the tribes invited to be members of the Working Group as governmental agencies.[73]

The comments of Audry Falcon, Chief of the Saginaw Chippewa Indian Tribe of Michigan, focus on the fact that tribes are not merely "interested persons" but governments whose cooperation is necessary if the Agreements are to be effectively implemented. Chief Falcon also articulated the special relationship that the tribes have with these waters by stating that "to exclude the tribes from participating in the creation and implementation of this agreement is in contradiction to the spiritual and cultural responsibility native people inherently have toward the earth and the future generations that will inhabit her."[74]

This emphasis on the value of the insights that come from being "a steward of the Great Lakes since time immemorial" to an effective system of protection for the lakes was reflected even more strongly in the October 18, 2004 comments of Frank Ettawageshik,[75] Tribal Chairman of the Little Traverse Bay Bands of Odawa Indians. He stated:

> We cannot support [the Agreement and Compact] until Tribes and First Nations in the Great Lakes Basin area have a representative voice along with the States and Provinces. Tribes and First Nations[']] interests must be appropriately

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> In regard to the process of consultation with the Tribes and First Nations during the time period between 2001 and now, CORA's Environmental Coordinator has represented CORA on several conference calls with the stakeholders work group, testified at public hearings and has written several letters with our concerns regarding water use and diversions.

Id.

73. Letter from Laura Spurr, Tribal Chairperson of the Nottawaseppi Huron Band of Potawatomi, to David Naftzger, Executive Director, Council of Great Lakes Governors (Oct. 13, 2004) (on file with Natural Resources Journal). This letter refers to the first draft, which was then in the public comment process.

74. Comments of Audry Falcon, Chief of the Saginaw Chippewa Indian Tribe of Michigan (Sept. 28, 2004) (on file with author and the CGLG).

75. Frank Ettawageshik has been at the forefront of tribal efforts to protect the Great Lakes. He was a driving force behind the November meeting and Declaration of Tribes from Michigan and Canada.

> heard and our solutions for addressing these interests and the interests of the waters must be incorporated into the final Agreement and Compact....Tribal and First Nations representation will strengthen the process by ensuring that all of the interested parties are represented and have committed to implementing the protections that are being envisioned. We must never lose sight that our goal is the protection of the Great Lakes for this and the next seven generations.[76]

These and similar comments raised important legal and practical questions about the development and content of the Draft Agreement and Compact. In addition to this problem relating to the status of the tribes as sovereign nations, there was substantial concern within the tribal community that it was too late to have any real impact on the final drafts. While the final drafts could be expected to reflect some changes in response to public comments, the basic structure was unlikely to be altered. In recognition of this reality, the tribes decided to speak with a united voice.

The response to this concern developed during the fall of 2004, when member tribes discussed the issue at the meetings of the Midwest Alliance of Sovereign Tribes and of the National Congress of American Indians (NCAI). This later meeting resulted in a strongly worded resolution, which provided:

> WHEREAS, Tribes were not included during the development process, or offered any meaningful involvement in the compact negotiation process for the Great Lakes Water Resources Compact; the resulting compact fails to reflect Tribal and First Nations interests in the groundwater; and
>
> ...
>
> WHEREAS, the importance of a compact for the survival and long-term well being of the Great Lakes is recognized by all Tribes and First Nations,
>
> NOW THEREFORE BE IT RESOLVED, that the NCAI hereby objects to the Compact, as drafted, and requests that Congress not consent to the compact until Tribal and First Nation concerns are properly addressed in the process.[77]

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76. Comments of Frank Ettawageshik, Tribal Chairman of the Little Traverse Bay Bands of Odawa Indians (Oct. 2004) (on file with author and the CGLG).

77. National Congress of American Indians Resolution # FTL-04018, Tribal Participation in the Great Lakes Resources Compact & Great Lakes Basin Water Resources (adopted at the NCAI Annual Session, Oct. 15, 2004) (on file with author). The NCAI is the largest and oldest organization of tribal governments in the United States, with over 250 tribal government members from all portions of the United States. NCAI, History, http://www.ncai.org/ (click on "About"). The NCAI has recently expanded its reach by agreeing to work with the Association (Assembly) of First Nations, a comparable Canadian organization.

Informal discussions at this meeting also led tribal leaders to the conclusion that concerned tribes must come together to express their objections to the Annex 2001 process with a united voice before the adoption of the Agreement and Compact in final form, which was then scheduled for January 2005.

About one month later, this meeting came together at Saulte Ste Marie, Michigan. A brief description of the meeting helps to provide a feel for the distinctive voice and approach the tribes and First Nations bring to resource protection issues.

The room was set up with concentric circles of chairs rather than the more common auditorium style, with entrances from all four directions; the keynote speaker was a representative of the Water Walkers.[78] In addition, a pipe ceremony was performed using a pipe that is over 300 years old, having been used in Montreal in 1701.[79] Approximately 160 tribal leaders attended from both sides of the border, representing 120 tribes and First Nations. Signatories included the Union of Ontario Indians, representing 42 First Nations; the Association of Iroquois and Allied Indians, representing eight First Nations; and the Ninhawbc-Aski Nation, representing 53 First Nations. In addition, 44 individual tribes from Ontario, New York, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota signed.[80] After every leader had talked about the agreement, each came to the front of the room individually to sign the document.[81] It was then smudged with sage and read aloud in Anishtabe, with translation on the spot by Pipe Carrier Frank Kelley. At the end, the drum played an honor song and virtually everyone present danced in honor of what had been done. A small tobacco bundle was given to every person present to spread with a prayer in his or her individual portion of the lakes.[82]

The resulting Tribal and First Nations Great Lakes Water Accord reiterated the concerns of the earlier letters and comments to the Council of Governors.[83] The Accord emphasized that the tribes and First Nations "continue to exercise cultural and spiritual rights of self determination and property rights within traditional territories....[W]e are not political

78. *See supra* note 1. In traditional Chippewa and Ottawa culture, women are responsible for the protection of water.

79. Tribes on both sides of the border had not been brought together in one place for a very long time. Telephone Interview with Frank Ettawageshik, Tribal Chairman of the Little Traverse Bands of Odawa Indians, Sept. 22, 2006.

80. *Id. See also* Jennifer Dale, *Tribes Sign Great Lakes Water Accord*, TRIBAL FISHING (Chippewa Ottawa Resource Authority, Sault Ste. Marie, Mich.), Jan. 2005, at 1.

81. Ettawageshik Interview, *supra* note 79. Some leaders included their clan sign, as was done in the early treaties. *Id.*

82. Representatives from the Annex 2001 process were at the meeting as observers. *Id.*

83. *See* Tribal and First Nations Great Lakes Water Accord, Nov. 23, 2004, *infra*, Appendix A.

subdivisions of the States or Provinces...."[84] It concluded that "[we are] further pledging to work together with each other and with the other governments in the Great Lakes Basin to secure a healthy future for the Great Lakes."[85] In effect, the tribes and First Nations asserted that their participation was necessary for the Agreement and Compact to accomplish its goals.

Almost immediately, an invitation was extended to attend a meeting with the Water Management Working Group.[86] This meeting took place in Chicago on February 1, 2005. At the meeting, presentations were made by members of both the Working Group and the various tribal and First Nations representatives. After discussions of both substantive issues and concerns about the process, the tribes and First Nations were assured that the Draft Agreements were "not intended to infringe on aboriginal or treaty rights, or rights held by a tribe or First Nation based on its status as a Tribe or a First Nation."[87] The meeting ended with a promise that the "Working Group will continue to discuss how best to continue dialogue with representatives of the Tribes and First Nations."[88] Further, the tribes were assured that the Agreements "are a work in progress and...alternatives are still under consideration."[89]

The Final Draft of the Compact, while essentially the same as the earlier drafts, does contain additional language of importance to the tribes and First Nations.[90] The Tribal Consultation provision articulates no

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84. *Id.* at 2.

85. *Id.*

86. At the Working Group's initial meeting on March 15, 2002, the Canadian Environmental Law Association, Great Lakes United, and CORA told the Group that the tribes should be more involved. Joint Water Management Working Group, *supra* note 67, at 9, 10, 13. This was reiterated at the next meeting by the Canadian Environmental Law Association. Joint Water Management Working Group/Advisory Committee Meeting, Meeting Summary Memorandum, Apr. 23, 2002, at 2, *available at* http://www.cglg.org/projects/water/GroupSummaries.asp. No further mention of the tribes occurred, despite numerous discussions about public participation, until more than two years later on November 15, 2004, when the Working Group was provided with a summary of tribal comments on the First Draft of the Agreements. After the Inter-tribal Accord, each meeting devoted time to discussing how the tribes should be included in the Agreement. *See, e.g.*, Joint Water Management Working Group/Advisory Committee Meeting, Meeting Summary Memorandum, Jan. 11-13, 2005, *available at* http://www.cglg.org/projects/water/GroupSummaries.asp.

87. Council of Great Lakes Governors, Water Management Working Group, Meeting with Tribal and First Nations Representatives, Meeting Summary, Feb.1, 2005, at 3, *available at* http://www.cglg.org/projects/water/GroupSummaries.asp.

88. *Id.* at 6.

89. *Id.*

90. The language of the Compact is congruent with the language of the Agreement between the states and provinces with respect to both provisions. Great Lakes-St. Lawrence River Basin Resource Compact, *supra* note 63.

substantial changes to the way the documents will be implemented. The Compact continues to provide for consultation but no enforceable input from the tribes. In language very similar to that of the parallel section of the First Draft, however, the section on tribal consultation provides that in addition to other opportunities for public participation, "appropriate consultations" will occur on "all Proposals subject to Council or Regional Review." It also provides that notice of proposals and any meeting or hearing on such proposals shall be given to the tribes. Finally, "the Parties and the Council shall consider the comments received under this Section before approving, approving with modification or disapproving any Proposal subject to this Compact."[91]

The most important additional language occurs in Section 8.1, Effect on Existing Rights. The earlier version of the Compact provided that the Compact would have no effect on water withdrawals established by state or federal law prior to the Compact's effective date. Further, the Compact will not interfere with the common law water rights laws of the signatory parties. The Final Draft explicitly added part three, which provides, "Nothing in this Compact is intended to abrogate or derogate from treaty rights or rights held by any Tribe recognized by the federal government of the United States based upon its status as a Tribe recognized by the federal government of the United States."[92]

This section acknowledges that the tribes are not bound by the Compact and can, if they wish, make or approve withdrawals of water from the lakes independent of the Compact and Agreement. Such a withdrawal to the detriment of the lakes is highly unlikely, given the tribes' strong collective commitment to the preservation of the Great Lakes and against

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91. Sections 1 and 2 of Article 5, Tribal Consultation, read as follows:

> 1. In addition to all other opportunities to comment pursuant to Section 6.2, appropriate consultations shall occur with federally recognized Tribes in the Originating Party for all Proposals subject to Council or Regional Review pursuant to this Compact. Such consultations shall be organized in the manner suitable to the individual Proposal and the laws and policies of the Originating Party.
>
> 2. All federally recognized Tribes within the Basin shall receive reasonable notice indicating that they have an opportunity to comment in writing to the Council or the Regional Body, or both, and other relevant organizations on whether the Proposal meets the requirements of the Standard of Review and Decision when a Proposal is subject to Regional Review or Council approval. Any notice from the Council shall inform the Tribes of any meeting or hearing...and invite them to attend. The Parties and the Council shall consider the comments received under this Section before approving, approving with modifications or disapproving any Proposal subject to Council or Regional Review.

Id. art. 5, § 5.1.1–5.1.2.

92. *Id.* art. 8, § 8.1.3.

the commodification of water. This independence does, however, provide a powerful incentive for the Regional Body, the primary implementation body of the agreement, to engage in genuine and effective consultation.

As a practical matter, an effective working relationship between the tribes, states, and provinces is developing. Instead of structuring the input of the tribes and First Nations through the representatives of the states and provinces in which they are located, as originally contemplated, the current approach is to consult directly with them. As a result, the tribes and First Nations were invited to a gathering before the first official meeting of the Regional Body to express their views and concerns. Although all leaders did not attend and, as a practical matter, are not expected to attend any given meeting, the opportunity was available. This has the advantage of reflecting the government-to-government nature of the relationship of the tribes with the states and provinces and their collective body, created by the Compact and Agreement.

However, the current system of collaboration does not totally address the concerns the tribes and First Nations raised regarding the Compact during the comment process. For example, the Compact provides tribes with no effective protection against diversions or consumptive uses that may be approved by the Regional Body. The Compact allows for diversions of substantial quantities of water without any requirement of approval by the Regional Body, so long as the water is transported in containers smaller than 5.7 gallons,[93] a clear bow to pressures by the bottled water industry.[94] The inclusion of this large loophole in the protection provided by the agreements was a key substantive issue raised by various tribal and First Nations representatives during the comment process.[95]

A CONTRASTING EXAMPLE

The flawed process of Annex 2001 with respect to tribes and First Nations can be contrasted with the substantially more inclusive method adopted by the Great Lakes Regional Collaboration (GLRC). Some of the disparity flows from the inherent differences between the two enterprises. While Annex 2001 was intended to develop a mechanism for enforceable

93. *Id.* art. 4, § 4.12.10.

94. *See* Hall *supra* note 44, at 443.

95. For example, the comments on the proposed Great Lake Basin Sustainable Water Resources Agreement by the Great Lakes Indian Fish and Wildlife Commission took the position that "the agreements must not allow through the back door what could not be accomplished through the front, that is, they must not allow in essence bulk removals of water in small bottles." Great Lakes Indian Fish and Wildlife Commission, Comments on the Proposed Great Lakes Basin Sustainable Water Resources Agreement (Aug. 31, 2005) (on file with author and the CGLG).

limits on approved diversions of water from the Great Lakes, the GLRC is a process for coordination and planning for dealing with a variety of environmental problem areas relating to the lakes. As such, it does not trigger the same resistance to providing the tribes a strong place at the decision-making table.

The Great Lakes Regional Collaboration, Executive Order 13340, was signed by President Bush on May 18, 2004.[96] This order established an Interagency Task Force to develop a process for collaboration between the federal government and "Great Lakes States, tribal and local governments, communities[,] and other interests"[97] to address the important environmental and natural resource issues in the Great Lakes. After numerous discussions in December of that year, a declaration of policy was issued by signatories who included the Interagency Task Force as well as the Council of Great Lakes Governors, the Great Lakes Cities Initiative, the Great Lakes Congressional Delegation, and Indian tribes. In addition, a framework document was developed to guide the efforts designed to create a comprehensive strategy to restore and protect the Great Lakes. The focus of the effort was eight priorities for protection of the watershed that had previously been identified by the Council of Great Lakes Governors.[98] Individual Area Strategy Teams were organized to deal with the priorities, each of which included tribal representatives along with others representing various constituencies from business to environmental groups. The reports of these eight Strategy Teams were combined to create a final strategy,[99] which was released in December 2005.[100] This document explicitly acknowledged that the resulting plan must address "tribal Interests and perspectives as an overarching issue."[101] In particular, it acknowledged that "most environmental problems, and particularly habitat degradation,

96. Establishment of Great Lakes Interagency Task Force and Promotion of a Regional Collaboration of National Significance for the Great Lakes, 69 Fed. Reg. 29,043 (May 18, 2004).

97. *Id.*

98. These priorities are aquatic invasive species, habitat conservation and species management, near-shore waters and coastal areas (coastal health), areas of concern/ sediments, non-point sources, toxic pollutants, sound information base and representative indicators, and sustainability. Great Lakes Regional Collaboration, Drafting the Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes, *available at* http://www.glrc. us/process.html (last visited Jan. 20, 2008).

99. A first draft was made available for a 60-day comment period in July 2005. Six public meetings were held throughout the region and over 6,000 comments were received. *Id.*

100. GLRC, GREAT LAKES REGIONAL COLLABORATION STRATEGY TO RESTORE AND PROTECT THE GREAT LAKES (2005), *available at* http://www.glrc.us/documents/strategy/GLRC_ Strategy.pdf.

101. *Id.* at 13.

disproportionately impact the culture, religious practices and other life ways of Tribal communities."[102]

The strategy will be implemented by a continuation of the structure that developed it. In particular the Executive Committee membership was continued. Thus, in addition to representatives for federal, state, and local governments, tribal representatives remain on the Executive Committee. A flexible system for identifying and designating the tribal representative was established, providing that

> [t]he Tribal Spokesperson will vary based on meeting location and topic of discussion. To ensure continuity, the Tribes will utilize the U.S. Environmental Protection Agency's American Indian Environmental Office as the central point of coordination and information sharing. In addition, Tribes will be responsible for continuity in participation on the Executive Committee.[103]

This system of tribal representation provides an interesting solution to the practical problem of giving the diverse tribal community an effective voice in a manageable way.

NATIVE AMERICAN ROLE IN ENVIRONMENTAL PROTECTION

The Annex 2001 process suggests several lessons for other situations where a significant natural resource is shared between tribes and other governments. Perhaps the most obvious is the tactical lesson for tribes that a united front is more effective than individual assertions of rights. Similarly, states and their representatives must learn that tribal assertions of sovereignty and shared property rights are real and cannot successfully be ignored, even though individual tribes may be small and lacking in economic muscle. From this perspective, a comparison of the Annex 2001 process and the Regional Collaboration process suggests that appropriate mechanisms can be developed for full tribal participation that enhance rather than impede progress toward shared goals.

While these may be useful object lessons in wise ways to navigate the political process inherent in co-management of shared natural resources, without more this is of relatively little relevance to the broader concern for creating more effective protection of the resource. In other words, does tribal participation add anything of substance to the goal of environmental protection? The answer must be that, in fact, it does for a variety of reasons, many of which involve the sort of broad generalizations that should be

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102. *Id.*

103. Great Lakes Regional Collaboration, Framework for the Great Lakes Regional Collaboration, § III.A.2(d), *available at* http://www.glrc.us.

approached very cautiously. Nevertheless, these assertions do have basis in fact, not merely in stereotype or rhetoric.

In particular, Indian tribes and First Nations people do offer a perspective on protection of the land and water that is quite distinct from that of the dominant culture.[104] This arises from a variety of sources. For many tribes, culture and spirituality are intertwined with sacred places, places that are not buildings or temples, but specific natural features. This fact encourages particularly intense efforts to protect such places from exploitation so as to preserve them in their natural condition.

This emphasis on preservation of land and water is also tied to physical well-being for tribal members who live on reservations and take at least part of their livelihood from the land. As a result, problems such as high levels of toxic chemicals in fish, which are consumed in much higher quantities than in other communities, are particularly acute. The immediacy of such impacts encourages an intense awareness of such problems and a commitment to remedying them.

The cultural characteristic of taking a long-range perspective on decision making is broadly espoused across North America. This is often articulated as the principle that decisions should be taken with a view to protecting the welfare of seven future generations.[105] This idea, which is currently advocated by the environmental community under the label of "intergenerational equity,"[106] is often overlooked in governmental and commercial decision making in favor of short-term, usually economic, benefit.

Finally, tribal governments are political, like all governmental entities, but the constituencies they must consider can be quite different from those that drive state and federal politicians. For example, the tribes have been among the strongest voices opposing the well-financed water bottling industry during the Annex 2001 process. As a result, a tribal voice can balance the compelling demands of the industrial and commercial sectors. Taken together these attributes show that tribal and First Nation participation improves the quality of natural resource decision making.

The Annex 2001 process is a useful example for parties embarking on the development of shared management systems where tribes are co-owners of the resource. It illustrates the difficulty of structuring tribal participation in such programs in a way that is both manageable and

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104. E-mail from Frank Ettawageshik, Tribal Chairman, Little Traverse Bay Bands of Odawa Indians, to Michigan DEQ (Oct. 18, 2004) (on file with author and the Council of Governors) ("The degradation of water in the Great Lakes devastates the traditional culture and spirituality of native peoples.").

105. *See* Comments of Frank Ettawageshik, *supra* note 76.

106. *See generally* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1966).

meaningful where the resource is broadly held, like the Great Lakes. This is a genuine concern because the number of affected tribes may be large and, as independent sovereigns, no one tribe can speak for another.[107] The initial approaches during the Annex 2001 process, which ignored the necessity of a direct tribal role by relegating it to the states, were not effective. The final solution recognizes tribal sovereignty but leaves both the Agreement participants and the tribes vulnerable to the consequences of others' decisions.

Although the non-binding nature of the Great Lakes Collaborative made inclusion less politically volatile than when the result is legally binding, the process it adopted suggests a better approach to tribal involvement. First, include representatives from the earliest stages of the endeavor. Even if an individual tribal leader cannot legally represent all affected tribes, he or she may be able to suggest structures for participation that are generally acceptable and effective. Second, invite affected tribes to some form of participation and consult with them on how their interests are represented. Existing institutions like Chippewa Ottawa Resource Authority or Great Lakes Indian Fish and Wildlife Commission or the EPA's American Indian Environmental Office can coordinate the input of those interests in the process. While this approach may not entirely solve the problem of including a number of different sovereigns' similar but quite distinct concerns, it can go a long way toward creating an effective process that enhances environmental protection.

107. At the initial Joint Water Management Working Group/Advisory Group Committee Meeting, when asked how tribes would be addressed, the Working Group responded that it wanted "a balanced, fair approach but it is difficult to find one, or even several, organizations to represent all Tribes. The Working Group does want Tribal representation at the table and is continuing its work to ensure that the Tribes are properly represented in this process." Joint Water Management Working Group, *supra* note 67, at 6.

APPENDIX A

Tribal and First Nations Great Lakes Water Accord

November 23, 2004, Page 1

Our ancestors have inhabited the Great Lakes Basin since time immemorial, long before the current political boundaries were drawn. Our spiritual and cultural connections to our Mother Earth are manifest by our willingness to embrace the responsibility of protecting and preserving the land and Waters.

Traditional teachings and modern science combine to strengthen our historical understanding that Water is the life-blood of our Mother Earth. Indigenous women continue their role as protectors of the Water. Ceremonial teachings are reminders of our heritage, they are practices of our current peoples, and they are treasured gifts that we hand to our children.

When considering matters of great importance we are taught to think beyond the current generation. We also are taught that each of us is someone's seventh generation. We must continually ask ourselves what we are leaving for a future seventh generation.

We understand that the whole earth is an interconnected ecosystem. The health of any one part affects the health and well being of the whole. It is our spiritual and cultural responsibility to protect our local lands and Waters in order to help protect the whole of Mother Earth.

Tribes and First Nations have observed with growing interest that the Great Lakes Basin governments of the United States and Canada have begun to share our concerns about the preservation of the quality and quantity of the Great Lakes Waters.

The eight States and two Provinces of the Great Lakes Basin entered into the 1985 Great Lakes Charter, Annex 2001, and have drafted an Interstate Compact and International Agreement to implement the provisions of Annex 2001. These agreements, however, make no provisions for including Tribes and First Nations as governments with rights and responsibilities regarding Great Lakes Waters. These agreements also assert that only the States and Provinces have governmental responsibility within the Great Lakes Basin.

Tribal and First Nations Great Lakes Water Accord
November 23, 2004, Page 2

Through International treaties and court actions, however, Tribes and First Nations continue to exercise cultural and spiritual rights of self-determination and property rights within traditional territories for our peoples and nations. Tribal and First Nation governments, like all governments, have the duty to protect the interests and future rights of our peoples. Since we have recognized rights and we are not political subdivisions of the States or Provinces, the assertion that the States and Provinces own and have the sole responsibility to protect the Waters is flawed.

Thus, the efforts of the States and Provinces to protect the Waters of the Great Lakes Basin are flawed because these efforts do not include the direct participation of the governments of Tribes and First Nations. This fundamental flaw endangers the interests of all of the inhabitants of the Great Lakes Basin and, ultimately, because of the interconnectedness of the worldwide ecosystem, endangers the interests of the entire earth.

It is thus our right, our responsibility and our duty to insist that no plan to protect and preserve the Great Lakes Waters moves forward without the equal highest-level participation of Tribal and First Nation governments with the governments of the United States and Canada. Merely consulting with Tribes and First Nations is not adequate, full participation must be achieved.

By this accord signed on November 23, 2004, at Sault Ste. Marie, Michigan, the Tribes and First Nations of the Great Lakes Basin do hereby demand that our rights and sovereignty be respected, that any governmental effort to protect and preserve the Waters of the Great Lakes Basin include full participation by Tribes and First Nations, and we also hereby pledge that we share the interests and concerns about the future of the Great Lakes Waters, further pledging to work together with each other and with the other governments in the Great Lakes Basin to secure a healthy future for the Great Lakes.

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November 23, 2004, Page 3

AAMJIWNAANG

By Darren Henry, Councilor

ASSOCIATION OF IROQUOIS AND ALLIED NATIONS

By Chief Chris McCormack

AUDECK OMNI KANING

By Peter Nahwegahbow

BATCHEWANA FIRST NATION

By Chief Vernon Syrette

BEAUSOLEIL FIRST NATION

By Rod Monague, Councilor

BIIJITWAABIK ZAAING ANISHINAABEK

By Chief Mike Esquega

CHIEFS OF ONTARIO

By Regional Chief Charles Fox

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION

By Geewadin Elliott

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November 23, 2004, Page 4

DELAWARE (MORAVIAN) NATION

By Denise Stonefish

FIRST NATION OF CREES QUEBEC

By Daisy Costas

FOND DU LAC

By Eugene Reynolds

GARDEN RIVER FIRST NATION

By Chief Lyle Sayers

GRAND TRAVERSE BAY BAND OF OTTAWA AND CHIPPEWA INDIANS

By Robert Kewaygoshkum, Chairperson

HURON POTAWATOMI, INC.

By Laura Spurr, Chairperson

KEWEENAW BAY INDIAN COMMUNITY

By William E. Emery, President

LITTLE RIVER BAND OF OTTAWA INDIANS

By Lee Sprague, Ogemaw

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LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

By Frank Ettawageshik, Chairman

MAGNETAWAN FIRST NATION

By Chief Wilmer Naganosh

MATAWA FIRST NATION

By Noah Oshag, First Nation Delegate

M'CHIGEENG FIRST NATION

By Chief Glen Hare

MISSISSAUGA FIRST NATION

By Chief Bryan LaForm

MOHAWKS OF BAY OF QUINTE

Dried meat, Otoroserilio Wolf Clan
By Chief R. Donald Maracle

MOHAWKS OF AKWENSASNE

By Chief A. Francis Boots

NISHNAWBE ASKI NATION

By Deputy Grand Chief Dan Kooses

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ONEIDA NATION OF THE THAMES
Chief K Phillips Biine'kwe
By Chief Randall Phillips

POKAGON BAND OF POTAWATOMI INDIANS
Daniel J Tapp
By Dan Rapp, Tribal Secretary

SAGAMOK ANISHNAWBEK

By Chief Angus Toulouse

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN
Audrey Falcon
By Chief Audrey Falcon

SAUGEEN FIRST NATION

By Chief Vernon Roote

SAULT STE MARIE TRIBE OF CHIPPEWA INDIANS
Aaron A Payment
By Aaron Payment, Chairperson

SOKAOGAN CHIPPEWA

By Tina Van Zile, Tribal Delegate

STOCKBRIDGE MUNSEE
Robert Chicks
Robert Chicks, Chairperson

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THESSALON FIRST NATION

Chief James Wabigwan

UNION OF ONTARIO INDIANS

By Grand Council Chief John Beaucage

WALPOLE ISLAND FIRST NATION

By David White, First Nation Delegate

WASAUKSING FIRST NATION

Chief Joel King

WHITEFISH RIVER FIRST NATION

Esther Osche, First Nation Delegate

WIKWEMIKONG FIRST NATION

By Ron Manitowabi, Councilor

ZHIIBAAHAASING FIRST NATION

Chief Irene Kells

Tribal and First Nations Great Lakes Water Accord

By the accord presented on November 23, 2004, at Sault Saint Marie, Michigan, the Tribes and First Nations of the Great Lakes Basin do hereby demand that our rights and sovereignty be respected, that any governmental effort to protect and preserve the Waters of the Great Lakes Basin include full participation by Tribes and First Nations, and we also hereby pledge that we share the interests and concerns about the future of the Great Lakes Waters, further pledging to work together with each other and with the other governments in the Great Lakes Basin to secure a healthy future for the Great Lakes.

WHITEFISH LAKE FIRST NATION

By Ogema Art Petahtegoose — Nov 23 2004
Date