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Challenges to the Constitutionality and the Effectiveness of the U.S. Management of the Bi-National Great Lakes Fisheries

by

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Introduction

The natural resources of the Great Lakes' basin have been coveted and used for thousands of years². Much of the superb Great Lakes ecosystem had been destroyed by the 1860s as a result of detrimental activities by society. The destructive action (or inaction) by society was brought to the attention of the Canadian and United States federal governments as early as 1897³. A Canadian-United States Joint Commission created in 1892 documented the “destructive methods of fishing, pollution, and obstruction of waters that was harmful to fish and to navigation.” This Joint Commission was also charged with making recommendations whereby “fish life may be. . . preserved and increased.”⁴ After an exhaustive four-year effort, this Joint Commission recommended “regulations to conserve the fish, creation of a permanent joint commission to monitor and investigate changing conditions, and have the authority to make rules that had the force of law.”

The article by Bogue (1993) provides a detailed history of the institutional problems that contributed to the failure to implement the recommendations. Bogue (1993) identified two other attempts (1908 and 1946) to regulate fishing by treaty that also failed.⁵

Environmental stresses that limit the availability of the natural resources, such as the construction of dams that prevented fish migration, became issues as society greatly increased in numbers as a result of the influx of Europeans. The initial stresses impacting the native fish populations were caused by habitat destruction, especially in the tributaries, and inadequate regulation of harvest. As the abundance of important species decreased, most of the blame was placed on excessive commercial harvest. By the late 1980s, after the fishery resources had declined drastically, the “cause-effect” relationship

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² Cleland, C. E. 1982. The inland shore fishery of the northern Great Lakes: its development and importance in prehistory. *American Antiquity* 45: 761-784.

³ Bogue, M. B. 1993. To Save the Fish: Canada, the United States, the Great Lakes, and the Joint Commission of 1892. *Journal of American History*, March 1993. 1429-1454.

⁴ U.S. Congress, House, *Report of the Joint Commission Relative to the Preservation of Fisheries in Waters Contiguous to Canada and the United States*, 54 Cong., 2 sess., 1897, H. Doc. 315 (Serial 3534), 3-6.

⁵ Piper, *International Law of the Great Lakes*, 40-44. For the content of the regulations developed under terms of the 1908 treaty, see U.S. Congress, House, *Protection and Preservation of food Fishes in International Boundary Waters of the United States and Canada*, 61 Cong., 2 sess., 1910, H. Doc. 638 (Serial 5834).

between habitat destruction and over harvest and the resulting crashes of fish stocks were voiced by conservationists⁶.

Bi-national environmental regulations (water levels/flows and quality), however, made progress as a result of the Boundary Waters Treaty (1909) and the more recent Great Lakes Water Quality Agreement (as amended 1987). Also, a number of federal laws and regulations have been passed to protect fish and wildlife species and their habitats. Although there is better understanding of the relationship between habitat quantity and quality, and fish abundance, the institutional structures have hindered the effective implementation of an “ecosystem approach” to resource management. While recent environmental regulations have required full consideration of environmental impacts on fish and wildlife, fish and wildlife agencies have not been very effective in describing and quantifying the structure of a healthy and robust ecosystem nor the habitat requirements of these resources under their management.

Aquatic resource management, especially when applied to large systems has been challenging because it requires remote sensing, subsampling, and modeling. Many of these populations have been greatly reduced in abundance, size/age range, and geographic distribution, even from recent historical levels. This is reflected in the phrase “*shifting baseline syndrome*”⁷ where each generation of resource managers appears to set for their goals and objectives the level of abundance and distribution of fish recorded during their contemporary studies, apparently ignoring the information that current numbers have been significantly reduced from those recorded by the previous generation. Although descriptions and quantification of historic conditions are important in terrestrial ecology, they are resisted in aquatic ecology because the historic references are assumed to be unreliable.

Fishery management has been attempting to ensure the availability of fish for recreational and commercial fishing in a changing environment. Since hatchery production and stocking can produce more pounds of fish more quickly than restoring fish in a perturbed system, fish management has often become hatchery dependent. Furthermore, the availability of “desired exotic sports fish” to supplement or replace native species has made some native species disposable. Therefore, the stocking of fish for fishing without addressing habitat degradation, has continued the isolation of fish and wildlife management personnel from environmental management groups that espouse “ecosystem restoration and management” for the Great Lakes.

Currently, the Great Lakes ecosystem(s), the legal regulations, and the institutional setting(s) are at crossroads. The very severe environmental destruction of some of the Great Lakes has been slowed, stopped or even reversed. Some native fish species that had been very depressed in abundance during the 1960s to 1980s are recovering and increasing in abundance. Opportunities exist to encourage such recoveries and also to reintroduce other native species that were lost in the system, but where the species is not extinct. Restoration of healthy, functioning ecosystems and their native species is in line with federal environmental laws, treaties and agreements. However, restoration may be in conflict with the desires of some of the fishing public,

⁶ Bogue, M. B. 1993. To Save the Fish: Canada, the United States, the Great Lakes, and the Joint Commission of 1892. *Journal of American History*, March 1993:1429-1454.

⁷ www.shiftingbaselines.org/

and some fishery management practices that have become dependent on exotics and hatcheries.

If natural species diversity and healthy functional ecosystems are not restored as part of the environmental recovery, the niches currently vacant or occupied by stocked exotic species could be permanently filled by existing or newly introduced exotic species. This could continue the precariously unstable ecosystems that may be more conducive to the expansion of disruptive nuisance species (e.g., ruffe, zebra mussel) and further introductions. It also requires continued, costly hatchery stockings to maintain the expected high harvest levels. Such artificial ecosystems are more likely to crash due to hatchery limitations in maintaining the stocking (e.g., funding, disease, broodstock problems) and the opportunity for new exotics to become established. Ecosystem “crashes” would result in tremendous economic losses to society.

Therefore, the recent management decisions by the Lake Committees to maintain and support artificial fish communities and to identify these as the desired goals for the future do not serve the long-term societal interest in these ecosystems. It also misleads other agencies that are working on the treaty⁸ mandated restoration of the Great Lakes.

Legal Setting

U.S. Constitution - The States and Tribes have primary jurisdiction over the regulation and management of the natural resources within their boundaries including navigable waters and soils under them⁹. According to the U.S. Constitution, the States and certain Indian Tribes have the authority to manage the natural resources within their boundary. The limits on multi-state, inter-jurisdictional management are addressed in Article I, Section 10 of the United States Constitution which prohibits any State of the United States from entering into “any Treaty, Alliance or Confederation.” The same Section prohibits any State, without the consent of Congress, from entering into “any Agreement or Compact . . . with a foreign Power.”

Federal influence on natural resources management is provided through a variety of approaches such as specific laws, through standards for environmental quality, and indirectly through the availability of funding. For example, when a species becomes severely depressed in abundance, the species may be listed as a federally threatened or endangered species, thereby, providing federal protection. Other exemptions to unilateral State management of natural resources include migratory birds (US Fish and Wildlife Service), statewide water quality (US Environmental Protection Agency), fish passage (Federal Energy Regulatory Commission), wetlands and other aquatic habitats (US Army Corps of Engineers), and inter-jurisdictional natural resources managed through congressionally approved interstate or international compacts or agreements.

Treaty Responsibilities - Due to the bi-national setting of the Great Lakes, activities in this area may be regulated by treaties and/or bi-national agreements, such as:

- i.) The Boundary Waters Treaty of 1909 identifies commerce and natural resources issues and the rights, obligations, and interests of both nations along their common frontier.

⁸ Great Lakes Water Quality Agreement (as amended 1987)

⁹ Pollard’s Lessee v. Hogan et al. U.S. (3 How.) 212, 230 (1845)

ii.) The Great Lakes Water Quality Agreement (as amended in 1987), a product of the Boundary Waters Treaty, requires an “ecosystem approach” to remediate anthropogenic environmental degradations.

iii.) Various treaties with 1st Nations that recognize their rights including stewardship of natural resources.

Great Lakes Fisheries Management Approach

The current federal role and responsibilities in protecting and managing the natural resources of the Great Lakes basin remains ambiguous. Numerous agencies exercise various degrees of management responsibility over the fisheries and other agencies regulate the habitat¹⁰. A review of the unique issues, such as the bi-national setting of the Great Lakes, the treaties and international agreements affecting this area, and the interagency agreements and compacts required for ecosystem management supports the requirement for interagency involvement. Congress has also recognized this need by establishing two International Commissions (International Joint Commission and the Great Lakes Fishery Commission) and the US Great Lakes Commission that provide avenues for federal participation in some natural resource issues.

Lake Committees - The day-to-day fishery management is accomplished through an organizational structure known as “Lake Committees” (see Table 1 for each committee’s membership). Although the Lake Committees are identified under/part of the Great Lakes Fishery Commission¹¹, they are independent. The Lake Committee also develops agreements on harvest levels by species, other regulatory activities and policies, and goals and objectives for their Great Lake. Terms of Reference for each Lake Committee are not specific, do not provide limits on their regulatory activities, and do not indicate that their decisions and proposed regulations are “non-binding.”

It apparently is assumed that the Lake Committees are an extension of the Great Lakes Fishery Commission. It also appears to be assumed that the Commission provides the unifying umbrella for constitutional required congressionally approved “oversight” to interjurisdictional state management of the inter-state, bi-national resources (in compliance with Article 1, Section 10). However, the Great Lakes Fishery Commission¹² was chartered to provide sea lamprey control and information dissemination, and coordination to the bi-national State, Provincial and Federal partners. It is **NOT** an interstate **fisheries management** commission like the Atlantic, Gulf, and Pacific States Marine Fisheries Commissions¹³

¹⁰ Fielder, D. 2002. St. Marys River and Challenges of Multijurisdictional Fisheries. Fisheries 27:9 32-34.

¹¹ www.glf.org

¹² Great Lakes Treaty (Convention on Great Lakes fisheries Between the United States and Canada; 6 U.S.T. 2836; T.I.A.S. 3326 as amended; Great Lakes Fishery Act of 1956)

¹³ Public Law 77-539, 56 Stat. 267; Public Law 81-66, 63 Stat. 70; Public Law 80-232, 61 Stat. 419; respectively.

Although the Lake Committees are not legal bodies, approved by congress in compliance with Article 1, Section 10, their exposure and linkage with the GLFC confuses the understanding of their relationship. For example:

- The Lake Committees do not have their own web sites but are part of the GLFC's.
- The Lake Committees use GLFC stationary for their formal correspondence.
- The Lake Committee policies and position papers such as fish community goals and objectives are published by the GLFC and the use of the GLFC logo implies endorsement.

The Great Lakes Fishery Commission has encouraged the development of “A Joint Strategic Plan for Management of Great Lakes Fisheries (SGLFMP)” (revised June 1997), approved by all Great Lakes’ state, provincial and federal jurisdictions and relying on recommendations and/or conclusions by “consensus.” The GLFC’s Strategic Plan also created the Council of Great Lakes Fishery Agencies, an informal interagency advisory body with no management responsibilities¹⁴ (therefore not in conflict with Article 1, Sect. 10) and, since it does not advice federal agencies, it is not in conflict with FACA.¹⁵ If it were to have either management/regulatory responsibilities or provided advice to federal agencies, it would require congressional approval.

Although the Great Lakes Fishery Commission and the Lake Committees have had a symbiotic relationship, the legal scope, duties, and responsibilities of the GLFC does not provide the Lake Committees with the a cloak of required congressional approval for their involvement in the alliances, agreements, or compacts that are being entered into by the member agencies on the Lake Committees.

Clarification by the U.S. Department of State on Article I, Section 10’s application to the Lake Committees included a conclusion that Section 10 does not apply because it does not prohibit States of the United States from coordinating their legitimate regulatory activities in a *non-binding manner* with those of a neighboring nation or province, especially where such coordination does not impinge on the authority or the foreign relations of the United States. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States # 201 RN 9.¹⁶ Therefore, the assumption that the resource management by the inter-state/provincial Lake Committees is “non-binding” has been given as the reason why they are not in violation of Article I, Section 10. This assumption is incorrect as demonstrated by the following examples:

- The Terms of Reference to the Lake Committee(s) do not limit their actions and responsibilities to non-binding management. A review of the terms of reference for the Lake Erie Committee does not support clear limits. Instead, the terms state in #1 “...issues that are within the Committee’s authority or under its auspices.” And #2 “...issues and problems of common concern to Michigan, New York, Ohio, Ontario

¹⁴ Letter dated June 4, 1998 from the Council of Great Lakes Fishery Agencies (G. Isbell, Chair) to Council of Lake Committees (R. MacGregor, Chair). Great Lakes Fishery Commission.

¹⁵ Federal Advisory Committee Act

¹⁶ United States Department of State, Washington D.C. Memorandum from D.A. Balton to D.C. Herman, dated February 28, 1997

and/or Pennsylvania,” however, the “authority” and “under its auspices” are not defined or limited¹⁷.

- The Lake Committees function as full management authorities setting harvest quotas; when a quota limited was not enforced by a member agency, bi-national arbitration to address allocation disputes were developed¹⁸.
- The Lake Committees are developing lake specific fisheries goals and objectives. These goals are used by U.S. and Canadian federal and state agencies as the official pronouncement and the guiding principle for use by those agencies in setting the restoration direction of their federal programs in support of congressionally mandated ecosystem restoration efforts¹⁹. The GLFC’s Lake Committee’s published goals and objectives support the continuation of an artificial fish community supported by the exotic forage of alewife (Lake Ontario) and smelt (Lake Erie) even though the Lake Ontario Committee recognized that this approach is “incompatible with managing for native fishes²⁰.”
- Although interagency lake trout restoration plans have been prepared and approved by the Lake Erie and Lake Ontario Committees, the scientifically calculated lake trout stocking level has been reduced to 25 to 40% of the quantity needed for restoration. The stocking reductions has/is forced on the participating federal agency (U.S. Fish and Wildlife Service) by the Lake Committee in order to have forage available for the stocking of exotic pacific salmon and also for direct commercial harvest of forage (smelt in Lake Erie).

Conclusion

The federal agencies have invested billions of dollars to restore the water quality and aquatic habitats in support of ecosystem restoration as required by the bi-national Great Lakes Water Quality Agreement (1987), the Fish and Wildlife Coordination Act as amended (1958), The Endangered Species Act (1973), the National Environmental Policy Act (1960) and other federal legislation. The agreements and compacts entered into by the members of the Lake Committees may (will) hinder or prevent ecosystem restoration because their goals and objectives are very different from historic condition (even allowing for permanent anthropogenic changes).

The GLFC lends erroneous credibility to the Lake Committee efforts and correspondence by publishing the committee’s materials under the GLFC’s name and logo. Although technical review is provided by GLFC staff on major reports, the GLFC does not require such documents to have the concurrence of other agencies as per the SGLFMP consensus policy.

Each of the five Great Lakes’ Lake Committees, with the support of the Great Lakes Fishery Commission, has assumed the mantle of being the definitive fisheries management authority as demonstrated above. They can not claim that their management

¹⁷ www.glf.org/lakecom.asp

¹⁸ Canadian Embassy Letter and proposed Agreement from M. Welsh to U.S. Ambassador D. Colson, dated June 17, 1994

¹⁹ www.epa.gov/glnpo

²⁰ Stewart, T.J. et al. 1999. Fish-Community Objectives for Lake Ontario. Great Lakes Fish. Com., Spec. Pub. 99-1 56p.

actions are “non-binding” and therefore exempt from the requirements of Article I, Section 10 of the U.S. Constitution. And, furthermore, the Lake Committee’s policies, decisions, and products are erroneously assumed to be legal positions that are to be accepted and used by federal management and regulatory agencies such as U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers.

The Lake Committee management structure for the fisheries of each the Great Lakes is not in accordance with Article 1, Section 10 of the United States Constitution and, therefore, can not be legal.

Table 1. Membership on the five Lake Committees

Lake Superior	Minnesota, Wisconsin, Michigan, Ontario, Chippewa-Ottawa Treaty Fishery Management Authority and Great Lakes Indian Fish and Wildlife Commission
Lake Michigan	Wisconsin, Illinois, Indiana, Michigan and Chippewa-Ottawa Treaty Fishery Management Authority
Lake Huron	Michigan, Ontario and Chippewa-Ottawa Treaty Fishery Management Authority
Lake Erie	Michigan, Ohio, Pennsylvania, New York and Ontario
Lake Ontario	New York and Ontario
