



Ecosystem Initiatives Advisory Services

August 18, 2005

The Honorable Condoleezza Rice
The Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Madam Secretary:

Although I expect that you and your Department already have a very heavy workload, I need to call your attention to the illegal use of some of the funds that your Department provides to the bi-national Great Lakes Fisheries Commission. Enclosed is a copy of a peer reviewed article in the Toledo Journal of Great Lakes' Law, Science and Policy titled *Challenges to the Constitutionality and the Effectiveness of the U.S. Management of the Bi-national Great Lakes Fisheries* that provides a detailed description of the legal problems.

Since the creation of the Great Lakes Fisheries Commission (GLFC) by the 1955 Convention on Great Lakes Fisheries between Canada and the United States, the U.S. Department of State has funded the activities of this Commission. However, the funding has been authorized for two complementary programs, i.e., coordinate and fund research and control the exotic predatory sea lamprey. The GLFC's congressionally authorized program did not and has not included regulatory authority for interstate/bi-national fisheries management¹ in partial response to the desire of the eight Great Lakes States. As you know, interstate/bi-national management requires specific congressional approval in order to be in compliance with Article I, Section 10 of the United States Constitution. Examples of the application of Article I, Section 10 to interstate fisheries management is demonstrated by the congressional authorization given to the interstate fisheries management commissions (i.e., Atlantic, Gulf, and Pacific States Marine Fisheries Commissions, the Potomac River Fisheries Commission, etc.).

Two attempts had been made to formalize the interstate/bi-national management of the Great Lakes fisheries prior to the 1954 convention on Great Lakes fisheries. An international treaty was prepared in 1908 and in 1946 a bi-national convention produced an agreement. However, neither was approved or ratified by Congress. Dochoda and Jones² provide information that the 1954 convention which created the Great Lakes Fisheries Commission succeeded in getting congressional approval because it did not provide "regulatory authority for the commission over Great Lakes fisheries (except possibly as pertains to sea lamprey)."²

¹ Dochoda, M.R. and M.L. Jones. 2003. Managing Great Lakes Fisheries Under Multiple and Diverse Authorities. *The Toledo Journal of Great Lakes' Law, Science and Policy*. Vol. 5, No. 1, 405-425.

² *Id.* at 408-409.

From 1954 to 1964 the GLFC program expanded to include more fisheries research and increased guidance and coordination in resolving harvest conflicts. These approached the regulatory authority that the States had denied the GLFC in its formation.³ A Canadian proposal was made in 1964 to have the GLFC sponsor inter-state/bi-national “lake committees”⁴ to coordinate management. These were established in 1965 by the GLFC. Their focus and their regulatory approach to the interstate/bi-national fisheries management has expanded over time.

The Magnuson Fishery Conservation Act of 1976 provided an opportunity for the eight Great Lakes States to form a U.S. regional fishery management council. The States declined but tried to increase the structure for regulation and coordination of management by preparing and approving a *Joint Strategic Plan for Management of Great Lakes Fisheries* in 1981, updated in 1986, and again in 1997. All the major Great Lakes fisheries management agencies (federal, state, and 1st Nations) participated and signed the Plan. However, neither the *Strategic Plan* nor the membership under this Plan received approval by Congress as a formal Advisory Committee⁵ or as a regulatory body; in fact Dochoda and Jones⁶ describe the *Strategic Plan* as a nonbinding “gentleman’s agreement.” The *Strategic Plan* identifies the interstate/bi-national lake committees as the “action arm” or implementation units for managing the inter-jurisdictional fisheries.⁷

In its defense the GLFC cites a failed challenge to the regulatory authority practiced by its lake committees. In a 1997 response to a legal challenge by Ohio commercial fishermen that questioned the management authority of the Lake Erie Committee, the U.S. State Department dismissed the claim since nonbinding harvest allocations among the States and between the States and Canada were not prohibited by the US Constitution⁸. The key term is **nonbinding**. However, in reality the harvest allocations and management goals and objectives are binding. The consensus decisions agreed upon by the participating States and Canada are binding to the same degree as those of the congressionally approved Atlantic, Gulf, and Pacific States Marine Fisheries Commissions. Furthermore, if the Lake Committee’s harvest allocations and resource objectives are nonbinding on the participants why have Lake Committees twice (1981 and 1986) requested arbitration to resolve harvest allocation and stocking issues? And, why has language been added to the 1997 version of the *Strategic Plan* to include: “each fishery agency should submit all substantive changes from existing practice to the lake committee before implementation.” Also language was added that “proposals from one agency that will influence the interest of another agency may become the subject of negotiations until consensus is achieved,” and for conflict resolution the use of “third party mediation.”⁹ Obviously the GLFC’s definition for “nonbinding” is very different from the common or legal definitions.

Non-compliance with Article I, Section 10 applies to all five Lake Committees. However, actual management implications on the fisheries differ between the Great Lakes and their lake committees.

A review of the current state of some of these ecosystems document significant losses and permanent destruction of their native fish community structure. And, future

³ *Id.* at 410.

⁴ *Id.* at 411.

⁵ Federal Advisory Committee Act, 5 U.S.C. App.2

⁶ Dochoda, M.R. and M.L. Jones. 2003. Managing Great Lakes Fisheries Under Multiple and Diverse Authorities. The Toledo Journal of Great Lakes’ Law, Science and Policy. Vol. 5, No. 1, 419.

⁷ *Id.* at 412.

⁸ Dochoda, M.R. and M.L. Jones, at 419.

⁹ *Id.* at 417.

goals and objectives by some of the lake committees are constructed on artificially maintained exotic fish populations, supported by exotic forage species that are unsuitable food for key native predator fish, thereby actually preventing the restoration of healthy, self-sustaining ecosystems.

The *Strategic Plan* charges the Lake Committees with developing “fish community objectives that are comprehensive and principle-based.” Such lake specific goals and objectives are crucial in advancing an ecosystem-based approach to management.¹⁰ They are also vital in providing information on the required habitats needed to support the goals and objectives. This information affects the activities of federal agencies, such as USEPA, USACOE, and FERC, and the International Joint Commission, in addressing their responsibilities in the specific lake basins. Therefore, the Lake Committees that neither operate with congressional approval nor are legally responsible to a congressional approved regulatory institution are developing fish community goals and objectives that directly influence the regulatory activities of federal agencies in the Great Lakes basin for decades to come. Furthermore, “the fish community objectives” developed by the lake committees are published by the GLFC under its logo. This incorrectly implies that the GLFC and its commissioners (including the Assistant Secretary of the Interior) endorse these objectives.

The ecological cost of some of these management actions may be determined by the answer to some questions. Does the current fisheries management approach for each specific Great Lake follow the stewardship principles of the *Public Trust Doctrine*, managing and protecting the resources for the benefit of our society in perpetuity? Or, are the fisheries resources mismanaged resulting in long-term economic and ecological losses to society? Since I am most familiar with Lakes Ontario and Erie, I will focus on them.

The Lake Ontario historic review of the changes in its fish community can be obtained from the GLFC.¹¹ In summary, the native Lake Ontario coldwater prey species, such as deepwater sculpin and lake herring, and predator specie, such as lake trout, Atlantic salmon, and blue pike have been driven to extinction. The prey community has been replaced by an exotic species (alewife), and the Lake Committee’s management is focused on maintaining this species prominent role. Promoted predator species are various exotic Pacific salmon and non-native brown and rainbow trout. A limited quantity of lake trout are stocked for the reported purpose of restoring this native predator.

A 30 year effort has been underway to restore the native lake trout. However, it has had little success because the native strains are extinct, the forage quality provided by the exotic alewife is unsuitable, stocking density has been reduced to have forage available for stocked Pacific salmon, and harvest of lake trout is allowed as follows: New York – 3 lake trout outside of protected slot size; Ontario – 3 lake trout any size.¹²

The GLFC’s Lake Ontario Committee (LOC) has shown little support for restoring native forage fish and Atlantic salmon and, as indicated above, the lake trout restoration program can not be taken as a serious effort. The LOC has also not shown support in identifying the historic Atlantic salmon population as “sea run” or “landlocked” that could be accomplished through the DNA analyzes of preserved specimens. This is a very important issue and an opportunity will

¹⁰ Busch, W.-D.N., B.L. Brown, and G.F. Mayer (Eds). 2003. *Strategic Guidance for Implementing an Ecosystem-based Approach to Fisheries Management*. United States Department of Commerce, National Oceanic and Atmospheric Administration, NMFS, Silver Spring, MD 62p.

¹¹ http://www.glf.org/pubs/SpecialPubs/Sp99_1.pdf

¹² <http://www.glf.org/lakecom/loc/lochome.php>

be missed for potential fish passage through the re-licensing of the hydropower facility on the St. Lawrence River.

Native fish restoration has the support of the public and the 1st Nations in the Lake Ontario drainage. The U.S. Fish and Wildlife Service has been providing lake trout for its restoration – a futile effort until the forage base is changed. A short lived exercise to evaluate the potential restoration of Atlantic salmon was ended because the LOC wanted to use all the suitable habitats for their exotic trout and salmon.

The Lake Erie historic summary of the changes in its fish community can also be obtained from the GLFC.¹³ Like Lake Ontario, Lake Erie also lost its coldwater prey such as lake herring and predators such as lake trout and blue pike. The LEC is not focused on restoring these historic fish populations.

A 20 year effort has been underway to restore the native lake trout. However, it has had no success because the native strains are extinct, the forage quality provided by the exotic rainbow smelt is unsuitable, stocking density has been kept very low in order to have the forage species available for commercial harvest, and harvest of lake trout is allowed as follows: Michigan – NA; Ohio - 2 to 5 mixed 12”; Pennsylvania - 2 size 9” or 15”; New York - 1 larger than 9”; Ontario – 3 lake trout any size.

The GLFC’s Lake Erie Committee (LEC) demonstrated no support for restoring native forage fish and, as indicated above, the lake trout restoration program can not be taken as a serious effort. The LEC has also not shown support in identifying the relationship of the historically very important blue pike population; this is a very important issue in addressing the restoration of the coldwater fish community in the eastern basin of the lake. However, the LEC’s goals and objectives are being used to guide the water quality restoration required by the Great Lakes Water Quality Agreement, under the International Joint Commission.

In conclusion the current fisheries management approach exercised by the independent, unregulated, and uncontrolled Lakes Ontario and Erie Committees, under the umbrella of the Great Lakes Fisheries Commission is not in line with the principles of the *Public Trust Doctrine*. The Lake Committees’ interstate/bi-national management structure is also not in compliance with the U.S. Constitution. Their management decisions have very significant consequences. This is demonstrated by the management goals and objectives prepared, supported, and promoted by these Lake Committees. Their reliance on artificially supported exotic predators, supported by exotic forage species, mislead and hamper federal regulatory agencies in their efforts to restore healthy, self-sustaining, basin-wide ecosystems which are in the public’s long-term interest and are also a goal of the bi-national Great Lake Water Quality Agreement. By enforcing the application of Article I, Section 10 of the U.S. Constitution on the Great Lakes fisheries management structure, the focus would change in support of healthy, self-sustaining, native fish communities, healthy habitats (water quality, wetlands, etc.), and prevention of exotic introductions. The documentation of this direction for resource goals and objectives will provide the correct guidance for activities by other federal and state agencies with habitat responsibilities. The results will be cost effective and will be in the long-term interest of society.

The interstate/bi-national lake committees and their management activities are not in compliance with the US Constitution. Therefore, congressionally authorized funding for the GLFC, provided through the Department of State, used to support the lake committees, must be considered illegal and stopped. Their management approach needs to be in compliance just like

¹³ <http://www.glfco.org/lakecom/lec/lehome.php>

all the other interstate fisheries management commissions. Thank you in advance for your support in addressing this important issue.

Sincerely yours,

Wolf-Dieter N. Busch

Enclosure - 1

cc with enclosure:

Senate Committee on Foreign Relations

The Honorable Richard G. Luger, United States Senate

The Honorable Joseph R. Biden Jr., United States Senate

Senate Committee on Appropriations

The Honorable Thad Cochran, United States Senate

The Honorable Robert C. Byrd, United States Senate

House Committee on International Relations

The Honorable Henry J. Hyde, House of Representatives

The Honorable Tom Lantos, House of Representatives

House Committee on Appropriations

The Honorable Jerry Lewis, House of Representatives

The Honorable David R. Obey, House of Representatives

House Subcommittee on Science, the Departments of State, Justice, and Commerce

The Honorable Frank R. Wolf, House of Representatives

The Honorable Allan B. Mollohan, House of Representatives