INDIGENOUS WATER GOVERNANCE

FLETCHER

WATER@MICHIGAN 2026

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.

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.

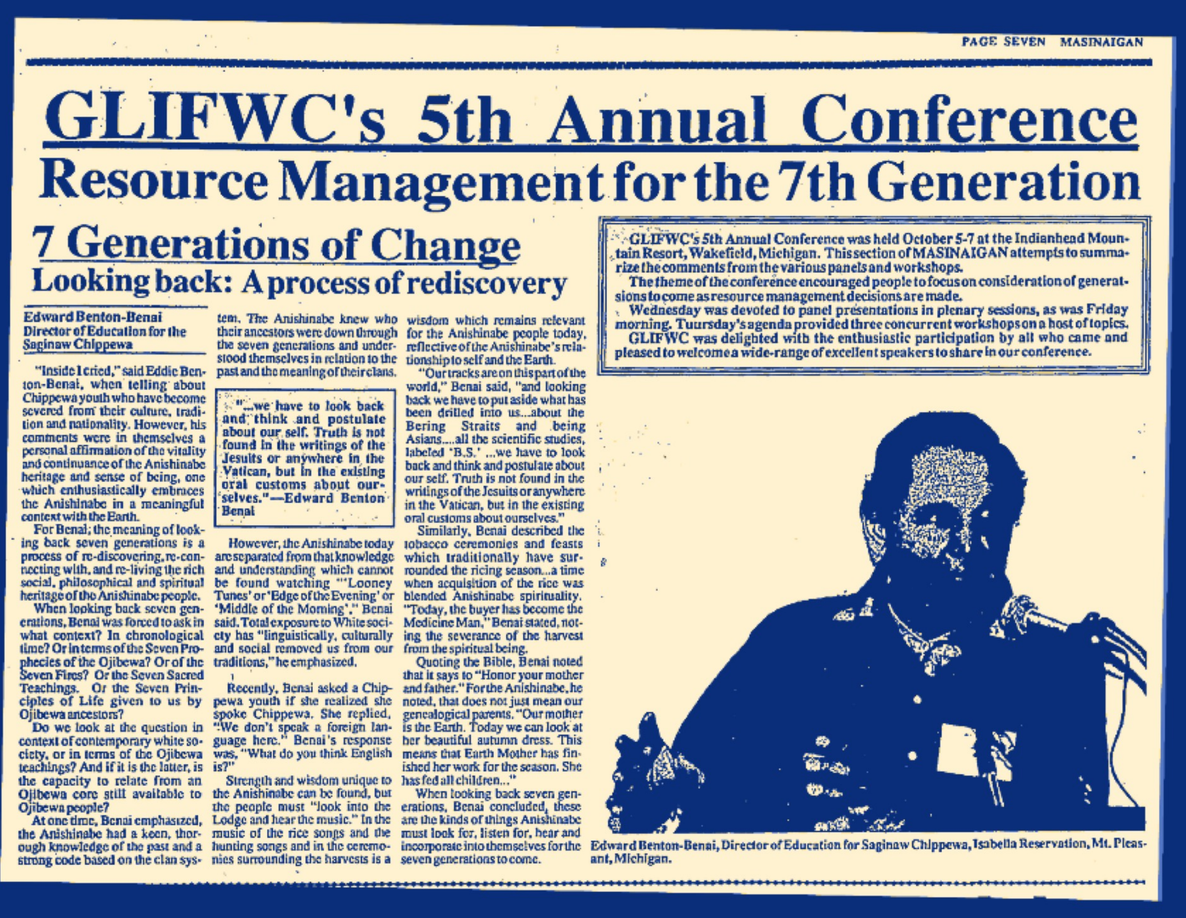
It is thus our right, our responsibility and our duty to insist that no plan to protect and preserve the Great Lakes Waters moves forward without the equal highest-level participation of Tribal and First Nation governments with the governments of the United States and Canada. Merely consulting with Tribes 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.

Stewardship actions have a greater influence on giigoonyag (fishes) than climate change

A recent scientific article finds that fishing had a greater influe on fish populations than climate change in the Upper Midwest. Stewa and managers in the Ceded Territories (Department of Natural Resour tribes, and GLIFWC) should examine the rules and regulations they h put in place to protect fish populations and determine if changes are nee especially for cool-/cold-water species. In addition, stewards should t steps to reduce or eliminate other environmental stressors (e.g., shore development, herbicides, pesticides, non-local beings) giigoonyag are fac in zaaga'igan (lakes).

Please see the abstract, and the full article can be accessed at *scie org/doi/full/10.1126/sciadv.adx5138* —A. Sh



PAGE SEVEN MASINAIGAN

GLIFWC's 5th Annual Conference

Resource Management for the 7th Generation

7 Generations of Change

Looking back: A process of rediscovery

GLIFWC's 5th Annual Conference was held October 5-7 at the Indianhead Mountain Resort, Wakefield, Michigan. This section of MASINAIGAN attempts to summarize the comments from the various panels and workshops.

The theme of the conference encouraged people to focus on consideration of generations to come as resource management decisions are made.

Wednesday was devoted to panel presentations in plenary sessions, as was Friday morning. Tuursday's agenda provided three concurrent workshops on a host of topics.

GLIFWC was delighted with the enthusiastic participation by all who came and pleased to welcome a wide-range of excellent speakers to share in our conference.

Edward Benton-Benai
Director of Education for the Saginaw Chippewa

"Inside I cried," said Eddie Benton-Benai, when telling about Chippewa youth who have become severed from their culture, tradition and nationality. However, his comments were in themselves a personal affirmation of the vitality and continuance of the Anishinabe heritage and sense of being, one which enthusiastically embraces the Anishinabe in a meaningful context with the Earth.

For Benai, the meaning of looking back seven generations is a process of re-discovering, re-connecting with, and re-living the rich social, philosophical and spiritual heritage of the Anishinabe people.

When looking back seven generations, Benai was forced to ask in what context? In chronological time? Or in terms of the Seven Prophecies of the Ojibewa? Or of the Seven Fires? Or the Seven Sacred Teachings. Or the Seven Principles of Life given to us by Ojibewa ancestors?

Do we look at the question in context of contemporary white society, or in terms of the Ojibewa teachings? And if it is the latter, is the capacity to relate from an Ojibewa core still available to Ojibewa people?

At one time, Benai emphasized, the Anishinabe had a keen, thorough knowledge of the past and a strong code based on the clan system. The Anishinabe knew who their ancestors were down through the seven generations and understood themselves in relation to the past and the meaning of their clans.

> "...we have to look back and think and postulate about our self. Truth is not found in the writings of the Jesuits or anywhere in the Vatican, but in the existing oral customs about ourselves."—Edward Benton Benai

However, the Anishinabe today are separated from that knowledge and understanding which cannot be found watching "'Looney Tunes' or 'Edge of the Evening' or 'Middle of the Morning'," Benai said. Total exposure to White society has "linguistically, culturally and social removed us from our traditions," he emphasized.

Recently, Benai asked a Chippewa youth if she realized she spoke Chippewa. She replied, "We don't speak a foreign language here." Benai's response was, "What do you think English is?"

Strength and wisdom unique to the Anishinabe can be found, but the people must "look into the Lodge and hear the music." In the music of the rice songs and the hunting songs and in the ceremonies surrounding the harvests is a wisdom which remains relevant for the Anishinabe people today, reflective of the Anishinabe's relationship to self and the Earth.

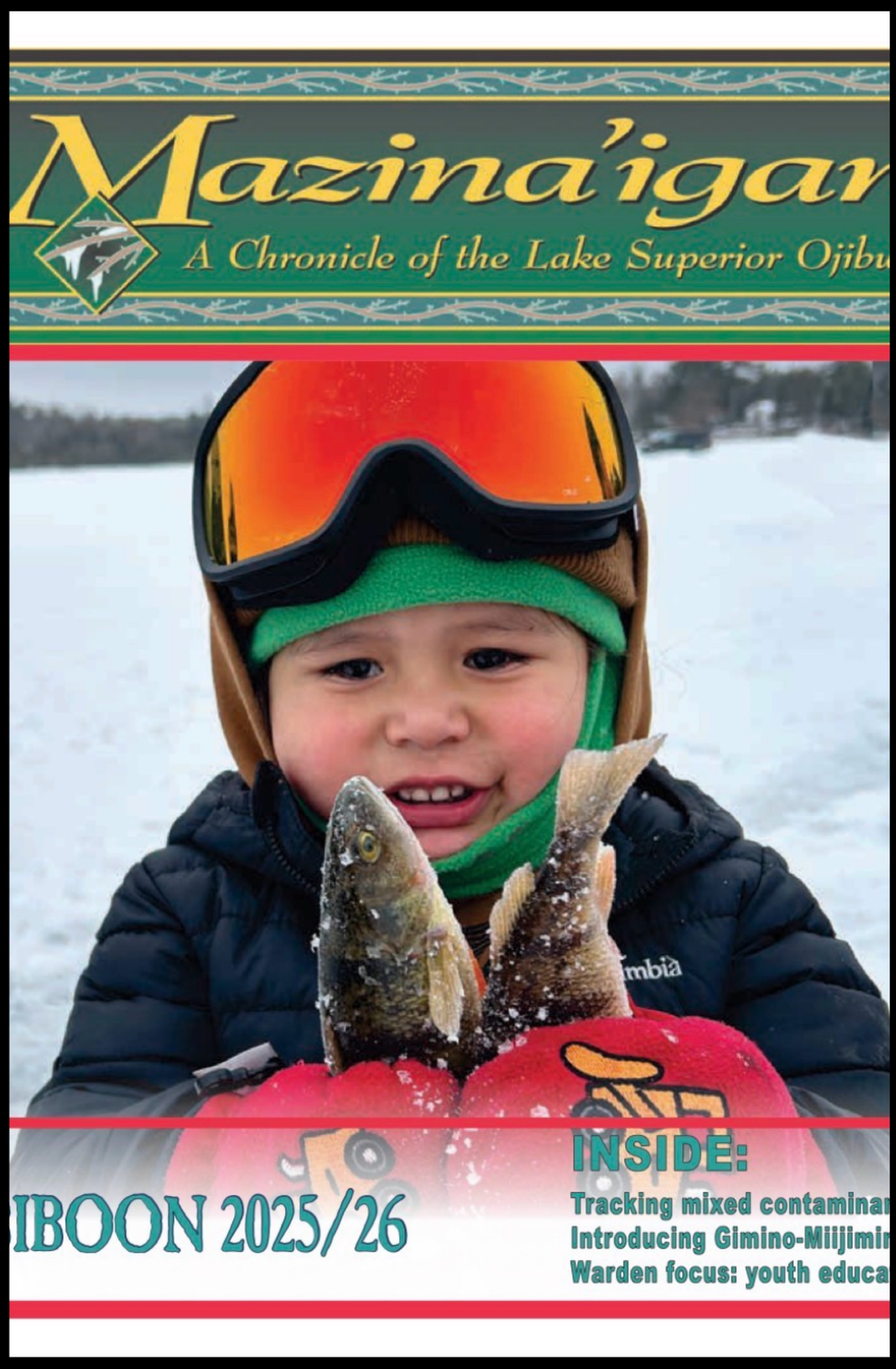
"Our tracks are on this part of the world," Benai said, "and looking back we have to put aside what has been drilled into us...about the Bering Straits and being Asians....all the scientific studies, labeled 'B.S.' ...we have to look back and think and postulate about our self. Truth is not found in the writings of the Jesuits or anywhere in the Vatican, but in the existing oral customs about ourselves."

Similarly, Benai described the tobacco ceremonies and feasts which traditionally have surrounded the ricing season...a time when acquisition of the rice was blended Anishinabe spirituality. "Today, the buyer has become the Medicine Man," Benai stated, noting the severance of the harvest from the spiritual being.

Quoting the Bible, Benai noted that it says to "Honor your mother and father." For the Anishinabe, he noted, that does not just mean our genealogical parents. "Our mother is the Earth. Today we can look at her beautiful autumn dress. This means that Earth Mother has finished her work for the season. She has fed all children..."

When looking back seven generations, Benai concluded, these are the kinds of things Anishinabe must look for, listen for, hear and incorporate into themselves for the seven generations to come.

Edward Benton-Benai, Director of Education for Saginaw Chippewa, Isabella Reservation, Mt. Pleasant, Michigan.



MAZINA'IGAN PAGE 4 • GREAT LAKES • SPRING 2005

The Great Lakes awash in policies

By Tina Adler, Contributing Correspondent
Environmental Health Perspectives

When a national resource has 8,300 miles of shoreline and 6 quadrillion gallons of fresh water—making it the largest surface freshwater system on Earth—it's bound to attract some attention. Now surround that resource with eight states, two Canadian provinces, and multiple tribal lands, and you've got a political hot spot known as the Great Lakes basin. Add to this picture vast numbers of individuals and industries relying on the water to serve as their fishing—and dumping—grounds as well as a source of drinking water, transportation, recreation, and power, and it's no wonder the U.S. government alone has about 140 programs devoted to the care and maintenance of the Great Lakes.

The Great Lakes basin has suffered from severe pollution problems, one of the most dramatic being recurring fires on one of Lake Erie's arteries, the Cuyahoga River. The fires began in 1936, when a spark from a blowtorch ignited waste oil floating on the river. Recurrent fires continued until the early 1970s, when policy makers and others decided to crack down on pollution.

Nowadays, the fires are history and the lakes are cleaner. But the Great Lakes remain plagued by mercury contamination, legal and illegal dumping of industrial chemicals, burgeoning populations of invasive species, and dwindling food supplies and habitat for native creatures. The Environmental Protection Agency's (EPA) *National Coastal Condition Report II*, released in January 2005, ranked the health of the lakes' coastal waters between poor and fair, based on the deterioration of coastal wetlands, the poor condition of the lake bottoms, low levels of dissolved oxygen, and sediment contamination.

After 30 years of new policies, regulations, procedures, guidelines, agreements, and directives aimed at helping the lakes, old problems persist, and new ones are cropping up. Policy makers have determined that the Great Lakes are suffering from good, but very disorganized, intentions and a shortfall in funding. As former EPA administrator Mike Leavitt said in a 2004 speech, "We have lots of musicians, but we need more harmony."

Finding harmony

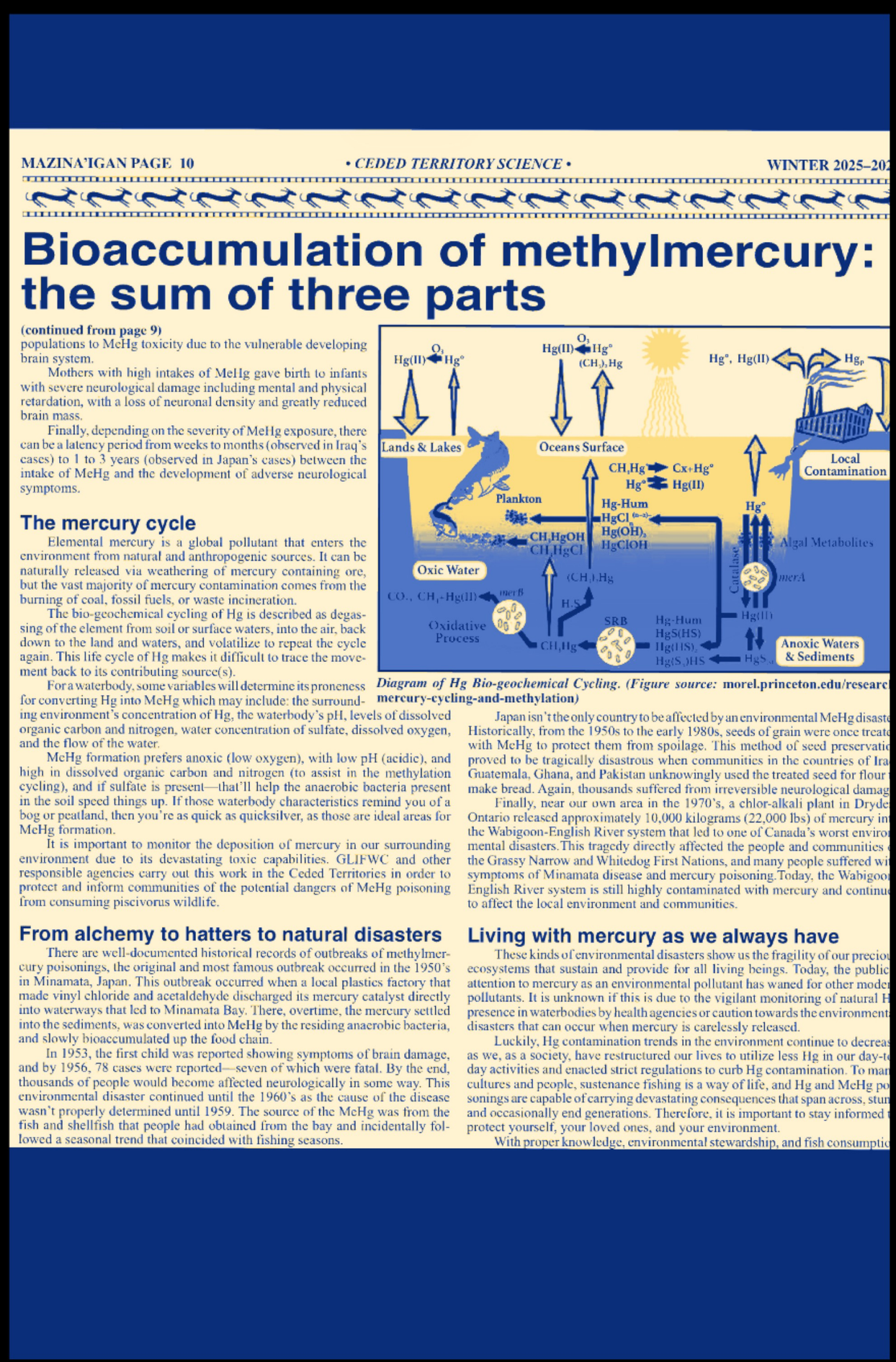
In May 2004, in an effort to support restoration efforts and, some analysts say, create political goodwill in key election states during an election year, President Bush jumped into the Great Lakes policy arena. He issued an executive order that recognized the Great Lakes as a "national treasure" and established an interagency task force of 10 cabinet and agency heads to coordinate restoration projects under the EPA's leadership.

The president also directed the EPA to convene a Great Lakes Regional Collaboration (GLRC) of stakeholders in the lakes. Participants held their first meeting on December 3, 2004. The collaboration includes elected officials from the eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin) and representatives of municipal and county governments, environmental groups, and 30 Indian tribes. The Canadian provinces of Québec and Ontario, as well as the Government of Canada, serve as observers.

The collaboration, although intended to bring harmony to a discordant

What his departure means to the collaboration and the task force remains unclear. "It is a cause for concern," says Buchsbaum. "The process has been pretty self-sustaining to a large degree, at least for the first few months, but we don't know if that will continue without Leavitt's involvement." He adds, "The big question is, at this time next year will we be able to say that this process has built momentum toward Great Lakes restoration? Or will it have simply distracted the players and stalled the momentum?"

The collaboration does have international support. Canada has representatives on all of the strategy teams established at the December collaboration meeting, says Marie-Christine Lilkoff, a spokesperson for the Canadian Department of Foreign Affairs. In a speech at the December meeting, Canadian consul general Anne Charles said, "The government of Canada welcomes the establishment of the U.S. Interagency Task Force and actions to improve coordination and strategic direction on Great Lakes policy, priorities, and programs in the United States, and to collaborate with Canada." And in a press release issued when the task force was announced, David Anderson, Canada's minister of the environment at the time, called the executive order "a strong sign of the importance of the Great Lakes to the United States government."



MAZINA'IGAN PAGE 10 • CEDED TERRITORY SCIENCE • WINTER 2025–202

Bioaccumulation of methylmercury: the sum of three parts

(continued from page 9)

populations to MeHg toxicity due to the vulnerable developing brain system.

Mothers with high intakes of MeHg gave birth to infants with severe neurological damage including mental and physical retardation, with a loss of neuronal density and greatly reduced brain mass.

Finally, depending on the severity of MeHg exposure, there can be a latency period from weeks to months (observed in Iraq's cases) to 1 to 3 years (observed in Japan's cases) between the intake of MeHg and the development of adverse neurological symptoms.

The mercury cycle

Elemental mercury is a global pollutant that enters the environment from natural and anthropogenic sources. It can be naturally released via weathering of mercury containing ore, but the vast majority of mercury contamination comes from the burning of coal, fossil fuels, or waste incineration.

The bio-geochemical cycling of Hg is described as degassing of the element from soil or surface waters, into the air, back down to the land and waters, and volatilize to repeat the cycle again. This life cycle of Hg makes it difficult to trace the movement back to its contributing source(s).

For a waterbody, some variables will determine its proneness for converting Hg into MeHg which may include: the surrounding environment's concentration of Hg, the waterbody's pH, levels of dissolved organic carbon and nitrogen, water concentration of sulfate, dissolved oxygen, and the flow of the water.

MeHg formation prefers anoxic (low oxygen), with low pH (acidic), and high in dissolved organic carbon and nitrogen (to assist in the methylation cycling), and if sulfate is present—that'll help the anaerobic bacteria present in the soil speed things up. If those waterbody characteristics remind you of a bog or peatland, then you're as quick as quicksilver, as those are ideal areas for MeHg formation.

It is important to monitor the deposition of mercury in our surrounding environment due to its devastating toxic capabilities. GLIFWC and other responsible agencies carry out this work in the Ceded Territories in order to protect and inform communities of the potential dangers of MeHg poisoning from consuming piscivorus wildlife.

From alchemy to hatters to natural disasters

There are well-documented historical records of outbreaks of methylmercury poisonings, the original and most famous outbreak occurred in the 1950's in Minamata, Japan. This outbreak occurred when a local plastics factory that made vinyl chloride and acetaldehyde discharged its mercury catalyst directly into waterways that led to Minamata Bay. There, overtime, the mercury settled into the sediments, was converted into MeHg by the residing anaerobic bacteria, and slowly bioaccumulated up the food chain.

In 1953, the first child was reported showing symptoms of brain damage, and by 1956, 78 cases were reported—seven of which were fatal. By the end, thousands of people would become affected neurologically in some way. This environmental disaster continued until the 1960's as the cause of the disease wasn't properly determined until 1959. The source of the MeHg was from the fish and shellfish that people had obtained from the bay and incidentally followed a seasonal trend that coincided with fishing seasons.

Diagram of Hg Bio-geochemical Cycling. (Figure source: **morel.princeton.edu/researc mercury-cycling-and-methylation***)*

Japan isn't the only country to be affected by an environmental MeHg disast Historically, from the 1950s to the early 1980s, seeds of grain were once treat with MeHg to protect them from spoilage. This method of seed preservati proved to be tragically disastrous when communities in the countries of Ira Guatemala, Ghana, and Pakistan unknowingly used the treated seed for flour make bread. Again, thousands suffered from irreversible neurological damag

Finally, near our own area in the 1970's, a chlor-alkali plant in Dryde Ontario released approximately 10,000 kilograms (22,000 lbs) of mercury in the Wabigoon-English River system that led to one of Canada's worst enviro mental disasters. This tragedy directly affected the people and communities the Grassy Narrow and Whitedog First Nations, and many people suffered wi symptoms of Minamata disease and mercury poisoning. Today, the Wabigoo English River system is still highly contaminated with mercury and continu to affect the local environment and communities.

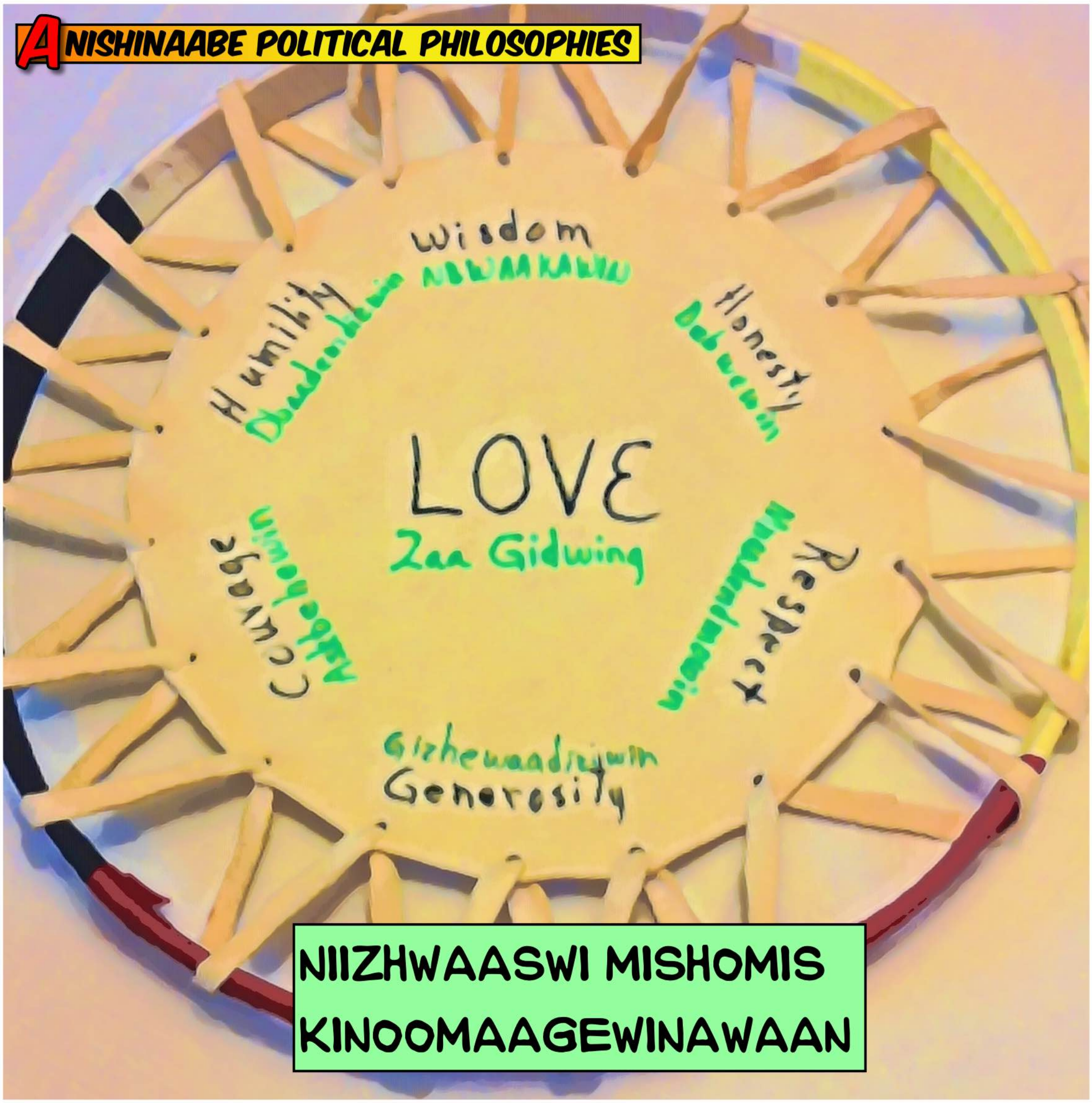
Living with mercury as we always have

These kinds of environmental disasters show us the fragility of our precio ecosystems that sustain and provide for all living beings. Today, the public attention to mercury as an environmental pollutant has waned for other mode pollutants. It is unknown if this is due to the vigilant monitoring of natural H presence in waterbodies by health agencies or caution towards the environment disasters that can occur when mercury is carelessly released.

Luckily, Hg contamination trends in the environment continue to decrea as we, as a society, have restructured our lives to utilize less Hg in our day-t day activities and enacted strict regulations to curb Hg contamination. To mar cultures and people, sustenance fishing is a way of life, and Hg and MeHg po sonings are capable of carrying devastating consequences that span across, stu and occasionally end generations. Therefore, it is important to stay informed protect yourself, your loved ones, and your environment.

With proper knowledge, environmental stewardship, and fish consumptio

ANISHINAABE POLITICAL PHILOSOPHIES

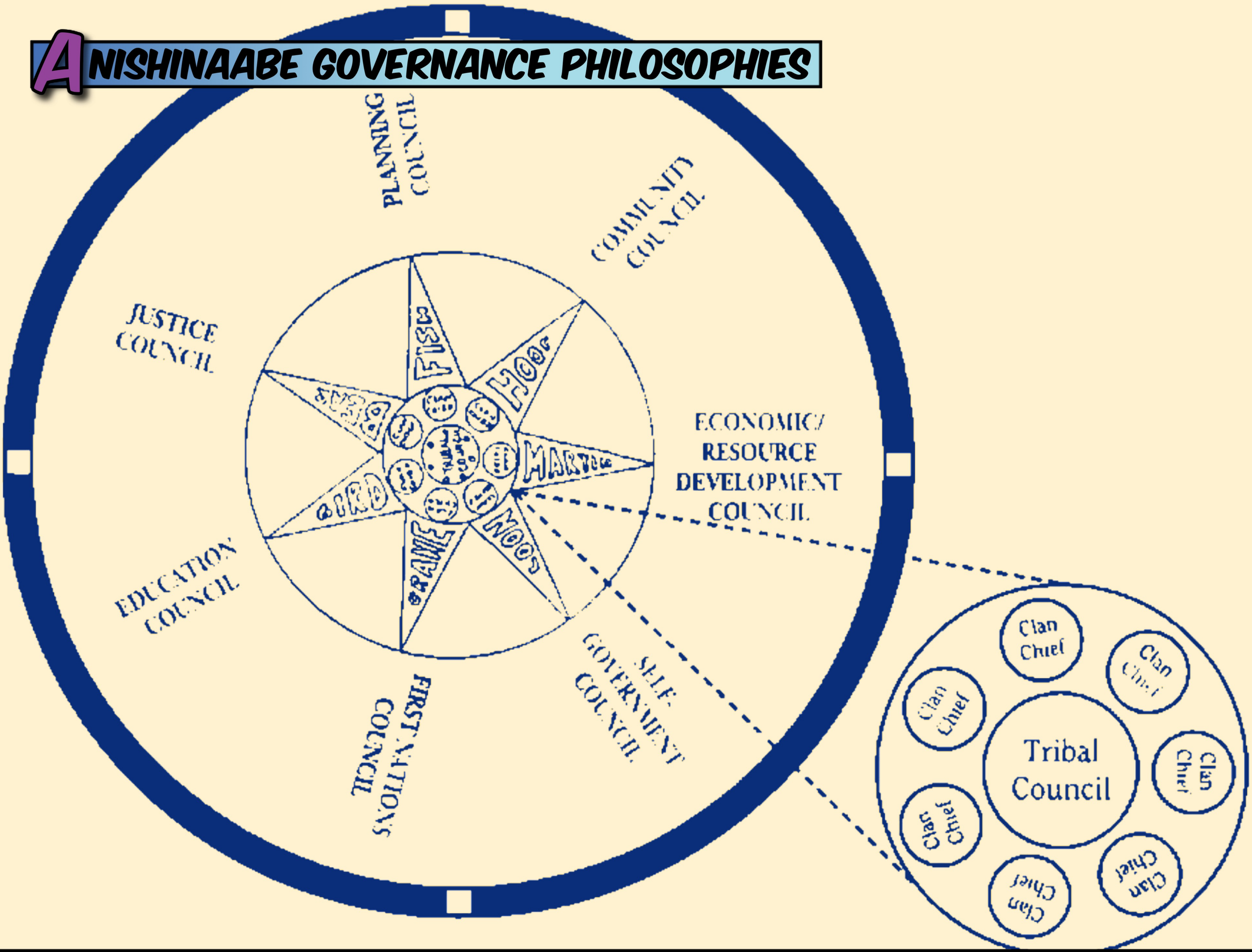


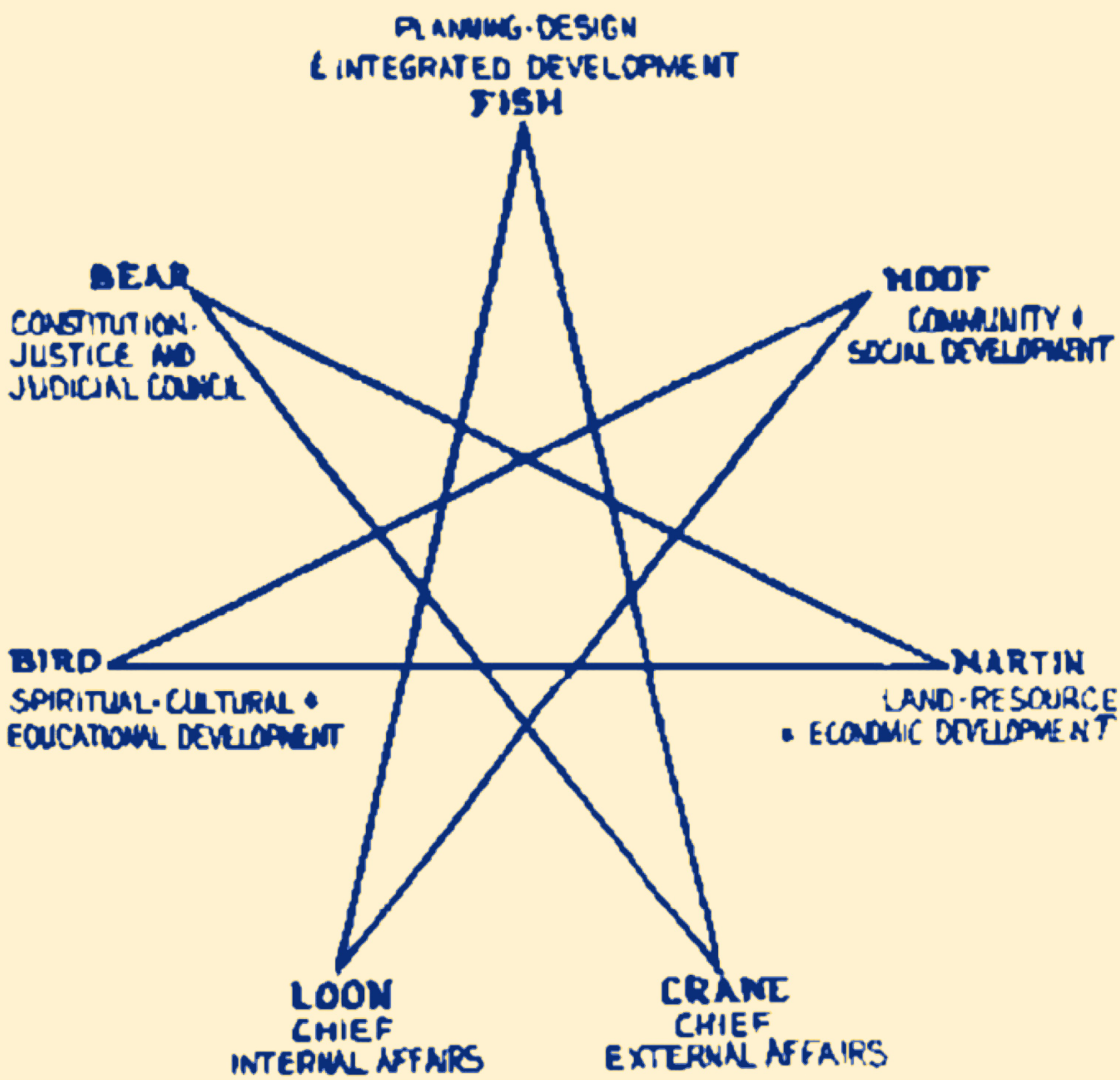
NIIZHWAASWI MISHOMIS
KINOOMAAGEWINAWAAN

MINO-BIMAADIZIWIN

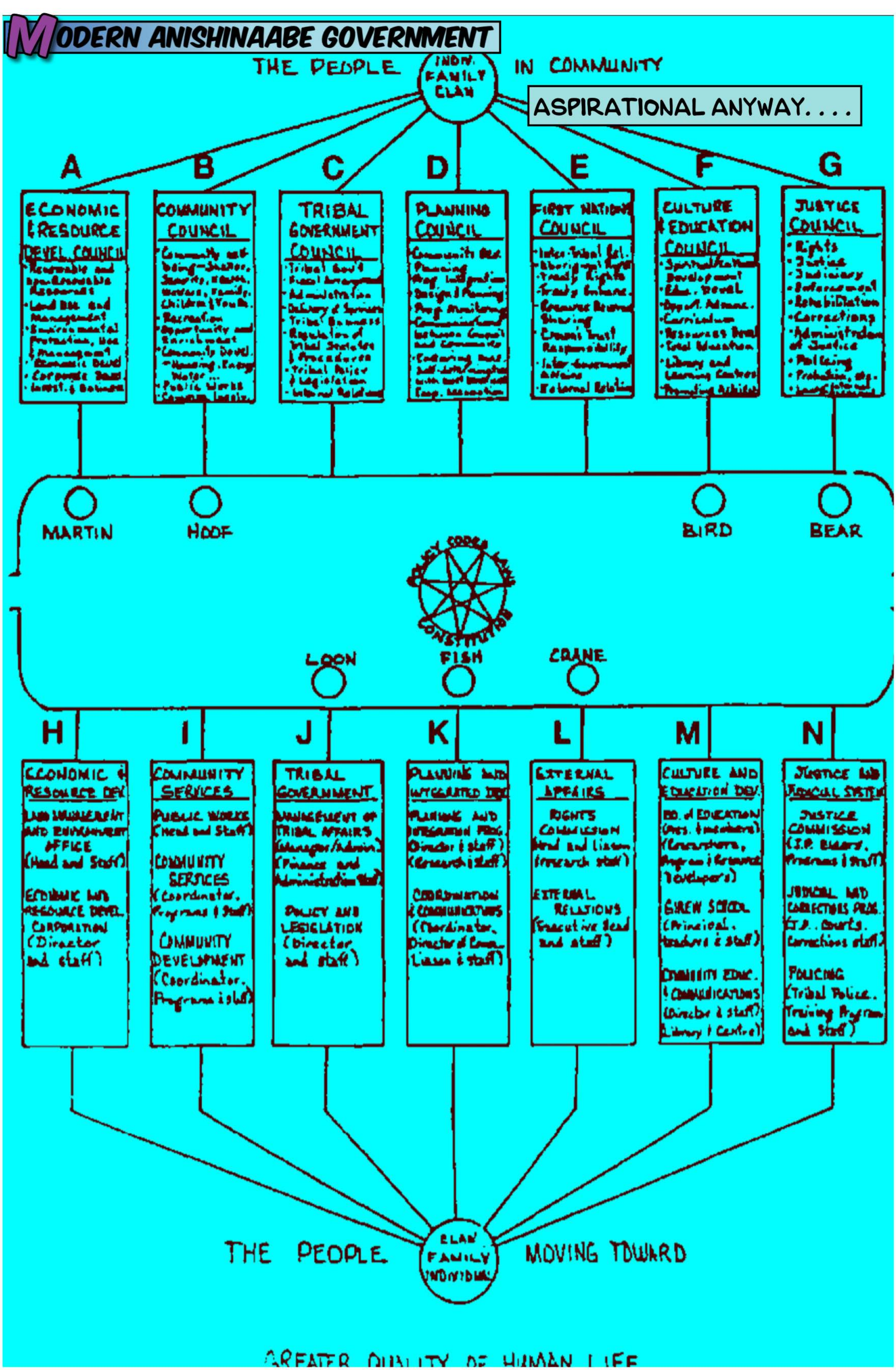
INAAWENDEWIN

ANISHINAABE GOVERNANCE PHILOSOPHIES





MODERN ANISHINAABE GOVERNMENT



ANIMIIKI – THUNDERBIRD

THE **ANISHINAABEG** BELIEVE THAT **NANABOOZHOO** CREATED THE THUNDERERS AS MASTER OF THE AIR.

NANABOOZHOO INTENDED THE THUNDERERS TO SERVE AS A COUNTERWEIGHT TO THE WATER SPIRITS.

THE THUNDERERS ALSO SERVED TO INFLICT PUNISHMENTS ON THE **ANISHINAABEG** WHO VIOLATED **INAAKONIGEWIN** — NATURAL LAW.

MISHEPISHU – UNDERWATER PANTHER

THE **ANISHINAABEG** BELIEVE THAT **MISHEPISHU** IS MASTER OF THE WATERS.

THE UNDERWATER PANTHER IS THE COUNTER-POINT TO THE THUNDERERS.

THESE TWO **MANIDOWAAG** — OR MYSTERIES OR SPIRITS — EXEMPLIFY HOW THE **ANISHINAABEG** VALUE HARMONY.

INAWENDEWIN — RELATIONS

HARMONY IS THE **ANISHINAABE** WAY.

ANISHINAABEWAKI — THE WORLD OF THE ANISHINAABEG — TRENDS TOWARD HARMONY.

IN **ANISHINAABE** POLITICAL THEORY, HUMANS ARE LOWER CREATURES.

THE **MANIDOWAAG** ARE THE MOST POWERFUL. **ANIMALS** ARE ALSO POWERFUL.

THE **ANISHINAABEG** BELIEVE THAT IF **HUMANS** EXERCISE TOO MUCH POWER, THERE WILL BE DISHARMONY.

INDIAN TREATIES AND THE SURVIVAL OF THE GREAT LAKES

Wenona T. Singel[*]

Matthew L.M. Fletcher[**]

2006 MICH. ST. L. REV. 1285

TABLE OF CONTENTS

INTRODUCTION 1286
I. INDIAN TREATIES AND NATURAL RESOURCE PROTECTION 1288
A. Treaty Rights 1289
B. Great Lakes Indian Treaties 1291
II. INCORPORATING INDIAN TRIBES AND INDIAN TREATIES 1293
A. Indian Treaties in Federal and State Litigation 1293
B. Indian Tribes as Stakeholders in International Compacting Process 1295
CONCLUSION 1296

The single most important defining element of the place we live, what makes this place unique in the entire world, is the Great Lakes and the waters that recharge these lakes from the springs, creeks, streams and rivers that make up this vast watershed. We speak for and honor the waters as the life-blood of our Mother Earth as an integral part of our traditional spirituality. As Native Nations we utilize these waters to define our boundaries, transport ourselves and trade goods, fish for our food and commerce, and enjoy their value for recreation and a strong economy.

—Frank Ettawageshik[1]

---

* Assistant Professor, Michigan State University College of Law; Associate Director, Indigenous Law and Policy Center; Appellate Judge and Enrolled Member, Little Traverse Bay Bands of Odawa Indians. This paper was prepared for The Great Lakes Water Basin: International Law and Policy Crossroads Conference held by the MSU Institute for Trade in the Americas, December 1-2, 2006. We thank Kevin Kennedy and Chris Bzdok for the invitation to participate in the conference.

** Assistant Professor, Michigan State University College of Law; Director, Indigenous Law and Policy Center; Appellate Judge, Hoopa Valley Tribe, Pokagon Band of Potawatomi Indians, and Turtle Mountain Band of Chippewa Indians; Enrolled Member, Grand Traverse Band of Ottawa and Chippewa Indians.

HeinOnline -- 2006 Mich. St. L. Rev. 1285 2006

INTRODUCTION

Anishinaabe elder Basil Johnston wrote that the waters of the Great Lakes gave the Anishinaabek a steady—if not "boundless"—source of food.[2] "[T]here were so many fish that the waters were said to be alive with fish."[3] Anishinaabe storytellers claimed that "when a school of fish passed in the shallows or over a shoal, the bottom of the lake could not be seen."[4] "The waters of lakes, rivers and seas were generous, abundant beyond saying."[5] But in the early years of the twenty-first century, the inland seas known as the Great Lakes are all but depleted.[6] Fish harvests by sports fishers, commercial fishers, and Indian tribes are at all-time lows.[7] And what fish are harvested cannot be consumed in great (or subsistence) quantities because of contamination by pollutants such as mercury and dioxin.[8] Tribal fishers, after decades of political, legal, and often violent conflict, persevered over their adversaries to preserve treaty fishing rights only to be faced with the prospect of "dip[ping their] nets into the water and [having them come up] empty."[9] "[T]hreats currently facing Great Lakes fisheries include invasive species, loss of native species, habitat destruction or degradation, water withdrawals, and pollution."[10]

---

1. Frank Ettawageshik, *Protecting the Life-Blood of Mother Earth*, BEDOHGEIMO (Office of the United States Attorney for the Western District of Michigan, Grand Rapids, Mich.), Winter 2004-05, at 3, http://www.usdoj.gov/usao/miw/nativenews/4newsletter.pdf.

2. BASIL H. JOHNSTON, HONOUR EARTH MOTHER: MINO-AUDJAUDAUH MIZZU-KUMMIK-QUAE 139 (2003).

3. *Id.* at 135.

4. *Id.*

5. *Id.* at 136; *see also* RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815 43-44 (1991) (noting that the fisheries were a critical source of food for Great Lakes Indians in the pre-treaty era).

6. Scott Fields, *Great Lakes: Resource at Risk*, ENVTL. HEALTH PERSP., Mar. 2005, at A165, A167.

7. *See, e.g.*, BRIAN BREIDERT, IND. DEP'T OF NAT. RES., HARVEST OF FISHES FROM LAKE MICHIGAN DURING 2004 (2005), http://www.in.gov/dnr/fishwild/fish/lkmich/harvest.pdf; N.Y. STATE DEP'T OF ENVTL. CONSERVATION, BUREAU OF FISHERIES 1999/2000 ANN. REP., http://www.dec.state.ny.us/website/dfwmr/fish/argrlake.pdf; GREAT LAKES FISHERY COMM'N, JOINT STRATEGIC PLAN FOR MGMT. OF GREAT LAKES FISHERIES (1994), http://www.glfc.org/pubs/sglbod.htm (last visited Mar. 29, 2007).

8. *See* H.M. Chan et al., *Impacts of Mercury on Freshwater Fish-Eating Wildlife and Humans*, 9 HUM. & ECOLOGICAL RISK ASSESSMENT 867, 877-79 (2003); Michael Gilbertson & David O. Carpenter, *An Ecosystem Approach to the Health Effects of Mercury in the Great Lakes Basin Ecosystem*, 95 ENVTL. RES. 240, 243 (2004); *Lake Ontario's Dioxin Level Still High and Bottom-Feeder the Likely Culprit*, TORONTO STAR, July 13, 1996, at C6.

9. *See* United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980) ("Were this trend to continue, the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty.").

10. Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322, 339

HeinOnline -- 2006 Mich. St. L. Rev. 1286 2006

Federal and state statutory and regulatory protections do not appear to be the answer to preventing the ongoing calamity in the waters of the Great Lakes.[11] To fill in the gap, environmental advocates and scholars devote much of their attentions to the public trust doctrine,[12] first articulated in this context by Joseph Sax.[13] Little attention is devoted to the insights of Indian tribes or to the potential legal benefits of invoking Indian treaty rights.[14] The Supreme Court has long affirmed the supremacy of Indian treaty provisions,[15] and while the Court's interpretation of some treaties has been cramped at best,[16] the Great Lakes and Pacific Northwest treaties have been interpreted in a manner that suggests there is room to provide for protection of major water bodies.[17]

The authors propose to incorporate Indian treaty jurisprudence into the strategy for saving the Great Lakes. The interests of the parties tend to be the same: the preservation of the resource. Indian treaties negotiated by Indian peoples that relied on water as a means of survival—economic, cultural, and political—provide a potential (and as yet untested) legal tool for the preservation of major water bodies such as the Great Lakes. Incorpora-

---

(2006); *see also id.* at 341 ("Pollution poses problems for fisheries, both because of its destructive effects on the ecosystem and its contamination of fish. A right to fish is seemingly worthless without the ability to eat that fish . . . .").

11. Professor Noah Hall's theory of "cooperative horizontal federalism" would be a giant leap forward. *See generally* Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006).

12. *See generally* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (summarizing the development of the public trust doctrine); Federico M. Cheever, Comment, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hidalgo*, 33 UCLA L. REV. 1364, 1364-69 (1986) (discussing the origins of the public trust doctrine); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1124 (2005) (arguing for the application of the public trust doctrine in tribal sacred sites litigation).

13. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

14. Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1220-21 (1991) (arguing that the public trust doctrine foreclosed any possible solution that could be developed by American Indians).

15. *See, e.g.*, Winters v. United States, 207 U.S. 564, 575-77 (1908); United States v. Winans, 198 U.S. 371, 380-84 (1905).

16. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

17. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979); United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978), *aff'd sub nom.* Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123 (9th Cir. 1978); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

HeinOnline -- 2006 Mich. St. L. Rev. 1287 2006

tion of Indian treaties may also help to alleviate the systematic limitations of the public trust doctrine, as identified by Richard Delgado.[18] Moreover, incorporation of the American Indian tribes and Canadian First Nations into the discussion is absolutely mandatory in order to reach true environmental justice.[19]

This Article proposes a preliminary strategy toward the end of preserving the Great Lakes for the next seven generations and beyond, if possible. Part I introduces a short history of Indian treaty law in the context of natural resource use and conservation. Part I also provides a short history and description of some of the Great Lakes Indian treaties and treaty litigation. Part II justifies including Indian tribes in any potential solution to the Great Lakes problem. Part III provides the preliminary framework for a Great Lakes solution that involves Indian tribes.

I. INDIAN TREATIES AND NATURAL RESOURCE PROTECTION

The litigation of Indian treaties has a rich and varied history.[20] Treaty rights litigation also rose in prominence around the same time as Joe Sax's seminal 1970 article on the public trust doctrine[21] and the concomitant rise of the environmental movement, but Indians and Indian tribes (often with the cooperation of the United States as a co-plaintiff) have been litigating and winning significant treaty cases since at least 1905's *United States v.*

---

18. Delgado, *supra* note 14, at 1213-18.

19. The Long Lake No. 58 First Nation Reserve in Canada has been devastated by a water diversion project (Long Lac and Ogoki diversion) *into* the Great Lakes. *See* PETER ANNIN, THE GREAT LAKES WATER WARS 121 (2006).

20. *See generally* ROBERT DOHERTY, DISPUTED WATERS: NATIVE AMERICANS AND THE GREAT LAKES FISHERY (1990) (describing the conflicts over Indian treaty rights in northwest lower Michigan); VINE DELORIA, JR., INDIANS OF THE PACIFIC NORTHWEST: FROM THE COMING OF THE WHITE MAN TO THE PRESENT DAY 145-97 (1977) (describing the conflicts over Indian treaty fishing rights in the Pacific Northwest); FISH IN THE LAKES, WILD RICE, AND GAME IN ABUNDANCE: TESTIMONY ON BEHALF OF MILLE LACS OJIBWE HUNTING AND FISHING RIGHTS (James M. McClurken et al. eds., 2000) [hereinafter FISH, RICE, AND GAME] (compiling expert reports and testimony in relation to Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 409-28 (1994) (describing treaty rights activism); Ronald N. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective*, TRANSACTIONS WIS. ACAD. SCI., ARTS, & LETTERS, 1991, at 1, 91-128 (describing the conflicts over Indian treaty rights in Wisconsin); GEORGE WEEKS, MEM-KA-WEH: DAWNING OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS 41-64 (1992) (describing the conflicts over Indian treaty rights in northwest lower Michigan).

21. *See* Sax, *supra* note 13.

HeinOnline -- 2006 Mich. St. L. Rev. 1288 2006

Winans.[22] Most treaty rights litigation involves the particular rights of certain property owners, namely Indians and Indian tribes.

A. Treaty Rights

The first major Supreme Court case regarding Indian treaty rights held that the rights contained in Indian treaties were not grants from the federal government, but a "reservation of those [rights] not granted."[23] Treaty fishing rights, the Court concluded, "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[24] The Court noted that Indians and Indian tribes retained rights to fish off the reservation as well, and although limited to some extent, the Court described them as a "servitude" or "easement" upon lands off the reservation alienated by the federal government to non-Indians.[25] The Court noted that both on- and off-reservation rights had to be recognized in order to "give effect to the treaty."[26] Three years later, the Court held that an Indian treaty implicitly reserved rights to water that the tribe had ceded, otherwise the treaty would have left the reservation a "barren waste."[27] Once again, the Court looked to the purpose of the treaty and concluded that the Indian leaders would never have agreed to a treaty that would destroy the land that they retained.[28]

Indian treaty interpretation by federal courts focuses on two very important issues. First, the courts review the original purpose of the treaty.[29] This analysis often is controlled by the canon of Indian treaty construction,[30] which holds that ambiguities in Indian treaty language should be interpreted in accordance with the way the Indians that executed the treaty understood it.[31] Second, the courts look to see if the treaty has been abrogated in any way, either completely or partially.[32] If the treaty has been abrogated, even

---

22. 198 U.S. 371 (1905). *See generally* 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY § 1.2, at 27-32 (2005) (providing the back story in the *Winans* decision).

23. *Winans*, 198 U.S. at 381.

24. *Id.*

25. *Id.* at 381, 384.

26. *Id.* at 381.

27. Winters v. United States, 207 U.S. 564, 577 (1908).

28. *Id.* at 576-77.

29. *See, e.g.*, *id.*

30. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 at 119-28 (Nell Jessup Newton et al. eds., 2005) [hereinafter FEDERAL INDIAN LAW].

31. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); United States v. Winans, 198 U.S. 371, 380-81 (1905).

32. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

HeinOnline -- 2006 Mich. St. L. Rev. 1289 2006

partially, often courts will ignore the purpose of the treaty and will refuse to apply the canon of construing Indian treaty language.[33]

Assuming an Indian treaty has not been abrogated, courts are more likely to find that the tribal resource rights remain extant. These resource rights include without limitation: fisheries,[34] hunting,[35] cultivation or gathering,[36] and water rights.[37] They survive Congressional termination of Indian tribes.[38] The resource rights are strongest on Indian lands[39] but, as *Winans* suggests, they extend off the reservation as well[40] and constitute a form of legal and enforceable servitude on all lands ceded by the tribes in the treaty.[41] These rights are powerful; they can trump private property rights,[42] state regulation,[43] and even state criminal laws.[44] The limitations on Indian treaty rights tend to be pragmatic limitations related to resource conservation issues where the courts read conservation mandates into the Indian treaties in the Great Lakes basin and the Pacific Northwest.[45] As a result, the courts find that the states and the tribes should be co-managers of the resource, leading to the establishment of resource conservation agreements and inter-sovereign cooperation.[46]

---

33. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 348 (1998); Hagen v. Utah, 510 U.S. 399, 422-24 (1994) (Blackmun, J., dissenting).

34. *See, e.g.*, *Mille Lacs Band*, 526 U.S. at 175-76; Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684-85 (1979); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 343-44, 365 (7th Cir. 1983); United States v. Michigan, 471 F. Supp. 192, 278-81 (W.D. Mich. 1979); United States v. Washington, 459 F. Supp. 1020, 1032 (W.D. Wash. 1978); United States v. Washington, 384 F. Supp. 312, 332-33 (W.D. Wash. 1974). *See generally* RODGERS, *supra* note 22, § 1.2, at 25-61 (describing treaty fishing rights litigation).

35. *See, e.g.*, *Mille Lacs Band*, 526 U.S. at 175-76; Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 (1968); Mitchel v. United States, 34 U.S. 711, 746 (1835).

36. *See, e.g.*, United States v. Aanerud, 893 F.2d 956, 961 (8th Cir. 1990).

37. *See, e.g.*, Winters v. United States, 207 U.S. 564 (1908); FEDERAL INDIAN LAW, *supra* note 30, § 19.02, at 1171-73.

38. *See Menominee Tribe*, 391 U.S. at 412-13.

39. *See* FEDERAL INDIAN LAW, *supra* note 30, § 18.03[2], at 1126-28.

40. *See, e.g.*, *Mille Lacs Band*, 526 U.S. at 201-02; Organized Village of Kake v. Egan, 369 U.S. 60, 76 (1962).

41. *See* Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Res., 141 F.3d 635, 639 (6th Cir. 1998); FEDERAL INDIAN LAW, *supra* note 30, at 1123. A Fifth Amendment right may attach to these servitudes or easements. *See* Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988).

42. *See, e.g.*, *Grand Traverse Band*, 141 F.3d at 639-41.

43. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1983).

44. *See, e.g.*, People v. LeBlanc, 248 N.W.2d 199, 202 (Mich. 1976).

45. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968); United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); United States v. Washington, 520 F.2d 676, 686 n.4 (9th Cir. 1975); RODGERS, *supra* note 22, § 1.3, at 61-85.

46. *See, e.g.*, Consent Decree, United States v. Michigan at 2, No. 2:73 CV 26 (W.D. Mich. Aug. 8, 2000), http://www.1836cora.org/pdf/2000consentdecree.pdf.

HeinOnline -- 2006 Mich. St. L. Rev. 1290 2006

Consequently, tribal treaty rights are a powerful environmental law tool. In the words of Professor Bill Rodgers:

> [Indian] treaties have the look, touch, and feel of a conservation easement. The fishing right is place-based, which means it is dependent upon protecting geography. It is expressed as a property interest, which means it is disposable if at all only by choice of the owner. It is owned by Native people for whom sale is an anathema.[47]

B. Great Lakes Indian Treaties

The Anishinaabek on the United States side of the Great Lakes entered into dozens of treaties with the federal government in the eighteenth and nineteenth centuries, ceding their claims and interests to millions of acres of land in exchange for certain concessions by the United States but reserving the authority and capacity to continue to live as they chose in limited territories.[48] Great Lakes Indian people retained certain usufructuary rights over ceded lands and waters to hunt and fish for sustenance and commerce.[49] In fact, the Anishinaabek would not have agreed to enter into any of these treaties unless the treaty was understood to have preserved their right to hunt and fish on ceded lands and waterways, subject to certain pragmatic limitations, and to fish in the Great Lakes without limitation.[50] In a similar fashion, Indian nations throughout the United States that depended upon fish for sustenance and commerce understood their treaties to mean that they could continue to hunt and fish on ceded lands.[51] And American treaty negotiators knew full well that Indian treaty negotiators sought to preserve the ability to hunt and fish on ceded lands and waters.[52]

The historical context of the Michigan Indian treaty negotiations is critical to understanding and applying them. The lead American treaty ne-

---

47. RODGERS, *supra* note 22, § 1.3, at 73.

48. *E.g.*, Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 14 Stat. 637 (1864); Treaty of Detroit, 11 Stat. 621 (1855); Treaty with the Chippewa at La-Pointe, 10 Stat. 1109 (1854); Treaty with the Chippewa at LaPointe, 7 Stat. 591 (1842); Treaty of Washington, 7 Stat. 491 (1836); Treaty of Greenville, 7 Stat. 49 (1795).

49. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 405-07 (1968); United States v. Michigan, 471 F. Supp. 192, 279 (W.D. Mich. 1979); People v. LeBlanc, 248 N.W.2d 199, 204-05 (Mich. 1976).

50. *See, e.g.*, James M. McClurken, *The 1837 Treaty of St. Peters Preserving the Rights of the Mille Lacs Ojibwa to Hunt, Fish, and Gather: The Effect of Treaties and Agreements Since 1855*, *in* FISH, RICE, AND GAME, *supra* note 20, at 327, 336-37 (testifying that the major purpose of the treaty negotiation from the tribal side was to preserve access to natural resources).

51. *E.g.*, Charles E. Cleland, *Preliminary Report of the Ethnohistorical Basis of the Hunting, Fishing, and Gathering Rights of the Mille Lacs Chippewa*, *in* FISH, RICE, AND GAME, *supra* note 20, at 1, 111 (testifying that the Indians "would have understood that the duration of the [usufruct] guarantee extended indefinitely into the future").

52. *E.g.*, McClurken, *supra* note 50, at 337.

HeinOnline -- 2006 Mich. St. L. Rev. 1291 2006

gotiator, Henry Schoolcraft, recognized that the fisheries of the Great Lakes alone could support the existence of Indian tribes on the shores.[53] Indian people depended a great deal on the Great Lakes fisheries with some bands eating fish as 75 percent of their diet by 1850.[54] "Before 1830 commerce in fish had been managed almost entirely by the Indians. Early traders and commercial fishermen sought and paid for tribal permission, and thus implicitly recognized the Indian right to the Lakes' fisheries."[55] But by the 1830s, white commercial trapping and hunting had all but eradicated the game in the upper portions of Michigan.[56] And by the 1850s, the fisheries were depleted, leading to the creation of the state's first conservation agencies.[57]

In this historical context, several Michigan Odawa and Ojibwe bands entered into a treaty in 1836 with the federal government that preserved the ability and authority of Indian people to hunt and fish in ceded territories "until the land is required for settlement" and in the Great Lakes forever.[58] Judge Fox held in 1979:

> The language contained in Article Thirteenth of the Treaty of 1836, by its own terms could not have limited the Indians' right to fish in the waters of the Great Lakes because these large bodies of water could not possibly be settled by homes, barns and tilled fields. While the Indians might have been willing to give up their right to hunt on various parcels of land as that land became occupied with settlers, the vital right to fish in the Great Lakes was something that the Indians understood would not be taken from them and, indeed, there was no need to do so. The western movement of non-Indian settlers could be accommodated without requiring the Indians to relinquish their aboriginal and treaty rights to fish. While the United States has the power to abrogate treaties by subsequent treaty or statute, it must do so expressly and emphatically. No such abrogation of the reserved treaty right to fish can be found.[59]

---

53. Robert H. Keller, *An Economic History of Indian Treaties in the Great Lakes Region*, AM. INDIAN J., Feb. 1978, at 2, 12.

54. *Id.*

55. *Id.*

56. *Id.* at 13.

57. *Id.*

58. Treaty with the Ottawa, Etc., art. 13, 7 Stat. 491 (1836). *See generally* James M. McClurken, *Ottawa Adaptive Strategies to Indian Removal*, MICH. HIST. REV., Spring 1986, at 29, 35 (describing the major points of the 1836 treaty, including permanent title to lands); Helen Hornbeck Tanner, *Mapping the Grand Traverse Indian Country: The Contributions of Peter Dougherty*, MICH. HIST. REV., Spring 2005, at 45, 63-64 (same); *cf.* Benjamin Ramirez-Shkwegnaabi, *The Dynamics of American Indian Diplomacy in the Great Lakes Region*, 27 AM. INDIAN CULTURE & RES. J. 53, 71 (2003) (same, in relation to 1855 Treaty of Washington, 11 Stat. 621 (1855)). *See generally* Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 525-26 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 680 (2006).

59. United States v. Michigan, 471 F. Supp. 192, 253 (W.D. Mich. 1979).

HeinOnline -- 2006 Mich. St. L. Rev. 1292 2006

The Anishinaabe treaty negotiators "fully appreciated the treaty's provision for usufructuary rights of the natural resources in their territory."[60] Federal courts have recognized that the rights of the Michigan Anishinaabek are "unabridged, aboriginal, tribal right[s] to fish derived from thousands of years of occupancy and use of the fishery of the waters of Michigan."[61] The Sixth Circuit even held that treaty fishers must be given access to municipal mooring points along Lake Michigan.[62]

The impact of treaty rights litigation in the Great Lakes states has been nothing short of phenomenal. The Supreme Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians* upheld the off-reservation usufructuary rights of the Minnesota Chippewa people to hunting, fishing, gathering, and cultivating to the exclusion of state laws and regulation.[63] Federal courts in Wisconsin upheld Wisconsin Indian treaty rights in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*.[64] And, of course, federal courts recognized the right of Michigan Indian tribes to fish in Great Lakes waters in accordance with the Treaty of 1836.[65]

II. INCORPORATING INDIAN TRIBES AND INDIAN TREATIES

The authors offer two non-mutually exclusive possibilities for Great Lakes advocates. First, advocates could seek to incorporate Indian treaties into federal environmental law.[66] Second, they should include Indian perspectives in the dialogue leading to interstate and international agreements.[67]

A. Indian Treaties in Federal and State Litigation

The authors propose incorporating Indian treaty rights into the discussion as a means of preserving the Great Lakes. Indian tribes have not yet begun litigating over the broader issues of the Great Lakes—pollution, de-

---

60. McClurken, *supra* note 58, at 37.

61. United States v. Michigan, 505 F. Supp. 467, 472 (W.D. Mich. 1980).

62. Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Res., 141 F.3d 635, 638-39 (6th Cir. 1998).

63. 526 U.S. 172, 175-76 (1999). *See generally* FISH, RICE, AND GAME, *supra* note 20 (compiling expert reports and testimony in relation to *Minnesota v. Mille Lacs Band of Chippewa Indians*).

64. 653 F. Supp. 1420, 1435 (W.D. Wis. 1987). *See generally* Satz, *supra* note 20 (describing the conflicts over Indian treaty rights in Wisconsin); Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375.

65. United States v. Michigan, 471 F. Supp. 192, 253 (W.D. Mich. 1979).

66. *See infra* Part II.A.

67. *See infra* Part II.B.

HeinOnline -- 2006 Mich. St. L. Rev. 1293 2006

clining water levels,[68] water exports, invasive species, and the rest of the plethora of problems facing the future of the Lakes—focusing instead on establishing other tribal rights such as hunting, fishing, gathering, and access rights. Indian tribes and environmental advocacy organizations or other individuals with standing could bring suit, for example, under public trust and treaty rights causes of action.[69]

First, the Great Lakes litigation would be grounded in positive, written law—Indian treaties—with the backing of the Supremacy Clause.[70] Indian treaties often have been construed as requiring both the federal government and the states to preserve the resource, such as the water levels, stream flows, or other environmental protections. The so-called "Culverts case," an ongoing subproceeding in *United States v. Washington*, offers a legal basis for construing Indian treaties as requiring governments to preserve the resource. In that proceeding, the tribes sued the State of Washington over whether the culverts used by the State and local governments were sufficient to preserve in-stream water flows to the extent necessary to allow for anadromous fish[71] to reach their spawning habitat.[72] Such a theory could work in the Great Lakes as well, with numerous Great Lakes Indian treaties offering language and history to support the theory.

Second, Indian treaty rights tend to trump state and private property rights without a takings concern. It is true that the public trust doctrine also is construed in this manner, but in reality it is a common law doctrine subject to the divestiture of its properties by the courts.[73]

---

68. The Michigan Ottawa tribes brought a federal claim against a water bottling company with a well in central lower Michigan that had the potential to take enough water from the watershed to make Lake Michigan water levels drop, but the tribes did not raise a treaty claim. *See* Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of Am., Inc., 203 F. Supp. 2d 853, 854 n.2 (W.D. Mich. 2002). A parallel state court case is pending before the Michigan Supreme Court. Michigan Citizens for Water Conservation v. Nestlé Waters N. Am. Inc., 709 N.W.2d 174, 188-92 (Mich. Ct. App. 2005) (describing trial court's findings of facts in parallel state court case), *leave granted to file briefs amicus curiae*, 722 N.W.2d 422 (Mich. 2006).

69. This is not a particularly original proposal. Professor Kristen Carpenter persuasively and perspicaciously argued that the public trust doctrine should be used as a means of preserving sacred sites of Indian peoples where treaty rights fail. Carpenter, *supra* note 12, at 1124.

70. U.S. CONST. art. VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .").

71. Fish that migrate from saltwater to fresh water to spawn.

72. The Culverts case is scheduled to go to trial in the summer of 2007. *See* Fish, Wildlife & Parks Division, Washington State Office of the Attorney General, Significant Cases, http://www.atg.wa.gov/page.aspx?id=1800#cases (last visited Mar. 29, 2007).

73. Commentators often criticize the public trust doctrine for its apparent hostility to private property rights and lack of basis in the Constitution or statute. *See, e.g.*, George A. Gould, *The Public Trust Doctrine and Water Rights*, 34 ROCKY MTN. MIN. L. INST. 25-1, 49

HeinOnline -- 2006 Mich. St. L. Rev. 1294 2006

Third, a litigation strategy involving Indian treaties does not foreclose alternate litigation strategies and encourages the development of longer-term solutions for the Great Lakes. Litigation over the interpretation of Indian treaties necessarily requires a deep understanding of what the tribal treaty negotiators understood the treaties to mean.[74] Richard Delgado's withering critique of the public trust doctrine—that the doctrine preempted the development of more alternative and experimental means of preserving the environment such as ecofeminism and other more holistic world-views[75]—would be answered, in part, by strategy and policy that looks at the environment the way Indian people look at it, which, by definition, is far more open to unusual and progressive alternatives.

One possible weakness to this strategy is that the treaties tend only to cover waters that are in direct contact with the territories ceded in the treaties. For example, in the 1836 Treaty of Washington several Ojibwe and Odawa bands ceded approximately half of the Lower Peninsula and half of the Upper Peninsula of Michigan.[76] The *United States v. Michigan* litigation resulted in a preservation of the fishing right in three of the Great Lakes (Michigan, Superior, and Huron),[77] but did not cover the remainder of the Great Lakes or their Canadian side. Moreover, there are more actors and stakeholders than the states, the federal government, and American Indian tribes. No litigation strategy is complete without considering additional avenues of redress.

B. Indian Tribes as Stakeholders in International Compacting Process

In November 2004, over 100 American Indian tribes and Canadian First Nations met at Sault Ste. Marie, Michigan to discuss means of cooperating in the preservation of the Great Lakes. Practically every tribe and nation that sent representatives agreed to an accord promising to cooperate with each other.[78] While the process of including these sovereign entities

---

(1988); Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 417-22, 428-30 (1987); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 204-12 (1987).

74. *See* Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 525-26 (6th Cir. 2005) (discussing expert ethnohistorical reports explaining how Indians understood an 1854 treaty), *cert. denied*, 127 S. Ct. 680 (2006).

75. Delgado, *supra* note 14, at 1213-21.

76. Treaty with the Ottawas, Etc. art. I, 7 Stat. 491 (1836). For a general map of treaty ceded waters, see http://www.1836cora.org/ (last visited Mar. 29, 2007).

77. *See* Consent Decree, United States v. Michigan at 7-17, No. 2:73 CV 26 (W.D. Mich. Aug. 8, 2000), http://www.1836cora.org/pdf/2000consentdecree.pdf.

78. Tribal and First Nations Great Lakes Water Accord (Nov. 23, 2004) (on file with the authors).

HeinOnline -- 2006 Mich. St. L. Rev. 1295 2006

into the international and state governors' Great Lakes preservation working groups is beginning,[79] more can and should be done.

The work of tribal leaders such as Frank Ettawageshik, chairman of the Little Traverse Bay Bands of Odawa Indians, on behalf of the Great Lakes is indispensable to the effort. He led the campaign to get the American Indian tribes and the Canadian First Nations together in 2004, testified before the Senate Committee on the Environment and Public Works in 2006,[80] and participated in a groundbreaking cooperative agreement between the tribes of Michigan and the State of Michigan.[81] According to Chairman Ettawageshik, "inter-governmental and other partnerships allow the parties to achieve public benefits that no one partner could achieve alone."[82]

CONCLUSION

The survival of the Great Lakes and the continuing viability of Indian treaty rights exist in fascinating juxtaposition. Indian treaty law offers recognition of Indian ownership of interests in public (and in some instances private) lands, waters, and natural resources, enforceable through a tribal-federal government agreement equivalent to a federal statute. Indian treaties are the supreme law of the land but only cover ceded territories and involve limited property rights. Nevertheless, treaty rights must be an important part of the strategy to save the Great Lakes. As Frank Ettawageshik's work to incorporate Indian tribes into the broader discussion as a political matter progresses, discussion of Indian treaty rights will follow. All parties have much to learn from each other.

Father Baraga wrote long ago: "Indians residing on the edges of [the Great L]akes feed on nothing but fish. . . . These lakes are so rich in fish that an Indian commonly takes twelve or fifteen large fish per day."[83] Anishinaabe people used the waters of the Great Lakes as an important part of

---

79. Water Management Working Group, Council of Great Lakes Governors, Summary of Meeting with Tribal and First Nations Representatives (Feb. 1, 2005), http://www.cglg.org/projects/water/docs/MeetingSummaries/2-1-05Tribes-FirstNationsMeetingSummary.pdf.

80. *Great Lakes Regional Collaboration's Strategy to Restore and Protect the Great Lakes, Hearing Before the S. Comm. on Environment and Public Works*, 109th Cong. (2006) [hereinafter Ettawageshik Testimony] (statement of Frank Ettawageshik, Chairman, Little Traverse Bay Bands of Odawa Indians), http://epw.senate.gov/109th/Ettawageshik_Testimony.pdf.

81. 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), http://www.michigan.gov/documents/Accord_91058_7.pdf.

82. Ettawageshik Testimony, *supra* note 80, at 8.

83. FREDERIC BARAGA, SHORT HISTORY OF THE NORTH AMERICAN INDIANS 121 (Graham A. MacDonald trans., U. Calgary Press 2004) (1837).

HeinOnline -- 2006 Mich. St. L. Rev. 1296 2006

their daily lives. But psychologist Carl G. Jung wrote: "As scientific understanding has grown, so our world has become dehumanized. . . . [Peoples'] contact with nature has gone, and with it has gone the profound emotional energy that this symbolic connection supplied."[84] There is a way to restore the Great Lakes. Anishinaabe elder Eddie Benton-Benai argues that we must choose between two roads: "the road to technology and the other road to Spiritualism. . . . The [other] road represents the slower path that Traditional Native people have traveled and are now seeking again. The Earth is not scorched on this trail. The grass is still growing there."[85] Our choice is before us.

84. CARL G. JUNG, MAN AND HIS SYMBOLS 95 (1964).

85. WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 198 (1999) (footnote omitted) (quoting Edward Benton-Benai; brackets and ellipses in original); *see also* EDWARD BENTON-BENAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY 111-12 (1979) (expanding upon the same discussion).

HeinOnline -- 2006 Mich. St. L. Rev. 1297 2006

DETROIT INDIAN CENTER