



LakeLinks

Spring/Summer 2003

A multi-disciplinary forum for dialogue and expression of diverse viewpoints on issues of importance to the Great Lakes region

Special Points of Interest

Responsibilities & Challenges in Advancing an Ecosystem Approach to Interjurisdictional Fisheries Management

April 10-11, 2003

University of Toledo

College of Law

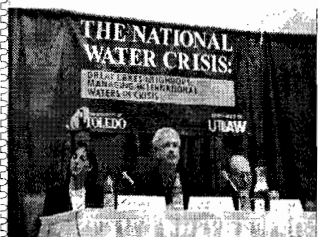
See page 4 for more information

Watch for LIGL's

November 2003 Water Conference

Tentative Topic:
Groundwater Resources in the Great Lakes

LIGL'S Fall 2002 Conference
The National Water Crisis: Great Lakes Neighbors Managing International Waters in Crisis
was a great success.
See pages 3 for conference highlights.



From Left: Professor Sandi Zellmer of the University of Toledo College of Law, U.S. International Joint Commissioner the Honorable Dennis Schornack, and the Canadian International Joint Commissioner the Right Honorable Herb Gray

Grand Traverse Band of Ottawa and Chippewa Indians

Patty O'Donnell
Environmental Stewardship Director

Long before Columbus, and long even before the Roman Empire, Native Americans inhabited northwest and lower Michigan and ranged along its Lake Michigan shore. America's original people were in the Grand Traverse region thousands of years before the coming of the first Europeans and the beginning of recorded history. They were initially swept up in European power struggles and then swept aside by American settlers.

By being a sovereign Tribe, the Band has the right to make laws, collect taxes,

(Grand Traverse: Continued on page 2)

Tribal Rights to Water and Water-Dependent Resources

Sandra Zellmer
Associate Professor University of Toledo, College of Law

Many American Indian Tribes throughout the United States have legally protected interests in water and in water-dependent resources, such as fisheries and wild rice. Canadian First Nations may also claim an interest in water resources, although the legal framework in Canada is quite different. In the United States, tribal interests in water resources flow from explicit and implicit provisions of U.S.-tribal treaties.

A. Treaty Rights to Water-Dependent Natural Resources

Many treaties with American Indian tribes provide that tribes have exclusive rights to reservation lands and resources, and that tribes retain their rights to hunt and

(Tribal Rights: Continued on page 6)

The Continuing Saga of SWANCC

(Solid Waste Agency of Northern Cook County v. United Army Corps of Engineers)

Lisa Raney
Law Student, University of Toledo, College of Law

In March of 2001 the United States Supreme Court decided a long running debate over wetland jurisdiction in *Solid Waste Agency of Northern Cook County v. United Army Corps of Engineers* (SWANCC), 531 U.S. 159 (2001). The decision, however, left important issues surrounding federal jurisdiction and authority over wetlands unanswered.

Prior to SWANCC, federal agencies had the power to assert jurisdiction over

(SWANCC: Continued on page 2)

(Grand Traverse: Continued from page 1)

protect the rights and welfare of the tribal members, and maintain a system of government on their own lands. Sovereignty is inherent; it is not something that was granted to tribes by the United States. Tribes never lost their right to self-governance through treaties; sovereignty was retained in large part because Indian tribes had existed as nations long before the United States government.

Fishing was a major factor in the formation, migration, and settlement patterns of Bands. In the 19th century, it was a subject of treaties. In the late 20th century, it was the subject of prolonged court battles. In the treaties of the 1800s that transferred land to the federal government, the Indians' right to continue fishing in ancestral waters was to be secured.

Today, the Grand Traverse Band has approximately 3,800 members with about 1,700 in the six county service area of Leelanau, Benzie, Manistee, Grand Traverse, Antrim, and Charlevoix. The tribal government provides membership services such as health care, housing, public safety, education activities, support program for elders and youth, and an Economic Development Corporation, and woven throughout these programs are environmental policies, laws, ordinances, concerns, issues and activities. The Band owns a total of 1,600 acres in the counties of Antrim, Benzie, Charlevoix, Grand Traverse, and Leelanau.

The Grand Traverse Band became involved in Great Lakes issues through the development of an Environmental Stewardship Program. The Tribes follow federal environmental laws or can adopt their own. The Environmental Stewardship Program includes air quality, water quality, land use planning, solid waste management, pollution prevention; emergency response, environmental health, and Great Lakes basin issues. The Grand Traverse Band participates in and with many Great Lakes entities on the local, state, federal, and international level to provide input for management and policy development and other basin issues/concerns. The Band has tried to participate in the Annex 2001 process regarding export and diversion of Great Lakes waters since the binding agreement to be developed affects the tribes in the Great Lakes basin on a natural resources level – including the impact on subwatersheds.

The protection of Great Lakes water supplies

(Grand Traverse: Continued on page 7)

(SWANCC: Continued from page 1)

most wetlands under the Clean Water Act and the Migratory Bird Treaty Act. See 33 USCS §1251 (2003), 16 USCS § 703 (2003). First, the Clean Water Act allows for federal control over “waters of the United States” which includes intrastate “navigable waters” and some wetlands. 33 USCS §1251 (2003). Next, the Army Corps of Engineers can claim federal jurisdiction over wetlands falling under the Migratory Bird Treaty Act. The Migratory Bird Treaty Act implements

The State of the Nation's Wetlands After SWANCC

In the Great Lakes region, millions of acres of wetlands have been developed over the years, and millions more could be left unprotected if state or local governments do not assume the regulatory authority abandoned by the federal government in the wake of the SWANCC opinion. Wetlands are areas where water is present at or near the surface of the soil or within the root zone, which support vegetation adapted to life in saturated ground. Bogs, salt and brackish marshes, freshwater marshes and prairie potholes provide wildlife habitat and act as a sponge or filter, sustaining water quality and providing flood control by collecting polluted runoff.

In January 2003, the U.S. Environmental Protection Agency (EPA) prohibited its field agents from using the Clean Water Act to regulate isolated wetlands if migratory bird concerns were the only basis for doing so. It also required them to seek permission from EPA headquarters in Washington before regulating isolated wetlands for any other reason. See Michael Kilian and Julie Deardorff, *EPA Softens Protection of Wetlands*, Chicago Tribune, Jan. 11, 2003, at 1. In addition, the agency began a process likely to lead to a new rule redefining “isolated wetlands” and setting limits on federal jurisdiction. See EPA and Army Corps of Engineers, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 (Jan. 15, 2003).

Estimates vary regarding the impact of these initiatives. Environmental groups believe as much as 60 percent of the nation's wetlands could be destroyed as a result. According to the EPA, affected areas include up to 20 percent of the nation's total waterways. The states' response will be especially critical in the Great Lakes region. Illinois has already lost nearly 90 percent of its historic wetlands and 50 percent of the Illinois River floodplain to development, and ninety percent of Minnesota's prairie potholes have been lost, mostly to agriculture.

which may affect interstate commerce, such as industry and tourism. Prior to SWANCC the Corps used the Clean Water Act and Migratory Bird Treaty Act to claim federal jurisdiction over the majority of wetlands because the wetland could either be considered a navigable waterway or a possible nesting ground for migratory birds.

In SWANCC, the Court addressed the Clean Water Act and narrowed the scope of the term “navigable waters” such that isolated wetlands that are entirely intrastate with no proven hydrological connection to more traditionally navigable waters fall under state jurisdiction. SWANCC holds that Congress did not intend for isolated wetlands to fall under federal control unless there is a substantial relationship to interstate commerce. 531 U.S. at 173-74. The Court did not address the validity of the Migratory Bird Treaty Act as an alternative ground for jurisdiction in this case.

The result of SWANCC, in regard to the Clean Wa-

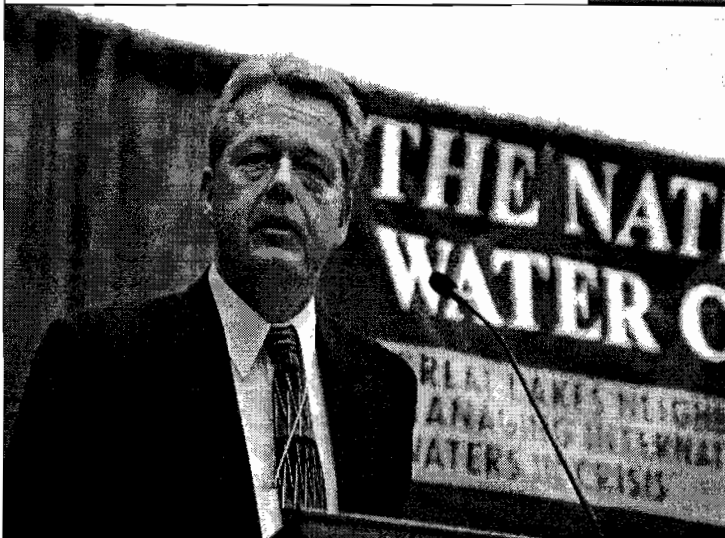
(SWANCC: Continued on page 7)

National Water Crisis Conference: Great Lakes Neighbors Managing International Waters in Crisis: Fall 2002

The Fall 2002 National Water Crisis Conference, held at the University of Toledo College of Law, was a great success. This conference was the second annual symposium on the Great Lakes sponsored by the College of Law. The 2001 conference, "The National Water Crisis: A Great Lakes Response," examined the role of the federal government in controlling diversions from the watershed. The 2002 conference explored the unique challenges facing the international community, including the Great Lakes states, provinces, and tribes. The panel discussions focused on Canadian perspectives regarding the regulation of Great Lakes water, the coordination of such controls with American au-



The Right Honorable Herb Gray, International Joint Commissioner for Canada

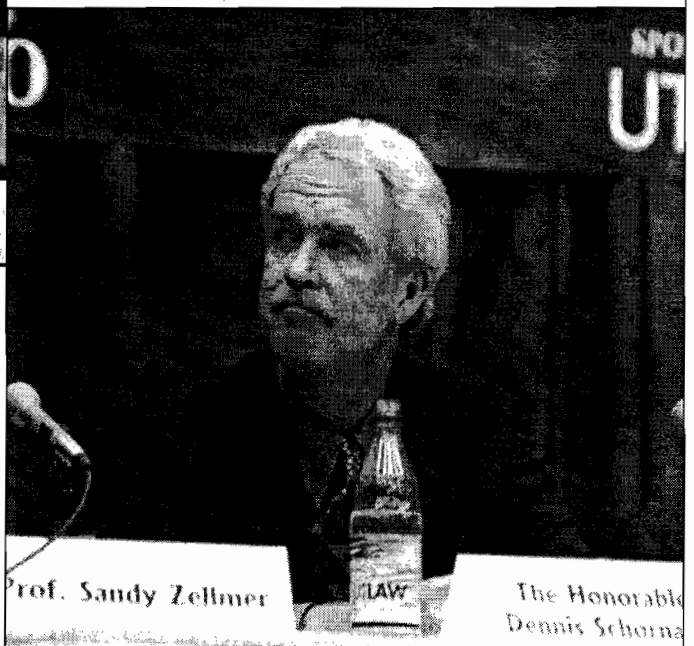


John Mills of Environment Canada

The next National Water Crisis conference is scheduled for November 2003, with a proposed topic of managing groundwater in the Great Lakes Basin. Please contact the Legal Institute of the Great Lakes for more information.

thorities, interstate compacts and international agreements for the Great Lakes, and issues faced by Tribes and First Nations.

The Chairs of the International Joint Commission, Dennis Schornack of the United States and the Right Honorable Herb Gray of Canada, delivered the keynote speeches at the Thursday evening session. John Mills, Regional Director General Environmental Canada, Ontario Region, gave the opening speech on Friday morning. Mills discussed the Canadian Federal Government's role in managing the Great Lakes and how that role fits with international agreements affecting the lakes.



The Honorable Dennis Schornack, International Joint Commissioner for the United States

RESPONSIBILITIES & CHALLENGES IN ADVANCING AN ECO-SYSTEM APPROACH TO INTERJURISDICTIONAL FISHERIES MANAGEMENT

APRIL 10 & 11, 2003
UNIVERSITY OF TOLEDO
COLLEGE OF LAW AUDITORIUM
TOLEDO, OHIO

Thursday, April 10

- 12:00 PM **WELCOME** *Professor Sandra Zellmer, University of Toledo College of Law - LIGL & Chairman Marine Resources Committee, ABA Section on Environment, Energy & Resources*
- 12:15 PM **PANEL 1: *Setting the Stage: Hot Topics in Interjurisdictional Management of Aquatic Ecosystems***
SPEAKERS: *Aquaculture: Josh Eagle, Stanford Fisheries Project; Exotic Species: Aaron Courtney, Pacific Environmental Advocacy Center, Lewis & Clark College of Law*
- 1:15 PM **PANEL 2: *Conference Opening: Fisheries Management Responsibilities***
SPEAKERS: *Eugene Smary, Chair, ABA Section on Environment, Energy & Resources*
- 1:45 PM **PANEL 3: *State Policy & Law on Inter- and Intra-agency Fisheries Management***
SPEAKERS: *Ohio Dept. of Natural Resources (DNR) - Gary Isbell; Michigan DNR - Gary Whelan; New York Dept. of Conservation - Robert Lange; Water Quality Considerations - Robert Thoma, Ohio EPA*
- 3:00 PM **BREAK**
- 3:15 PM **PANEL 4: *Canadian & Provincial Policy & Law on Inter- and Intra-agency Fisheries Management***
SPEAKERS: *Ontario Ministry of Natural Resources - Michael Morencie, Fish & Wildlife Branch; Environmental Commissioner of Ontario - David McRobert, In-House Counsel/Senior Policy Advisor; Environment Canada - Karen Brown, Assistant Deputy Minister, Environmental Conservation Service*
- 4:30 PM **PANEL 5: *Tribes & First Nations Policy & Law on Inter- and Intra-agency Fisheries Management***
SPEAKERS: *Chippewa-Ottawa Resource Association - Jeff Parker
Great Lakes Indian Fish & Wildlife Commission - Bill Mattes
Mohawk Nation - Henry Lickers*
- 5:45 PM **ADJOURN FOR RECEPTION & DINNER**
DINNER SPEAKER: *Charlotte deFontaubert, Greenpeace USA*

Friday, April 11

- 7:30 AM **CONTINENTAL BREAKFAST**
- 8:00 AM **PANEL 6: *Flow Regimes and Fisheries***
SPEAKERS: *National Wildlife Federation - Noah Hall, Water Resources Program Manager, Great Lakes Natural Resource Center*
- 8:30 AM **PANEL 7: *U.S. Federal Responsibilities for Interjurisdictional Fisheries Management***
SPEAKERS: *Fish & Wildlife Service - Mark Holey, Project Leader, Green Bay Fisheries Resources Office; NOAA Fisheries (NMFS) - LCDR Daniel Morris, Special Assistant to the Regional Administrator - Northeast Regional Office; Federal Energy Regulatory Commission - Lee Emery*
- 10:30 AM **BREAK**
- 10:45 AM **PANEL 7: *Roles & Lessons of International & Interstate Commissions***
SPEAKERS: *National Sea Grant Law Center - Kristen Fletcher: The Ocean Commission & Reauthorization of the Magnuson - Stevens Act; Atlantic States Marine Fisheries Commission - Dieter Busch; Great Lakes Fisheries Commission - Margaret Dochoda*
- 12:30 PM **ADJOURN**

8.0 HOURS OF CLE: Application has been made for Ohio CLE credit from the Ohio Supreme Court Commission on Continuing Legal Education for 8.0 of CLE credit including 0.0 hours of Ethics, Substance Abuse and Professionalism.

FYI

Insightful Sources for Information on Tribal Sovereignty & Water Rights

- Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights For Idaho Wilderness and Its Implications*, 73 U. Colo. L. Rev. 173 (2002).
- Peter Capossela, *Indian Reserved Water Rights in the Missouri River Basin*, 6 Great Plains Nat. Resources. J. 131 (2002).
- Kirsten Matoy Carlson, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 U. Mich. L. Rev. 569 (2002).
- Paul M. Drucker, *Wisconsin v. EPA: Tribal Empowerment and State Powerlessness Under §518(E) of the Clean Water Act*, 5 Denv. U. Water L. Rev. 323 (2002).
- Robert Erickson, *Protecting Tribal Waters: The Clean Water Act Takes Over Where Tribal Sovereignty Leaves Off*, 15 Tul. Envtl. L.J. 425 (2002).
- Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 Tulsa L. Rev. 5 (2002).
- Kara Gillon, *Watershed Down?: The Ups and Downs of Watershed Management in the Southwest*, 5 Denv. U. Water L. Rev. 395 (2002).
- Kathleen A. Kannler, *The Struggle Among the States, the Federal Government, and Federally Recognized Indian Tribes to Establish Water Quality Standards for Waters Located on Reservations*, 15 Geo. Intl. Envtl. L. Rev. 53 (2002).
- Ruth Langridge, *Changing Legal Regimes and the Allocation of Water Between Two California Rivers*, 283 Nat. Resources J. (2002).
- Judith Royster, *Winters in the East: Tribal Reserved Rights in Riparian States*, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 169 (2000).
- Andrea M. Seielstad, *The Recognition of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections On a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661 (2002).
- Sandra B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S. D. L. Rev. 381 (1998).

Websites

- Environment Canada, <http://www.ec.gc.ca>.
- American Indian Heritage Foundation, <http://www.indians.org/library/reacan.html>
- List of Federally Recognized Tribes, <http://www.afn.org/~native/tribesl.htm>
- Native American Rights Fund, <http://www.narf.org>

Federally Recognized Tribes - Great Lakes Region

(As published in Federal Register, Vol. 67, No. 134, Friday, July 12, 2002)

Indiana

Pokagon Band of Potawatomi Indians

Michigan

Bay Mills Indian Community

Grand Traverse Band of Ottawa and Chippewa Indians

Hannahville Indian Community

Huron Potawatomi, Inc.

Keweenaw Bay Indian Community

Lac Vieux Desert Band of Lake Superior Chippewa Indians

Little River Band of Ottawa Indians

Little Traverse Bay Bands of Odawa Indians

Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan

Pokagon Band of Potawatomi Indians

Saginaw Chippewa Indian Tribe of Michigan

Sault Ste. Marie Tribe of Chippewa Indians of Michigan

Minnesota

Lower Sioux Indian Community in the State of Minnesota

Prairie Island Indian Community in the State of Minnesota

Red Lake Band of Chippewa Indians

Minnesota Chippewa Tribe (Six component reservations: Bois Forte Band

(Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band;

Mille Lacs Band; White Earth Band)

Shakopee Mdewakanton Sioux Community of Minnesota

Upper Sioux Community

New York

Cayuga Nation of New York

Oneida Nation of New York

Onondaga Nation of New York

St. Regis Band of Mohawk Indians of New York

Seneca Nation of New York

Tonawanda Band of Seneca Indians of New York

Tuscarora Nation of New York

Wisconsin

Bad River Band of the Lake Superior Tribe of Chippewa Indians Forest

County Potawatomi Community

Ho-Chunk Nation of Wisconsin

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin

Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du

Flambeau Reservation of Wisconsin

Menominee Indian Tribe of Wisconsin

Oneida Tribe of Indians of Wisconsin

Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin

St. Croix Chippewa Indians of Wisconsin

Sokaogon Chippewa Community

Stockbridge Munsee Community

(Tribal Rights: Continued from page 1)

fish in off-reservation, ceded areas. Some provide for tribal hunting and “in all usual and accustomed grounds . . . in common with other citizens.” See *Washington v. Washington State Comm’l Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979). This provision has been found to provide tribes (1) access to off-reservation lands, and (2) a right to take a fair share of the harvest. See *Comm’l Passenger Fishing Vessel*, 443 U.S. 658; *Lac Courte Oreilles v. Wisconsin*, 707 F.Supp. 1034 (W.D. Wis. 1989).

Although states have only limited authority over the exercise of off-reservation treaty rights, states may regulate to the extent necessary for conservation of the resource. See *Dept. of Game v. Puyallup Tribe*, 414 U.S. 44 (1973). This is a notoriously vague and ill-defined standard.

The Great Lakes States are not immune to controversy over scarce natural resources, particularly fisheries. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 700 F.2d 341 (7th Cir. 1983), the Chippewa’s usufructuary rights in hunting, fishing, trapping and gathering on public lands in Wisconsin were upheld by the court. The lower courts were left to grapple with the permissible regulation of those rights. In *Lac Courte Oreilles v. Wisconsin*, 707 F.Supp. 1034 (W.D. Wis. 1989), regulation of off-reservation rights to harvest walleye and muskellunge was reserved to the tribes “on condition that they enact a management plan that provides for regulation of their members in accordance with biologically sound [conservation] principles necessary for the conservation of the species being harvested.” As a result, tribes regulate members’ fishing techniques (including gill-netting and spearing in larger lakes), seasons and bag limits, pursuant to a tribal management plan. *Id.* See *U.S. v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979); *Milles Lacs Band of Chippewa Indians v. Minnesota*, 861 F.Supp. 784 (D. Minn. 1994), *aff’d*, 526 U.S. 172 (2000).

B. Habitat and Water to Support Fish, Game and Gathering Rights

Indian treaty rights have given rise to governmental responsibilities to protect aquatic and terrestrial habitat relied upon by fish and game species and other treaty resources. The federal government has been required to protect habitat on ceded lands (for example, national forests, parks and wildlife refuges) from destruction or degradation to effectuate treaty provisions and its trust responsibilities toward tribes. In *U.S. v. Washington*, 506 F.Supp. 187 (W.D. Wash. 1980), *rev’d on other grounds*, 759 F.2d 1353 (9th Cir. 1985), the court remarked, “It is beyond doubt that the existence of an environmentally acceptable habitat is essential to the survival of fish, without which the expressly reserved right to take fish would

be meaningless.” Accordingly, habitat was to be protected from urbanization, development of water power and timber resources, and pollution. *Id.* See *U.S. v. Adair*, 723 F.2d 1394, 1417 (9th Cir. 1983) (stream flow through federally owned wetlands and forests must be maintained to support treaty resources, *i.e.*, fish and game), *cert. denied*, 467 U.S. 1252 (1984).

Water, in particular, has been found necessary for maintaining fisheries to fulfill treaty obligations. In the 1983 *Adair* case, 723 F.2d at 1410, water rights were reserved for tribes in an amount necessary to support hunting and fishing. In a more recent case by the same name, the court concluded that tribal rights include water to support the resources that are gathered, hunted, or fished pursuant to treaty and enjoined the Bureau of Reclamation from releasing water for irrigators, to protect endangered fish species and tribal interests. *U.S. v. Adair*, 187 F.Supp.2d 1273 (D. Or. 2002). See *Kandra v. U.S.*, 145 F. Supp.2d 1192 (D.Or. 2001); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972) (Secretary must preserve water to protect fishery resources), *mod’d on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev’d in part on other grounds*, 499 F.2d 1095 (D.C. Cir 1974), *cert. denied*, 420 U.S. 962 (1975).

C. Reserved Water Rights

Federal Indian treaties contain an implied reservation of water rights sufficient to carry out the purposes for which the tribe’s reservation was created. See *U.S. v. Winters*, 207 U.S. 564 (1908). The quantity of reserved water is typically measured by the practicable irrigable acreage (“PIA”) standard: tribes have a right to enough water to irrigate all reservation acres amenable to agriculture. *Arizona v. California*, 373 U.S. 546, 600 (1963). Quantities of water may be required to support fisheries as well. See *Adair*, 723 F. 2d at 1410.

In western jurisdictions (the only courts to issue published opinions on point), seniority is marked by the date of the reservation for agricultural rights, and time immemorial for hunting, fishing and gathering rights. Inconsistent state laws are preempted. *Id.*

Tribal water rights are not necessarily confined to traditional uses. In the General Adjudication of All Rights to Use Water in Gila River System and Source, 35 P.3d 68 (Ariz. 2001), the court found that tribes can use water for domestic or other purposes. As a result, tribes have become major players in marketing water, and have sold or leased water rights to various municipalities or other purchasers. See Shaun McKinnon, *Tribes Gain Water, Voice in State Future*, *The Ariz. Republic* (Mar. 24, 2002). It remains to be seen how these issues might play out in eastern, riparian jurisdictions such as the Great Lakes, as the states begin to implement Annex 2001 to the Great Lakes Charter. ■

(*SWANCC*: Continued from page 2)

ter Act, is at first glance simple and direct. If the wetland has absolutely no connection to a navigable waterway, the wetland is under state jurisdiction. If, however, the wetland is adjacent to a navigable waterway, the wetland falls under federal jurisdiction. *United States v Riverside Bayview Homes, Inc.*, 474 US 121 (1985). *SWANCC* still leaves the potential scope of federal control over non-adjacent wetlands vague as the courts today remain divided over the extent of the required relation to interstate commerce. The Army Corps' guidelines for wetlands that fall within federal jurisdiction include: 1) interstate wetlands and 2) intrastate wetlands which could be used by interstate travelers or for interstate commerce. 33 CFR § 328.3 (2002). The language of part 2 leaves practically all wetlands that are not completely isolated subject to federal jurisdiction. The *SWANCC* Court attempts to clarify when wetlands fall within federal jurisdiction under the Clean Water Act, but never looks at the validity of the power granted under the Migratory Bird Treaty Act, or how far the Migratory Bird Treaty Act could reach. The Army Corps of Engineers could have asserted jurisdiction over the wetlands in *SWANCC* under numerous international environmental treaties in addition to the Migratory Bird Treaty. Two examples of these treaties are the treaty on Wetlands of International Importance and the Ramsar Convention. See <http://www.wetlands.org/> (last updated February 17, 2003), <http://www.ramsar.org/> (last updated March 7, 2003). These treaties protect endangered wetlands around the world and waterfowl habitats. Congress could assert its treaty powers, in addition to or in lieu of the commerce clause powers, to protect migratory birds and presumably their habitats. Under international law, the issue of whether a wetland is sufficiently linked to a navigable water may not be important as more and more wetlands fall under treaty protection and therefore federal jurisdiction.

Two years after *SWANCC*, the courts are split regarding the scope of federal jurisdiction over wetlands.

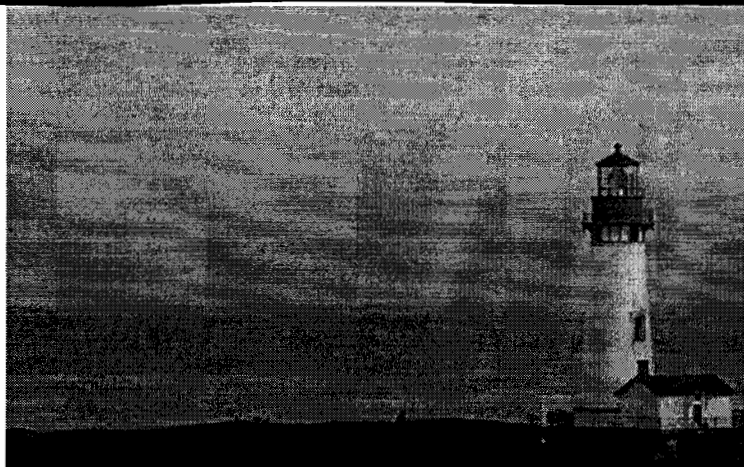
Some say a wetland must be "sufficiently linked" or have a "substantial nexus" to navigable waters for there to be federal jurisdiction. See *Rice v Harken Exploration Co.*, 250 F3d 264 (5th Cir. 2001), *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va 2002); *FD&P Enterprises, Inc. v. United States Army Corps of Engineers*, 2003 WL124761 (D.N.J. 2003). Others say *SWANCC* should be read narrowly, so that any wetlands that could be "capable of undermining the quality of the navigable water." are subject to federal jurisdiction. *United States v. Buday*, 138 F. Supp.2d 1282 (D. Montana 2001), and *FD&P Enterprises, Inc. v. United States Army Corps of Engineers*, 2003 WL124761 (D.N.J. 2003).

As a result, landowners are left confused as to what they can and cannot do with their land. For example, a farmer that owns an isolated wetland three miles from an interstate waterway would probably fall under state, rather than federal, jurisdiction. If, however, the wetlands at issue were once adjacent to a navigable or interstate waterway, but as a result of drought became isolated from that waterway, the farmer might find himself under federal jurisdiction under the Clean Water Act. The conclusion *SWANCC* leaves us that navigable interstate waterways and adjacent wetlands are under federal jurisdiction. Everything else will remain debatable unless and until international law takes over.

(*Grand Traverse*: Continued from page 2)

and ecosystems is an important issue with the Grand Traverse Band members. We need to be reminded that water belongs to the earth and all species – it is sacred where it is located and sacred to all life. That is an important thought to hold as we confront the mindset that sees the emerging water crisis as a business opportunity.

**FOR MORE INFORMATION
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The Legal Institute of the Great Lakes serves as a forum for the development and exchange of solutions to legal problems of the Great Lakes region. We welcome correspondence.

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