

**GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION**

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**•Member Tribes•**

**MICHIGAN**

Bay Mills Community  
Keweenaw Bay Community  
Lac Vieux Desert Band

**WISCONSIN**

Bad River Band  
Red Cliff Band  
Sokaogon Chippewa

Lac Courte Oreilles Band  
Lac du Flambeau Band  
St. Croix Chippewa

**MINNESOTA**

Fond du Lac Band  
Mille Lacs Band

**TESTIMONY**

of

**JAMES E. ZORN**

**POLICY ANALYST**

of the

**GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION**

on

**S. 2301**

**NATIVE AMERICAN FISH AND WILDLIFE RESOURCES MANAGEMENT  
ACT OF 2004**

Before the

**SENATE COMMITTEE ON INDIAN AFFAIRS**

**April 29, 2004**

**Testimony of James E. Zorn, Policy Analyst  
Great Lakes Indian Fish and Wildlife Commission**

Mr. Chairman and Members of the Committee, my name is James E. Zorn, Attorney and Policy Analyst with the Great Lakes Indian Fish and Wildlife Commission (GLIFWC). On behalf of GLIFWC's eleven member tribes, thank you for the opportunity to appear before you today to discuss S. 2301, the Native American Fish and Wildlife Resources Management Act of 2004.

S. 2301 would provide a federal statutory mandate for the preservation and enhancement of tribal fish, wildlife, wild plant and habitat management efforts. GLIFWC supports this initiative and the underlying goal of acknowledging – as a matter of federal law – the primacy of tribal self-regulation and self-governance of treaty-protected natural resources, both on and off the reservation.

S. 2301 would serve to implement the very core of federal Indian policy – the preservation of historically and culturally significant activities of Indian people, the fulfillment of federal promises made to the tribes by treaty, the protection of significant Indian economic activity, the enhancement of self-government by the tribes, the encouragement of government-to-government dealings between tribes, states and the federal government, and the promotion of education opportunities for Indian people.

On June 3, 2003, GLIFWC testified before this Committee to provide a detailed account of its activities as an intertribal agency exercising the delegated governmental authority of its members tribes with respect to the regulation and management of off-reservation natural resources protected by treaty. We ask that our previous testimony be incorporated for the record here as well.

In drafting S. 2301, the Committee clearly paid close attention to tribal comments provided at the June 3 oversight hearings. GLIFWC appreciates Committee's sensitivity and responsiveness to tribal concerns. Our comments here are offered in the spirit of working with the Committee and its staff to refine specific details and language as this measure proceeds through the legislative process.

**1. Title I – General Provisions.**

**a. Section 101 – Findings.** GLIFWC supports the bill's findings with the following suggestions:

- §101(3) – The term “wise use” may be viewed as “term of art” within social and political discourse on natural issues that carries unintended political or controversial connotations. Perhaps this subsection should simply refer to the “sustainable use and management of Indian fish and wildlife resources.”
- §101(6) – GLIFWC is concerned that this finding may imply that specific treaty obligations, such as those contained in the Chippewa Treaties of 1836, 1837, 1842, and 1854, are a “subset” of the general trust responsibility rather than as distinct obligations. Whatever else the trust responsibility might require, all branches of the federal

government must exercise their respective authorities to meet the provisions and fulfill the purposes of each treaty. Federal agencies must understand their proactive duty to: i) understand the nature and extent of the particular treaty rights involved; and ii) ensure that those rights involved are protected and given full effect.

- §101(8) – While technically correct, it would be helpful if this or another finding would specifically direct that “Indian fish and wildlife resources, and associated resource management activities, shall not be impaired or diminished by federal statute, except to the extent expressly provided otherwise by Congress.” GLIFWC offers this suggestion because of its experience with the attempted enforcement of federal laws of general applicability against either it as a tribal agency or against tribes attempting to exercise their retained sovereign prerogatives regarding their treaty rights.
- §101(10) – The bill generally utilizes the term “Indian fish and wildlife resources” as a convenient shorthand to capture the full range of activities and management interests involving the harvest of fish, wildlife and wild plants. This particular finding references only “hunting and fishing activities.” Perhaps, given the appropriate definition of an “Indian fish and wildlife resource” contained §103(11), this finding should simply refer to “natural resource harvesting activities.”
- §101(12) – This finding references “fish, wildlife and gathering resources.” While tribal rights to harvest plant life are vitally important and are properly within the scope of the bill, those rights are covered by the definition of an “Indian fish and wildlife resource,” which expressly includes plant life. In the interest of drafting clarity and consistency, perhaps references to “gathering” resources should be deleted in this subsection and elsewhere in the bill and that the term “Indian fish and wildlife resource(s)” be appropriately inserted. Alternatively, the term “gathering resources” could be changed to “plant resources” to describe the kind of resource, rather than the activity associated with the taking of the resource.

**b. Section 102 – Purposes.** GLIFWC supports the bill’s stated purposes with the following suggestions:

- §102(1) – As with §101(3), the term “sustainable use” might be more appropriate than “wise use.”
- §102(2) – As with §101(6), this subsection should not be drafted to imply that specific federal treaty obligations are merely a “subset” of the trust responsibility.

**c. Section 103 – Definitions.** GLIFWC supports most of the definitions, particularly the definition of “resource management activities” in §103(18) which properly recognizes the requisite elements of a comprehensive tribal natural resource management program. GLIFWC offers a few

definitional suggestions:

- §103(2) – “Ceded territory” rights should be defined to include “hunting, fishing, trapping and/or gathering rights.”
- §103(11) – To maintain clarity and consistency with usages throughout the bill, the term to be defined should be “Indian fish and wildlife resource.”
- §103(22) – As a matter of drafting clarity regarding “tribal co-management” activities, the word “or” should be substituted for “and” before “management responsibilities” and before “international” in this definition.

**2. Title II – Tribal Fish and Wildlife Programs.** GLIFWC views this Title as the heart of the bill for achieving increased and consistent federal recognition of and support for tribal natural resource management programs that are driven by the tribes themselves. Its major concern with this Title is the possible creation of a new bureaucracy within the Department of Interior that could: i) drain funding away from tribes rather than increasing the overall amount of Self-Determination Act funding available to them; and ii) improperly impose the Department of Interior’s views into or oversight of existing tribal programs, particularly ceded territory programs that already provide effective tribal self-regulation in compliance with federal court orders.

**a. Section 201(b) – Tribal Fish and Wildlife Resource Management Program.** Against the backdrop of these concerns, GLIFWC offers the following comments:

- §201(b)(1) – This subsection would reinforce the statutory authority of the Department of Interior to implement a “Tribal Fish and Wildlife Resource Management Program.” This authority must be seen within the larger framework of the bill which is designed to promote tribal management programs. The Committee, either directly in the bill or at least in the legislative history, should make clear that Congress does not intend Interior to create or operate a bureaucracy that diverts the financial resources needed for tribes to operate their own management programs. To ensure that unnecessary bureaucracy is avoided, perhaps the bill could provide something to the effect of “the primary purpose of this Program is to maximize the transfer of financial resources to fish and wildlife programs of tribal and tribal organizations under the Self-Determination Act.” From GLIFWC’s perspective, the problem is not the lack of some programmatic compartment within Interior, but the chronic underfunding of tribal natural resources management programs themselves.
- §201(b)(3) – GLIFWC offers its experience with the recognition and implementation of its member tribes’ ceded territory treaty rights on a number of federal lands, most notably National Forests, as to what this section might require of federal agencies. GLIFWC and its member tribes do not expect to “take over” the management of off-

reservation federal lands on which their ceded territory treaty rights attach. Rather, they seek recognition of those rights by the federal land manager involved, implementation of those rights under a system of tribal self-regulation, management of those lands in a manner that does not infringe upon those rights and that protects the habitats supporting the natural resources subject to the rights, and, finally, a thorough government-to-government consultation process on land management decisions affecting those rights.

After nearly two decades of assisting its member tribes to implement their ceded territory treaty rights, GLIFWC has worked with a number of federal agencies in resolving what might be called the “dual mandate dilemma” where the agencies have the concomitant responsibilities: i) to carry out specific Congressional directives establishing the particular federal stewardship involved; and ii) to honor specific treaty obligations and fulfill the trust responsibility. The role of Self-Determination Act funding and assistance has not been to allow tribes to assume the full range of federal land management responsibilities. Rather, it has been to provide the requisite tribal natural resource management infrastructure to secure recognition and implementation of the tribes’ rights and to engage in ongoing consultation and specific cooperative management projects to ensure protection of those rights.

In this regard, GLIFWC refers the Committee to its June 3, 2003, testimony, particularly Section V [GLIFWC’s Co-Management Activities] that discusses a comprehensive agreement between GLIFWC’s member tribes and the USDA-Forest Service regarding the recognition and implementation of treaty-reserved gathering rights on a number of National Forests. GLIFWC will provide additional information to Committee staff on this agreement, as well as on recent interactions with the National Park Service’s Apostle Islands National Lakeshore, to help illustrate: i) how federal lands can be managed to recognize and accommodate tribal rights without abdicating federal management and stewardship responsibilities; and ii) the role that Self-Determination Act funding and assistance can and should play in this context.

A key obstacle in this context has been the inability to access Self-Determination Act funding from agencies other than the Bureau of Indian Affairs where the primary interaction is with some other federal agency. For example, the Forest Service has not identified a mechanism within its organic laws that parallels the Self-Determination Act and, for example, has been unable (or unwilling) to provide funds for a tribal forest ecologist/biologist to assist in implementing the National Forest agreement. Similarly, when GLIFWC has sought the assistance of the USFWS for ceded territory spring fishery assessments, it has been compelled to pay over \$67,000 of its own funds since 1999 to secure the agency’s services.

**b. Section 201(d) – Survey and Report.** The fact that the bill offers tribes the option to request assistance in conducting the contemplated survey is consistent with the bill’s primary intent.

A few changes might help to clarify this section:

- §201(d)(1) – GLIFWC presumes that the contemplated survey could be conducted in relation to tribal rights that exist beyond a reservation boundary, such as the ceded territory treaty rights of GLIFWC’s member tribes or the reservation-based fishing rights that extend outside of reservation boundaries into Lake Superior for some of GLIFWC’s member tribes whose reservations are located on the Lake’s shoreline. As currently drafted, this subsection would limit the survey to “the reservation.”
- §201(d)(1)(F) – The survey should be able to assess the effects that a broad range of federal activities, not just federal resource management activities, have on tribal fish and wildlife resources and tribal resource management activities. For example, a tribe may need to assess the effects of Army Corps of Engineers decisions regarding the issues of Clean Water Act Section 404 permits.
- §201(d)(3) – The subsection is either out-of-place or inappropriately drafted. It appears to be an inadvertent holdover from a previous draft of the bill.

**c. Section 201(e) – Natural Resource Management Planning.** Sound natural resource planning is a vitally important endeavor for tribes, and tribes carry out their planning functions in a wide variety of ways. However, in an unwelcome major departure from predecessor bills from a decade ago, this bill would require (i.e. “shall” not “may”) tribes to develop a tribal fish and wildlife resource management plan. GLIFWC is uncertain whether this should be a requirement for those tribes and tribal organizations that already undertake extensive resource management activities, particularly those already being undertaken in compliance with federal court orders. At the very least, the bill should make clear that tribes are not required to change their natural resource management traditions or methods, or their existing management plans: i) to conform to the bill’s requirements; ii) as a prerequisite for the exercise of retained tribal sovereign prerogatives to carry out resource management activities; or iii) as a prerequisite for Self Determination Act funding or technical assistance.

The bill also should recognize that practical restraints may in some instances impede the completion of a comprehensive natural resource planning process within the bill’s contemplated three-year period. Resource management planning can be a complex undertaking that requires substantial funding, expertise and time. Tribal resource management authority may extend broadly to many species over a wide territory. For effective planning, much information must be gathered, priorities within the tribal community must be established, and many decisions must be made. And, it frequently may be the case that insufficient funding or other constraints limit a tribe’s ability to address all resources at once in the planning process. Given these practicalities, a tribe should not be penalized or adversely affected for not meeting the three-year planning deadline, especially for factors beyond a tribe’s control.

Thus, in calling for a tribal planning process, the bill must make clear that it does not intend to limit the approaches available to tribes or to force tribes to change their resource management traditions. In addition, the bill should not prescribe a particular planning process for the tribes, including imposing a requirement for public meetings. For example, public meetings in the context of implementing federal court orders are redundant given that the matter has already been through a public litigation process and ongoing matters are subject to the continuing jurisdiction of the court. This is particularly true in the dynamics of state/tribal interactions in the ceded territory context where each sovereign has the primary responsibility of dealing with its respective citizens. Therefore, consistent with tribal sovereignty and with the requirements of each tribe's own law and procedures, tribes should have broad discretion in designing and carrying out the planning process. Similarly, tribes should have broad discretion in determining the tribal needs to be addressed by the plan, the scope and contents of the plan, and the design and implementation of the plan.

Finally, GLIFWC is confused about the relationship between §201(e) regarding the development of resource management plans and §201(f) regarding management in regional resource management areas. When read together, these subsections seem to imply that tribes and their properly delegated tribal organizations which carry out resource management activities in regional resource management areas cannot avail themselves of the resource management planning process set forth in §201(e). GLIFWC assumes that this is an unintended implication, and that tribes as well as their properly delegated tribal organizations like GLIFWC, should be able to avail themselves of the §201(e) planning process or to require the Secretary to undertake the planning on their behalf.

**d. Section 201(h) – Federal Activities.** This section should be drafted broadly to apply to all actions by any federal agency that affect Indian fish and wildlife resources or tribal resource management activities. In addition, the federal government's treaty obligations and trust responsibility toward tribes involve more than participation in a process or mere consideration of tribal interests when a federal decision is to be made. All federal agencies have the substantive obligation to: i) make decisions that live up to federal treaty obligations or that are otherwise protect the interest of the affected tribes; and ii) ensure that agency actions and decisions, of whatever nature, do not impermissibly interfere with tribal resource management activities or infringe upon reserved tribal rights.

**e. Section 202 – Education in Tribal Fish and Wildlife Resource Management.** As for the provisions of §202, GLIFWC defers to others having more experience and expertise with educational programs and institutions. Suffice it to say that GLIFWC strongly supports the education and training of biologists and technicians, law enforcement officers, and other professionals who come from the communities and traditions that GLIFWC serves.

**f. Section 203 – Tribal Fish Hatchery Assistance Program.** This section authorizes the Secretary to establish and administer a Tribal Fish Hatchery Assistance program to, among other things, "assist Indian tribal governments to . . . enhance fishery resources on tribal lands." Several of GLIFWC's member tribes stock fish from tribal hatcheries in off-reservation waters adjacent to

their reservations and within the ceded territory. This provision should be drafted appropriately to account for this aspect of tribal fishery enhancement programs, as well as for all aspects of tribal aquaculture programs.

**3. Title IV – Tribal Seafood and Resource Marketing Assistance Program.** GLIFWC understands that a number of issues must be considered in developing this title but is uncertain at this time how best to deal with them in this bill. For example:

- There are matters of public health involved with the handling and processing of fish and wildlife. For example, the FDA has adopted regulations prescribing procedures for the safe and sanitary processing and importing of fish and fishery products. In implementing these regulations, three of GLIFWC member tribes and the FDA have entered into agreements whereby the FDA recognizes concurrent tribal jurisdiction over the inspection of fish and fishery products harvested, processed and/or sold by tribal members and agrees to honor tribal fish processing regulations that parallel the federal standards. Another issue that faces GLIFWC's member tribes is whether wild venison may be served as part of federally or state funded nutrition programs or in tribal schools. The issue here involves the inability to conduct an ante-mortem inspection of wild animals.
- In the case of wild rice, there are marketing and labeling matters relating to tribally harvested wild rice from lakes and streams as opposed to "paddy" rice and potentially genetically-modified strains.
- Finally, there are other matters, such as mercury-contaminated fish, where tribal natural resource managers must cope with the consequences of the failure of our Nation as a whole to adequately control the sources of the particular toxic substance involved. GLIFWC and its member tribes can not at this point simply stop the sources of mercury pollution. However, based upon the comprehensive mercury contaminant testing program described in our June 3, 2003, testimony, they can help tribal members understand the risks associated with consuming contaminated fish and make informed decisions about where to fish and how much fish to eat.

In any event, GLIFWC looks forward to working with Committee staff and tribal representatives in considering these issues and how they might be addressed in the bill.

**4. Title VI – Miscellaneous Provisions.** The bill calls for the development and implementation of final regulations within 18 months of enactment. The bill should clearly provide that the agencies may not stop or retreat from their current Self-Determination Act commitments and obligations while regulations are being developed.

GLIFWC understands that the implementing agencies will have discretion in developing



these regulations within the four corners of the bill's provisions. Nevertheless, GLIFWC is concerned that the regulatory development process itself could become overly cumbersome and, given past experience with new regulations under previous amendments to the Self-Determination Act, unreasonably lengthy and time consuming. And, GLIFWC is concerned that the regulatory development process could become more focused on agency bureaucratic interests and preferences rather than on securing prompt and efficient funding for tribal programs. Quite simply, this process could drain already-limited resources away from funding tribal resource management activities rather than quickly focusing federal energy and programs on getting funds and assistance out to the tribes.

GLIFWC would appreciate the Committee's assistance in assuring that the goal of the regulatory development process is to support and secure the primacy of tribal self-regulation and self-governance of Indian fish and wildlife resources, both on the reservation and, where appropriate, off the reservation. Tribal natural resource management programs can not become either a political football or a "turf war" within or between federal agencies in this time of diminishing federal staff and budgets.