

THE VALUE OF WATER AND THE MEANING OF WATER LAW FOR THE NATIVE AMERICANS KNOWN AS THE HAUDENOSAUNEE*

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Ohneka'shon:'a

Onen ehnon:we ientsitewakie:ra'te ne ohneka'shon:'a tsi rawe:ren
tsi enkahnekonionke ne tsiionhontsia:te. Ne ehnon:we nitewehtha
ne aionkwaha'tana:wen non:nen enionkwania'tathen. Nia'teka'
satstehsera:ke tewaienete:ri-tsi ieiohneken:shon, tsi iokenno:res, tsi
iaonhawi:nes tanon' tsi kaniatarahron:nion. Khenska tsi entewahwe'

* Haudenosaunee is the Seneca word to denote the "People of the Longhouse" and is sanctioned by the Confederacy of Six Nations to be the word used when referring to the Confederacy. The Mohawk word is *Rotinohnsonni*.

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non:ni ne onkwa'nikon:ra ne iorihwa:ke tsi entewatka'we ne
kanonhwaratonhtshera.

*Ehtho niihtonha'k ne onkwa'nikon:ra.*¹

The Waters

We give thanks to all the Waters of the world for quenching our thirst and providing us with strength. Water is life. We know its power in many forms—waterfalls and rain, mists and streams, rivers and oceans. With one mind, we send greetings and thanks to the spirit of Water.

*Now our minds are one.*²

INTRODUCTION

In the years following the American Revolution, the U.S. Constitution and its various amendments, with their emphasis on individual rights, unfolded to become the new standard as “the law of the land” with regard to water law and much more.³ This statement begs the question: What was the “law of the land” before the United States came to be?

THE ORIGINAL “LAW OF THE LAND”

As the first European colonists wandered about North America, they were met by the original, indigenous inhabitants of this land. In the Lake Ontario/St. Lawrence River basin, the Haudenosaunee (*Ho-dih-nuh-show-nee*), or People of the Longhouse, were greeted and courted by the French and Dutch, followed by the English.⁴ It was during these early French encounters that the Haudenosaunee were referred to as Iroquois from an adaptation of an Algonquian derogatory name, *Hilokoa*.⁵

¹ JANICE WHITNEY ANNUNZIATA, *HAUDENOSAUNEE ENVIRONMENTAL RESTORATION: AN INDIGENOUS STRATEGY FOR HUMAN SUSTAINABILITY* vii (1995).

² *Id.* at xv.

³ See, e.g., Curtis G. Berkey et al., *Violations of the Human Rights of American Indian Peoples by the United States*, in *RETHINKING INDIAN LAW* 141, 142 (National Lawyers Guild, Committee on Native American Struggles ed., 1982) (“However, as the power of the United States increased, it eventually asserted absolute ownership of Indian lands. Although there was no legal basis in domestic law or international law for this assertion, the courts of the United States refused to question the fairness and validity. As a result, the political position of the United States eventually came to be regarded as the law of the land.”).

⁴ See WENDELL H. OSWALT, *THIS LAND WAS THEIRS: A STUDY OF THE NORTH AMERICAN INDIAN* 398–400, 403 (1966); Oren R. Lyons, *The American Indian in the Past*, in *EXILED IN THE LAND OF THE FREE* 13, 31–32 (Oren R. Lyons & John C. Mohawk eds., 1993).

I am a member of the Haudensaunee Tribe, Mohawk Nation Turtle Clan, and I have studied the Mohawk Language. I use my knowledge as a member of the Haudensaunee Confederacy and as a student of the Mohawk language throughout the article to explain Haudensaunee history and culture and translate the Mohawk language.

⁵ DEAN R. SNOW, *THE IROQUOIS* 2 (1996).

The Haudenosaunee began as five autonomous, agrarian nations: Mohawk, Oneida, Onondaga, Cayuga, and Seneca related linguistically and socially through contiguous hunting, fishing, and gathering territories (later to become known as the Six Nations when the Tuscarora Nation took shelter under the protection of the Confederacy).⁶ Then, many, many years ago, perhaps as far back as one thousand years ago, a Huron prophet, referred to as the Peacemaker, united these five warring nations to become the Haudenosaunee Confederacy or Five Nations.⁷ The Peacemaker introduced a law referred to in the Mohawk language as the *Kaianerekowa* (*Ga-yawn-ne-lit-goe-wa*) or the Great Law of Peace. The Great Law of Peace also served to reestablish a clan system headed by a matriarch or clanmother through matrilineal familial titles.

Through the clan system, the clanmother appointed a male leader (referred to in English as a chief) and his male helper (referred to in English as a subchief) as well as two keepers of ceremonies: one male "faithkeeper" and one female "faithkeeper" position, bringing a total of five persons working together under one hereditary title. For the Mohawk Nation, there are nine hereditary titles, three in each clan: three Turtle Clan titles; three Wolf Clan titles and three Bear Clan titles.

My name, *Tekahnawiiaks*, (pronounced Deh-gunna-wee-yuks) is a name from Mohawk Nation Turtle Clan. As Administrator, I had the privilege of working under the direction of the Mohawk Nation Council of Chiefs, the traditional council for the Mohawk Nation of the Haudenosaunee Confederacy. I worked closely with a Mohawk leader named *Tekanatsiasere* (pronounced Deh-gunna-jaw-zeh-leh) who became a *Roi-ane* (chief, pronounced Low-yawn-ne).

As Managing Editor of *Indian Time* newspaper for a few years, I also reported on Confederacy events. It was under the tutelage of the Mohawk clanmothers, chiefs and faithkeepers that I began to truly appreciate the structure of the traditional Haudenosaunee Confederacy as a birthright of every Haudenosaunee. This paper addresses traditional Haudenosaunee beliefs according to oral history and philosophy, which is recorded, more or less, in literature throughout North America.⁸

⁶ OSWALT, *supra* note 4, at 399–400.

⁷ The Haudenosaunee Confederacy has not sanctioned a date for the beginning of the confederacy, except that it was many, many, many years ago. But Haudenosaunee oral history recounts an exceptional solar eclipse and astronomers have charted the date of the eclipse as 1142 A.D. See Bruce E. Johansen, *Dating the Iroquois Confederacy*, 1 AKWESASNE NOTES NEW SERIES 62–63 (1995), available at http://www.ratical.org/many_worlds/6Nations/DatingIC.html; see also CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 332–33 (2005).

⁸ See, e.g., JAMES BUCHANAN, SKETCHES OF THE HISTORY, MANNERS AND CUSTOMS OF THE NORTH AMERICAN INDIANS WITH A PLAN FOR THEIR MELIORATION (1824); BENJAMIN FRANKLIN, PENNSYLVANIA, AND THE FIRST NATIONS: THE TREATIES OF 1736–1762 (Susan Kalter ed., 2006); FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE (1984); THE HIS-

From the perspective of the traditional Haudenosaunee, we speak in terms of *responsibilities* with respect to water, not in terms of water *rights*. This shift in emphasis is not casual in our eyes and takes us to the central premise of this paper. From time immemorial, we have held the view that the “law of the land” is not man-made law, but a greater natural law, the Great Law of Peace.⁹ This law, in our view, is divine. The Haudenosaunee have a deep respect for the waters of the Earth. For example, one of the root words for “rain” in Mohawk means expensive, or precious or holy. Culturally, we would not abuse this resource. Our society treats and cares for the waters as a sacred element so that water remains pristine.¹⁰

No discussion of “Native American water law” is complete without acknowledging that multiple frames of reference come into play, legally speaking, when traditional Native people are consulted about water resources. What matters here are human relationships of *responsibility*. Responsibilities, like rights, are terms that have different implications depending on the individuals’ learning and experience. In law, some will associate it with the professional responsibility code emphasized in law school training. Others will think of fiduciary responsibilities, a familiar part of trust law. But moral behavior towards other people and towards the natural world brings together personal and legal responsibility; it is left to responsible individuals acting on their own good judgment rather than on the basis of legal prerequisite to behave morally and responsibly.

We Haudenosaunee believe at one time in history, all creatures could communicate with each other. Even water could communicate—for example to the fish that lived in it. What the water might say is, “You’re swimming the wrong way.” Today, however, water has lost its ability to communicate. The responsibility for its voice has been passed on to the Haudenosaunee! We are the surrogates for voiceless Creation.

This paper is intended to assist readers in appreciating the Haudenosaunee position on responsibility—namely, that personal responsibili-

TORY AND CULTURE OF IROQUOIS DIPLOMACY: AN INTERDISCIPLINARY GUIDE TO THE TREATIES OF THE SIX NATIONS AND THEIR LEAGUE (Francis Jennings et al. eds., 1985) [hereinafter IROQUOIS DIPLOMACY].

⁹ See Oren Lyons, *Introduction: When You Talk About Client Relationships, You Are Talking About the Future of Nations*, in *RETHINKING INDIAN LAW*, *supra* note 3, at vi (“There is one law which prevails over all law—and that’s the universal law, the natural law. And it will prevail And we are all subject to it.”).

¹⁰ Respect for the water: Our villages were not built near the waters so as not to “pollute” the waters. In fact, there is no word in the Mohawk language for pollution or garbage! The root word for “ugly/bad” is added to a Mohawk word to make the new word an equivalent of being polluted. Therefore, the translation for polluted water is “ugly water.” We also go so far as to make sure when we draw water from the river that the container is dipped in the water *with* the current so that the water’s natural flow will not be interrupted, even though dipping the container against the current will fill up the container faster.

ties towards water are established according to our law and are really our inherited moral and spiritual responsibilities. This appreciation will require a deeper acquaintance with indigenous culture. In particular, four components of Haudenosaunee law are significant to us as inherent laws. These components, addressed below, which predate the arrival of European explorers, voyageurs, traders, and settlers in North America, are: Haudenosaunee Cosmology and the Original Instructions, which includes the *Ohenton Kariwatehkwen* (*Oh-he(n)-doo Gully-wa-deh-qua*) or loosely translated as “the words that come before all else”; the *Kaianer-ekowa* (*Ga-yawn-ne-lit-goe-wa*) or the Great Law of Peace; and the *Kas-wen-tha* (*Gus-won-ta*) or Two Row Wampum and other treaties.¹¹ Part II of the paper will examine the Haudenosaunee Environmental Task Force Position Paper on the Great Lakes.¹² I will use it as a lens for understanding water rights and water law from an indigenous perspective.

I. HAUDENOSAUNEE WELTANSCHAUUNG

Water is the core of the Haudenosaunee weltanschauung. In the Haudenosaunee Creation Story, Earth was a planet of water and water creatures. Land was only a memory, a legend known to the water creatures that inhabited this planet. The planet was not fit for beings belonging to the land. Earth, in its true sense, became reality after the first being, the SkyWoman and the grandmother of the Creator, fell from the sky. With assistance from the water creatures and with the SkyWoman’s special abilities, land was created on a turtle’s back (hence the term “Turtle Island” to indicate North America.) The lesson in the Haudenosaunee Creation Story is that water is the primary element of the planet Earth. According to Haudenosaunee teachings, water is sacred on Earth, although its contemporary treatment would suggest otherwise.

¹¹ I need to interrupt to make a crucial point. I will sometimes be obliged to use the common English translation of a Mohawk word, but there is a conflict the reader must be aware of. These translated words are inadequate and do not do justice to the descriptive words found in indigenous languages. The common English equivalents have not embodied the precise connotations associated with words used in the Haudenosaunee languages. Although I cannot go through all the mistranslations, I have tried to correct the translations I am using in this paper. For example, when I refer to the three principles in the Great Law of Peace—peace, power and righteousness—“peace” is not a correct translation of *skennen*; “power” is not a correct translation of *ka’satstenhse:ra*; and “righteousness” does not do justice to *ka’nikonri:io*. Upon further examination of these three principles and from a Mohawk speaker’s perspective, a better translation for *skennen* is “a state of peacefulness”; a better equivalent for *ka’satstenhse:ra*, if the neologism may be permitted, is “a state of strengthfulness” (further to this equivalent, Mohawk elders have explained *ka’satstenhse:ra* as a strength in the unity of the people, not the power or might associated with guns or dictatorship); and a better translation for *ka’nikonri:io* is “a state of goodmindedness.”

¹² Joyce King et al., Haudenosaunee Position Paper on the Great Lakes (2005) (on file with *Cornell Journal of Law and Public Policy*).

A. HAUDENOSAUNEE COSMOLOGY: THE ORIGINAL INSTRUCTIONS

Also within the Creation Story, Original Instructions were given to the people of this land. They include the *Ohenton Kariwatehkwen*: “the words before all else.” We also call this the Thanksgiving Address and recite our thanks to all of Creation to “open the day” (in other words, to welcome, greet and thank the beginning of the day). The *Ohenton Kariwatehkwen* is recited before any issues are talked about when a gathering of the people takes place or to quote a Mohawk expression, “to open the door” (a comparable expression might be “to open the meeting”) and serves as a reminder to the people that everything on this land was provided for human existence and in return, we are to be thankful. Indeed, it is a solemn responsibility. The consequence of forgetting the human responsibility to give thanks to Creation, to water, is that one day, if a particular part of Creation is not addressed, and we fail to give thanks, we are told this part of Creation will disappear.

I began this paper with a short extract from the Thanksgiving Address pertaining to the Waters. Humans are tasked by the Creator to recite the *Ohenton Kariwatehkwen*, which is a reminder of the early and original law of this land: to first give thanks. And this is reflected in the three conclusions of our creation story: water is sacred; it is everyone’s responsibility to offer thanks; and neglecting this responsibility has dire consequences. Our oral history recalls a time of such consequences. Chief Jacob Thomas, Cayuga Nation, explained the prophecies:

What will people do when the sun no longer shines?
There will be many on their hands and knees praying.
What will we do when the rains no longer come? There
could come a time when there is no water. . . . I tell you,
when the thunderers no longer come, people will not
manage. That is why, when we come together to give
thanks for all things, we give thanks to the Creator for
what has been provided.¹³

Our teachings predict future consequences of the dereliction of gratitude. Gratitude is a *sine qua non*.

B. THE *KAIANEREKOWA*: THE GREAT LAW OF PEACE

The Haudenosaunee Creation Story deals with the responsibility of humankind to give thanks to the major elements of Creation: as one of the original instructions to the people of this land. We did not always fulfill this responsibility. Through our teachings, a Huron prophet,

¹³ JACOB THOMAS, TEACHINGS FROM THE LONGHOUSE 135 (1994).

whom we refer to as the Peacemaker,¹⁴ instituted a system of government and law within the nations called the *Kaianerekowa*: The Great Law of Peace. That system of law endures today as it did thousands of years ago; today, it is still referred to as the Great Law of Peace.

The Peacemaker demonstrated the *Kaianerekowa*'s strength. He showed the leaders how one arrow (representing one nation) could be broken easily. However, when he bound five arrows together (representing five nations), the package, and by extension, the individual nations, was almost impossible to break. The strength of the Great Law of Peace was effectively demonstrated for the unification of the Five Nations Confederacy (later to become known as the Six Nations when the Tuscarora Nation took shelter under the protection of the Confederacy).

The Peacemaker used the white pine tree as a symbol of Peace. He planted this "Tree of Peace" in Haudenosaunee Territory to unify the Five Nations, brought an end to the bloodshed between these Nations, reinstalled the clan system, and reestablished what we know as the Original Instructions. This prophet then uprooted the Tree of Peace and buried the weapons of destruction to be carried away, forever, by an underground cavern that held a fast-flowing stream.¹⁵ Any nation may follow the four white roots to their origination, in particular, Turtle Island (North America) to seek protection under the leaves of the "Tree of Peace."¹⁶

This *Kaianerekowa* existed eons ago before the colonists were allowed to settle within the Territory of the Haudenosaunee, and the Great Law of Peace remains a vital part of the Haudenosaunee Six Nations Confederacy. Even the early colonists followed the protocols of the Haudenosaunee found in the *Kaianerekowa*:

[T]he roots of forest diplomacy can be traced to an entrenched piece of Iroquoian political ritual, the Condolence Ceremony for the mourning of dead chiefs and the installation of successors; and white government offi-

¹⁴ We are not to use the Peacemaker's name unless it is done through a recital of the Great Law of Peace or through a condolence ceremony. His name remains sacred to us.

¹⁵ I believe that the provenance of the expression, "to bury the hatchet," came from the time when the Peacemaker lifted the "Tree of Peace" and threw in the weapons of war. The weapons were carried away by a stream which lay underneath the "Tree of Peace" and jet-tisoned all weapons of war, never to be brought up again, after which the Peacemaker stood the Tree of Peace upright so the *Kaianerekowa* continues to be held erect.

¹⁶ Through Haudenosaunee oral traditional teachings, the Tree of Peace is the symbol for the *Kaianerekowa*. The white (white being a symbol of peace) roots extend to the four corners of the Earth. The leaves represent the government (chiefs and clanmothers) under which one can find protection. The trunk of the tree represents the people, for without the people, without the strength of the structure, there is no law.

cials found it necessary to learn the native system in order to do business with the Indians.¹⁷

Its natural law principles provide a mechanism for human responsibility to express itself with respect to the inter-generational protection of water. It is the key to environmental sustainability, of which humans are a small piece. The Great Law of Peace, to Haudenosaunee, is the divine law of this land.

This moral code is first and foremost environmentally-based and follows the Original Instructions (which includes the *Ohenton Kari-watehkwen*) to remind people of their relationship and responsibility to Creation. Most Haudenosaunee people who know the *Kaianerekowa* can list its three basic principles: peace, power, and righteousness (I must insert that the translations are dangerously misleading because power is interpreted often as might but by power here I mean unity.). However, it is the lesson in our “One Dish/One Spoon” concept which forms its overarching core.

The Peacemaker demonstrated the One Dish/One Spoon principle in an analogy to the fifty Haudenosaunee *Roianeson* (translated in the English equivalent as chiefs, pronounced *low-yaw-neh-soo*).¹⁸ Once the Five Nations agreed to unite, the *Roianeson* sat in a circle to listen to the Peacemaker. The Peacemaker expressed this principle by passing around a bowl of beaver tail, a delicacy among the People of the Longhouse. As the leaders sat in this circle of fifty, the *Roianeson* took only what they needed, knowing the bowl had to complete its circle. The “One Dish” demonstrated the collective responsibility of the people to share *equally*.¹⁹ The spoon revealed an additional symbol lesson here: to avoid a sharp instrument, such as a knife, at a gathering of the people, because knives could cause the spilling of blood. Therefore employing sharp instruments—or even sharp words—was prohibited.

One Dish/One Spoon principle represents a tenet of the Great Law of Peace and is a succinct expression of our ongoing responsibilities to conserve what sustains us. The *Kaianerekowa* has four directives that reinforce this tenet:

¹⁷ Michael K. Foster, *On Who Spoke First at Iroquois-White Councils: An Exercise in the Method of Upstreaming*, in *EXTENDING THE RAFTERS: INTERDISCIPLINARY APPROACHES TO IROQUOIAN STUDIES* 183, 183 (Michael K. Foster et al., eds., 1984).

¹⁸ The translated English word, chief, denotes only a leadership title. It does not acknowledge the chiefs’ moral character whereas the literal translation identifies them as “good-minded men.”

¹⁹ I must stress this point. Before the appearance of the Peacemaker, there was warring among all Nations over hunting grounds. It was mortally dangerous to travel across Haudenosaunee Territory. Armed with the principles of the Great Law of Peace, the Peacemaker put an end to this conflict by using the concepts within the One Dish/One Spoon where people share hunting grounds equally. This agreement later expanded to other indigenous nations.

1. Offer thanks;²⁰
2. Don't take the first "catch" you encounter;²¹
3. Take only what you need in life to sustain yourself and your family;
4. Leave some of the "catch" for the future, ensuring the future of seven generations for your family and the species' survival.²²

The Great Law of Peace is a law for Six Nations people, their government and all who seek protection under the "Great Tree of Peace." Its principles served as a source for the formation of the law of the United States.²³ In the early colonies, the *Kaianerekowa's* protocol was followed in treaty councils between the Haudenosaunee and the British, and later by the United States.²⁴ The law of 'the Six Nations Confederacy was intensely studied and written about by Benjamin Franklin, a co-author of the U.S. Constitution.²⁵ In many ways, the Great Law of Peace

²⁰ Tobacco is the medium used to offer thanks, as directed by the Creator, to send a message of thanksgiving. The tobacco is a native species, not the common tobacco most people associate and used in cigarettes/cigars or pipes. The Mohawk word for indigenous tobacco is *oionkwaonweh*, which is commonly translated as "sacred tobacco."

²¹ That is, whether you are hunting, fishing, gathering water, or medicine, etc. leave enough for others—the sharing principle.

²² As explained to me, it was the Peacemaker who taught us to look "seven generations into the future" as a reminder of the future generations of people we are responsible for. A generation, during the Peacemaker's time, was the lifetime of a person, which reached, in most instances, one hundred years of age. As agreements are made, not only are we, the Haudenosaunee, responsible to uphold the agreements made by the past generations, but to also uphold agreements seven generations into the future, ensuring they are afforded the same protection and rights. It is only a conjecture of mine that seven generations may be a term equivalent to what a person may have seen in her/his lifetime. For example, I knew my great-grandparents, my grandparents, my parents, my siblings, my children and now know my grandchildren. If the Creator is willing, I may have the privilege of knowing my great-grandchildren.

²³ See John C. Mohawk, *Indians and Democracy: No One ever Told Us, in EXILED IN THE LAND OF THE FREE*, *supra* note 4, at 43, 43–72 ("From Benjamin Franklin to Thomas Jefferson, the Founding Fathers were dramatically more familiar with Indian customs and lifestyles than has previously been acknowledged; and they celebrated that familiarity in a plethora of ceremonies and brotherhoods dedicated to the image of the American Indian, which generally have been unreported in mainstream American history.").

²⁴ WILLIAM N. FENTON, *THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY* 423 (1998) ("The Lancaster treaty with the Six Nations proved to be a pivotal event in the history of the colonies. It opened on 22 June 1744 on a note of mutual suspicion and closed 4 July in friendship and mutual respect. The Iroquois controlled the agenda, and native protocol prevailed. . . . The treaty proceedings proved a learning experience for the commissioners of Virginia and Maryland. . . . They went home fascinated by native diplomacy, and at least one Virginian sought to learn more of native customs and usages. . . . The Lancaster treaty conformed to a pattern of sequence that governed other such negotiations. Traditional council-fire protocol governed the proceedings: The formal invitation, the time appointed, the delegates selected, their travel and approach, . . . [and] their conduct to the treaty cite Ritual hedged the entire event.").

²⁵ Mohawk, *supra* note 23, at 43; 69.

was at least two hundred years ahead of its time.²⁶ However, unlike the Great Law of Peace, the U.S. Constitution originally failed to give women voting rights.²⁷

Franklin used the Great Law of Peace as an example of good governmental structure when he contributed to the Articles of Confederation and the U.S. Constitution.²⁸ As Franklin put it:

It would be a very strange Thing, if *Six Nations* of ignorant Savages should be capable of forming such an Union, and be able to execute it in such a Manner, as that it has subsisted Ages, and appears indissoluble; and yet a like Union should be impracticable for ten or a Dozen *English Colonies*.²⁹

The treaty councils, the records of which Franklin printed extensively, were the origin of the idea of federalism for the United States.³⁰ Each nation was autonomous within the Confederacy and as a whole, could make decisions for itself.³¹ Where the collective good of all five Nations was at issue, however, deliberations ensued at the Grand Council.³²

²⁶ Anthropologists estimate that the Confederacy formed in 1525. See SNOW, *supra* note 5, at 60. There were at least three major omissions when the newly formed United States government borrowed from the *Kaianerekowa*—the right of women to pick the *Roianeson* (nation's leaders); the assurance of moral leaders through removal power (e.g., clanmother's right to appoint and remove *Roiane* (clan leader)); and making decisions by consensus. See generally U.S. CONST.

²⁷ Compare U.S. CONST. amend. XIX, with Stephen Fadden, *Mother of the Nations—The Peace Queen*, in INDIAN ROOTS, *supra* note 27, at 68, 68 (Interview of Peter Jemison) (“[The Peacemaker] said the women would have the responsibility of holding the titles of chiefs and would be able to remove a chief if he went astray.”).

²⁸ See Donald A. Grinde, Jr., *Iroquois Political Theory and the Roots of American Democracy*, in EXILED IN THE LAND OF THE FREE, *supra* note 4, at 227, 240–50, 266; see also Bruce Burton, *The Iroquois Had Democracy Before We Did*, in INDIAN ROOTS OF AMERICAN DEMOCRACY, 44, 44–46 (Jose Barreiro ed., 1988) [hereinafter INDIAN ROOTS]; Robert W. Venables, *Some Observations on the Treaty of Canandaigua*, in TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES 84, 103 (G. Peter Jemison & Anna M. Schein eds., 2000) [hereinafter TREATY OF CANANDAIGUA] (“Four years after Franklin wrote . . . [his] observations [of] Iroquois Indian government, he would become the sage of the Philadelphia Convention, which would produce the United States Constitution.”); BRUCE JOHANSEN, *DEBATING DEMOCRACY: NATIVE AMERICAN LEGACY OF FREEDOM* 33 (“Sidis contends that ‘Canesetego’ (his spelling), the Onondaga chief, set out to shape America’s development through Benjamin Franklin. Sidis maintains that the Albany Plan was largely a result of Canessatego’s communication with Franklin and was adapted from an Iroquois model.”).

²⁹ BENJAMIN FRANKLIN, 3 THE WRITINGS OF BENJAMIN FRANKLIN 42 (Albert H. Smyth ed., 1905–1907).

³⁰ Bruce Burton, *The Iroquois Had Democracy Before We Did*, in INDIAN ROOTS, *supra* note 27, at 44, 45–46; see Grinde, *supra* note 27, at 240–50.

³¹ FENTON, *supra* note 24, at 408.

³² See, e.g., *id.* at 579.

Another example of how the U.S. Constitution and the *Kaianer-ekowa* were similar is the structure of the two “Houses” within Congress: the Senate and the House of Representatives. The Haudenosaunee Confederacy also splits its Longhouse into a two-house system, the Oneida, Cayuga and Tuscarora Nations sitting on one side and the Mohawk, Onondaga and Seneca Nation sitting on the other.

In addition, the Onondaga Nation has a “Speaker of the House,” whose hereditary title is the legendary *Tadadaho* (pronounced *Tah-dah-da-hoe*) who decides what issues will be discussed on the agenda and who opens the Grand Council meeting (a reference to an all-Six-Nations meeting).

Indeed, the connections between the U.S. Constitution and the *Kaianer-ekowa* are significant, notwithstanding the abuses and omissions of the former regarding Native peoples in later years.³³ The 100th Congress decided “[t]o acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.”³⁴

C. THE *KASWENTHA*: THE TWO ROW WAMPUM AND OTHER TREATIES

The sacredness of water was acknowledged in treaties and agreements with other nations.³⁵ In order to coexist on this land with the Europeans, the Haudenosaunee arrived at a mutual understanding with the Dutch, the French, the British, and later, the Americans through the exchange of wampum.³⁶ The *Kaswentha*, or Two Row Wampum, also

³³ Because Indian Nations and tribes were not created by the Constitution, they did not enjoy the protections of the Bill of Rights until passage of the Indian Civil Rights Act of 1968. B. J. JONES, *ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM* 9 (2000), www.icctc.org/Tribal%20Courts-final.pdf.

³⁴ S. Con. Res. 76, 100th Cong. (1987).

³⁵ See MICHAEL K. FOSTER, *FROM THE EARTH TO BEYOND THE SKY: AN ETHNOGRAPHIC APPROACH TO FOUR LONGHOUSE IROQUOIS SPEECH EVENTS* (NATIONAL MUSEUM OF MAN MERCURY SERIES, CANADIAN ETHNOLOGY SERVICE PAPER No. 20, 1974) 6–7, 58 (stating, “From the early published sources . . . it is known that the Iroquois had elaborate procedures for dealing with other tribes and the Europeans, and that they followed a closely circumscribed formal etiquette in treaty-making sessions,” and “Speakers always mention at least three types of water bodies from among a set of five The Seneca Longhouse speakers . . . mention either that the earth or the people are ‘strengthened’ [] by water.”). This being said, it is known protocol to “open” a meeting with the Thanksgiving Address, offer an elaborate process of condolence and to recite agreements (polishing the Covenant Chain). It is within these speeches that the sacredness of water prevails just by invoking the word *ohnekanos* (water). Any treaty-making procedures would include these speeches and both sides would agree with wampum belts, of which the Two Row Wampum and the Silver Covenant Chain would be part of the exchange, reciting the “River of Life” in speeches and as a way to live.

³⁶ Richard L. Haan, *Covenant and Consensus: Iroquois and English 1676–1760*, in *BEYOND THE COVENANT CHAIN: THE IROQUOIS AND THEIR NEIGHBORS IN INDIAN NORTH*

known as the Covenant Chain, was a treaty agreement first made with and first recorded by the Dutch in 1613.³⁷ The Two Row Wampum was later referred to as the Silver Covenant Chain.³⁸

The “two row” metaphor referred to the two nations of the treaty, i.e., the Haudenosaunee and the Netherlands, traveling together down the River of Life. In the Two Row Wampum, there are two parallel rows of purple beads, to symbolize the two paths for two vessels: one for the Haudenosaunee canoe and one for the Dutch ship.³⁹ The two vessels are forever parallel, never meeting, but, by agreement, the vessels were intended to pursue parallel paths, not interfering with each other. Between the two paths of purple were three rows of white beads to symbolize the River of Life and three words to show the continued relationship of the two peoples: peace, respect and friendship. This metaphor explains how the two nations would agree to exist, living side by side, but never interfere in each other’s government or way of life. So water is both the “river of life” and, importantly, the medium or backdrop of the *Kaswentha*.

After the precedent of the *Kaswentha*, water protection and responsibility continued to be present in virtually all treaties made between and agreed to by the Haudenosaunee and other nations.⁴⁰ From 1613 on, when the Confederacy met with officials from outside governments, such

AMERICA, 1600–1800, at 41, 41–43, 55 (Daniel K. Richter & James H. Merrell eds., 1987) (“Diplomatic protocol required that decisions be made through public face-to-face meetings, with the exchange of gifts—usually wampum—to carry the messages and to serve as symbols of reciprocity.”); see, e.g., FENTON, *supra* note 24, at 635 (“The ritual uses of wampum pertain to ‘those rules which were in the minds of our forefathers,’ continued Red Jacket. ‘These were the rules[,] and they told their sons to observe them as long as the world might last.’” Red Jacket “reminded Pickering [Representative for George Washington] that in Sir William Johnson’s [Indian Superintendent for the British] day certain ways of doing things had been established, which the Indians seemed to remember if white men had misplaced their writings.”).

“Wampum” is a string of beads from the Quahog shell threaded together on a string or woven into a belt of purple and white symbols. The symbols were woven into a design as a reminder of an agreement. There were two colors for wampum: purple and white. White is a symbol for purity and peace. Purple represents the law and death. Mike McDonald, Mohawk Nation, Wolf Clan, Haudenosaunee Environmental Task Force Treaty Workshops Series: Oral Recitation of the Treaty Belts (Nov. 3, 2001).

³⁷ See Chief Irving Powless, Jr., *Treaty Making*, in *TREATY OF CANANDAIGUA*, *supra* note 27, at 15, 24. This date is an estimate: “The origins of the Covenant Chain are shrouded in obscurity. . . . The new scholarly orthodoxy argues that the Covenant Chain was at first a pragmatic trading alliance between the Mohawks and the Dutch of Fort Orange (Albany).” See Haan, *supra* note 36, at 42.

³⁸ See Haan, *supra* note 36, at 42–43.

³⁹ The Mohawk word for the Two Row Wampum belt is *Tekeni Ohaha* meaning two roads or two paths. The symbolic references to the “ship” and the “canoe” is in the Two Row Wampum oral history. Mike McDonald, Mohawk Nation Council of Chiefs, Treaty Workshops, Oral Recitation of the Two Row Wampum (July 12, 1997).

⁴⁰ Powless, *supra* note 37, at 21 (“‘Forever’ is described by our ancestors in this agreement in the following words: ‘As long as the grass is green, as long as the water flows downhill, and as long as the sun rises in the east and sets in the west.’”).

as the French, British and American, all historical agreements between the nations were recited, especially the Two-Row Wampum.⁴¹ Consistency and tradition are a sacred part of the Haudenosaunee's treaty-making process. This is why a voting democracy is so hard for Haudenosaunee to contend with: each new democratic leader leaves behind the policies of his predecessor, forgetting the agreements and lessons of the past, and the *Roianeson* must educate new political officials every term.

Another obstacle in getting the U.S. government to recognize past meetings between itself and the Haudenosaunee is that very little historical written evidence of meetings accurately portrays what the Haudenosaunee said.⁴² The Haudenosaunee people are noted as great orators.⁴³ With a few exceptions, the recorders did not document much of the content of the speeches by these orators at treaty deliberations.⁴⁴ The clerks were non-Native and recorded only small details of the actual treaty deliberations.⁴⁵ It will be conceded, however, that language barriers may have impeded accurate translations of the speeches and even the preservation of portions of the content, but translations often left out references to the Great Law of Peace and other key protocols.⁴⁶ Our concept of water would have been described as sacred if those translations had been more accurate and more faithfully recorded.

⁴¹ See *id.* at 21, 23–24; Venables, *supra* note 27, at 100. In fact, I have seen this practice continue today when the Haudenosaunee met with representatives in Washington, D.C.; hosted a representative from the House of Lords (England); and represented the *Kaswentha* at a hearing for the Canadian Royal Commission on Aboriginal Peoples.

⁴² William N. Fenton, *Structure, Continuity, and Change in the Process of Iroquois Treaty Making*, in *IROQUOIS DIPLOMACY*, *supra* note 8, at 3, 26 (“[T]he recorders, or secretaries for Indian Affairs at Albany, . . . created the Indian Records as they made their own versions of what they heard from the mouths of interpreters.”).

⁴³ See, e.g., RONALD WRIGHT, *STOLEN CONTINENTS: THE “NEW WORLD” THROUGH INDIAN EYES SINCE 1492*, at 127, 226 (1991) (stating, “many great orators [] spoke for the Six Nations in the mid-eighteenth century” and “[m]any considered [Red Jacket, a Seneca orator.] the finest orator of his place and time, Indian or white.”); Fenton, *supra* note 42, at 5 (“[Benjamin Franklin] very much admired the style of their oratory”).

⁴⁴ See FENTON, *supra* note 24, at 623–24 (“Conceivably, Iroquois traditionalists who speak confidently of agreements that their forebears entered into may be better custodians of the spirit of history than we later Americans who remain preoccupied with the written record.”); Fenton, *supra* note 42, at 26 (“As these scribes [colonial recorders] came to understand the native customs, they often just refer to them without describing them, which is a source of frustration to the ethnohistorian.”).

⁴⁵ *Introduction to Part II*, in *EXTENDING THE RAFTERS*, *supra* note 17, at 129 (“But because of the selective interests of the white secretaries and the circumstances under which the councils were held which prevented their witnessing all of the goings on, some phases of the event sequence, particularly those preceding the main public council, tended to be neglected in the written accounts, and finer points of Indian protocol were often simply missed.”).

⁴⁶ See Robert W. Venables, *The Price of American Liberty Is Paid in Indian Lands*, in *INDIAN ROOTS*, *supra* note 27, at 35, 36 (commenting that English translations must be analyzed cautiously but one meeting's translation suggests that even though the record does not mention “the Great Law of Peace” the Iroquois may have extended it to the colonists).

Some of our concepts did survive in the treaties, however. Upon our direction, the United States did incorporate language to reflect the sacredness of water in some treaties such as “[a]s long as the grass is green, as long as the water flows downhill, and as long as the sun rises in the east and sets in the west.”⁴⁷ This language was not meant casually or merely as a literary flourish in our eyes. Every phrase in the clause resonates deep in the breast of our people because each refers to the natural world which is considered a sacred gift from the Creator.⁴⁸

Additionally, treaties were always made with the exchange of wampum,⁴⁹ which symbolizes and records our spiritual commitment to the treaty—it now becomes our spiritual as well as civic law (the Haudenosaunee do not separate church and state).⁵⁰ For the Haudenosaunee, the use of wampum in treaties is like swearing on the Bible in U.S. courts.⁵¹ Inserting sacred terms of the natural, Creator-given world into a treaty is, for us, of equal solemnity: sacred water, sacred wampum, sacred treaty.

In 1794, the Treaty of Canandaigua was made between the Haudenosaunee and the United States, a promise by the United States government to protect Haudenosaunee territory from further land encroachment.⁵² The Treaty provides that large sections of New York State remain in Haudenosaunee control.⁵³ Despite the supposed sacredness of the treaties to all parties, there were well-known land frauds by the U.S. government and its people, both on our Territory and more generally.⁵⁴ In one such example, in 1788, the New York commissioners

⁴⁷ See Powless, *supra* note 37, at 21.

⁴⁸ WRIGHT, *supra* note 42, at 223 (“Native Americans saw (and still see) their Great Island [North America] as a sacred gift. They loved it and had no desire to leave it. They found it hard to understand why the intruders had not felt the same.”).

⁴⁹ See Mary A. Druke, *Iroquois Treaties: Common Forms, Varying Interpretations*, in IROQUOIS DIPLOMACY, *supra* note 8, at 85, 88–90.

⁵⁰ This synthesis is beautifully reflected in the essay *Spiritualism the Highest Form of Political Consciousness*, in BASIC CALL TO CONSCIOUSNESS 71 (Akwasasne Notes ed., rev. ed., 2d printing (1981) 1982).

⁵¹ See Druke, *supra* note 49, at 89 (“[Y]ou may know our words are of no weight unless accompanied with wampum . . .”).

⁵² See Appendix, 1795: Text of the Canandaigua Treaty, TREATY OF CANANDAIGUA, *supra* note 27, at 297 (“ART. 4. The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof”); HELEN M. UPTON, THE EVERETT REPORT IN HISTORICAL PERSPECTIVE: THE INDIANS OF NEW YORK 44 (1980).

⁵³ See Laurence M. Hauptman, *Who Owns Grand Island (Erie County, New York)*, in TREATY OF CANANDAIGUA, *supra* note 27, at 127, 127–28.

⁵⁴ See, e.g., LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE 7 (1999) (noting that state transportation revolution led to the periodic extinguishment of Indian land rights along the Genesee Turnpike); Francis Jennings, *Iroquois Alliances in American History*, in IROQUOIS DIPLOMACY, *supra* note 8, at

lied to the Oneidas and encouraged the Oneidas to lease their land to New York State.⁵⁵ After signing the “lease,” the Oneidas found out that they had been tricked and that the treaty was actually for the “sale” of 5 million acres of Oneida land!⁵⁶ The U.S. Supreme Court continues to uphold these “sales,” as recently as its decision in *City of Sherrill v. Oneida Indian Nation*, which bars the Oneida Nation land claim due to equitable doctrines such as laches, acquiescence, and impossibilities.⁵⁷ But these and prior treaties were agreements over land rights and were very separate from water rights.⁵⁸

This point bears repeating. Treaties that the Haudenosaunee entered into never gave away our collective right to access, use and enjoy the waterways nor to hunt, fish, trap, or gather.⁵⁹ In our view—a view supported by the Great Law of Peace—rights to land and water have always followed from responsibilities, dating back to well before Europeans’ arrival. And they follow today, even as our rivers and the “River of Life” in the *Kaswentha* have been physically altered and choked by dams, pollution, and abusive practices by those who sought our trust through treaties.⁶⁰

Despite the complications introduced by treaties, the Law of the Land remains the *Kaianerekowa*, the Great Law of Peace, in the original Haudenosaunee Territory.⁶¹ The Creation Story, the Thanksgiving Ad-

37, 52. See generally INTERNATIONAL PERSPECTIVES ON RURAL HOMELESSNESS 25–44 (Paul Milbourne & Paul Cloke eds., 2006).

⁵⁵ See Jack Campisi, *From Stanwix to Canandaigua: National Policy, States’ Rights and Indian Land*, in IROQUOIS LAND CLAIMS 49, 58–60 (Christopher Vecsey & William A. Starna eds., 1988).

⁵⁶ *Id.*

⁵⁷ See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214–21 (2005).

⁵⁸ See *United States v. Winans*, 198 U.S. 371, 381 (1905) (noting that a treaty was a reservation of rights not granted); Vine Deloria, Jr., *The Application of the Constitution to American Indians*, in EXILED IN THE LAND OF THE FREE, *supra* note 4, at 281, 315 (“It is standard treaty law that everything not specifically ceded to the United States by an Indian nation in a treaty remains vested in the Indian nation.”).

⁵⁹ See *Winans*, 198 U.S. at 381. “The proper relationship of Indian nations and the Constitution is, therefore, also one of delegated rights and powers with the Indian nations, like the states, reserving and preserving everything not specifically ceded by treaty.” Deloria, *supra* note 56, at 315.

⁶⁰ See Chief Jake Swamp, *Kaniatarowanenneh One River, Many Nations: The Position of the Mohawks of Akwesasne*, in PUBLIC SCOPING MEETING ON NEW YORK POWER AUTHORITY/ST. LAWRENCE-FDR POWER PROJECT RELICENSING (Sept. 9, 1997) (on file with *Cornell Journal of Law & Public Policy*) (“From our perspective, the building of the dam in the 1950’s brought the industries and their pollution, which continues to contaminate our world today.”).

⁶¹ See Venables, *supra* note 27, 92 (“Treaty of Canandaigua specifically notes that the United States will *not* disturb the Haudenosaunee in the free use and enjoyment” of their lands); ANTHONY F. C. WALLACE, *THE DEATH AND REBIRTH OF THE SENECA* 178 (1970) (“From the Six Nations standpoint, they established Complanter and his people firmly on lands that their descendants occupy to this very day and made it possible for the Iroquois generally to remain one of the few Indian peoples east of the Mississippi who still live in territory that was theirs before Columbus.”).

dress, the principles of the *Kaianerekowa*, the Two Row Wampum and other treaties serve to reinforce the fact that water is sacred and we have a responsibility to Creation.

The Great Law of Peace is the common law on Turtle Island (which means North America to the Haudenosaunee).⁶² Under U.S. and international law, Haudenosaunee existence and continual practice of government under the aforementioned law has preemption rights over the U.S. Constitution.⁶³ Sadly, “[i]t is, unfortunately, the exceptional lawyer who can be heard arguing today in federal courts that Indian peoples have fundamental rights to self-determination and to ownership and control of their lands and resources.”⁶⁴ Most states have bar exams that do not even test students on Native American law, perpetuating the lack of knowledge of Native American law in the U.S. legal community.⁶⁵

Therefore, law students face a dilemma. They must take an oath to protect the U.S. Constitution upon their entry to the bar.⁶⁶ On the other hand, “whenever Indians insist on their fundamental, sovereign rights, there is a legal, ethical duty which the Indians’ lawyers must fulfill by

⁶² See Robert T. Coulter, *Contemporary Indian Sovereignty*, in *RETHINKING INDIAN LAW*, *supra* note 3, at 109, 117 (“The Confederacy [or Houdenosaunee] has its renowned government operating under the Great Law of Peace or *Kayanerakowa*.” (emphasis in original)).

⁶³ See *id.* at 116–20 (“[M]any Indian governments have always asserted rights independent of and superior to United States law.”).

⁶⁴ See Steven Tullberg and Robert T. Coulter, *The Failure of Indian Rights Advocacy: Are Lawyers to Blame?*, in *RETHINKING INDIAN LAW*, *supra* note 3, at 51, 51–56 (arguing that the lawyers representing the Indians have repeatedly conceded that the “United States government has virtually unchecked political power over Indians, Indian governments and Indian property for whatever unknown reasons). Also, as a Mohawk educator lecturing around the country, I have found that many legal practitioners were not versed in Native Americans law, Federal Indian Law, or International Law.

⁶⁵ See, e.g., *Frontier Justice Revisited*, *UTNE READER*, Jan./Feb. 2008, at 18 (“New Mexico mandated similar tests [bar exam questions on Native American law] in 2002, South Dakota passed a similar measure this year, and Arizona, California, Montana, and Idaho are also looking to raise the bar.”); Eve Rickard, *Raising the Bar for Lawyers*, *HIGH COUNTRY NEWS*, Sept. 17, 2007, at 6 (“in Washington State, this year’s graduating class of law students became the first in state history tested on Indian law.”).

⁶⁶ The Constitution of the State of New York Article XIII, § 1 provides:

Members of the legislature, and all officers, executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: “I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of, according to the best of my ability;” and no other oath, declaration or test shall be required as a qualification for any office of public trust, except that any committee of a political party may, by rule, provide for equal representation of the sexes on any such committee, and a state convention of a political party, at which candidates for public office are nominated, may, by rule, provide for equal representation of the sexes on any committee of such party.

N.Y. CONST. art. XIII, § 1.

zealously advocating those rights. If compromises must be made, it is the Indians and not the lawyers who are entitled to make them.”⁶⁷ Authors Steven Tullberg and Robert Coulter hypothesize that:

The totally unsatisfactory state of United States Indian law will continue until Indian peoples and others become aware of its failings and work to bring about the law reform which is so sorely needed. What is clear at this time is that many lawyers representing Indians have not even begun to fight the most crucial Indian rights battles.⁶⁸

D. THE HAUDENOSAUNEE CONCEPT OF LAND

With the Original Instructions, the Great Law of Peace and the Two Row wampum and other treaties in place, our understanding of Haudenosaunee *weltanschauung* is almost complete. All that is lacking is a context and that lies in the Haudenosaunee conception of land, or territory.

The value of water and the meaning of water law for the Native American called the Haudenosaunee cannot be separated from a yet-more foundational discussion on Haudenosaunee sovereignty and the right to protect land and Creation must be understood. It is my belief the Haudenosaunee would not have the problems of today, the degradation of water being one of them, were its sovereignty respected by the United States. Views on sovereignty are dependent upon the level of regard one has for the land itself (water, of course, included).

I propose a simplified model. I propose that there are three levels of regard for the land: a low level, a medium level, and a high level. The low-level view of the land is based on the land being viewed as a commodity, a utility. You grow food on it, live off it, buy it, sell it and so forth. On this level, land has merely practical value. It is regarded as a commodity called “real property.”

The medium level is understood by most people. People who live on the land for many generations become attached to it as they are born and die on this land. They will speak of the land in familial terms such as: “the Father land,” or “Mother Russia.” On this level, the land is considered homeland. People love their homeland and would die defending it. This is a very patriotic view and most people might consider what I am calling a medium level regard for land as the highest possible view of land.

⁶⁷ See Tullberg & Coulter, *supra* note 63, at 51, 55.

⁶⁸ *Id.* at 55.

However, I would like to suggest a yet higher regard for the land. For the Haudenosaunee, not only is this land our homeland, but the Creator has assigned the land to us. For many, this may be a new idea. But Jews, for example, believe that their Creator gave them *Eretz Yisrael*—the Land of Israel.⁶⁹ The traditional Native American will tell you that the Creator gave them Turtle Island—North (and South) America. For the Haudenosaunee, we are the rightful owners, for example, of Ithaca NY, the home of Cornell University. Our original territory which lies in New York State, Pennsylvania and Ohio, as well as southern Canada, if I may use a Jewish analogy, is *our Eretz Yisrael*. It is with the highest level of regard to the land, that we, the Haudenosaunee come to view “water law” as much more than technical legal rules but as our responsibilities to water, earth, and the Creator.

II. HAUDENOSAUNEE POSITION PAPER ON THE GREAT LAKES

The Haudenosaunee Position Paper on the Great Lakes was designed to express to the Great Lakes Regional Collaboration (GLRC) the Haudenosaunee’s inherent sovereignty over the waters, as a jurisdictional right to control our own Haudenosaunee territories and the water within them, but even more so as a voice for the water.⁷⁰

The Great Lakes Charter of 1985 established principles for the management of Great Lakes resources as determined by the governors of the Great Lakes states and the premiers of the Great Lakes provinces.⁷¹ In 2001, an “Annex” was added to the Charter to regulate water withdrawals and diversions from the Great Lakes.⁷²

The GLRC was established by U.S. President George W. Bush in an Executive Order to facilitate collaboration among the U.S. federal government, the Great Lakes states, local communities, tribes, and other interests in the Great Lakes region as well as Canada.⁷³ A public consultation process allowed the Haudenosaunee, for the first time, to make a formal presentation on the Great Lakes.⁷⁴ On September 9, 2005

⁶⁹ AAA Analogy Service aided with the development of this analogy, *available at* <http://analogyservice.com>.

⁷⁰ See King et al., *supra* note 12, at 21.

⁷¹ *Id.* at 18–22. See generally The Great Lakes Charter: Principles for the Management of Great Lakes Water Resources (Feb. 11, 1985), <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf>.

⁷² The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter (June 18, 2001), at 1, <http://www.deq.state.mi.us/documents/deq-ogl-Annex2001.pdf>.

⁷³ Exec. Order No. 13,340, 69 Fed. Reg. 29,043 (May 18, 2004).

⁷⁴ See King et al., *supra* note 12, at 20–21. The Haudenosaunee were not aware of a public consultation process in regard to issues on the Great Lakes before this. For example, the Haudenosaunee were never consulted on and do not condone the Boundary Waters Treaty of 1909 or the Great Lakes Water Quality Agreement of 1972 and 1978. *Id.* at 20.

the Haudenosaunee Environmental Task Force (HETF), of which I was Acting Director and am now Director, sent the Haudenosaunee Position Paper (for which I served as the main co-author) on the Great Lakes to the GLRC.⁷⁵

The purpose of the Haudenosaunee Position Paper on the Great Lakes was, first, to communicate with the GLRC Executive Committee and Strategy Teams not only that the Haudenosaunee were the voice for Creation but also to convey to the United States and Canada that the Six Nations Confederacy has a right to control beyond federal legal standards, and through our preserved treaty rights to the water, and “water law” in the Great Lakes basin.⁷⁶ HETF has always considered and used the following questions in its decision-making: first, what effect will our decision have on peace; second, what effect will our decision have on the natural world; and third, what effect will our decision have on future generations?⁷⁷ The Position Paper was written with all these considerations in mind.

We also viewed it as our responsibility to the waters and to mankind to speak against the policies in the Charter and in its Annex:

The mission of HETF is to assist Haudenosaunee Nations in their efforts to conserve, preserve, protect and restore their environment, natural and cultural resources; to promote the health and survival of the sacred web of life for future generations; to support other indigenous Nations working on environmental issues; and to fulfill our responsibilities to the natural world as our Creator instructed without jeopardizing peace, sovereignty or treaty obligations.⁷⁸

⁷⁵ See Letter from Joyce King, Acting Director, Haudenosaunee Environmental Task Force, to Great Lakes Regional Collaboration (Sept. 9, 2005) (on file with *Cornell Journal of Law & Public Policy*).

⁷⁶ King et al., *supra* note 12, at 1–3. The federal legal standards are found in *Winters v. United States*, 207 U.S. 564, 576–77 (1908). See e.g., Indian Law Resource Center, *Indian Water Rights Disputes*, in *RETHINKING INDIAN LAW*, *supra* note 3, at 96, 96 (“In subsequent decisions, the *Winters* decision was construed to hold true for all Indian reservations.”). The Court in *Winters* found that a reservation of waters for the purpose of irrigation would be implied from the agreement, by which the Indians, having the right to use and occupy a large tract of lands, ceded the lands to the United States except the small tract set apart for such reservation. *Winters*, 207 U.S. at 576–77. Although by federal standards the *Winters* doctrine may apply, we, the Haudenosaunee, will not use the *Winters* doctrine as a right of the Nations because in the Haudenosaunee’s view, the *Winters* Doctrine “waters-down” sovereignty of tribes/Nations. To the Haudenosaunee, a nation exercises its right as a sovereignty, and a government (such as the United States) cannot “give” a nation sovereignty.

⁷⁷ *Id.* at 17.

⁷⁸ King et al., *supra* note 12, at 17.

As People of the Longhouse who have lived on this land since time immemorial, we assume responsibility for water—including water in the Great Lakes basin—within the larger “River of Life.”⁷⁹ The Haudenosaunee position is that:

As humans, we have an obligation to voice our concern [regarding] the damage to Creation. Waters, birds, animals, fish, air and pollution have no man-imposed boundaries. As humans we must look beyond those boundaries and do what is best for the Great Lakes, its watershed and all creatures sustained by this entity. HETF’s position paper is being submitted as a voice for Creation.⁸⁰

Over the course of the Position Paper, we attempted to convey our relationship to the waters that sustain us in a language similar to that used by the U.S. and Canadian governments who believe they have ultimate authority over all water.⁸¹ It was—and still is—HETF’s intention to communicate to the GLRC both the Haudenosaunee legal view and legal standing with respect to this sacred resource.⁸² At the same time, we followed the Original Instructions from the Creator (*Ohenton Kariwatehkwen*) and assumed the role of advocates for the protection of water and for society’s responsibility to embrace protection.

In the submissions to the GLRC, the Haudenosaunee Great Lakes Position Paper made reference to the violations against nature, especially the environmental destruction of the Great Lakes watershed such as the loss of shoreline, destruction of fish spawning beds, and the scouring of the riverbank and bed so as to churn up sediment of already-polluted waters.⁸³ Once the Haudenosaunee relationship to water was shown and humankind’s abuse of water was brought forward, we argued that Creation itself was at stake, as every part of creation is related:

As people of this land, we took great care to keep the earth and its waters as pristine as possible, [something] known in the past as common sense, known now as good environmental practices. There was no need for formalized environmental regulations. The challenge

⁷⁹ *Id.* at 26–27.

⁸⁰ Letter to Great Lakes Regional Collaboration, *supra* note 70.

⁸¹ For example the position paper contained common U.S. and Canadian policy language such as “environmental issues,” and “sustainability,” and by referring to the U.S. government’s case law, e.g., the *Winter’s* doctrine to show proof of the U.S. legal jurisprudence that acknowledges Haudenosaunee have rights to the land and water. See King et al., *supra* note 12, at 2, 22–23.

⁸² See *id.* at 2–3.

⁸³ See *id.* at 21, 25.

before us is finding ways to protect the natural world while preserving our unique relationship with it.⁸⁴

We commended the Great Lakes Charter's use of language consistent with principles within Haudenosaunee philosophy, as when it spoke of the need "to protect, conserve, and manage the renewable but finite waters of the Great Lakes Basin . . . [for] generations yet to come."⁸⁵ However, the Charter's 2001 Annex stops short of taking a completely holistic approach by only addressing new water diversions and not addressing existing water diversions that have affected our indigenous practices.⁸⁶ For example, because there were elevated levels of PCBs⁸⁷ in the local fish, we were forced into changing from a higher protein fish-based diet to a diet lower in protein and higher in carbohydrates which in turn played a part in the dramatic increase of diabetes.⁸⁸

Also, in a section regarding the proposed Seaway Navigational System expansion on the St. Lawrence River that was included in the Haudenosaunee Position Paper on the Great Lakes, the Thanksgiving Address was used as a framework for addressing the affected parts of Creation.⁸⁹ As part of the Position Paper, we reminded the U.S. and Canadian officials of our warnings stated years ago. The Haudenosaunee warned the early colonists:

Over the past five hundred years, the Haudenosaunee have observed and recorded the impacts of the European settlers on America. Our people tried to warn the colonists of their practices that do not sustain the earth and will eventually destroy both ourselves and [they,] the newcomers. Like children possessed by a new toy, they the newcomers did not listen. The environmental destruction we see today is the result. Our communities have suffered the destruction of their natural resources. Our Nations have been confined to small tracts of land. Our Confederacy has been mocked by the young countries which do not understand the world. However, as

⁸⁴ *Id.* at 16.

⁸⁵ The Great Lakes Charter: Principles for the Management of Great Lakes Water Resources, *supra* note 73, at 1.

⁸⁶ King et al., *supra* note 12, at 21.

⁸⁷ See generally Alexey Goncharov et al., *High Serum PCBs Are Associated with Elevation of Serum Lipids and Cardiovascular Disease in a Native American Population*, 106 ENVTL. RESEARCH 226 (2008), available at http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6WDS-4R8PNNW-1-D&_cdi=6774&_user=492137&_orig=browse&_coverDate=02%2F29%2F2008&_sk=998939997&view=c&wchp=dGLbVzz-zSkzS&md5=169a4ebbdaadc833594354fd197e1322&ie=/sdarticle.pdf.

⁸⁸ *Id.*

⁸⁹ *Id.* at 25-27.

more time passes, western society has begun to feel the limit of our resources and the message of the Haudenosaunee has begun to be heard.⁹⁰

We remember that the treaties protect our land and water "as long as the grass shall grow and the rivers run."⁹¹ The grass, in fact, is still growing, and the waters are still flowing, which proves that water rights and Haudenosaunee water law and responsibility still prevail and must be viewed as taking precedence over the imposed water law currently in existence in the United States and Canada.

CONCLUSION

As seen through Haudenosaunee eyes, our cultural understanding is deeply ingrained in our society as a society of laws and rights/responsibilities. Those laws and rights were promulgated by our forefathers.⁹² The treaties were designed to protect Haudenosaunee rights (and believe it or not, our existence as Haudenosaunee) of this day.⁹³ It is the Haudenosaunee society of the past and of today which upholds our collective responsibility towards Creation for our future existence. It is a Haudenosaunee duty to protect the water, not the water's duty to protect the Haudenosaunee.

Any person reading this article can no longer be ignorant of the original "law of the land," the value of water, and the meaning of water law through the *Kaianerekowa* (Great Law of Peace). We, the indigenous people and non-indigenous people, can live side by side in this river of life. All of our forefathers agreed on this point.⁹⁴ Let us walk on Mother Earth together, honoring the value of water according to the

⁹⁰ *Id.* at 16.

⁹¹ *See, e.g.,* Campisi, *supra* note 55, at 60.

⁹² *See* Powless, *supra* note 37, at 33 ("The history of our people has come to us by being passed on from generation to generation in our oral tradition. Today we still carry on the ways of our people.").

⁹³ *See id.* at 34 ("The treaties that we made were usually for the welfare, benefit, but most important, for the preservation of our heritage, culture, and the language of our people.").

⁹⁴ *See* Venables, *supra* note 27, at 108 ("The concepts of the [Ka]swenta are in turn a part of the Haudenosaunee worldview. The goals of the [Ka]swenta are certainly reflected in Article 2, 3, and 4, in which the United States promised not to 'disturb' the Haudenosaunee, and in Article 7, which provides for a resolution of conflicts that is to be followed by both the United States and the Haudenosaunee: 'The United States and Six Nations agree, that . . . e complaint shall be made by the party injured to the other.'"); *see also* ANNUNZIATA, *supra* note 1, at 11 (1995) ("By this belt, we, the Twelve United Colonies renew the old Covenant Chain by which our forefathers in their great wisdom thought proper to bind us and you, our brothers, of the Six Nations together when they first landed at this place and if any of the links of this great chain should have received any rust we now brighten it and make it shine like silver. As God has put it into our hearts to love the Six Nations and their allies[,] we now make the chain of Friendship so strong, we, hope through the favour and mercy of the good Spirit that it will remain strong and bright while the sun shines and waters run.").

Original Instructions of this land and let us all use the Haudenosaunee principles as the law of the land.

This brings up, finally, a yet-more-foundational discussion, the discussion of Haudenosaunee sovereignty. All those who reside in what is now called New York State, or in certain portions of Canada, live on the original Haudenosaunee territory. Land that is influenced and preempted by the true law of the land: the Great Law of Peace of the Haudenosaunee. *With unsurpassed irony, Cornell Law School, itself, in fact, is established on Haudenosaunee Territory without our legal permission!*⁹⁵ The Haudenosaunee would not have many of the problems they have today, water being one of them, were its sovereignty respected by the United States.⁹⁶ As a result, we are yet in another court battle.

On March 11, 2005, the Onondaga Nation filed a land rights legal case in United States District Court.⁹⁷ The legendary titleholder Tadadaho, Sid Hill, stated, “‘The incomplete plan to clean up Onondaga Lake is only the latest example of the New York State and federal authorities’ inability to care for our land,’ ‘In asserting our land rights, we insist that polluted areas be cleaned up and that the lands and waters be protected for generations to come.’”⁹⁸

Onondaga Lake is the birthplace of Haudenosaunee democracy. Subsequently and consequently, the lake is the founding site of democracy for the U.S. people and, as such, should be protected as a national treasure instead of the chemical cesspool it has become. Currently, the U.S. Environmental Protection Agency recognizes it as a location for at least thirteen Superfund cleanup sites and ten to fifteen additional sites that are being evaluated.⁹⁹

As a young girl, an elder shared a prophecy with to me: One day we would have to buy our water. I scoffed at the idea. How could this be? My family lived on the St. Lawrence River. We ate the fish, swam, drew our water for drinking, cooking and cleaning from the river. I still have the yoke my dad hand-carved from basswood, designed to draw water with a pail attached to each end. The St. Lawrence Seaway is 2,000 miles of navigable waters and at some locations more than a mile wide

⁹⁵ See generally HAUPTMAN, *supra* note 51.

⁹⁶ John C. Mohawk, *Preface* to TREATY OF CANANDAIGUA, *supra* note 27, at xv.

⁹⁷ See Onondaga Nation v. New York, 05-CV-0314 (Mar. 11, 2005); Onondaga Communications Office, Press Release, Onondaga Nation Announces Land Rights Action Promising No Evictions and No Casinos: Law Suit Asserts Rights to Historic Territory that Stretches from Pennsylvania to Canada, Mar. 11, 2005, http://www.onondaganation.org/news/releases/2005_0311.html.

⁹⁸ Onondaga Communications Office, *supra* note 100.

⁹⁹ ONONDAGA LAKE CLEANUP CORP., THE STATE OF ONONDAGA LAKE 21–22 (Edward M. Michalenko ed., 2001), <http://www.onlakepartners.org/ppdf/p1508a.pdf>.

across.¹⁰⁰ This prophecy was an impossibility in my mind. Yet, today, I buy my water!

¹⁰⁰ CORNELIUS S. CARTÉE, *ELEMENTS OF PHYSICAL AND POLITICAL GEOGRAPHY* 60 (1855); Wisconsin Sea Grant Institute, Lake Ontario and the St. Lawrence River, http://www.seagrant.wisc.edu/communications/greatlakes/GlacialGift/lake_ontario.html.