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## Transboundary Water Disputes on an International and State Platform: A Controversial Resolution to North Dakota's Devils Lake Dilemma

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TRANSBOUNDARY WATER DISPUTES  
ON AN INTERNATIONAL AND STATE PLATFORM:  
A CONTROVERSIAL RESOLUTION  
TO NORTH DAKOTA'S DEVILS LAKE DILEMMA

I. INTRODUCTION

*“The best that can be said of the U.S.-Canadian deal on Devils Lake is that it may prove better than no deal at all. Or it may not.”<sup>1</sup>*

The United States and Canada share a sweeping expanse of waterways that splash across the respective borders of both countries.<sup>2</sup> Long before political boundaries were drawn separating the two nations, massive glaciers carved out what would later become some of the largest freshwater lakes in the world.<sup>3</sup> Now, twenty thousand years after the last of these glaciers retreated, these lakes and waterways have become a critical turning point in international and state law.<sup>4</sup> Attempts to resolve transboundary water disputes among parties of heterogeneous make-ups, including sovereign nations, states, and public and private groups, are proving to be increasingly complicated, necessitating the navigation of a myriad of laws, treaties, policies, and agreements in order to determine the applicable jurisdictional and legal framework to be used in their resolution.<sup>5</sup>

The long-standing conflict between both the United States and Canada, as well as between North Dakota and Minnesota, over the ever-expanding Devils Lake in central North Dakota is an excellent example of such a multi-faceted transboundary dispute.<sup>6</sup> It would be difficult to find a more complicated conflict involving so many different parties, jurisdictions, and

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1. Editorial, *Devils Lake; Settlement Looks Like Surrender*, STAR TRIB. (Minneapolis, Minn.), Aug. 11, 2005, at 16A.

2. See John Knox, *Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution*, 27 CAN.-U.S. L.J. 199, 203 (2001) (explaining that Canada and the United States share a border approximately 5,000 miles long).

3. See Kendall Hamilton & Kimberly Martineau, *The 100-Year Forecast: Very Hot, and Stormy*, NEWSWEEK, Aug. 18, 1997, at 12 (explaining the change of weather patterns over time and its corollary effect on societal relationships).

4. See Knox, *supra* note 2, at 203 (discussing the effects of transboundary pollution).

5. *Id.* at 203-04.

6. Editorial, *supra* note 1, at 16A.

components of federal and state law.<sup>7</sup> For more than fourteen years, attempts to curtail the expansion and flooding of Devils Lake have been a source of contention for the respective governments, as well as for many additional parties, both public and private.<sup>8</sup> Not surprisingly, in spite of a recent agreement between the governments of Manitoba and North Dakota on August 5, 2005,<sup>9</sup> that may lead, in substance, to a temporary resolution of the long-running Devils Lake dilemma,<sup>10</sup> a residue of discontent remains for many of the engaged parties.

This Note will provide a substantive review of the legal ramifications of international and state-level transboundary water disputes, with reference specifically to the flooding of Devils Lake. The discussion involved in this Note will focus on the following: (1) the relevant environmental law legislation as applied on a state and federal level; (2) the controlling international treaty law; and (3) the possible ameliorative remedies of state nuisance law. The North Dakota Supreme Court's June 2005 decision in *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health* (hereinafter *People*)<sup>11</sup> will serve as the center point for the discussion of each area of law as it pertains to the case. After considering the implications and/or applications of each area of law, this Note will analyze the rights and remedies of those substantive areas of law as they pertain to international and state transboundary water disputes. Finally, this Note will attempt to justify the North Dakota Department of Health's decision to build an outlet from Devils Lake into the nearby Sheyenne River to protect North Dakota's citizens from harm, while at the same time outlining broader public policy issues inherent in making large-scale changes to our natural environment.

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7. See Knox, *supra* note 2, at 200-02 (indicating that despite the relative frequency of transboundary water pollution disputes, a situation involving multiple states, as well as both Canada and the United States, is an infrequent occurrence).

8. Dean Rebuffoni, *North Dakota Flood-Control Plan Is Under Fire*, STAR TRIB. (Minneapolis, Minn.), May 9, 1997, at 22A.

9. Press Release, State of N.D., Office of the Governor, Joint Press Statement on Devils Lake Flooding and Ecological Protection by the United States and Canada, North Dakota, Minnesota, and Manitoba 1-2 (Aug. 5, 2005), available at <http://governor.state.nd.us./media/news-releases/2005/08/050806.html> [hereinafter Press Release]. See generally Clifford Krauss, *U.S. and Canada Reach Deal on Draining Lake*, N.Y. TIMES, Aug. 7, 2005, § 1, at 17 (explaining the background and concept of the agreement).

10. Press Release, *supra* note 9, at 1.

11. 2005 ND 104, 697 N.W.2d 319.

## II. THE HISTORY OF THE DEVILS LAKE DILEMMA

### A. RISING WATER AND FLOODS

Devils Lake, with a surface area of over 125,000 acres, is the largest freshwater lake in North Dakota.<sup>12</sup> As a part of the Hudson River Basin, the lake is located in an isolated ecosystem that allows for little or no natural drainage.<sup>13</sup> Much like the Great Salt Lake in Utah, the lack of any natural outflow leads to high levels of salinity in the water.<sup>14</sup> Additionally, the lake is prone to drastic variations in water levels.<sup>15</sup> Since the 1990s, the lake has risen more than twenty-four feet, bringing water levels to their highest point since the 1830s,<sup>16</sup> and expanding the surface area of the lake from seventy square miles to its current size of 125,000 acres.<sup>17</sup>

The resulting flooding has destroyed over 80,000 acres of farmland, homes, and businesses.<sup>18</sup> Consequently, the lake's natural borders have increased to the point where they have begun to displace residents living outside the City of Devils Lake.<sup>19</sup> In 1996, the Federal Emergency Management Agency implemented a buyout program for many of the residents who lived in flooded areas.<sup>20</sup> While some of the residents have

12. *People to Save the Sheyenne River*, ¶ 2, 697 N.W.2d at 323.

13. John Knox, *Proceedings of the Canada–United States Law Institute Conference on Multiple Actors in Canada–U.S. Relations: Cleveland, Ohio, April 16-18, 2004: Environment: Garrison Dam, Columbia River, The IJC, NGOS*, 30 CAN.-U.S. L.J. 129, 130 (2004).

14. See Sheryl A. Rosenberg, *A Canadian Perspective on the Devils Lake Outlet: Towards an Environmental Assessment Model for Transboundary Disputes*, 76 N.D. L. REV. 817, 821 (2000) (providing a wealth of helpful information regarding the facts and issues of the conflict that took place, in large part, in the 1990s).

15. *Id.*

16. *Id.* See also U.S. ARMY CORPS OF ENGINEERS, CORPUS FACTS: DEVILS LAKE, N.D. FLOOD REDUCTION PROJECT—OUTLET 1 (2005), available at <http://www.mvp.usace.army.mil/docs/press/devilsoutlet.pdf> [hereinafter U.S. ARMY CORPS OF ENGINEERS].

17. *Id.*

18. *Id.*

19. *Id.*

20. FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA), CLOSED BASIN LAKE FLOODING—INTERIM FINAL RULE, <http://www.fema.gov/business/nfip/fnlrlcbl.shtm> (last visited October 13, 2006) [hereinafter FEMA Report]. The FEMA report explained the need for a federal buyout program:

The conditions at Devils Lake Basin are unique because the lake is part of a "closed basin," that is, although it lies within the Red River-Hudson Bay drainage system, no water has flowed from the Devils Lake Basin in recorded history (since the 1830s) . . . . The runoff remains in these two lakes until it evaporates or enters the groundwater table . . . . We (the Mitigation Division) are adding an endorsement to the Standard Flood Insurance Policy (SFIP) that will establish a permanent procedure for honoring claims for buildings damaged by continuous lake flooding from closed basin lakes or under imminent threat of flood damage from those closed basin lakes . . . . We estimate that, by being proactive, rather than waiting for an insured building to be inundated for 90 days by the rising lake levels, we have saved the

taken advantage of the program, many have remained despite the increased risks of flooding and the lack of any foreseeable improvement of the situation.<sup>21</sup>

Since the beginning of the precipitous rise in lake water levels during the early 1990s, efforts to control water levels have cost the State of North Dakota and the federal government over \$350 million in damage relief.<sup>22</sup> In 1993, the North Dakota Water Commission, in an effort to reduce the damage caused by frequent floods and rising water levels, asked the United States Army Corps of Engineers (hereinafter the Corps) to conduct a comprehensive study on the creation and cost of an outlet from Devils Lake to an outside body of water.<sup>23</sup> The Corps began the study in 1997.<sup>24</sup> The resulting plan was later approved in 2003.<sup>25</sup> The Corps recommended the construction of an outlet at nearby Pelican Lake, which empties into the Sheyenne River, under the stipulation that North Dakota adhere to the Clean Water Act's permit program<sup>26</sup> and effluent limitations standards.<sup>27</sup> Furthermore, the Corps estimated that an additional \$900 million in potential damages might occur if the lake continued to rise to the point of overflowing into the Sheyenne River,<sup>28</sup> with the greatest impact falling on the City of Devils Lake and its surrounding highways.<sup>29</sup> The cost of implementing the Corps' outlet plan was estimated to be around \$200 million.<sup>30</sup> Despite the high cost, the Corps' final integrated planning report states that

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program on average 25% for each claim in the Devils Lake area. Paying in advance for these inevitable flood losses so that policyholders can use the claim proceeds to relocate their homes so that we can recover salvage simply makes the best public policy and insurance sense under the circumstances.

*Id.*

21. *Id.*

22. U.S. ARMY CORPS OF ENGINEERS, *supra* note 16, at 1.

23. *Id.*

24. *People to Save the Sheyenne River v. N.D. Dep't of Health*, 2005 ND 104, ¶ 4, 697 N.W.2d 319, 323.

25. U.S. ARMY CORPS OF ENGINEERS, FINAL INTEGRATED PLANNING REPORT/ ENVIRONMENTAL IMPACT STATEMENT FOR DEVILS LAKE, NORTH DAKOTA, 1-4 (2003), available at <http://www.mvp.usace.army.mil/docs/14sp292recordofdec.pdf> [hereinafter ARMY CORPS FINAL INTEGRATED PLANNING REPORT]. The Army Corps' plan was approved on the condition that North Dakota applied for and was granted a Clean Water Act § 1342 permit, and met effluent limitation standards of § 1311. *Id.*

26. *See* 33 U.S.C. § 1342(b) (2000) (explaining the state permit program and its requirements).

27. *See id.* § 1311 (explaining the effluent limitation standards and requirements).

28. U.S. ARMY CORPS OF ENGINEERS, *supra* note 16, at 1.

29. *Id.*

30. Knox, *supra* note 13, at 133.

the Corps' plan "is the least environmentally damaging practicable outlet alternative."<sup>31</sup>

The Corps plan was never implemented.<sup>32</sup> In 1999, the North Dakota Legislature passed a bill<sup>33</sup> that effectively rejected the Corps plan in favor of a more cost-effective and immediate solution, allowing the construction of an outlet to the Sheyenne River which would cost the state under \$30 million to build.<sup>34</sup> The Sheyenne River outlet will relieve pressure from the lake by pumping water from the lake to the Sheyenne River at a rate of 100 cubic feet per second.<sup>35</sup> This second plan remains controversial for a number of reasons, as illustrated in the arguments made by the adverse parties in *People*.<sup>36</sup>

The recent ruling by the North Dakota Supreme Court in *People* effectively closed the door on the likelihood of further litigation.<sup>37</sup> In *People*, Manitoba, joined by two environmental interest groups,<sup>38</sup> appealed the district court's decision, which upheld the North Dakota Department of Health's decision to grant the Water Commission a permit for the creation of the Sheyenne River outlet.<sup>39</sup> The North Dakota Supreme Court rejected the argument that the Health Department failed to conduct the permit process in accordance with the law, and paid deference to the administrative agency's decision-making process.<sup>40</sup>

Explaining its decision, the court reasoned that the Health Department had conducted a permit hearing and received public comments concerning the outlet as required by law.<sup>41</sup> Furthermore, applying the deferential "arbitrary, capricious, or unreasonable" standard of review, the North Dakota Supreme Court also found that the Health Department had sufficiently considered and addressed the issues concerning the transfer of harmful biota from Devils Lake into the waters connected to the Sheyenne River outlet.<sup>42</sup>

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31. ARMY CORPS FINAL INTEGRATED PLANNING REPORT, *supra* note 25, at 4.

32. *Id.*

33. *See* Statewide Water Development Goals, 1999 N.D. Laws 535, § 3 (codified as N.D. CENT. CODE § 61-01-26.2 (2005)) (explaining the sources of funding for the Devils Lake outlet, and requiring approval by the North Dakota Water Commission for the project).

34. Knox, *supra* note 13, at 134.

35. *People to Save the Sheyenne River v. N.D. Dep't of Health*, 2005 ND 14, ¶ 6, 697 N.W.2d 319, 324.

36. *Id.*

37. *Id.*

38. *Id.* ¶ 1, 697 N.W.2d at 323. Manitoba was joined by two public interest parties: *People to Save the Sheyenne River, Inc.* and the Peterson Coulee Outlet Association. *Id.* Additionally, the Minnesota Attorney General joined the appellants as *Amicus Curiae*. *Id.*

39. *Id.*

40. *Id.* ¶ 38, 697 N.W.2d at 333.

41. *Id.*

42. *Id.* ¶ 37.

Though potentially harmful foreign biota were undoubtedly present within the “closed” water system of Devils Lake, the court deferred to the North Dakota Department of Health’s decision.<sup>43</sup>

The decision in *People*, effectively paving the way for the construction of the proposed outlet,<sup>44</sup> was followed by an agreement between North Dakota and Canada regarding the maintenance and construction of the outlet.<sup>45</sup> On August 5, 2005, two months after the decision in *People*, Manitoba and North Dakota agreed to cooperate with the newly proposed design of the Devils Lake outlet, which put an end to the conflict, at least for Manitoba.<sup>46</sup> While the negotiation efforts should be applauded, the agreement appears to leave Minnesota and other interested parties in the dark concerning further legal recourse.<sup>47</sup>

### B. THE CONFLICT: WHAT IS AT STAKE?

It is commonly agreed by all parties involved that the situation at Devils Lake has reached critical proportions.<sup>48</sup> The disagreement lies in the proposed solutions to this calamity.<sup>49</sup> On one side stand the State of North Dakota and the federal government in the form of the Environmental Protection Agency (EPA) and Secretary of State Condoleezza Rice.<sup>50</sup> On the other side are the government of Manitoba, various American and Canadian public interest groups,<sup>51</sup> and the State of Minnesota.<sup>52</sup> The crossfire in the media has been palpable.<sup>53</sup>

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43. *Id.*

44. *Id.* ¶¶ 38-39.

45. Press Release, *supra* note 9, at 1.

46. *Id.*

47. Editorial, *supra* note 1, at 16A.

48. *Id.*

49. *Id.*

50. Knox, *supra* note 13, at 133. Knox discusses the post held by former Secretary of State Colin Powell, and his decision that the North Dakota outlet plans would not violate the Boundary Waters Treaty, which naturally pleased Governor John Hoeven. *Id.* As of the writing of this Note, the current Secretary of State is Condoleezza Rice. U.S. Dep’t of State, <http://www.state.gov/secretary/> (last visited April 30, 2006).

51. *People to Save the Sheyenne River v. N.D. Dep’t of Health*, 2005 ND 104, ¶ 1, 697 N.W.2d 319, 323.

52. Brief for Minnesota Department of Natural Resources et. al. as Amici Curiae Supporting Petitioners at 1, *People to Save the Sheyenne River*, 2005 ND 104, 697 N.W.2d 319 (No. 20040376). The Minnesota Department of Natural Resources, Minnesota Pollution Control Agency, and the Minnesota Attorney General appeared as Amici Curiae to argue that the Sheyenne River outlet would result in the transfer of potentially harmful biota and invasive parasites to Minnesota waterways, which would violate Minnesota water quality standards. *Id.* at 8-11.

53. See Frank McKenna, *Hell from High Water*, N.Y. TIMES, May 12, 2005, at A27. Ambassador McKenna’s position summarized the concerns of Manitoba and Canada, stating, “In Canada, we are sympathetic to the plight of the lake’s neighbors, but not to the solution their state

The disagreement stems from the adverse parties' concerns that the Shyenne River outlet will introduce foreign biota and other environmentally harmful water into the river, which will in turn infect the waters of Lake Winnipeg and the Nelson River system, both part of the Hudson Bay watershed leading to the Atlantic Ocean.<sup>54</sup> The salty waters of Devils Lake have high concentrations of nitrogen, sulfates, phosphates, and minerals "that could cause severe digestive distress if consumed and could be lethal to aquatic life."<sup>55</sup> Therefore, the water quality in Devils Lake is arguably much lower than the water quality in the Red River and Lake Winnipeg, and the parties against the outlet maintain that the concentrations of certain water quality parameters exceed relevant water quality standards.<sup>56</sup> Furthermore, there is a concern regarding the potential for biota transfer from Devils Lake to the rest of the Red River basin, largely because of indications that there has been no significant exchange of water between the Devils Lake sub-basin and the rest of the Red River basin for nearly 1,800 years.<sup>57</sup>

Many of the concerns that had persisted since the planned construction of the Pelican Lake outlet by the Army Corps continued to be debated until the August 2005 agreement between Manitoba and North Dakota.<sup>58</sup> The parties opposing the outlet argued that the addition of Devils Lake water into the Red River system posed a potential threat to commercial and sport fisheries in the waters connected to the Hudson Bay basin.<sup>59</sup> Furthermore, Manitoba estimates "[t]he total direct and indirect annual value of the Lake Winnipeg and Red River commercial and sport fishery to the Manitoba economy [to be] nearly [\$50 million (Canadian)]."<sup>60</sup>

Concerns over water degradation are very real, and yet the solutions to those concerns must be weighed against the right of North Dakota to protect its citizens.<sup>61</sup> Conversely, the struggle over how to properly balance North

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has proposed." *Id.* ¶ 2. *But see* Gov. John Hoeven, *North Dakota Water*, N.Y. TIMES, May 20, 2005, at A24. In response, North Dakota Governor John Hoeven summarized the position of North Dakota on the issue: "Canada is opposing our efforts to bring relief to our people." *Id.* ¶ 4. "North Dakota will not jeopardize its unblemished record of environmental responsibility for the Devils Lake outlet or any other project." *Id.*

54. Rosenberg, *supra* note 14, at 818.

55. McKenna, *supra* note 53, at A27.

56. GOV'T OF MANITOBA, MANITOBA'S CONCERNS: GARRISON-DAKOTA WATER RESOURCES ACT AND DEVILS LAKE OUTLET 1-2 (2005), available at <http://www.gov.mb.ca/waterstewardship/transboundary/positions/man-position/backgr.html>.

57. *Id.*

58. Press Release, *supra* note 9, at 2.

59. Rosenberg, *supra* note 14, at 818.

60. *Id.* (citing Information Bulletin, Gov't Of Manitoba and North Dakota Views, <http://www.gov.mb.ca/envirom/pagesnews/devlake/ib000403.html>) (first alteration in original).

61. Hoeven, *supra* note 53, at A24.

Dakota's use of its police powers to help its own citizens is weighed heavily against the interest of such parties as Manitoba to protect their waters from pollution.<sup>62</sup>

### III. TRANSBOUNDARY WATER DISPUTES: INTERNATIONAL AND STATE-LEVEL REGULATION

International and inter-state transboundary disputes over environmental pollution, such as the one involving Devils Lake, arise fairly often, and their resolution is almost always complicated.<sup>63</sup> Perhaps the leading factor contributing to the overall complexity is the question of jurisdictional authority: Who has authority to make decisions, the federal government or the individual states?<sup>64</sup> Additionally, to whom should these decisions be appealed?<sup>65</sup> Although a system of cooperative federalism exists in the United States to confront this issue, the answers to these questions are not entirely clear.<sup>66</sup>

#### A. INTERNATIONAL DISPUTES: FEDERAL-LEVEL REGULATION

Water pollution can, and often does, cross international political boundaries.<sup>67</sup> As a result, transboundary water disputes are not new to the judicial systems of the United States and Canada.<sup>68</sup> Though a variety of different arguments are often made on both sides, the questions that consistently arise in most cases are the following: how much pollution is enough; who regulates it; and how?<sup>69</sup> In the oft-cited *Trail Smelter* decisions of the 1930s, the federal government tried to answer some of these questions.<sup>70</sup> The essential holding of the *Trail Smelter* decisions is that in

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62. *Id.*

63. See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 932 (1997) (explaining that when pollution which originates in one state makes its way to the bordering state, both jurisdictions have trouble regulating it effectively).

64. *Id.* at 932-33

65. *Id.*

66. *Id.* at 932. Merrill explains the inherent problems with a cooperative federalism system: "Notwithstanding the broad general trend toward centralized regulatory authority in environmental law, and the widespread invocation of transboundary pollution as a justification for that trend, little meaningful regulation of transboundary pollution actually exists." *Id.*

67. *Id.*

68. See generally Neil S. Kagan, *Great Lakes Commentary: Building On The Great Lakes Water Quality Agreement: The Next 25 Years*, 1998 TOL. J. GREAT LAKES' L. SCI. & POL'Y 37, 40-45 (1998) (discussing the history between the United States and Canada in regards to the Great Lakes Water Quality Agreement, its enforcement, and the problems and solutions created over time).

69. Merrill, *supra* note 63, at 932.

70. *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1938); see Austen L. Parrish, *Trail Smelter Deju Vu: Extraterritoriality, International Environmental Law, and the Search for*

any transboundary dispute, no country has the right to use its territory or to allow its territory to be used in a way that causes serious injury to the territory of another.<sup>71</sup> The rationale laid forth in these decisions continues to serve as the basis for most transboundary dispute resolutions.<sup>72</sup>

However, unlike traditional American jurisprudence, where common law, statutes, and constitutional provisions provide a relatively clear framework for the operation of environmental regulation, international law depends largely on negotiations and political relationships to define the rights and responsibilities of the states.<sup>73</sup> For the most part, international law operates with little procedural hierarchy, and many times it does not give any court or agency legal authority over another.<sup>74</sup> Because of these inherent problems, the channels and procedures for proper dispute resolution are unusually cloudy.<sup>75</sup> When dealing with international transboundary pollution problems, it is often only to treaty law that one can turn for solutions to these difficult questions.<sup>76</sup>

In the Devils Lake dispute, the germane international treaty law is the Boundary Waters Treaty (hereinafter BWT) of 1909.<sup>77</sup> The BWT created an agreement between the United States and Great Britain, including the sovereign nation of Canada.<sup>78</sup> The BWT states that both nations agree to work amicably toward the resolution of all international transboundary disputes in regards to pollution in all “navigable waters.”<sup>79</sup> Additionally, the BWT created the International Joint Commission (hereinafter IJC), the controlling international administrative body overseeing all transboundary water disputes between the United States and Canada.<sup>80</sup> The BWT has been used to help solve many transboundary water disputes between Canada and

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*Solutions to Canadian–U.S. Transboundary Pollution Disputes*, 85 B.U. L. REV. 363, 364, & n.1 (2005) (explaining that the Trail Smelter Arbitrations between the United States and Canada in the 1930s required a Canadian company operating the Trail Smelter to cease causing damage to the State of Washington).

71. Parrish, *supra* note 70, at 364, & n.1.

72. *Id.* at 364.

73. Merrill, *supra* note 63, at 934.

74. *Id.*

75. *Id.*

76. *Id.*

77. Boundary Waters Treaty, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448.

78. *Id.* at Preamble. In 1909, Great Britain was the sovereign of Canada. *Id.*

79. *Id.* at Preliminary Article. “For the purpose of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes.” *Id.*

80. *Id.* at Article IV.

the United States since its inception;<sup>81</sup> however, in the Devils Lake conflict, the IJC has not, as of the writing of this Note, been asked to review the case.<sup>82</sup> Without an obvious recourse to treaty law, Manitoba, Minnesota, and the other interested parties were forced to turn to federal environmental statutes for answers.<sup>83</sup>

### 1. *Federal Statutory Regulation*

The federal government of the United States, in the form of the EPA, uses statutory provisions to regulate most areas of environmental law.<sup>84</sup> In the Devils Lake dispute, there are two essential statutes that come into play: (1) the Clean Water Act (CWA);<sup>85</sup> and (2) the National Environmental Protection Act (NEPA).<sup>86</sup> Enacted in 1969, NEPA was the first major statutory provision created by the federal government that had a significant impact on environmental pollution.<sup>87</sup> Soon after the passage of NEPA, the CWA was passed in 1972.<sup>88</sup>

Together, the enactment of NEPA and the CWA ushered in a previously unknown era of environmental protection for the collective waters of the United States.<sup>89</sup> The CWA declares that “[t]he objective of this Act is to restore and maintain the . . . biological integrity of the Nation’s waters [and] [i]n order to achieve this objective it is hereby declared that, consistent with the provisions of this Act . . . it is the national policy that the discharge of . . . pollutants . . . be prohibited.”<sup>90</sup> The use of such expansive language exemplifies the all-encompassing vision shared by both NEPA and the CWA, and, consequently, they bestow upon the federal

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81. See Rosenberg, *supra* note 14, at 841 (explaining that “[t]he factual record appears to bear out the view that the IJC has been successful in acting as an impartial and independent body making principled decisions”).

82. McKenna, *supra* note 53, at A27. However, pursuant to the August 2005 agreement, the IJC will appoint the International Red River Board to implement a shared risk management strategy for the greater Red River basin. Press Release, *supra* note 10, at 2.

83. Rosenberg, *supra* note 14, at 840.

84. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 2 (4th ed. 2003) (explaining that “[e]nvironmental law has grown from a sparse set of common law precedents and local ordinances to encompass a vast body of national legislation”).

85. Clean Water Act, 33 U.S.C. § 1251 (2000).

86. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000).

87. See generally Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act’s Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 246 (2000) (applauding Congress’s enactment of NEPA, but expressing skepticism about its long-term effectiveness).

88. 33 U.S.C. § 1251.

89. See generally PERCIVAL ET AL., *supra* note 84, at 569, 784 (discussing both statutes’ impact on modern environmental regulation).

90. 33 U.S.C. § 1251(a)(3).

government significant powers of regulation in any water pollution dispute.<sup>91</sup>

## 2. *International Disputes: State Level Regulation*

Though states are also bound by international treaty law, the Fourteenth Amendment of the United States Constitution gives states the right of decisional autonomy and the power to regulate through their own state laws.<sup>92</sup> Naturally, this dynamic creates a conflict of enforcement.<sup>93</sup> Congress gives the EPA the power to regulate through environmental statutes, but individual states often desire their own decision-making authority.<sup>94</sup> This conflict is, at least in theory, solved by a system of cooperative federalism.<sup>95</sup> Under such a system, the EPA allows states to regulate their pollution problems, with the EPA keeping a watchful eye from above.<sup>96</sup> However, complications inevitably arise when the impetus behind the creation of the law interferes with the law's enforcement.<sup>97</sup> Because of these reasons, the body of laws governing cross-state pollution remains nearly as undeveloped as those laws governing international transboundary pollution.<sup>98</sup>

### B. TRANSBOUNDARY DISPUTES: STATE VERSUS STATE

Much like the problems involved in international water pollution disputes at the inter-state level, satisfactory solutions to transboundary pollution are difficult to achieve.<sup>99</sup> Historically, common law nuisance and trespass actions served as viable dispute resolution tools in inter-state

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91. PERCIVAL ET AL., *supra* note 84, at 569, 784. Common law has clearly stated that federal regulation trumps any state regulation concerning pollution concerns. *Id.* This concept was first decided in *Sanitary District of Chicago v. United States*, 266 U.S. 405, 423-26 (1925), where the Supreme Court held that federal law trumps state law on any water diversion issue. This result stems from the Commerce Clause of the United States Constitution, which gives the federal government power to enforce an injunction against a state water outlet project, and to hold authority over a state's right of police power. *Id.*

92. U.S. CONST. amend. XIV, § 2.

93. See Steven M. Siros, *Transboundary Pollution in the Great Lakes: Do Individual States Have Any Role to Play in Its Prevention?*, 20 S. ILL. U. L.J. 287, 288 (1996) (explaining the inherent conflict that results from the cooperative federalism system between individual states and the federal government).

94. *Id.* at 288-91.

95. *Id.*

96. See 33 U.S.C. § 1251(g) (2000) (providing that “[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter”).

97. Merrill, *supra* note 63, at 933.

98. *Id.*

99. Siros, *supra* note 93, at 288.

conflicts.<sup>100</sup> However, court decisions based on common law have been severely restricted since the United States Supreme Court's decision in *International Paper Co. v. Ouellette*,<sup>101</sup> where the Court held that individual states are bound by the CWA and may not use their own nuisance laws to sue a polluting neighbor state.<sup>102</sup> As a consequence, *Ouellette* closed the door on downstream states bringing claims based on their own nuisance laws because doing so would violate Congress's intent behind the enactment of the CWA.<sup>103</sup> However, in *Ouellette*, the Court held that downstream states injured by the actions of the polluting upstream states may still bring a nuisance claim under the upstream state's nuisance laws.<sup>104</sup> Despite this concession, after the ruling in *Ouellette*, many litigants appear to feel bound by EPA-administered environmental statutes, and, therefore, most petitioners do not bring common law or statutory nuisance claims when federally mandated environmental statutes are involved.<sup>105</sup> Despite this tendency, the United States Supreme Court's opinion in *Ouellette* did leave room for a downstream state to bring a nuisance claim as a remedy to water pollution injuries; however, whether or not litigants see nuisance law as a viable regulatory tool appears questionable.<sup>106</sup>

In any case, and perhaps inconsistent with the concept of state sovereignty, most water pollution abatement actions are restricted by the federal CWA, and downstream states are precluded from controlling pollutants originating within the upstream point-source state unless the downstream state chooses to bring a nuisance action under the upstream state's nuisance law.<sup>107</sup> After the *Ouellette* decision, the trend has been to move away from nuisance remedies, and when downstream states are harmed by

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100. *Id.* at 289.

101. 479 U.S. 481 (1987).

102. *Ouellette*, 479 U.S. at 491.

103. *Id.* at 508.

104. *Id.* at 510.

105. See Siros, *supra* note 93, at 289-95 (discussing the *Ouellette* decision and its effect on nuisance law claims); see also Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 55, at 1-4 (deciding not to bring a nuisance law cause of action).

106. Siros, *supra* note 93, at 209.

107. *Id.* at 290. Siros explains the importance of *Ouellette* for inter-state transboundary disputes:

[T]he *Ouellette* Court emphasized the role of affected states in the permitting system as being subordinate to that of the source state, with the only available remedy being the affected state's ability to petition the Environmental Protection Agency . . . [because the] [a]pplication of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system.

*Id.* (citing *Ouellette*, 479 U.S. at 496) (final alteration in original).

transboundary pollution, as the State of Minnesota claimed to be in *People*, those states often feel their only option is to look to federal remedies rather than direct state-level regulation.<sup>108</sup>

#### IV. THE SCOPE OF ENVIRONMENTAL LAW

##### A. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

In response to the groundswell of popular support for environmental protection and conservation, Congress enacted the landmark National Environmental Policy Act (NEPA) in 1969,<sup>109</sup> which requires federal agencies to take environmental concerns into account when the agency implements any federally funded program that could have a significant impact on the environment.<sup>110</sup> NEPA corresponds in many ways to the Canadian federal statute mandating environmental assessment, the Canadian Environmental Assessment Act (CEAA).<sup>111</sup>

The key difference between NEPA and the CWA is that, rather than using a traditional regulatory approach in dealing with individual polluters such as business and industry, NEPA instead delegates decision-making authority to individual federal agencies such as the EPA.<sup>112</sup> NEPA requires that the EPA, to the “fullest extent possible,” must consider alternatives to its actions with the aim of reducing environmental impact.<sup>113</sup> In practice, NEPA is applied on a case-by-case basis, where federal and cooperating state agencies are required to assess the environmental impacts and the

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108. See Siros, *supra* note 93, at 289-95 (discussing the *Ouellette* decision and its effect on nuisance law claims); see also Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 52, at 1-5 (making no mention of a nuisance law claim).

109. National Environmental Policy Act, 42 U.S.C. § 4321 (2000) [hereinafter NEPA]. Section 4321, entitled “Congressional Declaration of Purpose,” reads:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Policy.

*Id.*

110. *Id.* § 4332. The section is entitled: “Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.” *Id.*

111. Rosenberg, *supra* note 14, at 855; Canadian Environmental Assessment Act, R.S.C., ch. 37 (1985).

112. 42 U.S.C. § 4332.

113. *Id.* § 4332(C)(iii).

particular benefits of each action in terms of which actions are least likely to adversely effect the environment.<sup>114</sup>

This assessment process involves considering the general environmental impact of any planned action through an EIS.<sup>115</sup> All federal agencies are required to conduct an EIS for any major federal action that could significantly affect the quality of the environment.<sup>116</sup> The EIS must include a detailed statement of environmental impact,<sup>117</sup> alternatives to the proposed action,<sup>118</sup> and any irretrievable commitments of resources involved.<sup>119</sup> Finally, an EIS applies to any federally funded environmental project that presents potential pollution concerns.<sup>120</sup>

Under any case-by-case approach, the federal government has stipulated that NEPA impact assessments are also intended to cover the transboundary effects of all federal actions.<sup>121</sup> A NEPA assessment is to be applied to any proposed federal action which may have transboundary pollution effects, because of the “worldwide and long-range character of environmental problems.”<sup>122</sup> Furthermore, NEPA directs federal agencies to assist other countries in preventing any transboundary water pollution.<sup>123</sup> To this end, NEPA requires that federal agencies assess environmental impact to the extent that it may be reasonably foreseeable.<sup>124</sup>

However, as indicated below, the NEPA-mandated environmental impact statement (EIS) requirement has been somewhat undermined by the CWA’s delegation of power, under the National Pollutant Discharge Elimination System (NPDES) permit system, to individual states.<sup>125</sup> The NPDES permit program allows individual states to prepare their own functional equivalent of a federal EIS if a state project is funded, not by the

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114. *Id.* § 4332.

115. *Id.*

116. *Id.*

117. *Id.* § 4332(C).

118. *Id.* § 4332(C)(iii).

119. *Id.* § 4332(C)(v).

120. *Id.* § 4332(C).

121. *Id.* § 4332(F). The statute provides:

The Federal Government Shall: recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.

*Id.*

122. *Id.*

123. *Id.*

124. Rosenberg, *supra* note 14, at 849. All governmental bodies must be aware of the potential impacts of federal actions on transboundary watersheds. *Id.* at 850.

125. 33 U.S.C. § 1342 (2000).

federal government, but by purely state dollars.<sup>126</sup> Thus, although an EIS is still technically required of all federally funded projects, states can circumvent the requirement by applying for a CWA permit, and in turn, developing their own environmental impact analysis document and completely funding a project on their own.<sup>127</sup>

## B. THE CLEAN WATER ACT

In 1972, following the precepts of NEPA, Congress enacted a more regulatory statute, the Clean Water Act (CWA),<sup>128</sup> which prohibits all environmentally damaging discharges of pollutants from non-permit exempted point sources<sup>129</sup> into the “navigable waters” of the United States.<sup>130</sup> The CWA is the most comprehensive source of federal regulatory authority overseeing water pollution.<sup>131</sup> Adopting a lofty, and arguably cost-blind goal, the opening passages of the CWA dictate that “the discharge of pollutants into the navigable waters be eliminated by 1985,” and that the enforcing authority is to work towards the “protection and propagation of fish, shellfish, and wildlife and . . . recreation in and on that water.”<sup>132</sup> This sweeping set of legislation came in response to Congress’s recognition that pollution could have severely deleterious effects on the environment, diminishing recreational and economic opportunities, while posing clear threats to public health.<sup>133</sup> Additionally, § 1311<sup>134</sup> of the CWA imposes

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126. See 42 U.S.C. § 4332(D) (discussing the responsibilities of state agencies, and the federal government’s responsibility to oversee that states comply with the statute); see also *Georgia River Network v. U.S. Army Corps of Engineers*, 334 F. Supp. 2d 1329, 1340-42 (N.D. Ga. 2003). In *Georgia River Network*, the United States District Court for the Northern District of Georgia held that the U.S. Army Corps of Engineers was not required to issue an EIS prior to issuing a CWA § 1342 permit to a county water authority for the creation of a reservoir in the State of Georgia. *Id.*

127. 33 U.S.C. § 1342(a)(1). The permit program provides that “the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant . . . notwithstanding section 1311(a) of this title, upon condition that such discharge will meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.” *Id.*

128. Clean Water Act, 33 U.S.C. § 1251 (2000). The CWA was passed in 1972 as the “Federal Water Pollution Control Act,” and renamed the Clean Water Act in 1977. *Id.*

129. See *id.* § 1362(14) (defining the term “point source”). “The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *Id.*

130. See *id.* § 1362(7) (defining the term “navigable waters”). “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” *Id.*; see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (endorsing a functional approach to the definition of “navigable waters”).

131. PERCIVAL ET AL., *supra* note 84, at 569.

132. 33 U.S.C. § 1251.

133. *Id.* § 1251(b).

effluent limitations on dischargers by prohibiting “the ‘discharge of a[ny] pollutant’”<sup>135</sup> into navigable waters, as well as requiring statewide planning for control of pollution through the § 1342 permit program.<sup>136</sup>

### C. COOPERATIVE FEDERALISM UNDER THE CWA

Under the collaborative CWA system, each state choosing to implement the CWA program must meet the minimum federal requirements under § 1342(b), and must assume all responsibility for issuance of permits to all point source dischargers.<sup>137</sup> Section 1342 prohibits the discharge of any pollutant from a point source to surface waters, except when the discharge is covered with an NPDES permit.<sup>138</sup> The rationale behind the decision to allow states to develop their own environmental impact analyses is that individual states may be in a better position to recognize and develop the functional equivalent of an NEPA-mandated EIS statement.<sup>139</sup> To obtain a CWA-mandated NPDES permit, the delegated state agency must conduct scientific studies, collect public input, and submit a report of the agency approved plan.<sup>140</sup> All of these requirements are similar in scope to a

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134. *Id.* § 1311.

135. *See id.* § 1362(12) (defining the term “discharge of a pollutant”). The statute provides: The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

*Id.*

136. *Id.* § 1342.

137. *Id.* § 1342(b).

138. *Id.* § 1342. Congress, in § 1251(b) of the CWA, explained the reasoning behind its decision to require a NPDES permit for individual states:

Congressional recognition, preservation, and protection of primary responsibilities and rights of States: It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

*Id.*

139. *Id.* § 1342. *See, e.g.*, 33 U.S.C. § 1342(b) (providing that “the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.”).

140. 33 U.S.C. § 1342(a)(2).

NEPA-mandated EIS.<sup>141</sup> Thus, to comply with the CWA agenda and goals for the Devils Lake outlet, the North Dakota Department of Health was required to take into account a complicated measurement of environmental clean-up goals, while simultaneously weighing the economic impact and the health of the state's citizens.<sup>142</sup>

In practice, all water redirection decisions, such as the creation of the Devils Lake outlet, where the redirection is not an inter-basin transfer, are regulated by using the NPDES system with oversight control maintained by the EPA.<sup>143</sup> Section 61-28-04 of the North Dakota Century Code<sup>144</sup> is the mandatory statute required for state implementation of the section 1342 permit program to comply with the CWA.<sup>145</sup> The statute designates the Health Department as the water pollution control agency, and gives the Department broad power to make rules governing the issuance, denial, modification, and revocation of permits, and to hold hearings necessary for the proper administration of the permit process.<sup>146</sup> With the powers granted to the North Dakota Water Commission, via the Department of Health, thus enumerated, all that remained to be decided in *People* was whether the Department complied with those requirements.<sup>147</sup>

In *People*, Manitoba and Minnesota contended that North Dakota did not comply with both section 61-28-04<sup>148</sup> and section 61-28-12 of the North Dakota Administrative Code<sup>149</sup> because it failed to take into account many of the environmental concerns, including phosphorous, anti-degradation, and the risk of biota transfer.<sup>150</sup> It was the North Dakota Supreme Court's task in *People* to consider if this argument held any water.<sup>151</sup>

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141. See 42 U.S.C. § 4332 (explaining the necessity and requirements of an "environmental assessment" or an "environmental impact statement" under NEPA).

142. See 33 U.S.C. § 1342 (discussing the NPDES permit requirements). *But see* 42 U.S.C. § 4332 (discussing the EIS requirements).

143. 33 U.S.C. § 1342(b).

144. N.D. CENT. CODE § 61-28-04 (2005).

145. *Id.* § 61-28-04(12). "The department is hereby designated as the state water pollution control agency for all purposes of the Federal Water Pollution Control Act, . . . and is hereby authorized to take all action necessary or appropriate to secure to this state the benefits of that act and similar federal acts." *Id.*

146. *Id.*

147. *People to Save the Sheyenne River v. N.D. Dep't of Health*, 2005 ND 104, ¶ 1, 697 N.W.2d 319, 323.

148. Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 52, at 6-9.

149. N.D. ADMIN. CODE § 33-16-01-12 (2005). The statute explains which discharges will violate the EPA permit system. *Id.* Manitoba and Minnesota argued that the potential for foreign biota transfer violated the code. Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 52, at 7.

150. *People to Save the Sheyenne River*, ¶ 32-33, 697 N.W.2d at 331.

151. *Id.* ¶ 1, 697 N.W.2d at 323.

D. THE CWA AS APPLIED TO ADMINISTRATIVE RULEMAKING: THE ARBITRARY, CAPRICIOUS, OR UNREASONABLE STANDARD OF REVIEW

In 2002, pursuant to its authority granted by the EPA, the North Dakota Water Commission applied for and was granted a North Dakota Pollutant Discharge Elimination System (NDPDES) permit from the North Dakota Department of Health.<sup>152</sup> The Health Department conducted an initial environmental review of the project and issued a public notice of its intent to issue a permit for the state funded outlet.<sup>153</sup>

As required under North Dakota Administrative Code section 33-16-01-01(2),<sup>154</sup> the Health Department held two public hearings and received comments in May 2003 which were then compiled and considered by the North Dakota Chief of the Environmental Health, L. David Glatt.<sup>155</sup> The Health Department replied to all of the comments it received at the public meetings, as well as those received in writing.<sup>156</sup> In July 2003, Glatt recommended issuing a permit to the Water Commission for the Sheyenne River outlet.<sup>157</sup> The original plan was for the outlet to begin operation in the summer of 2005, and it would continue as implemented until June of 2008 when a review of the entire system would be required.<sup>158</sup> The Health Department's issuance of the permit also required "biological assessments of the ecological condition of the Sheyenne River at four different points, and an intake screen to prevent the transfer of adult fish species to the Sheyenne River."<sup>159</sup> Furthermore, the permit would limit the operation of the outlet to the warmer time period between May through November, and it would prohibit any discharge of water if the elevation of Devils Lake dipped below 1445 feet.<sup>160</sup>

The government of Manitoba, the State of Minnesota, and the environmental interest groups who opposed the approved permit filed petitions for

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152. *Id.* ¶ 5.

153. *Id.* at 323-24.

154. N.D. ADMIN. CODE § 33-16-01-01(2) (2005). The North Dakota Supreme Court in *People* stated that the code "require[s] notice and public participation for tentative determinations and draft permits, a period for public comment, a requirement for responses to comments, the preparation of fact sheets for applications, notice to appropriate government agencies, and public hearings for applications involving significant public interest." *People to Save the Sheyenne River*, ¶ 11, 697 N.W.2d at 325.

155. *People to Save the Sheyenne River*, ¶ 5, 697 N.W.2d at 323-24

156. *Id.* at 324.

157. *Id.*

158. *Id.* ¶ 6, 697 N.W.2d at 324.

159. *Id.*

160. *Id.*

reconsideration under North Dakota Century Code section 28-32-40.<sup>161</sup> The North Dakota Health Department then reopened the administrative record for further comments.<sup>162</sup> The Health Department responded to the newly received comments, and, subsequently, decided the permit would still be issued as originally planned.<sup>163</sup>

The Health Department's decision to issue the permit was ultimately upheld by the North Dakota Supreme Court in *People*.<sup>164</sup> The court found that under the highly deferential "arbitrary, capricious, or unreasonable" standard of review,<sup>165</sup> the Health Department's findings regarding the permit requirements were sufficient to justify the creation of the Sheyenne River outlet.<sup>166</sup> This standard of review established a low burden of proof for North Dakota and paid deference to Chief Glatt's findings.<sup>167</sup>

In reaching its decision, the North Dakota Supreme Court explained that the separation of powers doctrine of the North Dakota Constitution gave it very little room to interpret the Health Department's decision under the circumstances of the case.<sup>168</sup> The court reasoned that the Health Department's decision-making process did not constitute an adjudicative proceeding,<sup>169</sup> and, thus, the less deferential "preponderance of evidence"

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161. *People to Save the Sheyenne River*, ¶ 7, 697 N.W.2d at 324.

162. *Id.*

163. *Id.*

164. *Id.* ¶ 38, 697 N.W.2d at 333.

165. *Id.* ¶ 1, 697 N.W.2d at 323. The court explained the definition of the standard:

A decision is arbitrary, capricious, or unreasonable if it is not the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation. We consider the issues raised in Manitoba's appeal in light of that highly deferential standard of review.

*Id.* ¶ 24, 697 N.W.2d at 329 (citing *Little v. Traynor*, 565 N.W.2d 766, 773 (N.D. 1997)).

166. *Id.* ¶ 1, 697 N.W.2d at 323. The North Dakota Supreme Court stated, "[w]e conclude the Health Department's issuance of the permit was not arbitrary, capricious, or unreasonable under the statutory scheme for the issuance of this permit." *Id.*

167. *Id.* ¶ 14, 697 N.W.2d at 326.

168. N.D. CONST. art. VI, § 1. The North Dakota Supreme Court has explained the basic premise of the separation of powers doctrine in North Dakota:

Although the Constitution does not contain a general distributing clause expressly providing for division of governmental powers among the legislative, executive and judicial branches, creation of those branches operates as an apportionment of the different classes of power; as all branches derive their authority from the same Constitution, there is an implied exclusion of each branch from the exercise of the functions of the others.

*People to Save the Sheyenne River*, ¶ 14, 697 N.W.2d at 326 (citing *City of Carrington v. Foster County*, 166 N.W.2d 377, 382-83 (N.D. 1969)).

169. *Id.* The North Dakota Supreme court explained that "[a]n agency may dispose of any adjudicative proceeding by informal disposition, unless otherwise prohibited by statute or rule." *Id.* (citing N.D. CENT. CODE § 28-32-22).

standard of review under North Dakota Century Code section 28-32-46<sup>170</sup> did not apply to the case, despite arguments to this effect from Manitoba, the Minnesota Attorney General, and the environmental interest groups.<sup>171</sup> Furthermore, the North Dakota Supreme Court reasoned that the deferential arbitrary and capricious standard was more applicable to environmental law questions like the one at hand, because “the subject matter is complex or technical and involves agency expertise.”<sup>172</sup>

The decision to pay deference to the Health Department’s findings left little room for the North Dakota Supreme Court to consider the evidence, and to overrule the decisions made by the district court and the Department of Health.<sup>173</sup> With such a low standard of review, it may be argued that Manitoba’s and Minnesota’s arguments essentially fell on deaf ears.<sup>174</sup> Though the proper standard of review was applied, the question to be asked is, at what cost? The decision in *People* deferred not only to the separation of powers doctrine and to the findings of an administrative agency, in the form of the North Dakota Department of Health, but also to the pressure applied by North Dakota Governor John Hoeven.<sup>175</sup> However, such an interpretation left little recourse for Manitoba, Minnesota, and the environmental interest groups.<sup>176</sup> Their last hope seemed to be either a highly unlikely federal review by the EPA, or an improbable IJC review under the Boundary Waters Treaty of 1909.<sup>177</sup>

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170. See N.D. CENT. CODE § 28-32-46 (2005) (explaining that the “preponderance of evidence” standard applies to all findings made by an administrative hearing officer in an adjudicative proceeding); see also N.D. CENT. CODE § 23-01-23. Section 23-01-23 provides that:

A permit hearing conducted for purposes of receiving public comment or an investigatory hearing conducted under chapters 23-20.1, 23-20.3, 23-25, 23-29, 61-28, and 61-28.1 is not an adjudicative proceeding under chapter 28-32 and is not subject to the requirements of chapter 54-57 [which requires a preponderance of evidence standard].

*Id.* (emphasis added).

171. Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 52, at 6.

172. *People to Save the Sheyenne River*, ¶ 24, 697 N.W.2d at 328.

173. Editorial, *supra* note 1, at 16A.

174. *Id.*

175. Hoeven, *supra* note 53, at A24.

176. Editorial, *supra* note 1, at 16A.

177. McKenna, *supra* note 53, at A27.

#### IV. INTERNATIONAL DISPUTE RESOLUTION: THE HOPE OF TREATY LAW?

There is no uniform statutory environmental regulation like NEPA or the CWA for the resolution of purely international water disputes.<sup>178</sup> Because of this, injured parties in international transboundary disputes must often turn to international treaty law, and more specifically, the Boundary Waters Treaty of 1909.<sup>179</sup> Unlike statutory environmental law, “[i]nternational treaties or conventions are akin to contracts in that they derive their legal force from the consent of the parties.”<sup>180</sup> Though the international portion of the Devils Lake dispute concerns only Canada and the United States, the regulation of international waterways is a source of perpetual disagreement among nations throughout the world.<sup>181</sup> These disputes have almost universally sprung from the lack of recognized processes and procedures for the creation of a uniform set of laws governing international waterways.<sup>182</sup> Though international treaty law exists, its actual practical usefulness in solving disputes is often limited at best.<sup>183</sup>

##### A. THE BOUNDARY WATERS TREATY OF 1909

The Boundary Waters Treaty (BWT) is one of the oldest and most significant treaties in existence between Canada and the United States.<sup>184</sup> In light of the changing conditions of the American economy at the turn of the century due to the Industrial Revolution, the United States and Canada were both concerned with the degradation of water quality caused by increasing amounts of industrial pollution.<sup>185</sup> Naturally, much of the industry was located at or around large bodies of water such as the Great Lakes.<sup>186</sup> To rectify some of the problems caused by water pollution across international borders, treaties like the BWT were created.<sup>187</sup>

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178. Kagan, *supra* note 68, at 40-45.

179. Boundary Water Treaty of 1909, *supra* note 77, 36 Stat. 2448 at Preamble.

180. PERCIVAL ET AL., *supra* note 84, at 1036.

181. See Michael A. Hyman, *Under The Dunabe Canopy: The Future of International Waterway Law*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 355, 355 (1998) (discussing the difficulties that countries all over the world have in developing useful laws to regulate international water conflicts).

182. *Id.*

183. *Id.*

184. Daniel K. DeWitt, Note, *Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, 69 IND. L.J. 299, 302 (1993).

185. *Id.*

186. *Id.* at 302-04; see also Great Lakes Treaty, Sept. 10, 1954, 6 U.S.T. 2836 (discussing the pollution problems arising out of the Great Lakes region, and providing clean-up goals for those problems).

187. Rosenberg, *supra* note 14, at 820.

The Preamble to the Treaty states that it was created to “prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada.”<sup>188</sup> However, in spite of the expansive language, the Treaty’s actual power to effectively regulate water pollution problems has repeatedly been questioned.<sup>189</sup> Additionally, questions relating to the relationship between the injury one country might incur in response to another country’s duty to aid its own citizens remain unclear.<sup>190</sup>

One of the major problems of the BWT has to do with its lack of direct enforceability.<sup>191</sup> One attempt to directly enforce the BWT, as documented in *Soucheray v. Army Corps of Engineers*,<sup>192</sup> involved a dispute similar to that of Devils Lake, where bays and tributaries of Lake Superior overflowed due to the United States Army Corps destruction of a dam, which in turn led to the destruction of private property.<sup>193</sup> The federal district court in *Soucheray* held that state and federal governments cannot sue under the BWT because treaty law cannot violate an American citizen’s constitutional rights.<sup>194</sup> The effect of *Soucheray* was to mandate that all grievances under the BWT are to be exclusively handled by the IJC.<sup>195</sup> Thus, at least on a superficial level, the IJC is a powerful body when considered in terms of its regulatory power over certain transboundary disputes between Canada and the United States.<sup>196</sup>

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188. Boundary Water Treaty of 1909, *supra* note 77, 36 Stat. 2448 at Preamble.

189. DeWitt, *supra* note 184, at 322. DeWitt takes the position that the Treaty is outdated, largely ineffectual, and lacks any real legitimacy. *Id.* at 324.

190. *Id.*

191. *Id.* DeWitt bemoans the power of the Treaty, stating, “[t]he present Treaty makes clear that the Treaty itself and the IJC exist solely for the pleasure of the two governments and not for the people.” *Id.* at 323.

192. 483 F. Supp. 352 (W.D. Wisc. 1979).

193. *Soucheray*, 483 F. Supp. at 353.

194. *Id.* at 357. The federal district court did note an exception that might occur under the BWT when plaintiffs claim there has been a taking of their property in violation of the Fifth Amendment: “If the Treaty of 1909 did in some way effect a taking of plaintiffs’ property, they would have a much stronger case for the necessity of finding a way to grant them relief. However, no taking has occurred here.” *Id.*

195. *Id.*

196. Rosenberg, *supra* note 14, at 825-27.

## B. THE INTERNATIONAL JOINT COMMISSION

Article IV of the BWT created the IJC to oversee all international conflicts involving transboundary water disputes.<sup>197</sup> In theory, this does much in the way of solving conflicts similar to that of Devils Lake.<sup>198</sup> The IJC is a bi-national body comprised of six commissioners, three appointed by the United States and three by Canada.<sup>199</sup> The IJC commissioners describe the function of the IJC as “pursuing the common good of both countries as an independent and objective adviser to the two governments.”<sup>200</sup> Whether or not the IJC has adequately proven its ability to solve conflicts remains in question.<sup>201</sup> There is, however, support for the commission as a useful scientific body, just not as a decision making one.<sup>202</sup>

The BWT endorses two means by which the countries can address disputes with each other: (1) submission to arbitration by the IJC; or (2) a reference for the opinion of the IJC.<sup>203</sup> A binding ruling can be obtained by arbitration for either party, but the submission to arbitration may only be made upon the consent of both the United States and Canada.<sup>204</sup>

Manitoba has argued for an IJC overview of the entire Devils Lake project.<sup>205</sup> However, North Dakota and the federal government have not given their full consent for this type of review.<sup>206</sup> Manitoba has argued that

197. Boundary Water Treaty of 1909, *supra* note 77, 36 Stat. 2448 at Article VII.

198. Rosenberg, *supra* note 14, at 825-27.

199. *Id.*

200. INT’L JOINT COMM’N, HANDBOOK ON ORIGIN, MANDATE, FUNCTIONS, STRUCTURE, PROCEDURES, POLICIES, PRACTICES AND RESPONSIBILITIES 4 (2000). Article VIII of the BWT explains that the IJC is to oversee the precedence of uses:

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

- (1) Uses for domestic and sanitary purposes;
- (2) Uses for navigation, including the service of canals for the purpose of navigation;
- (3) Uses for power and for irrigation purposes.

Boundary Water Treaty of 1909, *supra* note 77, 36 Stat. 2448 at Article VIII.

201. DeWitt, *supra* note 184, at 308, 313.

202. *Id.* at 310.

203. *Id.* at 308. DeWitt explains that much of the IJC’s power comes from Article X of the BWT: “If the two countries *both* give their consent, issues can be handed to the IJC for binding arbitral determination. This time, if a tie results, reports are sent to the two governments and then an umpire is chosen. The umpire has the power to render a final decision.” *Id.* (emphasis in original).

204. *Id.*

205. McKenna, *supra* note 53, at A27.

206. Hoeven, *supra* note 53, at A24.

the IJC should be allowed to arbitrate under the premise that the Red River clearly qualifies as a navigable water flowing across the international boundary, thus falling under the jurisdiction of the BWT.<sup>207</sup> Under this rationale, the United States is bound by the BWT to not allow any pollution to injure the health or property in Manitoba.<sup>208</sup> The problem then becomes determining how to accommodate international concerns associated with projects in the context of larger political and legal processes.<sup>209</sup> Up until the August 2005 agreement,<sup>210</sup> neither North Dakota nor Manitoba appeared to put much faith into the negotiation process.<sup>211</sup> Instead, both parties seemed to see their roles as limiting the scope of the negotiations so as not to allow them to have too great an effect on state and provincial interests.<sup>212</sup>

## V. STATE VERSUS STATE CONFLICT RESOLUTION

Transboundary disputes on a purely inter-state level pose altogether different problems and solutions in comparison to an international dispute.<sup>213</sup> International treaties like the BWT obviously have no effect on the dispute between North Dakota and Minnesota, at least on a purely state level.<sup>214</sup> However, much like an international dispute, North Dakota and Minnesota are still confined to federal environmental law as mandated by the EPA, and more specifically, the CWA permit system that exists between the EPA and the individual states.<sup>215</sup> Generally, the federal government, in the form of the EPA, has the final authority over all environmental law questions.<sup>216</sup> This is because states cannot pass environmental regulations

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207. McKenna, *supra* note 53, at A27.

208. *Id.*; *see also* Boundary Water Treaty of 1909, *supra* note 77, 36 Stat. 2448 at Article II (explaining the rights and remedies held by both countries).

209. Hoeven, *supra* note 53, at A24.

210. Press Release, *supra* note 9, at 2.

211. *See* McKenna, *supra* note 53, at A27 (discussing Manitoba's view concerning the Devils Lake dispute). *But see* Hoeven, *supra* note 53, at A24 (discussing North Dakota's view concerning the Devils Lake dispute). The respective government officials of both North Dakota and Manitoba recognize that there is a substantial problem, and that North Dakota needs to do something to help its citizens. McKenna, *supra* note 53, at A27. However, both sides have historically disagreed on the solution to that problem. *Id.*

212. *See* Rebuffoni, *supra* note 8, at 22A (explaining that the Devils Lake agreement came at the end of fourteen years of conflict, and only two months after the final decision in *People*).

213. Siros, *supra* note 93, at 288.

214. *Id.* at 303.

215. *See* 33 U.S.C. § 1342 (2000) (explaining the NPDES permit program as it applies to individual states).

216. *Id.* § 1342(b).

that are binding over the actions of other states or nations.<sup>217</sup> Thus, states harmed by transboundary pollution from other states might choose to look to other remedies other than direct CWA regulation.<sup>218</sup> Nuisance and trespass actions were two formerly relied upon solutions, but, as we have seen above, common law tort actions have been restricted by recent court decisions.<sup>219</sup>

#### A. HISTORICAL COMMON LAW REMEDIES

Prior to the landmark environmental legislation passed in the 1970s, common law, and more specifically nuisance and trespass torts, was the primary resource for transboundary dispute resolution in the United States legal system.<sup>220</sup> Nuisance<sup>221</sup> and trespass law<sup>222</sup> have a long history, stemming from a body of law whose definition could essentially be reduced to invasions of interests in the use and enjoyment of land.<sup>223</sup> Early nuisance law held actors strictly liable when their actions interfered with property rights held by others,<sup>224</sup> which was a precursor to the strict liability mandated by the CWA today.<sup>225</sup>

In a state-level dispute, public rather than private nuisance law most often comes into play.<sup>226</sup> An interesting example of an early common law

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217. See Siros, *supra* note 93, at 288 (stating that “[t]his is a result of: (1) state sovereignty; and (2) federal preemption of state environmental laws”).

218. *Id.*

219. *Id.* at 288-89.

220. *Id.* at 288-92.

221. See RESTATEMENT (SECOND) OF TORTS: NUISANCE § 40 (1965) (explaining the historical and common law evolution of the tort doctrine of nuisance as it relates to trespass).

222. See *id.* § 159 (imposing liability for “Intrusions Upon, Beneath, and Above Surface of Earth”).

223. *Id.* § 40.

224. PERCIVAL ET AL., *supra* note 84, at 73.

225. 33 U.S.C. § 1251 (2000).

226. See RESTATEMENT (SECOND) OF TORTS § 821B (1979) (defining “Public Nuisance”).

The Restatement provides:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

*Id.*

public nuisance action is the 1923 case *North Dakota v. Minnesota*,<sup>227</sup> where the United States Supreme Court used trespass law as its rationale for determining that Minnesota did not pollute North Dakota's waters.<sup>228</sup> North Dakota sought to stop Minnesota from continuing to use a system of drainage ditches constructed by Minnesota and to receive monetary compensation for damages to North Dakota farms, public roads, and bridges caused by the overflow of a river allegedly due to the construction and operation of the ditches.<sup>229</sup> The Supreme Court held that Minnesota was not responsible for any overflow or damage to North Dakota because, although damage did occur, Minnesota's first obligation was to its own citizens.<sup>230</sup> At this point in the history of American jurisprudence, the general rationale was to allow individual states to help their own citizens, even at the expense of neighboring states.<sup>231</sup> It was under this rationale that the Supreme Court found that Minnesota was not liable for any flooding damage to North Dakota.<sup>232</sup>

This early decision employing common law nuisance and trespass torts is a telling example of the Supreme Court's early rationale involving state-level transboundary disputes.<sup>233</sup> Much like the North Dakota Supreme Court in *People*,<sup>234</sup> the United States Supreme Court in *North Dakota v. Minnesota* paid deference to the opinions and decisions of experts in the field.<sup>235</sup>

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227. 263 U.S. 365 (1923).

228. *North Dakota*, 263 U.S. at 388.

229. *Id.* at 371-72.

230. *Id.* at 388.

231. PERCIVAL ET AL., *supra* note 84, at 73.

232. *North Dakota*, 263 U.S. at 388.

233. *See* PERCIVAL ET AL., *supra* note 84, at 73 (explaining that "[t]he doctrine of public nuisance was used most frequently in the early [English] common law to prosecute those who obstructed public highways or encroached on the royal domain").

234. *People to Save the Sheyenne River v. N.D. Dep't of Health*, 2005 ND 104, ¶ 38, 697 N.W.2d 319, 333. The North Dakota Supreme Court's "arbitrary, capricious, or unreasonable" standard of review paid deference to the North Dakota Department of Health and Water Commission for decisions that require complicated scientific and technical knowledge. *Id.* ¶ 24, 697 N.W.2d at 329; *see also North Dakota*, 263 U.S. at 388. Chief Justice Taft explained the United States Supreme Court's reasoning:

The conclusion we have come to on the main issue of fact that Minnesota is not responsible for the floods of which complaint is made, makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two States in a possible effort by either or both to remedy existing conditions in this basin.

*Id.* (emphasis added).

235. *North Dakota*, 263 U.S. at 388.

B. CONTEMPORARY DEVELOPMENTS: NUISANCE ACTIONS IN LIGHT OF THE CLEAN WATER ACT

When the federal government enacted the CWA, common law tort actions lost a great deal of their former significance in remedying state versus state disputes.<sup>236</sup> In *International Paper Co. v. Ouellette*, the United States Supreme Court effectively abolished the traditional state common law nuisance or trespass actions seen in *North Dakota v. Minnesota*, in favor of water pollution being regulated by the CWA.<sup>237</sup>

In *Ouellette*, the issue before the Court was whether the CWA preempted a state's use of its own common law definitions of nuisance to impose liability on another state's point source.<sup>238</sup> The State of New York had granted a permit to the International Paper Company to discharge pollutants into a waterway that crossed the boundary between New York and Vermont.<sup>239</sup> The issuance of the permit would have resulted in pollution being released into the waterway, subsequently affecting the quality of the water entering Vermont.<sup>240</sup> As a result, interested parties in Vermont attempted to utilize Vermont's nuisance common law to impose liability on the New York point source.<sup>241</sup>

The Supreme Court in *Ouellette* examined whether Vermont's common law action had any role in light of the regulatory scheme of the CWA.<sup>242</sup> The Court noted that, as was decided in *City of Milwaukee v. Illinois*,<sup>243</sup> the CWA had established a sophisticated system of water pollution regulation to be used in transboundary water disputes.<sup>244</sup> Keeping this in mind, the *Ouellette* Court reasoned that the affected state's position in the permit

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236. Siros, *supra* note 93, at 291-92.

237. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 484-86 (1987); see *City of Milwaukee v. Illinois*, 451 U.S. 304, 304-05 (1981) (serving as the precursor decision for *Ouellette*); see also *Arkansas v. Oklahoma*, 503 U.S. 91, 91 (1992). In *Arkansas v. Oklahoma*, Oklahoma challenged the permit before the EPA on grounds that the discharge violated Oklahoma's water quality standards. 503 U.S. at 91. The Court held that an affected state's only recourse was to apply to the EPA administrator, who then had the discretion to disapprove the permit if he concluded that the discharges would have an undue impact on interstate waters, pursuant to the Clean Water Act. *Id.* at 111-14. The Supreme Court stated that the CWA made it clear that affected states occupy a subordinate position to source states in the federal regulatory program. *Id.*

238. *Ouellette*, 479 U.S. at 483.

239. *Id.* at 483-84.

240. *Id.* at 484.

241. *Id.*

242. *Id.* at 484-85.

243. 451 U.S. 304 (1981).

244. *Ouellette*, 479 U.S. at 492 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)). The Supreme Court in *City of Milwaukee* concluded that with the passage of the CWA, Congress intended the EPA to handle all pollution regulation, leaving no room for federal common law nuisance actions. *City of Milwaukee*, 451 U.S. at 310.

system was subordinate to that of the state who applied for a permit.<sup>245</sup> In its explanation, the Supreme Court concluded that an “application of an affected State’s law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system.”<sup>246</sup> Thus, Vermont’s common law could not be used to impose liability on a New York point source.<sup>247</sup>

Under the holding of *Ouellette*, it is clear that Minnesota can no more control North Dakota’s permitting program through its own nuisance laws than North Dakota could pass a law directly taxing Minnesota’s residents.<sup>248</sup> Within a state’s borders, each state determines its own rules of law and policies of social and industrial regulation.<sup>249</sup> Thus, many injured parties appear to believe that nuisance law has been rendered obsolete by the § 1342 NPDES permit program, and that any state looking for recourse in water pollution disputes would be wise to look only to federal statutory law.<sup>250</sup> However, the ruling in *Ouellette* left open the door for a petitioner to bring a nuisance complaint under the law of the state which had applied for, and was granted, a NPDES permit.<sup>251</sup> Thus, in the Devils Lake scenario, Minnesota and Manitoba still had the option of bringing a nuisance claim under North Dakota law.<sup>252</sup> The question becomes: Why didn’t they? Although the answer to this question is not entirely clear, perhaps it can be explained by the general reluctance of parties to bringing nuisance claims after the *Ouellette* decision.<sup>253</sup> This may explain why a nuisance suit was not brought by any of the suing parties in *People*.<sup>254</sup>

Despite the apparent reluctance to utilize another states’ nuisance law, there are scholars who argue in favor of using nuisance laws as a viable remedy to transboundary water pollution.<sup>255</sup> Indeed, the United States

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245. *Ouellette*, 479 U.S. at 491.

246. *Id.* at 496.

247. *Id.* at 497.

248. Siros, *supra* note 93, at 288.

249. *See* U.S. CONST. amend. XIV, § 2 (granting states the right to govern their own citizens).

250. *Id.*

251. *Ouellette*, 479 U.S. at 481-85.

252. *Id.*

253. *See* Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 52, at 4-10 (failing to argue for a nuisance law remedy).

254. *People to Save the Sheyenne River v. N.D. Dep’t of Health*, 2005 ND 104, ¶ 7, 697 N.W.2d 319, 324.

255. Ann M. Lininger, *Narrowing the Preemptive Scope of the Clean Water Act as a Means of Enhancing Environmental Protection*, 20 HARV. ENVTL. L. REV. 165, 196-98 (1996) (arguing that “[c]urrent societal interest in the property rights movement, state sovereignty, accountability, and regulatory efficiency have been used to undermine environmental protection at the federal level. However, incorporating these same values into a revised approach to preemption analysis

Supreme Court in *Ouellette* specifically held that nuisance law may still be used in cases of environmental pollution.<sup>256</sup> In theory, North Dakota's nuisance law<sup>257</sup> provides the same potential remedy for pollution complaints as does Minnesota's nuisance law.<sup>258</sup> Although the appellants in *People* did not choose to bring a nuisance claim against North Dakota, their decision not to do so does not preclude other interested parties from choosing to act differently.<sup>259</sup> Therefore, although nuisance law after *Ouellette* appears to be disfavored, nuisance law's mandate of strict liability, and its potential for injunctive relief, make it a viable and perhaps powerful tool for transboundary water pollution disputes.<sup>260</sup>

## VI. THE AGREEMENT AND ITS IMPLICATIONS

The August 2005 agreement between Manitoba and North Dakota seems to indicate an end to the Devils Lake dispute.<sup>261</sup> Barring an improbable review by the IJC, Manitoba and Minnesota have little choice but to accept the decision handed down in *People*.<sup>262</sup> For this reason, Manitoba has tried to make the best of the situation by agreeing with North Dakota to cooperate in the design and construction of the Sheyenne River outlet.<sup>263</sup>

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could enhance environmental protection . . ."); see also Kathleen Roth, Note, *A Landowner's Remedy Laid to Waste: State Preemption of Private Nuisance Claims Against Regulated Pollution Sources*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 401, 423 (1996) (arguing that "[t]o apply the permit as an across-the-board preclusion of private nuisance remedies unfairly imposes the burden of industry discharges on the parties harmed by this pollution and invites abuse from unscrupulous sources").

256. Lininger, *supra* note 255, at 193; Roth, *supra* note 255, at 423.

257. See N.D. CENT. CODE § 42-01-01 (2005) (defining nuisance).

A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:

1. Annoys, injures, or endangers the comfort, repose, health, or safety of others;
2. Offends decency;
3. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or
4. In any way renders other persons insecure in life or in the use of property.

*Id.*; see also N.D. CENT. CODE § 42-01-07 (2005) (explaining that the potential remedies for public nuisance complaints are: "1. Indictment; 2. Filing an information; 3. Bringing a criminal action before a district court judge; 4. A civil action; or 5. Abatement").

258. See Roth, *supra* note 255, at 420-23 (arguing that nuisance law is still a viable remedy for injured parties).

259. *Id.*

260. *Id.*

261. Press Release, *supra* note 9, at 2.

262. Editorial, *supra* note 1, at 16A.

263. Press Release, *supra* note 9, at 2.

The agreement is not completely without merit for Manitoba, for it contains a certain number of concessions made by North Dakota.<sup>264</sup> For example, the outlet will use a more sophisticated filtration system by incorporating a rock and gravel filter to clock the release of “macroscopic aquatic nuisance species.”<sup>265</sup> Furthermore, the IJC has created the International Red River Board to develop and implement a shared-risk management strategy for the greater Red River Basin, with the goal of creating an “early detection and monitoring system for water quality and aquatic nuisance species throughout the Basin.”<sup>266</sup> Additionally, Manitoba will be allowed to construct a dike on the Red River near the international border at Pembina, North Dakota.<sup>267</sup> The dike will “provide for water monitoring downstream to help prevent invasive species, nitrogen and phosphorus from crossing the border.”<sup>268</sup> Finally, North Dakota and Manitoba have agreed to:

Share and review prior scientific work studying the potential for “aquatic nuisance species,” such as invasive fish or plants, and parasites; [j]ointly conduct a rapid bio-assessment of the Lake by 20 biologists from the U.S. and Canada to enhance our collective understanding of Lake organisms; [and] [d]evelop shared strategies to protect the broader Red River Basin from future risk of aquatic nuisance species that might pose a significant risk to the Basin.<sup>269</sup>

Clearly, the agreement has helped to assuage some of the most embattled issues and does result in some tangible benefits for Manitoba.<sup>270</sup>

As the agreement demonstrates, cost-benefit and risk-benefit analyses have become a standard part of environmental policy decisions.<sup>271</sup> In order to determine whether a proposed governmental regulation may actually lead to the improvement of public welfare, it is often necessary to subject the policy to an analysis of the overall benefits of the proposed regulation in comparison with any possible injurious effects the initiative could have on the environment.<sup>272</sup> On one hand, we can weigh the social benefit of the

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264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Krauss, *supra* note 9, at 1.

269. Press Release, *supra* note 9, at 1.

270. *Id.* *But see* Editorial, *supra* note 1, at 16A (discussing the State of Minnesota’s lingering concerns and feelings of exasperation at not being included in the negotiation process).

271. PERCIVAL ET AL., *supra* note 84, at 29.

272. *Id.*

policy, and on the other hand, we can examine the environmental cost.<sup>273</sup> Somewhere in the middle lies economic cost.<sup>274</sup> Naturally, trade-offs must always be made.<sup>275</sup>

The ramifications of the Devils Lake dispute have long-term consequences for not only the immediate residents of North Dakota, but also for other transboundary disputes on a national and global scale.<sup>276</sup> In the Devils Lake scenario, it is improbable that anyone would argue that the federal government and North Dakota do not have an obligation to help the citizens of North Dakota to cope with the massive structural and monetary damage caused by the flooding.<sup>277</sup> However, it may also be argued that it was the residents of North Dakota who encroached on the lake and not vice versa.<sup>278</sup>

## VII. RECOMMENDATIONS

### A. INCREASE THE SCOPE AND ENFORCEMENT AUTHORITY OF THE BOUNDARY WATERS TREATY

As should be clear from this Note, a certain body of treaty law already exists on these points; however, its effectiveness is noticeably lacking.<sup>279</sup> Without more powerful treaty law, the resolution of international water disputes becomes enmeshed in a slew of negotiations and arbitrations, often without real solutions.<sup>280</sup> One answer to this dilemma is to increase the authority of the BWT.<sup>281</sup> This could be accomplished by requiring that all international water disputes be automatically subject to an IJC review.<sup>282</sup>

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273. *Id.*

274. *Id.*

275. Rosenberg, *supra* note 14, at 858.

276. Siros, *supra* note 93, at 288.

277. See Krauss, *supra* note 19 at 17 (discussing the August 2005 agreement).

278. See FEMA Report, *supra* note 20 (discussing the need for a federal flood insurance program to help home owners relocate their homes away from the flooding lake which has long been recognized as having little or no natural drainage basin).

279. See DeWitt, *supra* note 184, at 323 (emphasizing the need for changes to the BWT). DeWitt calls for two changes to make the Boundary Waters Treaty of 1909 more effective:

The first is to rewrite the Treaty in a way that fundamentally changes its nature as a tool of the governments to being an “environmental pledge” to the people. This first proposal gives no new specific power to the IJC, but for the reasons set out below, will substantially increase the IJC’s influence. The second proposal is to establish a “science judgment board” to settle scientific discrepancies and encourage scientific research throughout the basin.

*Id.*

280. *Id.*

281. *Id.*

282. *Id.*

Additionally, making the IJC more of a regulatory authority would solve many problems because it would eliminate the need for appeals for review, via either forced diplomacy or polemical editorials in national newspapers like the *New York Times*.<sup>283</sup> Finally, because the BWT was enacted in 1909, an argument can and has been made that it is outdated.<sup>284</sup> Perhaps it is time for the respective governments of the United States and Canada to discuss potential changes to the Treaty that would enable the governments to more ably cope with transboundary disputes in the twenty-first century.<sup>285</sup>

B. INCREASE THE BURDEN ON THE PERMIT OPERATOR AND/OR  
OVERSIGHT BY THE EPA

The federal government should not completely ignore international transboundary water disputes merely by delegating authority to the states or provinces, essentially washing its hands of the matter.<sup>286</sup> Under the § 1342 permit program, the EPA is required to work with the states in implementation and regulation under the permit.<sup>287</sup> This is the goal of a system of cooperative federalism.<sup>288</sup>

In both international and domestic law, therefore, a general failure to develop an effective central strategy for regulating transboundary pollution is manifest.<sup>289</sup> Case-by-case approaches based on international law or American common law have failed to address the problem in a rigorous and useful manner.<sup>290</sup> As a consequence, no specific legal norms have been

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283. See Hoeven, *supra* note 53, at A24 (discussing the dispute); McKenna, *supra* note 53, at A27 (discussing the dispute). Crossfire in the media, such as that between the Ambassador of Manitoba, McKenna, and North Dakota Governor John Hoeven, is a telling example of the lengths to which government officials from competing countries must go to in light of the lack of powerful dispute-solving treaty law. See Hoeven, *supra* note 53, at A24 (discussing the dispute); McKenna, *supra* note 53, at A27 (discussing the dispute). Additionally, the publication of editorials in the *New York Times* puts the Devils Lake issue into the spotlight on an international level, a ploy which is sure to catch the attention of government officials like United States Secretary of State Condoleezza Rice, who might be swayed to lobby for an IJC review. See Hoeven, *supra* note 53, at A24 (discussing the dispute); McKenna, *supra* note 53, at A27 (discussing the dispute).

284. DeWitt, *supra* note 184, at 323.

285. *Id.*

286. Siros, *supra* note 93, at 288.

287. 33 U.S.C. § 1342(b) (2000).

288. Siros, *supra* note 93, at 311. As Siros points out, there is some hope under recent case law that the EPA may be taking steps to become more involved in the permit process; however, he expresses skepticism: "Unfortunately, this in and of itself, is not enough. The discretion granted the EPA should be restricted, and when an affected state can show a significant interference with a water . . . quality standard, the EPA should be required to take action." *Id.*

289. *Id.*; see DeWitt, *supra* note 184, at 302 (discussing the problems of the current American system of cooperative federalism).

290. DeWitt, *supra* note 184, at 302.

created.<sup>291</sup> One solution is to include more state and province representatives in the international negotiations.<sup>292</sup>

C. REQUIRE THAT ALL STATE IMPLEMENTED CWA PERMITS BE ISSUED ONLY AFTER AN ADJUDICATIVE HEARING HAS BEEN HELD

Requiring that every NPDES permit, in terms of those permits issued by state agencies such as the North Dakota Department of Health in *People*, be issued only after an adjudicative proceeding has been held, would ensure that all contested viewpoints are satisfactorily considered.<sup>293</sup> Perhaps the principal argument in favor of requiring an adjudicative proceeding for all issuances of NPDES permits is that the higher “preponderance of the evidence” standard of judicial review would necessarily be applied by appellate courts when reviewing an agency’s decision to grant a permit.<sup>294</sup> This argument has persuasive merit as explained by the Court in *People*, who found that under the North Dakota Administrative Procedures Act, the Act generally defines the issuance of permits to require an adjudicative proceeding.<sup>295</sup> However, the CWA, as applied to North Dakota through North Dakota Century Code section 23-01-23, circumvents the Administrative Procedure Act’s requirement, and instead allows states to grant permits through informal rulemaking where the “arbitrary, capricious or unreasonable” standard of review is to be applied to all agency decisions made within their discretion and at the behest of Congress.<sup>296</sup>

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291. *Id.*

292. *Id.*

293. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453-60 (1989) (arguing that the delegation doctrine of the United States Constitution does not permit the current level of deference that courts give to most administrative agency decisions).

294. See N.D. CENT. CODE § 28-32-46 (2005) (requiring that appellate courts utilize the “preponderance of the evidence” standard for all adjudicative proceedings held before an administrative agency).

295. *People to Save the Sheyenne River v. N.D. Dep’t of Health*, 2005 ND 104, ¶ 13, 697 N.W.2d 319, 325.

296. *Id.* ¶ 19, 697 N.W.2d at 327. The North Dakota Supreme Court explained their decision to use the “arbitrary and capricious standard of review,” stating that:

Section 23-01-23, N.D.C.C., was enacted in 1995 to specifically preclude application of the ‘contested case’ procedural requirements of the Administrative Agencies Practice Act to environmental permit hearings conducted for the purpose of receiving public comment, because the potential cost requirements for contested case procedures for those type of permit hearings would be ‘astronomical’.

*Id.* (citing Hearing on Senate Bill 2154 before Senate Judiciary Committee, 54th N.D. Legis. Sess. (Jan. 11, 1995) (testimony of William J. Delmore, Assistant Attorney General for Environmental Section of Health Department)).

Therefore, in *People*, the North Dakota Supreme Court correctly applied the “arbitrary, capricious or unreasonable” standard of review to the North Dakota Department of Health’s decision to issue the permit without an adjudicative proceeding, and the Court thereby ensured not to offend the North Dakota Legislature or North Dakota Governor John Hoeven.<sup>297</sup> The Department of Health was only required to adhere to informal rulemaking procedures as required by section 23-01-23,<sup>298</sup> and, therefore, the agency’s notice of and conducting of the two public hearings was found to be sufficient.<sup>299</sup>

However, Manitoba and the public interest groups appealed the suit to the North Dakota Supreme Court to be heard on its merits, which, it may be argued, was not done.<sup>300</sup> This is not to say that courts should take it upon themselves to become policy makers; it is only to suggest that perhaps Congress was either not clear enough, or too permissive, in delineating which specifications need to be met when applying for and implementing the CWA permit system.<sup>301</sup> However, in the main, the courts are not to blame in this matter.<sup>302</sup> To be fair, a lobbying effort to change the standard of review might make more sense.<sup>303</sup> Perhaps the myriad of environmental special interest groups like those in *People* could take up this cause.<sup>304</sup>

#### D. REVISIT THE ORIGINAL RATIONALE FOR NUISANCE LAW

Pollution that originates in one state and spills over into another is very difficult for either jurisdictional authority to regulate effectively.<sup>305</sup> The affected state may not be able to obtain jurisdiction over actors in the source state, or, if it can obtain jurisdiction, the affected state may have difficulties

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297. *Id.* ¶ 19, 27 697 N.W.2d at 327, 330.

298. *See* N.D. CENT. CODE § 23-01-23 (2005) (providing that a permit hearing is not an adjudicative hearing).

299. *People to Save the Sheyenne River v. N.D. Dep’t of Health*, 2005 ND 104, ¶ 20, 697 N.W.2d 319, 327.

300. Editorial, *supra* note 1, at 16A; *see* N.D. CENT. CODE § 28-32-46 (2005) (explaining that on appeal from an adjudicative proceeding made before an administrative agency, courts are to scrutinize the record made before the agency to determine if the agency’s decision was lawful).

301. *See* Farina, *supra* note 293, at 453-60 (arguing that complete deference should not be given to an administrative agency when Congress’s intention behind the statute is ambiguous).

302. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 550-60 (1985) (discussing the benefits of judicial deference to administrative agencies).

303. *Id.*

304. *See id.* at 574-75 (arguing that legislators, as opposed to the courts, have gained in-depth knowledge of the reasoning behind the enactment of a statute which renders them more qualified to define the particular meaning of their own words).

305. *See* Siros, *supra* note 93, at 288-90 (offering a useful discussion of the problems that often arise in transboundary disputes).

enforcing its statutes.<sup>306</sup> Because of the shift in regulation stemming from the permit process in the CWA, states like Minnesota appear to no longer see using nuisance law as a viable option for this type of transboundary water dispute.<sup>307</sup> However, Minnesota and Manitoba still had the option of bringing a claim under North Dakota's nuisance laws.<sup>308</sup> The United States Supreme Court opinion in *Ouellette* left open the opportunity for injured downstream parties, or in the case at hand, Minnesota and Manitoba, to utilize a tort law nuisance action.<sup>309</sup> For whatever reason, and despite the availability of North Dakota's nuisance laws, many parties appear not to believe that nuisance law is a viable solution to transboundary water disputes.<sup>310</sup> However, there are scholars who insist that, despite the modern use of federal preemption through federal statutes like the CWA, there is still potential for a rebirth of nuisance law being a viable remedy for injured downstream parties.<sup>311</sup> Public nuisance law was used for hundreds of years in English common law jurisprudence, and subsequently adopted by American courts as a means for regulating water disputes.<sup>312</sup> Though the CWA essentially mandates strict liability, true liability of polluters becomes muddled in a permit system which prevents some, but not all, discharges of polluting waste.<sup>313</sup>

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306. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 481-85 (1987).

307. *See* Siros, *supra* note 93, at 289-92 (explaining the demise of nuisance law as an effective regulatory tool). The amicus brief filed by the Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, and the Minnesota Attorney General makes no mention of nuisance law. Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 55, at 4.

308. *See* Roth, *supra* note 255, at 423 (explaining that the federal CWA preempts only nuisance laws of the complaining downstream state, but not the upstream point-source state).

309. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 484-86 (1987).

310. *See* Brief for Minnesota Department of Natural Resources et al. as Amici Curiae Supporting Petitioners, *supra* note 52, at 4.

311. *See* Lininger, *supra* note 255, at 195-98 (discussing federal preemption of state laws under the CWA); *see also* Roth, *supra* note 255, at 420-23 (discussing federal preemption of state laws under the CWA).

312. Siros, *supra* note 93, at 289.

313. *Id.* at 295-97.

## VIII. CONCLUSION

When the North Dakota Department of Health, in its capacity as an administrative body, carefully adheres to the proper regulations of the EPA-delegated permit system under the CWA, there is no doubt that the State of North Dakota has the legal right to create and use the Sheyenne River outlet to combat the flooding of Devils Lake.<sup>314</sup> The purpose of government is to give citizens a legal outlet to identify problems and create solutions.<sup>315</sup> Sometimes those means come at a cost. As the population grows and humans expand further and further into their environments, there is a point at which man-made reconstruction of natural processes will take its toll.<sup>316</sup> Of course, there is always a cost-benefit analysis to be employed, but time and again, it seems as though the environment sees fewer of the benefits and much more of the cost.<sup>317</sup>

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314. *People to Save the Sheyenne River v. N.D. Dep't of Health*, 2005 ND 104, ¶ 38, 697 N.W.2d 319, 333.

315. PERCIVAL ET AL., *supra* note 84, at 9-24.

316. *Id.*

317. *Id.*

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