North Dakota Law Review

Volume 76 | Number 4 Article 3

2000

A Canadian Perspective on the Devils Lake Outlet: Towards an Environmental Assessment Model for the Management of Transboundary Disputes

Sheryl A. Rosenberg

A CANADIAN PERSPECTIVE ON THE DEVILS LAKE OUTLET: TOWARDS AN ENVIRONMENTAL ASSESSMENT MODEL FOR THE MANAGEMENT OF TRANSBOUNDARY DISPUTES

SHERYL A. ROSENBERG*

I. INTRODUCTION

A. THE CONFLICT

Imagine, if you will, that on one side of an international border, there is a lake which threatens to flood and cause damage to the communities built around it. Over the last few years, high water levels have caused great concern and serious damage to property. A large amount of public funding has been spent by all levels of government to relocate public facilities and protect private property from the effects of the flooding. Residents of the area, exhausted by years of responding to emergency conditions, are anxious to find a long-term solution so that they will not have to wonder each spring whether they will be facing a crisis caused by higher and higher levels on the lake. Government officials release a news bulletin reassuring residents of the region that the government will construct a drainage outlet which will reduce water levels and prevent future flooding.

On the other side of the international border, government officials release their own news bulletins stating that they are taking immediate action to prevent the neighbouring jurisdiction from proceeding with a water diversion plan which, if not stopped in time, could cause irreversible damage in the rivers and lakes which flow through the region. The diverted water would connect a lake which is part of a "closed system" to the larger drainage system with which it has no natural connection.

---

* Sheryl A. Rosenberg practices environmental law at the Winnipeg firm of Thompson Dorfman Sweatman. She graduated from the University of Manitoba School of Law in 1995 and was called to the bar of Manitoba in 1996. Before that she obtained a B.A. in English from the University of Manitoba and a M.S. in Special Education from the University of Wisconsin-Lacrosse. Ms. Rosenberg is the co-author of the chapter on Manitoba Environmental Regulatory Controls in the looseleaf treatise, Butterworth's *Canadian Environmental Law*, second edition. For the last two years, she has been an adjunct instructor at the University of Manitoba School of Law, responsible for developing and teaching the course in environmental law.

The author wishes to express her special gratitude to: her colleague, Kate Murphy, for her support and advice in shaping this research project; Chris Hoeschen, third year law student at the University of North Dakota School of Law, for his invaluable assistance in researching American authorities; and to Robert W. Oleson, Coordinator and Senior Adviser, Transboundary Waters Office of the Manitoba Department of Conservation. Mr. Oleson provided access to the relevant documentary record and generously shared with the author his detailed and comprehensive knowledge of the subject matter.

Because it comes from a closed system, the water is more saline and therefore lower in quality than the water in the larger drainage system. Of even more concern is that it may introduce non-native fish or other organisms to the rivers and lakes which form the larger drainage system. In the worst-case scenario, these non-native biota could decimate the native fish species which support significant commercial and sport fisheries. Government officials are cooperating to oppose the plan, citing as their central concern the fear that transfer of non-native biota would carry with it risks of unpredictable changes in the environment. Unfortunately, the two news bulletins are talking about the very same project.

B. MANITOBA'S CONCERNS ABOUT DEVILS LAKE

Residents of North Dakota and Manitoba will recognize this situation as not imaginary at all, but rather as a simplified description of the conflicting needs and points of view of North Dakota and Manitoba in what has become the all-too-familiar controversy over the proposal to build an outlet from Devils Lake into the Sheyenne River. Near Fargo, North Dakota, the Sheyenne joins the Red River of the North, which flows northward into Manitoba to empty into Lake Winnipeg, the tenth largest fresh water lake in the world.[1] Lake Winnipeg, in turn, connects through the Nelson River system to Hudson Bay. Manitoba rates "[t]he total direct and indirect annual value of the Lake Winnipeg and Red River commercial and sport fishery to the Manitoba economy [a]s nearly [50 million dollars (Canadian)]."[2]

The Province of Manitoba takes the position that the addition of Devils Lake water to the Red River system poses a potential threat to these commercial and sport fisheries. Manitoba argues that the water quality of Devils Lake, even at best, is much lower than the water quality in the Red River and Lake Winnipeg and that the concentrations of certain water quality parameters exceed relevant water quality standards.[3]

In addition, Manitoba expresses concern about the potential for biota transfer from Devils Lake to the rest of the Red River basin, citing statistics which indicate that there has been no significant exchange of water between the Devils Lake sub-basin and the rest of the Red River

---

1. *See* Information Bulletin, Government of Manitoba, Devils Lake Outlet—A Comparison of Manitoba and North Dakota Views, (Apr. 3, 2000), *available at* http://www.gov.mb.ca/environ/pages/news/devlake/ib000403.html.

2. *Id.*

3. *See* Government of Manitoba, *Manitoba's Concerns: Garrison—Dakota Water Resources Act and Devils Lake Outlet*, *available at* http://www.gov.mb.ca/environ/pages/news/devlake/backgr.html [hereinafter *Manitoba's Concerns*]; *see also* U.S. Army Corps of Engineers, St. Paul District, *Flood Control, Red River of the North: Devils Lake Levee, N.D.*, *available at* http://www.mvp.usace.army mil/project_info/dev_lake/levee_report/ [hereinafter *Devils Lake Levee*].

basin for about 1,800 years. Manitoba's concern is that during this time, some organisms, and in particular, fish diseases and other pathogens, may have become established in Devils Lake, which are not present in the remainder of the Red River Basin.[4]

A specific example of this concern is the risk that striped bass, a non-native species stocked in Devils Lake during the late 1970s, may have survived. Striped bass would have the potential to do well in the Red River basin and, being aggressive competitors, they could damage the valuable sport and commercial fish stocks in the Red River and Lake Winnipeg. Manitoba, in its position papers, points to the damage which may be done by the unintended transfer of foreign biota from one basin to another and the efforts being made to cope with the issue all over the world, using as an example the accidental introduction of zebra mussels to North America, which is said to cause about $3 billion in damages each year to the Great Lakes region alone.[5]

C. THE INTERNATIONAL DISPUTE

It is not only Manitoba and Canada who oppose construction of a Devils Lake outlet. They are joined by a variety of American interests, including environmental public interest groups seeking to protect wildlife and other natural resources, neighbouring states with opposing interests and landowners affected by the projects. An example is Minnesota, the downstream state which shares the Red River as its border with North Dakota.[6] Minnesota is supported by the National Wildlife Federation which advances numerous technical objections to the need for and effects of the project, as well as to its economic efficacy.[7] How best then

4. *See Manitoba's Concerns, supra* note 3.

5. *See* Information Bulletin, *supra* note 1; *Manitoba's Concerns, supra* note 3.

6. *See* Letter from Kent Lokkesmoe, Director, Department of Natural Resources, Waters for the State of Minnesota, to U.S. Army Corps of Engineers, Omaha District (Sept. 10, 1999) (on file with author); Letter from Rodney W. Sando, Commissioner, Minnesota Department of Natural Resources, to The Honorable Paul Wellstone, United States Senate (Apr. 4, 1997) (on file with author).

7. *See* Letter from Steve Blomeke, Center Director, National Wildlife Federation, to Rodney Sando, Commissioner, Minnesota Department of Natural Resources (Apr. 30, 1997) (on file with author); *see also* Letter from Neil Tangen, President, People to Save the Sheyenne, to Members of Congress (Mar. 15, 2000); Memorandum from People to Save the Sheyenne to North Dakota Citizens, Newspapers, Public Officials, National Friends (Nov. 19, 1999). Part of the grounds of attack by the National Wildlife Federation and others involve the allegation that the rising levels of the lake are caused in part by drainage of wetlands in the upper basin of the Devils Lake area. These groups seek to advance the environmental goal of preservation and restoration of wetlands. They also point out potential effects of Devils Lake water on fish in the Sheyenne River and the other wildlife it supports. These issues form the basis for concerns by the National Wildlife Federation, the National Audubon Society and by People to Save the Sheyenne. See Eric M. Bryn, Comment, *Through a Biodiversity Looking-Glass: An Analysis of the Devils Lake Basin Water Management* Plan, 1 GREAT PLAINS NAT. RESOURCES J. 65, 92 (1996), which critiques North Dakota's watershed management plans for the Devils Lake Basin, supporting the concept of basin-wide planning, but criticizing the plan's failure to take account of the effects of the plan on the larger Red River basin.

to tease out the strands of the international issues at play in the story of the Devils Lake dispute?

The international dispute over Devils Lake is complex, involving a wide range of environmental, economic, social and engineering issues overlaid on layers of political, diplomatic and legal processes. Both North Dakota and Manitoba are states in different federal systems and both have complex inter-relationships with their federal governments, which in turn have similarly complex relationships with each other. The history of this political and diplomatic dispute and the problem in international relations which it raises are interwoven with the water and environmental law of all four jurisdictions and with the treaty and other international law which applies to waters flowing across the boundary between our two countries. In addition, the Devils Lake dispute is intimately connected to the international disagreement over the Garrison Diversion project, a story which has been unfolding for more than thirty-five years.

In tracing the history of the development of the project, it becomes clear that decision making has been and will continue to be affected by specific international factors. These include Canadian diplomatic efforts, the requirement to take account of Canadian concerns in environmental assessment studies, the need to consider the rights and duties set out in the provisions of the treaty between our two countries, commonly known as the Boundary Waters Treaty of 1909 (Treaty),[8] and the potential for direct intervention by the International Joint Commission (IJC), the international tribunal created pursuant to the Treaty. This paper will attempt to trace the story of some of these influences and analyze the lessons that may be learned, concluding with a proposal for a legal structure which may be used to manage this international dispute and others like it.

II. THE HISTORY OF THE DEVILS LAKE-GARRISON DISPUTE

A. THE STORY OF DEVILS LAKE

1. *Flooding in the Devils Lake Region*

Lying in semi-arid north-eastern North Dakota, Devils Lake is within the geographical area of the basin of the Red River of the North, but is part of what is known as a "closed basin." A closed basin is a

8. *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., U.S.-Can., 36 Stat. 2448, T.S. No. 548 (entered into force May 5, 1910) [hereinafter Boundary Waters Treaty].

water system which, at its normal levels, has no outlet or connection to a larger system of drainage.[9]

Devils Lake is comprised of coulees, channels and basins which, depending upon the water levels in any given year, may be separated from each other by land or comprise a single lake.[10] With no connection to the larger drainage system, it is subject to variations in level, with extremes at both low and high levels causing significant losses.[11] Because it is a closed system, Devils Lake, like the Great Salt Lake in Utah, tends to be more saline than lakes which have outlets to river systems.

When lake levels are low, the salinity concentration is so great that fish and wildlife are seriously affected and boat access to the lake is cut off, which causes recreation-related income in North Dakota to suffer.[12] High lake levels, on the other hand, result in flood damage. There is no doubt that the people of the Devils Lake region have suffered loss and damage as a result of flooding in recent times. When it reached its highest recorded stage in 1999, Devils Lake had risen about twenty-five feet in seven years and caused over $300 million in flood damage.[13] The recent rise in level has been caused at least in part by a wet cycle in climatic conditions.[14]

In the past, the fluctuating water levels have been seen as two halves of one problem, both of which should be solved by a single management plan. The United States Army Corps of Engineers (the Corps), together with the North Dakota State Water Commission, has a long history of involvement in studying the concerns associated with the rise and fall of Devils Lake. A *Draft Feasibility Study and Environmental Impact Statement* released by the Corps in April of 1988 studied seven flood outlet control plans, each of which involved a release of Devils Lake water to the Sheyenne River,[15] but the North Dakota State Water Commission withdrew its support for the joint project because the study did not also

---

9. *See Devils Lake Levee*, *supra* note 3.

10. *See* U.S. Army Corps of Engineers, *Devils Lake, N.D., Status* (Sept. 7, 2000) <http://www.hq.usace.army.mil/cepa/pubs/devils.htm>.[hereinafter *Devils Lake Status*].

11. *See* U.S. Army Corps of Engineers, *Flood Control: Red River of the North, Devils Lake Basin, North Dakota* <http://www.mvp.usace.army.mil/project%5Finfo/dev%5Flake/basin%5Freport/default.htm> [hereinafter *Flood Control*].

12. *See id.*

13. *See Devils Lake Levee*, *supra* note 3.

14. *See* Bryn, *supra* note 7, at 65.

15. *See Strategies and Actions to Address Devils Lake Flooding*, DEVILS LAKE EMERGENCY OUTLET NEWSLETTER (U.S. Army Corps of Engineers, St. Paul District & North Dakota State Water Comm'n), Mar. 1998, at 4, *available at* http://www.mvp.usace.army.mil/project_info/dev_lake/ NEWSLETTER.PDF.

include a plan for an inlet to Devils Lake.[16] The inlet was seen as necessary to provide for lake stabilization and freshening (that is, reduction of salinity) during low water level periods.

2. *The Connection to Garrison*

In tracing the story of the current dispute back through time, it is at this point that it becomes clear that the story of Devils Lake is intertwined with the story of Garrison, for the most likely source of water to supply such an inlet to Devils Lake has always been Missouri River water re-directed north to Devils Lake through the Garrison Diversion Unit. Canadian authorities have consistently expressed concern about both a Devils Lake outlet and all portions of the Garrison Diversion project which could bring Missouri River water into the Hudson Bay basin. While Canadian opposition would continue to exist even if there were no Garrison Diversion project, the construction at Devils Lake of both an inlet and an outlet would comprise a direct link between the Missouri and Hudson Bay basins, and accordingly, would raise significantly the level of concern about accidental transfer of non-native biota.

From its inception, the Garrison Diversion project has involved plans to bring water across the continental divide separating the Hudson Bay basin (which includes the Souris River and the Red River of the North and its tributaries, including the Sheyenne River) from the Missouri River basin (which includes the James River and its tributaries). These are two separate water drainage systems that support different types of beneficial and harmful organisms.

B. ORIGINS OF THE GARRISON PROJECT

The Garrison Diversion project began its life as a far-reaching plan for flood control and irrigation of lands in the Missouri Basin and for irrigation of lands in the Hudson Bay-Souris-Red River Basin, with the generation of hydro-electric power as an additional benefit.[17] The first

16. *See Flood Control*, *supra* note 11.

17. It was a time in which there was a public commitment to massive engineering projects to be constructed in order to control flooding, put thousands of acres of land under irrigation, and bring electricity to many communities. *See* Robert L. Manley & Jeffrey J. Peterson, *Selected Environmental Law Aspects of the Garrison Diversion Project*, 50 N.D. L. REV. 329, 330-32 (1974); Charlotte K. Goldberg, *The Garrison Diversion Project: New Solutions for Transboundary Pollution Disputes*, 11 MANITOBA L.J. 177, 177-78 (1981) (giving a comprehensive early history of the plans for the Garrison Diversion and the reasons for the project); *see also* Sanford E. Gaines, *The International Law Aspects of the Garrison Diversion Project*, 4 ENVTL. L. REP. 50085 (Nov. 1974); Comment, *Garrison Diversion Faces New Challenges*, 6 ENVTL L. REP. 10179 (Aug. 1976) (detailing early opposition to the Garrison project).

step was the construction of the Garrison Dam, which flooded many acres of North Dakota land, creating a huge reservoir known as Lake Sakakawea.[18] Construction of Garrison Dam began in 1947 and was completed by 1955.[19] In 1960, the North Dakota Legislature created the Garrison Conservancy District, an administrative agency whose job has been ever since to facilitate development and local administration of the Garrison Diversion Project.[20]

As economic assessments were performed and information was received about the ability of the soil to tolerate and sustain large-scale irrigation, the massive irrigation component of the project was reduced until, in 1965, it was restructured and authorized as the Garrison Diversion Unit, a canal system to "transfer water from 'the Missouri River to the James River, Souris River and Sheyenne River Basins, and Devils Lake Basin.'"[21] Still, it was a grand plan which involved the irrigation of large tracts of land in the Hudson Bay basin. It also included plans for "Devils Lake Restoration."[22]

C. OPPOSITION TO THE GARRISON PROJECT

As construction continued, opposition to many aspects of the Garrison Diversion project crystallized around a variety of interests. A group of North Dakota citizens banded together in a group called the Committee to Save North Dakota, which was formed to oppose the project. The National Audubon Society and others had concerns about potential effects on fish and wildlife and about the destruction of wetlands which would be covered under additional large reservoirs if portions of the Garrison Diversion were constructed.[23] By 1969, the National Environmental Policy Act (NEPA) had been passed requiring environmental impact assessment to be performed, and throughout the

18. As described by Goldberg, *supra* note 17, at 177, and by Manley & Peterson, *supra* note 17, at 330 n.16, construction proceeded pursuant to the Flood Control Act of 1944. *See* Dakota Water Resources Hearing on H.R. 2918 before Subcommittee on Water and Power Resources, 106th Cong. (1999) (statement of Chairman Hall on behalf of the Three Affiliated Tribes of Fort Berthold) (testifying as to the proportion of land inundated by Lake Sakakawea that was Reservation land and describing the losses experienced by Tribal members).

19. *See* Manley & Peterson, *supra* note 17, at 331.

20. *See* Manley & Peterson, *supra* note 17, at 331.

21. Pursuant to Act of Aug. 5, 1965, Pub. L. No. 89-108, 79 Stat. 433 as described by Manley & Peterson, *supra* note 17, at 331 n.30, who also cite the U.S. BUREAU OF RECLAMATION, INITIAL GARRISON DIVERSION UNIT DRAFT ENVIRONMENTAL IMPACT STATEMENT III-7 (1973). Manley & Peterson analyze the political decisions which were made on the basis of early studies of the agricultural value of the land proposed to be put under cultivation with massive irrigation projects.

22. *See Garrison Diversion Faces New Challenges*, *supra* note 17, at 10179.

23. *See* Goldberg, *supra* note 17, at 181; *Garrison Diversion Faces New Challenges*, *supra* note 17; Manley & Peterson, *supra* note 17, 338-39; Gaines, *supra* note 17.

1970s groups of citizens began to take legal action based on its provisions.[24] Among these legal actions were efforts to use NEPA to slow down, redirect, or bring to a halt some project features of the Garrison Diversion Unit.[25]

Canada, too, had been actively advocating for its position. In 1970, concerns were "crystallized in a Canadian aide-memoire,"[26] prompting discussion between the United States and Canada. A diplomatic note was sent to express Canada's concerns in October of 1971.[27] Early Canadian objections focused on the potential increased salinity of the Souris River which could result from irrigation return flows joining the waters of the Souris River and its tributaries.[28] Canadian diplomats cited and relied upon the duties set out in the Treaty. In a Diplomatic Note sent in October of 1973, Canada requested that:

> the Government of the United States establish a moratorium on all further construction of the GDU until such time as the United States and Canadian Governments could reach an understanding that Canadian rights and interests have been fully protected in accordance with the provisions of the Boundary Waters Treaty.[29]

The United States Government was sufficiently impressed with Canada's position to acknowledge in its reply in February of 1974 that it recognized its obligations under the Treaty and to provide assurances that no construction affecting Canada's interests would be undertaken until it became clear that the obligation could be met.[30]

D. EARLY ENVIRONMENTAL ASSESSMENT BY THE BUREAU OF RECLAMATION

In the meantime, the Department of Interior Bureau of Reclamation, the federal agency responsible for the project, had been proceeding with the environmental assessment process which was now mandated by

---

24. *See* Manley & Peterson, *supra* note 17, at 338-57 (discussing early judicial consideration of NEPA).

25. *See* Goldberg, *supra* note 17, at 179-80. *See, e.g,* National Audubon Soc'y v. Andrus, 442 F. Supp. 42, 43 (D.D.C. 1977).

26. *See* INTERNATIONAL JOINT COMMISSION, TRANSBOUNDARY IMPLICATIONS OF THE GARRISON DIVERSION UNIT 7 (1977).

27. *See id.*

28. *See* Manley & Peterson, *supra* note 17, at 332.

29. *See* GARRISON JOINT TECHNICAL COMMITTEE, GARRISON DIVERSION UNIT JOINT TECHNICAL COMMITTEE REPORT TO THE UNITED STATES-CANADA CONSULTATIVE GROUP 9 (Nov. 1990).

30. *See id.*

NEPA. A Draft Environmental Impact Statement, produced in 1973,[31] summarized the Canadian objections to the project, reporting that a meeting had been held between representatives of the two countries at which a decision had been made to strike a task force to study the problem of the effects of return flows. Manley and Peterson, writing one year later in 1974, observed that no solution had been reached through the efforts of the task force.[32]

E. ENVIRONMENTAL ASSESSMENT BY THE IJC

Nevertheless, discussions proceeded between Canadian and American officials during 1974 about the concern which had been expressed by Canada "over potential degradation of water quality and the associated effects on health and property in Canada."[33] The statement of its concern in this fashion was a clear reference by Canada to the second paragraph of Article IV of the Treaty, by which the parties had agreed that waters flowing across the boundary would "not be polluted on either side to the injury of health or property on the other."[34] Finally, in October of 1975, Canada and the United States agreed to refer the problem to the IJC for its study and recommendations as to the measures required to ensure that the "provisions of Article IV . . . are honoured."[35] By this time, the potential for introduction of foreign biota into the water systems of Manitoba was understood as an issue both by Canada and by the IJC itself. In accordance with its practice,[36] the IJC appointed a bi-national study group of technical experts comprised of an equal number of Canadians and Americans, whose job it was to consider the issues impartially and attempt to reach consensus.[37] The Board, in turn created five technical committees, comprised of fifty-three experts, each to study one of the technical issues which required assessment.[38] The Board came up with engineering modifications of the project which were designed to prevent unintended transfer of biota from one basin to the other.

---

31. *See* Manley &. Peterson, *supra* note 17, at 332 (citing U.S. BUREAU OF RECLAMATION, INITIAL STAGE GARRISON DIVERSION UNIT DRAFT ENVIRONMENTAL IMPACT STATEMENT (1973)).

32. *See id.*

33. INTERNATIONAL JOINT COMMISSION, *supra* note 26, at 8.

34. INTERNATIONAL JOINT COMMISSION, *supra* note 26, at 1 (citing Boundary Waters Treaty, *supra* note 8).

35. INTERNATIONAL JOINT COMMISSION, *supra* note 26, at 2.

36. For the usual practice of the IJC, see INTERNATIONAL JOINT COMMISSION, HANDBOOK ON ORIGIN, MANDATE, FUNCTIONS, STRUCTURE, PROCEDURES, POLICIES, PRACTICES AND RESPONSIBILITIES (Sept. 2000) [hereinafter IJC HANDBOOK].

37. *See* INTERNATIONAL JOINT COMMISSION, *supra* note 26, at 140.

38. *See* INTERNATIONAL JOINT COMMISSION, *supra* note 26, at 142-44.

In August of 1977, after nearly two years of study, public hearings and deliberations, the IJC issued its report. The IJC, while taking into account the Study Board's conceptual design of mitigation works that could assist in guarding against biota transfer, rejected its recommendations.[39] The IJC took the view that because the effect of an unintended transfer of biota from one drainage system to another could cause "severe and irreversible damage to the ecosystem," the risk in the event of a failure of the mitigation works would be too great.[40] In a deliberate adoption of the precautionary approach, the IJC took the position that the standard to be met was not merely to reduce the risk of such a "biological 'time bomb'" but to eliminate it.[41] It recommended that the portions of the project which "could affect waters flowing into Canada not be built [unless and until the two governments were to agree] that methods [had] been proven that [would] eliminate the risk of biota transfer [and such methods incorporated into the design], or if the question of biota transfer is agreed to be no longer a matter of concern."[42]

F. AMERICAN FEDERAL ENVIRONMENTAL ASSESSMENT OF GARRISON CONTINUES

Meanwhile, the National Audubon Society, whose concern was impacts to duck breeding areas in North Dakota,[43] had filed suit against the Department of the Interior, challenging the adequacy of the 1974 Environmental Impact Statement (EIS) and seeking an injunction to prevent continuation of construction. A settlement was reached in May of 1977 requiring the Secretary of the Interior to prepare a revised EIS and submit a proposal to Congress for legislation based on the revised EIS before proceeding with construction.[44]

In February of 1979, the Final Comprehensive Supplementary Environmental Impact Statement was released.[45] It recommended a greatly scaled-down version of the plan but acknowledged that even this plan entailed a risk of interbasin transfer of fish and fish diseases.[46] Construction resumed and so did the suit by the National Audubon

---

39. *See* INTERNATIONAL JOINT COMMISSION, *supra* note 26, at 121.

40. *See id.* at 102-21.

41. *See id.*

42. *Id.* at 121.

43. *See* BEN RUSSELL, WATER DIVERSION LAW IN THE PRAIRIE PROVINCES (report prepared for Environmental Law Centre) 36 (Aug. 1984); National Audubon Society, Inc. v. Watt, 678 F.2d 299, 301 (D.C. Cir. 1982); National Audubon Society v. Andrus, 442 F. Supp. 42, 43 (D.D.C. 1977).

44. *See* Charlotte K. Goldberg, *The Garrison Diversion Project: New Solutions for Trans-boundary Disputes*, 11 MANITOBA L.J. 177, 180 (1981).

45. *See id.*

46. *See id.*

Society. Manitoba groups joined the ongoing Audubon suit, filing an *amicus curiae* brief which argued that proceeding with construction under the 1965 statutory authorization would violate Article IV of the Treaty.[47] An injunction was granted by the United States District Court, but without mention of the Treaty issue.[48] Ultimately, the Department's appeal was successful, with the case decided on the ground that the Secretary had fulfilled the terms of the settlement agreement.[49] That being the case, there was no basis to prevent the Secretary from proceeding with construction once funds had been appropriated by Congress explicitly for that purpose.

G. TAKING CANADIAN CONCERNS INTO ACCOUNT: THE REFORMULATION ACT

Notwithstanding the fact that Congress had made appropriations to proceed with the project and construction of parts of the Garrison Project as authorized by the 1965 Act were indeed proceeding, the American federal government appeared to continue to have concerns about the international issues. The United States and Canada agreed to form a joint consultative group to address the remaining concerns and consultations began on April 23, 1981.[50] By November, 1983, the Canada-United States Consultative Group had seen the need to obtain the assistance of technical experts. At their November 21, 1983 meeting, they established the Garrison Joint Technical Committee, comprised of technical experts from all levels of government of both countries, and charged it with the task of considering the environmental impacts and engineering and biological aspects of the proposed project.[51] The Joint Technical Committee was to function in much the same way as the technical committees of the IJC Study Group had done before.[52]

By 1984, the Federal Government had become convinced that the Garrison plan needed to be re-evaluated, and it passed legislation establishing the Garrison Diversion Unit Commission, whose task involved the assessment of the contemporary water needs of the State of North Dakota, as well as an assessment of the measures needed to comply with the Treaty.[53] The activities of the Canada-United States

47. *See id.* at 181.
48. *See Watt*, 678 F.2d at 302.
49. *See id.*
50. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 10.
51. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 10.
52. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 10.
53. *See* Act of July 16, 1984, Pub. L. No. 98-360, § 207, 98 Stat. 403.

Consultative Group were suspended while the Commission did its work.[54] The result of the Commission's work was a set of recommendations, known as the Commission Plan, which again reduced and re-cast the Garrison Diversion project.[55] The Commission Plan recommended that irrigation for the time being be restricted to the Missouri River Basin.[56] Although international consultation was to continue in an attempt to develop methodologies for use of Missouri River water for irrigation in the Hudson Bay basin in the future, the main focus of the project had shifted to the supply of water for municipal and industrial consumption.

The plan still involved an interbasin transfer of water, but only on certain conditions.[57] Water would be conveyed from the Missouri to the Sheyenne River to supply municipal and industrial needs in the Red River basin, but only after undergoing a treatment process.[58] The Commission Plan also recommended construction of an outlet from Devils Lake with consideration of funding for an inlet, but advised that initiation of either the inlet or the outlet be based in part on "NEPA compliance . . . and satisfactory completion of consultations with Canada."[59] The Commission Plan was accepted by the government and adopted in the form of the Garrison Diversion Unit Reformulation Act of 1986 (Reformulation Act).[60]

The Reformulation Act provided that construction of the feature known as the Lonetree Dam and Reservoir, which had been planned as a part of the link between the two drainage basins and which was to be located very close to the Sheyenne River, could not proceed without consultations with the Government of Canada. The Secretary of State, after consultation with the Administrator of the Environmental Protection Agency, had to reach a conclusion that no violation of the Boundary Waters Treaty of 1909 would result from the construction and operation of the dam and reservoir.[61]

It also provided that the municipal, rural and industrial water supply systems for the Red River basin region could

> deliver Missouri River water into the Hudson Bay drainage only after the Secretary of the Interior, in consultation with the

54. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 10.
55. *See generally* GARRISON DIVERSION UNIT COMMISSION, FINAL REPORT (Dec. 20, 1984).
56. *See id.* at ii.
57. *See id.*
58. *See id.*
59. *See id.* at 10
60. *See* Garrison Diversion Unit Reformation Act of 1986, Pub. L. No. 99-294, 100 Stat. 418 (1986); *see also* GARRISON DIVERSION CONSERVANCY DISTRICT, GARRISON HISTORY, *available at* http://www.garrisondiv.org/history.htm.
61. *See* Garrison Diversion Unit Reformation Act § 6.

> Secretary of State and the Administrator of the Environmental Protection Agency, has determined that adequate treatment has been provided to meet the requirements of the Boundary Waters Treaty of 1909.[62]

The requirement to comply with the pollution prohibition of the Treaty was thus built right into the Garrison authorizing legislation. Significantly, the determination was to be made not by the Secretary of the Interior, whose portfolio included planning and administration of the project, but by the Secretary of State, the member of the administration who is concerned with international obligations and treaty compliance.[63] In addition, besides the usual NEPA process which would require the preparation by the Secretary of the Interior of an Environmental Impact Statement and Certificate of Decision, the Secretary of State was to consult directly with the Administrator of the Environmental Protection Agency before making the determination of Treaty compliance.[64] Thus, the statute gives evidence of both the effectiveness of the Treaty requirement not to pollute and the importance that the role of environmental impact assessment had assumed in American federal decision making by 1986.

H. CANADIAN CONCERNS OVER THE GARRISON REFORMULATION

Work proceeded on supplementing the environmental impact assessment to take account of the changes in the project contemplated in the Reformulation Act. A Draft Supplemental Impact Statement was released in December of 1986 which included a plan to complete consultations with Canada before completing future versions.[65] Notwithstanding the compromises represented by the Reformulation Act, Canada continued to have concerns, and it expressed those concerns in two diplomatic notes. The first was sent in July of 1987 for the purpose of providing Canada's reaction to the draft supplemental environmental impact statement.[66] The note took the position that the draft supplemental environmental impact statement failed to "adequately address many of Canada's concerns regarding the potential transfer of biota from the Missouri River to the Hudson Bay drainage basin."[67]

---

62. *See id.* § 5.
63. *See id.*
64. *See id.*
65. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 5.
66. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 5, 13.
67. GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 13 (quoting Canadian Diplomatic Note No. 177).

The detailed comments which it attached made clear that a plan for stabilization of Devils Lake was of major concern to Canada and repeated the need for consultation to continue as plans progressed.[68] The note went on to propose a meeting of the Canada-United States Consultative Group to discuss Canada's concerns. [69]

I. CANADIAN CONCERNS INCORPORATED INTO FEDERAL ENVIRONMENTAL ASSESSMENT

The second diplomatic note was sent in May, 1989 in response to the release of a report which had been issued describing alternatives for location of a feature to be known as the Sykeston Canal, a structure which had been proposed as the alternative to the Lonetree Dam and Reservoir.[70] The second note reiterated Canada's concerns about the potential for biota transfer and again proposed a meeting of the Canada-United States Consultative Group to discuss the issues.[71] This time, the Garrison Joint Technical Committee was reactivated and given instructions to "investigate and assess Canadian technical concerns [and] develop recommendations to the Consultative Group on whether and how [certain] project features might proceed without adverse consequences for waters flowing into Canada."[72]

The Joint Technical Committee reported in November of 1990 with recommendations on how best to proceed with the portions of the project that they had studied.[73] The report acknowledged that the introduction of Devils Lake water into the Red River would be of concern and included the recommendation that the water supply treatment plant, which was to treat water destined for use in the Red River basin, be located on the Missouri basin side of the Continental Divide.[74] It also identified the features of the project in which Canada had no interest and made general recommendations about the continuation of consultations concerning those issues which could affect Canadian interests.[75] Work could have continued on the project following this report, but in 1990, the Administration made a decision to terminate funding for Garrison, pending a re-evaluation of the contemporary water needs of North

68. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 43-47.
69. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 13.
70. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 13.
71. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 13.
72. GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 1.
73. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 1.
74. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 7.
75. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 1-2.

Dakota and of national priorities.[76]

J. RESUMPTION OF WORK ON DEVILS LAKE STABILIZATION

Meanwhile, North Dakota was advocating for a resumption of work on the Devils Lake stabilization issue. Following a Senate Committee resolution in 1990, in February of 1992, the Corps of Engineers issued a draft *Devils Lake Basin Reconnaissance Report* which addressed plans for both an inlet and an outlet.[77] The report recommended that the most viable way to provide water for the inlet that it needed to stabilize Devils Lake would be to operate the proposed Garrison treatment plant year-round, instead of seven months a year. The plant was intended to process Missouri River water before releasing it into the Sheyenne River.[78]

With both the inlet and the outlet back on the table, the North Dakota State Water Commission once again agreed to participate in a cost-shared feasibility study. The study was intended to plan for lake stabilization by assessing methods of both raising and lowering the level of Devils Lake as required.[79] The study was to be funded in part by an appropriation made pursuant to the Energy and Water Development Appropriations Act of 1993,[80] legislation which also funded a broader formal analysis of the alternatives for the design, construction and operation of that portion of the Garrison Diversion Unit which would direct Missouri River water northwards into the Red River drainage basin.[81] Once again, work would resume on both projects, with the Corps of Engineers primarily responsible for Devils Lake and the Bureau of Reclamation responsible for the rest of Garrison.

K. CANADIAN CONCERNS ACKNOWLEDGED IN DEVILS LAKE LEGISLATION

In recognition of the international implications of the project, the Appropriations Act provided that the recommendations of the Secretary of the Interior which would result from the analysis were to be consistent with the Treaty.[82] Also of interest to the Canadian position is that

76. *See* GARRISON DIVERSION CONSERVANCY DISTRICT, *supra* note 60 (describing the course of events from the point of view of the [State of North Dakota] Garrison Conservancy District).

77. *See Flood Control*, *supra* note 11.

78. *See* U.S. DEP'T OF THE INTERIOR BUREAU OF RECLAMATION, SYKESTON CANAL ALTERNATIVE STUDY GARRISON DIVERSION UNIT NORTH DAKOTA: EXECUTIVE SUMMARY, at 5-3, 5-4 (Mar. 1994).

79. *See Devils Lake Status*, *supra* note 10.

80. *See* Pub. L. No. 102-377, 106 Stat. 1315.

81. *See id.*, 106 Stat. 1315, § 207.

82. The Devils Lake stabilization studies were to be conducted by the Secretary of the Army, that is, the U.S. Army Corps of Engineers, while the analysis of options for proceeding with the Gar

both the processes used in carrying out the analysis and the resulting recommendations were to comply with the *National Environmental Policy Act*.[83]

L. THE FOCUS ON FLOODING IN THE DEVILS LAKE BASIN

Because Devils Lake levels were rising in 1993 and the immediate issue was a threat of flood damage, the Corps decided to accelerate the portions of the study dealing with flood control.[84] On February 15, 1996, at the request of the North Dakota Congressional delegation, the Corps completed the *Devils Lake Contingency Plan,* which presented options to be considered for implementation if the lake should continue to rise.[85] As a follow-up, in August of 1996, the Corps presented an *Emergency Outlet Plan* that included a plan for the construction of an outlet from Devils Lake to the Sheyenne River during an accelerated time period.[86]

M. CANADIAN OBJECTIONS TO THE EMERGENCY PLAN

In an Aide Memoire dated April 3, 1997, Canada took the position that "the outlet ha[d] the potential to significantly affect Canadian waters in violation of the . . . Treaty," that it could not be constructed on an emergency basis and, therefore, did not belong in an emergency flood relief appropriation, that it should undergo a "full environmental review and cost benefit analysis and should be considered by Congress" in that context.[87] Canada's official position again was stated in a letter dated May 14, 1997, from Ambassador Raymond Chrétien to House Majority Leader Armey, in which Canada expressed its concern about a

---

rison Diversion was to be conducted by the Secretary of the Interior, that is, by the Bureau of Reclamation. See Manley & Peterson, *supra* note 17, for an interesting analysis of the relationship between these two agencies and their history of cooperation in the Garrison Diversion project.

83. *See* 106 Stat. 1315, § 207.

84. *See Devils Lake Status*, *supra* note 10.

> In 1993, in accordance with Public Law 102-377, the Corps initiated a feasibility study and EIS to address water management needs of the Devils Lake area. The study scope initially included lake stabilization, water quality, recreation, and the enhancement and conservation of fish and wildlife. However, due to the rapidly rising lake levels, the study focus *to date* has been primarily on flood damage reduction.

U.S. ARMY CORPS OF ENGINEERS (St. Paul District), SCOPING DOCUMENT: DEVILS LAKE EMERGENCY OUTLET ENVIRONMENTAL IMPACT STATEMENT 1 (Feb. 1999) (emphasis added) [hereinafter SCOPING DOCUMENT]. It is clear, therefore, that as late as 1999 there was no intention to permanently drop assessment and consideration of an inlet from the planning process.

85. *See* U.S. ARMY CORPS OF ENGINEERS, DEVILS LAKE CONTINGENCY PLAN (Feb. 15, 1996), *available at* http://www.mvp.usace.army.mil. This is the explanation for the preparation of the plan given by the Corps in their public information literature. An analysis of the political process and its effects on decisions taken by the federal agencies in this process would make an interesting study.

86. *See Flood Control*, *supra* note 11.

87. Government of Canada, Aide Memoire (Apr. 3, 1997) (on file with author).

supplemental Appropriations Bill which was before the House of Representatives at the time.[88] The bill included funding for construction of the "emergency" outlet, when that same year the House Committee on Appropriations and its subcommittee of jurisdiction had decided against funding it.[89] In June 1997, President Clinton signed the Emergency Supplemental Appropriations Act,[90] which did indeed include appropriations for the Army Corps of Engineers to carry out pre-construction engineering and design for a proposed "emergency"[91] outlet from Devils Lake and to conduct an environmental impact assessment in accordance with the National Environmental Policy Act.[92]

Canada's and Manitoba's insistence on linking the planning for an outlet to potential future planning for an inlet seems to have been based in part upon the position that was being taken by the leadership of the State of North Dakota. In a letter addressed to North Dakota's United States Senator Dorgan, Governor Schafer, and the State Senate and House Majority Leaders stated that, while they were grateful for the $5 million appropriation for Devils Lake outlet planning, they were troubled by language in the bill which they viewed as an impediment to plans for an inlet.[93] The letter stated their opposition to the "permanent ban on the inlet [which] remains in the bill, despite our efforts and yours to soften the language."[94]

North Dakota's objections to the bill included an unwillingness to comply with "numerous onerous conditions," the failure of the bill to guarantee future funding for completion of the project and the fact that North Dakota continued to see an inlet as "important to ensure the long-term economic stability of the Devils Lake region" and as a "significant component of our State's water-development plan."[95] The letter went

88. Letter from Raymond Chrétien, Canada's Ambassador to the United States, to the Honorable Richard K. Armey, Majority Leader, U.S. House of Representatives (May 14, 1997) (on file with author).

89. *See id.*

90. *See* 1997 Emergency Supplemental Appropriations Act for Recovery from Natural Disasters, and for Overseas Peacekeeping Efforts Including Those in Bosnia, Pub. L. No. 105-18, 111 Stat. 158, 176.

91. The DEVILS LAKE CONTINGENCY PLAN, *supra* note 85, acknowledged that an "emergency" outlet would face the "same challenges of environmental, WQ, biota, political, cost, and other issues as a permanent outlet." The use of the term "emergency" may have been intended to affect the obligations for environmental assessment under NEPA.

92. *See* SCOPING DOCUMENT, *supra* note 84, at 1.

93. Letter from Edward T. Schafer, Governor, State of North Dakota; Gary J. Nelson, Senate Majority Leader, State of North Dakota; John Dorso, House Majority Leader, State of North Dakota, to The Honorable Byron L. Dorgan, United States Senator (Sept. 26, 1997) (on file with author).

94. *Id.*

95. *Id.*

on to insist that "everything possible must be done to keep the inlet viable in Congress as a long term option."[96]

N. INTERNATIONAL OBLIGATIONS EXPRESSED IN DEVILS LAKE LEGISLATION

The Energy and Water Development Appropriations Act of 1998, signed by the President on October 13, 1997,[97] included $5 million to initiate construction of a Devils Lake outlet. The funding was made subject to a number of conditions, including the condition that no money appropriated under that, or any other Act, could be used to plan or carry out the portion of the feasibility study of the Devils Lake Basin (authorized in 1993 under Public Law 102-377) which addressed the need of the area for "stabilized lake levels through inlet controls," or to otherwise pursue any plans for transferring water from the Missouri River basin into Devils Lake.[98] In addition, the Secretary of the Army would have to report to Congress that the

> construction is technically sound, economically justified, and environmentally acceptable and in compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) [and the further conditions that there be a determination that an emergency exists and that the] plans for the emergency outlet shall be reviewed and, to be effective, shall contain assurances provided by the Secretary of State, after consultation with International Joint Commission, that the project will not violate the requirements or intent of the [Boundary Waters Treaty].[99]

Again, the effect of Canadian protests based on the Treaty had been felt. The explicit reference to NEPA and the provision for the decision to be made by the Secretary of State both give evidence of the awareness by the United States of the need to comply with its international obligation and of the reliance which was now being placed on environmental assessment to assist in accomplishing that purpose. The requirement to consult with the IJC went one step further in ensuring that Treaty obligations would be met, although stopping short of a requirement for a reference to be made such as had been done for Garrison.

---

96. *Id.*
97. *See* Pub. L. No. 105-62, 111 Stat. 1320.
98. *See id.*, 111 Stat. at 1324.
99. *Id.*, 111 Stat. at 1323-24.

Subsequent Energy and Water Development Appropriations Acts have contained the identical conditions.[100] As yet, no construction funds have been allotted to the Corps under this authority because the conditions have not been fulfilled. The pre-construction engineering, design and associated environmental impact assessment have not been completed. Some environmental assessment studies have continued, but the formal process for preparation of an environmental impact statement has proceeded only to the "scoping" stage, at which the project itself is defined, the issues to be covered in the environmental assessment are described and the methods for conducting the assessment are planned.

O. PUSHING AHEAD WITH THE DEVILS LAKE OUTLET PLAN

Public information brochures published by the Corps as late as September 7, 2000, indicate that consideration of an inlet is "generally abeyant while resources are focused on the outlet design and related environmental work."[101] The brochures indicate that the Corps is prepared to proceed with an accelerated outlet construction schedule on the assumption that it will receive $2 million in 2000 and an additional $5.7 million in fiscal years 2001 and 2002 to cover the anticipated additional pre-construction engineering design and environmental assessment cost.[102] Ultimately, in the second session of the 106th Congress, the Senate narrowly approved the Energy and Water Development Appropriations Act of 2000,[103] which allocated an additional $4 million to continue environmental studies with respect to the Devils Lake outlet in 2000 and 2001, but the bill was vetoed by the President for other reasons. At this writing, at the close of the 106th Congress, it appears likely than an amended appropriation bill will pass and be signed into law before the end of the session.[104] It is not known whether the bill will have the same protections for Canada that the other appropriation bills have had.

---

100. *See* Energy and Water Development Appropriations Act of 1999, Pub. L. No. 105-245, 112 Stat. 1838; Energy and Water Development Appropriations Act of 2000, Pub. L. No. 106-60, 113 Stat. 483.

101. *Devils Lake Status*, *supra* note 10.

102. *See Devils Lake Status*, *supra* note 10.

103. H.R. 4733, 106th Cong. (2000).

104. During the editing of this article, an amended appropriation bill was passed. *See* Pub. L. No. 106-60, 173 Stat. 483 (2000).

P. MANITOBA'S POSITION

Manitoba consistently has taken the view that "[b]ecause an artificial outlet from Devils Lake to the Sheyenne River may significantly affect the downstream aquatic ecosystem within Manitoba and Canada and because the extent of these impacts are not known, a full, comprehensive, and scientifically-credible, environmental impact statement must be completed prior to construction in accordance with the National Environmental Policy Act."[105] In articulating its position, Manitoba relies upon the Treaty Article IV duty not to pollute to the injury of health or property on the other side of the border, and it advocates consultation with the IJC as a step in the resolution of the dispute.[106] The position of Manitoba has been expressed directly in statements by the Premiers of Manitoba to Governor Schafer of North Dakota since 1996. In 1998, Governor Schafer requested that Manitoba designate an official to serve as an "ex officio member to the North Dakota Devils Lake Outlet Management Advisory Committee."[107]

In his letter of reply, Premier Filmon took the position that it would not be appropriate for Manitoba to be represented on a Management Advisory Committee when the construction of the outlet project had not yet been authorized and there were "numerous domestic processes in the United States which [had] yet to be initiated or completed."[108] He also affirmed Manitoba's understanding that there would have to be compliance with the NEPA, the Treaty, and "consultation with the International Joint Commission."[109] Clearly, Manitoba did not wish to be seen as having agreed to the construction of an outlet. In October of 1999, the newly-elected Premier of Manitoba, Mr. Doer, visited both Washington and North Dakota to express Manitoba's opposition to the Devils Lake outlet plan. [110]

---

105. Information Bulletin, *supra* note 1.

106. *See Manitoba's Concerns*, *supra* note 3.

107. Letter from Premier Gary Filmon, Premier of the Province of Manitoba, to the Honorable Edward T. Schafer, Governor of the State of North Dakota (Jan. 6, 1998) (on file with author).

108. *Id.*

109. *Id.*

110. *See* Press Release, State of North Dakota, Schafer Invites Doer to Visit Devils Lake (Oct. 28, 1999) (on file with author). A similar position to Manitoba's was expressed in a statement made on December 2, 1999 in the Senate of Canada by the Honourable Janis Johnson, and in a subsequent exchange of correspondence with Governor Schafer. *See* Letter from Janis G. Johnson, Senate of Canada, to Governor Edward T. Schafer, State of North Dakota (Feb. 23, 2000) (on file with author); Letter from Edward T. Schafer, Governor, State of North Dakota, to the Honorable Janis Johnson, Senate of Canada (Dec. 10, 1999) (on file with author); Debates of the Senate (Hansard), 2d Sess., 36th Parliament (Can.), Vol. 138, Issue 15 (Thursday, Dec. 2, 1999).

Q. CANADA'S DIPLOMATIC EFFORTS

On March 8, 2000, Ambassador Chrétien wrote to the Chairman of the Energy and Water Development Subcommittee of the Appropriations Committee of the United States House of Representatives to express Canada's and Manitoba's strong opposition to the construction of an outlet from Devils Lake into the Sheyenne River.[111] In the letter, Canada took the position that additional funds should not be provided for the outlet project unless and until issues of concern to Canada had been thoroughly addressed through the studies which were mandated in previous statutes and there had been meaningful consultation with Canada under the Treaty.[112] The letter contains a detailed listing of the arguments against the use of an outlet to solve the problem at Devils Lake and refers to the risk of an eventual tie-in to an inlet connected with the Garrison Project.[113]

In addition to these efforts, Foreign Affairs Minister Axworthy and a Member of Parliament from Winnipeg, Manitoba, visited Washington in February of 2000 to explain Canada's position in discussions with Senators and Congressmen.[114] Ambassador Chrétien again stated Canada's position in a letter dated March 14, 2000, to the Chairman of Energy and Water Development Subcommittee of the Appropriations Committee, advising that Canada could not agree to the Devils Lake outlet project as a solution and recommending denial of the Administration's request for $6.6 million in emergency supplemental funding for pre-construction activities.[115]

R. THE GARRISON PROJECT TODAY

Meanwhile, during the 1990s, pursuant to the authority granted by the Reformulation Act, the Garrison Conservancy District has continued to be active. As an example, in December of 1993, a Sykeston Canal Alternative Study[116] was released which proposed a plan that took

111. *See* Letter from Raymond Chrétien, Canada's Ambassador to the United States, to the Honorable Ron Packard, Chairman, Energy and Water Development Subcommittee, Appropriations Committee, United States House of Representatives (Mar. 8, 2000) (on file with author).

112. *See id.*

113. *See id.*

114. *See* Paul Samyn, *Martin, Axworthy Voice Concerns*, WINNIPEG FREE PRESS (Feb. 12, 2000), at A4, *available at* 2000 WL 2351823.

115. *See* Letter from Raymond Chrétien, Canada's Ambassador to the United States, to the Honorable Pete V. Domenici, Chairman, Energy and Water Development Subcommittee, Appropriations Committee, United States Senate (Mar. 14, 2000) (on file with author).

116. *See* SYKESTON CANAL ALTERNATIVE STUDY, *supra* note 78.

account of the recommendations of the Garrison Joint Technical Committee. Funds have been provided throughout for operation and maintenance, while the Bureau of Reclamation has continued to study the issues.[117] In September of 1994, the Canada-United States Consultative Group met and gave the Joint Technical Committee an ongoing mandate to monitor Garrison activities.[118] The Joint Technical Committee has continued to work on technical and scientific issues for most of the decade.[119] The view of at least the Manitoba experts who sit on the Joint Technical Committee is that its members should work together with a view to achieving results that are based on sound technical and scientific principles and evidence.[120]

A new amended Garrison project was proposed in the form of the Dakota Water Resources Act of 1997, but it did not pass during the 105th Congress.[121] Another attempt was made in the 106th Congress, with new legislation, the Dakota Water Resources Act of 1999. The bill was introduced and Congressional subcommittee hearings were held to consider it.[122] The bill was amended, renamed the Dakota Water Resources Act of 2000, and enacted.[123] This statute will yet again reformulate the Garrison project, shifting emphasis to the use of treated Missouri River water to supply municipal and industrial systems in parts of the Red River basin.[124] It will also provide for the use of that water for streamflow augmentation and groundwater recharge, while leaving open the possibility for other uses.[125]

Canadian officials have not accepted the notion that treatment of Missouri River water can adequately protect against a transfer of biota to the Hudson Bay basin. Throughout the last few years, Canadian officials have continued diplomatic efforts to register Canada's and Manitoba's objections to both the Devils Lake and Garrison projects, citing concerns about risks to Canadian waters in Manitoba associated with interbasin

---

117. Interview with Robert V. Oleson, Coordinator and Senior Adviser, Transboundary Waters Office, Manitoba Conservation (Oct. 2000). See also the annual reports published at the Garrison Conservancy District, available at its website at http://www.garisondiv.org.

118. *Id.* Mr. Oleson is a member of the Canada-United Sates Consultative Group.

119. *Id.*

120. *Id.*

121. H.R. 3012, 105th Cong. (1997); S. 1515, 105th Cong. (1997).

122. H.R. 2918, 106th Cong. (1999); S. 623, 106th Cong. (2000).

123. *See* Pub. L. No. 106-554, 14 Stat. 2763 (2000); *see also* David Kuxhaus, *Back-Room Deal on Diversion Feared*, WINNIPEG FREE PRESS, Oct. 13, 2000, at A9, *available at* 2000 WL 26951854; *N. Dakota Water Plan Won't Hurt Manitoba*,WINNIPEG FREE PRESS, Oct. 15, 2000, at A2, *available at* 2000 WL 26952013; *Missouri Attorney General and Canada Protest Bill*, ASSOCIATED PRESS NEWSWIRES, Oct. 16, 2000.

The passage of the Dakota Water Resources Act of 2000 occurred during the editing of this article. Thus, its implications are not reflected in the recommendations or conclusions of the author.

124. *See* Pub. L. No. 106-554, 14 Stat. 2763.

125. *Id.*

transfers of invasive species.[126] Recent communications have continued to rely on the Treaty provisions, but also have relied on President Clinton's February, 1999 Executive Order on Invasive Species.[127] The Dakota Water Resources Act of 2000,[128] acknowledges the need to comply with the Treaty and to perform environmental impact assessment pursuant to NEPA, but does not require direct consultation with Canada or with the IJC.[129] It appears that it may also de-authorize funding for the planning of a Devils Lake inlet as part of the Garrison project.

S. THE NORTH DAKOTA STATE PLAN

While the Corps of Engineers' long term and emergency proposals for the construction of an outlet from Devils Lake have been advancing slowly through the study and planning process, and political efforts have been proceeding to obtain further funding from the federal Government, the State of North Dakota has announced a plan to construct an alternative emergency outlet without the use of Federal funding.[130] On January 19, 2000, the State of North Dakota announced that Governor Schafer had issued an executive order that would "hasten the engineering and design work for a Twin Lakes temporary emergency outlet."[131] The Twin Lakes outlet proposal is an option which had been assessed and rejected by the Corps of Engineers in its 1993 report.[132] North Dakota's State Engineer, David Sprynczynatyk, said recently that the State is considering a second plan, which involves building a pipeline along U.S. Highway 281.[133]

---

126. *See* Can. Diplomatic Note No. 0271 (July 7, 1998); *Missouri Attorney General and Canada Protest Bill, supra* note 123; Letter from Lloyd Axworthy, Minister of Foreign Affairs of the Government of Canada, to The Honourable Madeleine K. Albright, Secretary of State of the United States (Sept. 20, 1999) (file with author) [hereinafter Axworthy Letter]; Letter from Raymond Chrétien, Canada's Ambassador to the United States, to The Honorable John T. Doolittle, Chairman, Subcommittee on Water and Power, Committee on Resources, U.S. House of Representatives (Sept. 26, 1999) (on file with author).

127. *See* Axworthy Letter, *supra* note 126.

128. *See* Pub. L. No. 106-554, 14 Stat. 2763 (2000).

129. *See id.*

130. *See* NORTH DAKOTA STATE WATER COMMISSION, TWIN LAKES TEMPORARY EMERGENCY OUTLET (Nov. 1999). It would appear that this plan is designed to avoid federal environmental assessment under NEPA: "If a project of this nature required a Section 404 Permit [that is a permanent Federal permit for projects that may affect wetlands], it is likely that an environment impact statement would be required. This would effectively prevent development of the project in the timely fashion warranted by the emergency and would add greatly to its cost." *Id. at 8.*

131. Press Release, State of North Dakota, State Moves Forward on Devils Lake Relief Plans (Jan. 19, 2000).

132. *See Strategies and Actions, supra* note 15.

133. *See Devils Lake Alternative Presented,* ASSOCIATED PRESS (Sept. 2000), *available at* http://www.swc.state.nd.us/projects/archives/alternative.html.

It appears that the State's emergency plan is proceeding,[134] even though the Corps of Engineers reports that throughout the summer of 2000, due to a dry fall and early winter, Devils Lake has remained a foot below the level it reached in 1999, when it was at its highest.[135] On October 4, 2000, Governor Schafer wrote to Premier Doer to suggest once again that Manitoba participate in an environmental assessment process to be specially designed by North Dakota as part of the State emergency outlet plan.[136] In his reply, Premier Doer took the position that the requirement to comply with the Treaty mandates participation by both federal governments and that the environmental assessment process to be followed must be the one specified under NEPA.[137] Newspaper articles attribute comments to State officials which indicate that the North Dakota is proceeding with its plan in an effort to avoid federal environmental impact assessment obligations.[138]

State officials are quoted as saying that although the State does not require environmental impact assessment of its own projects, it intends to do an expedited review which will "concentrate on the hot topics" in an effort to "appease opponents of the project."[139] A recent news item reports that Governor Schafer has contacted Minnesota and Manitoba to ask them to contribute to a "technical team" to perform this expedited assessment, without also reporting that Premier Doer has refused to do so.[140]

III. DISPUTE RESOLUTION

A. THE TREATY

1. *A General View*

It is clear that with or without a link to Garrison, Canadian opposition to a Devils Lake outlet will continue. The problem is how to accommodate the international concerns associated with the project in the context of the larger political and legal process. One consideration must

134. *See id.*

135. *See Devils Lake Status*, *supra* note 10.

136. *See* Letter from Gary Doer, Premier of the Province of Manitoba to The Honorable Edward T. Schafer, Governor of North Dakota (Oct. 12, 2000) (text of letter provided to the author from Government of Manitoba records)(referring to an October 4, 2000, letter from Edward T. Schafer, Governor of North Dakota, to Gary Doer, Premier of the Province of Manitoba)

137. *See id.*

138. See, for example, the articles cited at *supra* note 133 and *infra* note 139.

139. *SWC Continues to Move Ahead on Twin Lakes Outlet*, DEVILS LAKE J. (Devils Lake, N.D.), Oct. 16, 2000, *available at* http://www.devilslakejournal.com.

140. *See id.*

be the effect of the Treaty on the dispute and any remedies that it offers for a problem such as this one. The Treaty is one of the oldest and by all accounts, one of the most significant treaties in existence be-tween Canada and the United States. While there is disagreement about both the effectiveness of the Treaty provisions and the proper role for the IJC, there appears to be a consensus among writers in the legal liter-ature that the Treaty has continuing value and represents a significant international achievement in environmental protection of water resources.[141]

The IJC itself has been the subject of some scholarly interest. It is a bi-national body, comprised of six commissioners, three appointed by the United States and three by Canada.[142] The IJC describes itself as "pursu[ing] the common good of both countries as an independent and objective adviser to the two governments"[143] It contrasts its identity with that of bi-national bodies in which the function of the members is to represent the views and interests of their own states.[144] The 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.

---

141. There has been a good deal of academic writing with respect to the Treaty, including both explication of the terms of the Treaty and evaluation of the success of the remedies it affords. For a discussion of the Treaty in relation to the early development of the Garrison Diversion project, see Gaines, *supra* note 17; Manley & Peterson, *supra* note 17; Goldberg, *supra* note 17; Peter Pantaleo, Note, *A Primer on the Boundary Waters Treaty and the International Joint Commission*, 51 N.D. L. REV. 493 (1975). The following sources detail the application of the Treaty and give an overview of the mandate and procedures of the International Joint Commission: F.J.E. Jordan, *Nature of Canada-United States Relations, The International Joint Commission and Canada-United States Boundary Relations in* CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 522 (R. MacDonald, G. Morris, D. Johnston eds., 1974); M.J. Vechsler, The International Joint Commission of Canada and the United States: Its Roles and Responsibilities, Paper Presentation at the National Symposium on Water Law, Canadian Bar Association, Environmental Law Continuing Legal Education Programme in Toronto, Ont., Can. (Apr. 1999). See Stephen J. Toope & Jutta Brunnée, *Freshwater Regimes: The Mandate of the International Joint Commission*, 15 ARIZ. J. INT'L & COMP. L. 273, for an evaluation of the efficacy of the Treaty and the application of "regime theory." For a discussion of international environmental protection of freshwater resources, see Jutta Brunnèe, *Environmental Security and Freshwater Resources: The Role of International Law*. John E. Carroll & Newell B. Mack, *On Living Together in North America: Canada, The United States and International Environmental* Relations, 12 DENV. J. INT'L L. & POL'Y 35, analyze the relationship between Canada and the U.S. with respect to environmental issues and advocate a more authoritative role for the IJC. Also see the International Joint Commission's own writing about its role in IJC HANDBOOK, *supra* note 36; INTERNATIONAL JOINT COMMISSION, THE IJC AND THE 21ST CENTURY 4 (Response of the IJC to a Request by the Governments of Canada and the United States for Proposals on How to Best Assist them to meet the Environmental Challenges of the 21st Century), *available at* http://www.ijc.org/comm/21ste.htm [hereinafter IJC AND THE 21 ST CENTURY]. Finally, see Leonard B. Dworsky & Albert E. Utton, *Assessing North America's Management of its Transboundary Waters*, 33 NAT. RESOURCES J. 413 (1993), which sup-ports the more active watershed management and pollution prevention role that the IJC advocates for itself.

142. *See* IJC HANDBOOK, *supra* note 36, at 2.

143. *See* IJC HANDBOOK, *supra* note 36, at 4.

144. The contrasting example the IJC uses is the Commission on Environmental Cooperation (CEC), the body established pursuant to the North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (entered into force Jan. 1, 1994) (the side agreement to the North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289). *See* THE IJC AND THE 21ST CENTURY, *supra* note 141.

It seems that in 1909, the primary purposes for the Treaty likely were to ensure free and open navigation, regulate priority of use of shared waters and control the raising and lowering of water levels.[145] The Treaty includes provisions that address both boundary waters, that is, lakes and rivers flowing along the international boundary line with shores on both sides of the international line (for example, four of the Great Lakes),[146] and transboundary waters, such as the Red River of the North, which rise in one country and flow across the border into the other (and some, such as the Souris River, which rise in one country and then cross the border more than once).[147] The Devils Lake outlet would direct water into the Sheyenne River which empties into the Red River of the North, a transboundary water. The United States has acknowledged the application of the Treaty to the Devils Lake dispute in passing the Appropriations Acts described above, each of which required that there be a finding by the Secretary of State that the project would not "violate the requirements or intent" of the Treaty.[148] What then are the requirements and the intent of the Treaty?

2. *Transboundary Water Provisions*

The provisions of the Treaty which directly address transboundary waters are Articles II and IV.[149] The first paragraph of Article IV provides that neither of the governments will permit the construction of works which would raise the water level on the other side of the border without first obtaining an order of approval from the IJC or reaching a special agreement with the other government.[150] This is the only circumstance in which a government must apply to the IJC for an order of approval before constructing a work in a transboundary waterway. It

145. Manley & Peterson, *supra* note 17, at 332-38, and Pantaleo, *supra* note 141, at 494-96, begin with an interesting summary of the historical origins of the Treaty, but see especially the analysis of purposes of the Treaty in Gaines, *supra* note 17. Gaines' views are based on a detailed analysis of the negotiations leading up to the Treaty.

146. This explanation is simplified—"boundary waters" are defined explicitly in the Pre-liminary Article of the Treaty; transboundary waters are referred to in article IV of the Treaty as "waters flowing across the boundary." Boundary Waters Treaty, *supra* note 8, art. IV, 36 Stat. 2448, 2450.

147. While the Green Peace motto is "we all live downstream," Gord Hannon, of the Department of Justice of Manitoba often points out that Manitoba in fact is "downstream from everywhere." Gord Hannon, Rivers Run to the Sea, Paper Presentation at the National Symposium on Water Law, Canadian Bar Association, Environmental Law Continuing Legal Education Programme in Toronto, Ont. Can. (Apr. 1999). Manitoba is downstream from both Canadian provinces which border it, Ontario and Saskatchewan, and both American states, North Dakota and Minnesota.

148. *See* statutes cited *supra* notes 97, 100.

149. *See* Boundary Waters Treaty, *supra* note 8, arts. II, IV, 36 Stat. 2448, 2450.

150. If an order of approval is required, Article VIII sets the procedure and determines the factors for the decision to be made by the IJC. See the history of the negotiation of each of the terms of the Treaty and Gaines' opinion of their meaning in Gaines, *supra* note 17.

would not seem that this provision would apply to the Devils Lake outlet dispute, unless there were to be a concern about a rise in level of the downstream water bodies. The concerns stated by Canadian authorities to date appear to be about effects on water quality and the introduction of non-native biota, rather than about water level. Therefore, there does not appear to be a role for the IJC in issuing a decision which would be binding on the two governments in advance of construction of the outlet.

3. *The Article II Remedy*

Article II deals with works for the "use and diversion" of water on one side of the border which cause injury on the other side, but states that each government reserves to itself the "exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line . . . ."[151] There is an interesting remedy provided in Article II, however, in the form of a right of action to address the harm that such a work may cause:

> [A]ny interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and remedies and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs . . . .[152]

It does not appear that this provision has been invoked on either side of the border as a remedy for damage suffered on the other, although there has been an (unsuccessful) attempt by a Canadian to use the provision to sue for losses experienced on his own side of the border.[153] It appears reasonable to argue that the construction of a Devils Lake outlet could be construed as "an interference with," or "use" of, the Red River system and that a reduction of water quality or the introduction of foreign biota could result in an injury. The special cause of action created in this provision grants an injured person only those legal

---

151. Boundary Waters Treaty, *supra* note 8, art. II, 36 Stat. 2448, 2449. Pantaleo, *supra* note 141, at 495, takes the view that this notion had its origins in the Harmon Doctrine. Gaines, *supra* note 17, argues that at the time of the Treaty, the Harmon Doctrine already was in direct conflict with international riparian law, which provided that the riparian rights of a nation-state, similar to those of individuals in the common law world, were limited by the requirement that quantity and quality of water downstream not be diminished. Gaines takes the view that the Harmon doctrine played no part in the drafting of the Article IV right of action, preferring the explanation that protection of the right of each nation to be "in the first instance the judge of its own international obligations" is "usual in international law."

152. Boundary Waters Treaty, *supra* note 8, art. II, 36 Stat. 2448, 2449.

153. *See generally* Burnell v. International Joint Comm'n (1976), 71 D.L.R.(3d) 725 (Fed Ct. 1976).

remedies, which would have been allowed under the law of the jurisdiction in which the work was built.[154] Gaines, writing in 1974 about the use that could be made of the Treaty in opposing the Garrison Diversion, undertook a comprehensive analysis of the intent of the Treaty, including the subject matter and scope of Article II.[155] He predicted that the provision would be read narrowly as applying only to quantity rather than quality of the water.[156]

One argument Gaines offered for a narrow reading is based on the pollution provision in Article IV.[157] He took the view that increased salinity (the effect which was feared at the time that he was writing) would be considered to be pollution.[158] Pollution is mentioned explicitly in a different article which grants no private right of action.[159] This suggests that no such right is intended in the case of damage caused by pollution. The other argument Gaines raised in favour of a narrow reading is based on his analysis of the purpose of Articles II and IV of the Treaty as being to address the raising and lowering of water levels, rather than issues of water quality.[160]

Still, Gaines was addressing a factual circumstance in which increased salinity would result from the drainage of return irrigation flows into the Souris River, not a circumstance in which a structure would be built to convey water directly from one water body into another. On a plain reading of the provision, there seems to be no logical reason why a court should not consider the addition of water to a river in order to lower water levels in another water body as a "use" of the river. If the construction of an outlet is considered to be a "use" of the transboundary waterway and it results in damage, the Article II remedy would apply. An action would be successful if the law of North Dakota and the United States supports a cause of action for the harm that is threatened to be caused—that is, a loss of fish and other natural resources and an increase in the cost of water treatment.

The existence of such a remedy and the possibility that a government could become liable for the payment of compensation for the destruction of a fishery may itself be a powerful incentive for the government to ensure that it does not take an action that causes compensable harm across the border. The fact that the private law remedy is contemplated and that there is a reasonable argument in favour of a cause of

154. *See* Gaines, *supra* note 17.
155. *See* Gaines, *supra* note 17.
156. *See* Gaines, *supra* note 17.
157. *See* Gaines, *supra* note 17.
158. *See* Gaines, *supra* note 17.
159. *See* Gaines, *supra* note 17.
160. *See* Gaines, *supra* note 17.

action based upon it may be a sufficient incentive to influence governments to assess in advance the environmental effects of projects such as the Devils Lake outlet and avoid taking steps which could trigger an Article II remedy.

4. *The Article IV Duty Not to Pollute*

The Treaty also includes an explicit measure to prevent degradation of water quality.[161] The second paragraph of Article IV contains the covenant about pollution which is discussed above.[162] It clearly applies both to boundary and transboundary waters: "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."[163]

As demonstrated above, it would appear likely that it is this provision which provides the basis for Canada's position with respect to the Devils Lake dispute. There seems little doubt that degradation of water quality and/or the introduction of non-native biota, which results in injury to health or property across the border, would be considered to be "pollution" for the purpose of the Treaty. [164]

It appears that concern about compliance with the Article IV duty not to pollute is the spur that motivated the United States to agree to the 1977 Garrison Reference to the IJC. This also seems to be the concern that continues to motivate the United States to maintain its dialogue with Canada in the form of the Garrison Joint Technical Committee. The IJC itself has expressed an opinion with respect to the implications of the Article IV obligation in a 1988 reference report about a proposed Canadian project.[165] Again, in that case as in the Garrison report, the IJC

---

161. *See* Boundary Waters Treaty, *supra* note 8, art. IV, 36 Stat. 2448, 2450.

162. *See* Boundary Waters Treaty, *supra* note 8, art. IV, 36 Stat. 2448, 2450.

163. *See* Boundary Waters Treaty, *supra* note 8, art. IV, 36 Stat. 2448, 2450.

164. Gaines, *supra* note 17, offers a detailed analysis of the meaning of "pollution," and the application of this provision to the Garrison Diversion project as it was conceived in 1974 (before the reference to the IJC). Also see Pantaleo, *supra* note 141,at 506-07, for a discussion of how this provision could be used in private law actions in the domestic courts of the United States to address harm that may be suffered in connection with the Garrison Diversion project. Writing more recently, Carlos Manual Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992), argues for a theory which would permit such treaty provisions to be used as the basis for legal action in American domestic courts. *Haudenosaunee Six Nations of Iroquois (Confederacy) of North America v. Canada, Great Britain, United States* 1998 WL 748352 (W.D.N.Y. Oct. 16, 1998) and *Six Nations of Iroquois (Confederacy) of North America v. Niagara Mohawk Power Corp.*, 1999 WL 528822 (W.D.N.Y. July 22, 1999), are decisions in a case in which the plaintiff attempted unsuccessfully to use the Treaty pollution provision as the basis for a private right of action against Canada, Great Britain and the United States. The complaint was dismissed at the outset on the basis, *inter alia*, that it disclosed no cause of action, but it should be noted that plaintiffs appeared without counsel, and the hearings focused on procedural deficiencies.

165. *See* INTERNATIONAL JOINT COMMISSION, IMPACTS OF A PROPOSED COAL MINE IN THE FLATHEAD

explicitly adopted the precautionary approach and recommended that the project not proceed, stating that:

> The Commission believes that, to ensure that the provisions of the Boundary Waters Treaty are honoured, when any proposed development project has been shown to create an identified risk of a transboundary impact in contravention of Article IV, existence of that risk should be sufficient to prevent the development from proceeding. This principle should apply, even though the degree of the risk cannot be measured with certainty, unless and until it is agreed that such an impact—or the risk of it occurring —is acceptable to both parties.[166]

The project at issue in that report, a proposed coal mine in the Flathead River Basin, also was stopped after the IJC reported its recommendations.[167] The need to avoid violation of the Article IV Treaty obligation not to pollute thus seems to have proved to be a powerful influence on governments on both sides of the border.

5. *Dispute Resolution by the IJC under the Treaty*

The Treaty sets out two means by which the two countries can address disputes with each other: submission to arbitration by the IJC, and a reference for the opinion of the IJC, such as was done in the case of the Garrison and Flathead River Basin projects.[168] A ruling binding on both parties can be obtained by arbitration, but the submission to arbitration may only be made upon the consent of both the United States and Canada.[169] The submission of a reference to the IJC for "examination and report" may be done by one party alone,[170] but in fact, there has never been a reference by one party without the consent of the other. Nor has there been a submission to arbitration under Article X.[171] The IJC has conducted over fifty references, some prompted by proposals for projects, such as Garrison and the Flathead River Basin coal mine, which entailed a risk of violation of the Treaty.[172] The references have been conducted according to the practice described above for the Garrison reference, employing both technical assessment by experts and public

---

RIVER BASIN 9 (Dec. 1988).

166. *Id.*

167. *See id.*

168. *See* Boundary Waters Treaty, *supra* note 8, art. IX, 36 Stat. 2448, 2452.

169. *See* Boundary Waters Treaty, *supra* note 8, art. IX, 36 Stat. 2448, 2452.

170. *See* Boundary Waters Treaty, *supra* note 8, art. IX, at 2452.

171. *See* Vechsler, *supra* note 141, at 11.

172. *See* IJC Handbook, *supra* note 36, at 68.

hearings to gather information.[173] The recommendations made by the IJC as a result of these references generally have been followed.[174]

The proper role of the IJC has been much discussed in the legal literature. Most writers advocate a more authoritative role for the IJC or the creation of a parallel tribunal which would be able to render binding decisions upon a submission to arbitration by one party alone.[175] Goldberg, writing about Garrison in 1981 (during the time between the IJC reference report and the formation of the Canada-United States Consultative Group), expressed the view that there was a need for a tribunal to be created which would issue binding decisions when asked to do so by a party who was experiencing harm or who feared harm from transboundary pollution.[176] Whether such a solution would or would not be the most desirable means of dealing with such issues, it is clear that in the intervening nearly twenty years, no such tribunal has been created. Indeed, the fact that the arbitration provision of the Treaty has never been used may be an indication that the political will for such a measure does not yet exist.

The recommendation of the IJC itself in the Garrison reference was to approach such problems by entering into water quality agreements to cooperatively manage water quality in transboundary watersheds, instead of waiting until a particular project had been proposed.[177] While there has been cooperative effort between the two countries in the intervening years under the aegis of the IJC,[178] no watershed management board exists today to make binding decisions with respect to the Devils Lake dispute.[179] In reality, the Devils Lake dispute and others like it will continue to occur in the context of specific projects which are seen as beneficial, advantageous or necessary on one side of the border or the other. In practical terms, notwithstanding the cogency and passion of legal arguments which have been made,[180] the time may not have arrived for transnational decision making with respect to environmental issues in North America. A process is needed today to deal with such problems which does not require an evolution in political will and a merging of the administrative and judicial functions of the two national governments.

---

173. *See* IJC Handbook, *supra* note 36, at 68.

174. *See* Vechsler, *supra* note 141, at 27. Vechsler offers the examples of the Garrison Diversion, an American project and the Cabin Creek coal mine, a Canadian project.

175. *See* Dworsky & Utton, *supra* note 141, at 186-89; Goldberg, *supra* note 17, at 452-53.

176. *See* Goldberg, *supra* note 17, at 188-89.

177. *See* INTERNATIONAL JOINT COMMISSION, *supra* note 26, at 96-97.

178. See the efforts described by the IJC in THE IJC AND THE 21ST CENTURY, *supra* note 141.

179. See the further recommendation for such boards by the IJC in THE IJC AND THE 21ST CENTURY, *supra* note 141, and support for the concept in the legal literature by Dworsky & Utton, *supra* note 141.

180. *See, e.g.*, Brunnée, *supra* note 141.

6. *The Lessons of Garrison for the Role of the IJC*

What can be learned about the influence of the IJC from the thirty-year history of the Garrison dispute? It is self evident that both the existence of the pollution provision in the Treaty and the recommendations made by the IJC in the Garrison reference and other references have had an impact on the American decision-making process. The reference to the Treaty in the Reformulation Act, the method it encompasses for ensuring Treaty compliance, the fact that the Garrison project has been reconfigured in recognition of Canada's interests and the fact that no portion of the project which could impact Canadian waters has been built, all constitute solid evidence that the Treaty has had a powerful effect.

That effect has been felt largely on the influence that consideration of transboundary effects has been given in the American federal environmental assessment process.[181] As shown above, it would appear that the joint technical assessment process developed by the IJC was adopted by the American government, and applied in the context of its domestic environmental assessment process when developing Garrison plans in 1990. The Joint Technical Committee continues to date to work in an effective manner to gather information and conduct planning efforts with respect to the Garrison project. The influence of the Treaty and the IJC may be realized best by this influence on the American domestic process of environmental assessment.

B. CONTRIBUTION TO THE DOMESTIC ENVIRONMENTAL ASSESSMENT

1. *An Overview of Federal Assessment on Both Sides of the Border*

One practical solution for such a problem is for the country which may be impacted to contribute information during the process of environmental impact assessment which is now mandated for federal projects on both sides of the border. Each of the statutes passed with respect to the Garrison and Devils Lake projects has recognized the requirement to complete an environmental assessment process in compliance with the rules set out in NEPA. Similarly, if a project such as Devils Lake were proposed in Manitoba, it likely would trigger inter alia

181. *See, e.g.*, SYKESTON CANAL ALTERNATIVE STUDY, *supra* note 78.

environmental assessment and licensing processes under *The Environment Act*[182] and the *Canadian Environmental Assessment Act*.[183] NEPA and the regulations implementing it provide, at a minimum, that a Devils Lake outlet cannot be constructed with federal funding, or upon the issuance of a federal permit, without completion of an Environmental Impact Statement and a Record of Decision by the Administration.[184] The process requires that decision makers take a "hard look at the environmental consequences of the decision.[185]

2. *NEPA and Transboundary Issues*

It appears that the NEPA impact assessment is intended also to cover the transboundary effects of federal actions. An Executive Order issued by President Carter in 1979 specified that NEPA applies even to actions taken by the United States outside its borders.[186] The Council for Environmental Quality (CEQ) has recently issued a memorandum to heads of agencies giving guidance as to the need to apply NEPA to proposed federal actions in the United States with transboundary effects.[187] The CEQ takes the position that NEPA "requires analysis and disclosure of transboundary impacts of proposed federal actions taking place in the United States."[188] The CEQ relies for its interpretation in part on provisions of NEPA which refer to the "worldwide and long-range character of environmental problems," and the direction it gives to federal agencies to "assist other countries in anticipating and preventing a decline in the quality of the world environment."[189] They point out that the weight of the body of NEPA law, including NEPA, the regulations and case law, requires that federal agencies must assess environmental impacts to the extent that they are reasonably foreseeable, regardless of

182. S.M. 1987-88, c.26, section 12 and the *Classes of Development Regulation*, Man. Reg. 164/88 (defining certain inter-basin water transfers and flood control projects as "developments" which require an environmental license). A comprehensive environmental assessment process is required in order to obtain the license. Pursuant to section 54 of the Act, the Crown (that is, the provincial government and its agencies) is bound by the Act.

183. See S.C. 1992, c. 37, which is discussed *infra*.

184. *See* Pub. L. No. 91-190, 83 Stat. 852; Environmental Impact Statement, 40 C.F.R. pt. 1502; NEPA and Agency Decisionmaking, 40 C.F.R. pt. 1505; Other Requirements of NEPA, 40 C.F.R. pt. 1506; Terminology and Index, 40 C.F.R. pt. 1508.

185. Association of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1187-89 (9th Cir. 1997).

186. *See* Exec. Order No. 12,114, 44 Fed. Reg. 1957 (Jan. 4, 1979).

187. *See* Memorandum from Kathleen A. McGinty, Chair, Council on Environmental Quality, to Heads of Agencies on the Application of the National Environmental Policy Act to Proposed Federal Actions in the United States with Transboundary Effects (July 1, 1997) (on file with author).

188. *Id.*

189. COUNCIL ON ENVIRONMENTAL QUALITY GUIDANCE ON NEPA ANALYSES FOR TRANSBOUNDARY IMPACTS 2 (July 1, 1997) [hereinafter CEQ GUIDANCE] (on file with author) (quoting 42 U.S.C. § 4332(2)(F)).

where they occur.[190] They specifically require that agencies be alive to the potential impacts of federal actions on transboundary watersheds.[191]

In addition, the CEQ re-states the principle of international law that "no nation may undertake acts on its territory that will harm the territory of another state."[192] This principle was first stated in the course of a decision by the IJC on a reference with respect to a proposed smelter which was expected to have transboundary effects on air quality.[193] This decision generally is cited as the original source for this doctrine in international law.[194] There seems to be little doubt, then, that the American federal environmental impact assessment process generally is intended to include assessment of transboundary impacts.

3. *Canadian Participation in the Garrison Environmental Assessment: Success of the Specially Designed Process*

Canadian participation in the American federal assessment process undertaken in the Garrison project has been a practical means of addressing Canadian concerns since the formation of the Garrison Joint Technical Committee. As described above, the recommendations which have resulted from the work of the Committee, such as those contained in their November, 1990 report,[195] have served as the means for both accommodating Canadian concerns and for guiding, in a practical sense, the direction of further planning of the project. The lesson that may be learned is that beneficial results occur when government technical experts from both sides of the border work together to gather and share information in a specially structured format.

4. *Canadian Participation in Devils Lake Environmental Assessment*

Canada and Manitoba also have attempted to contribute actively to the federal environmental assessment process for Devils Lake, though, as explained above, that process has only reached the phase of scoping the assessment. This contribution has come in the form of comments submitted on the scoping work done by the U.S. Corps of Army Engineers,

---

190. *See id.* at 2, 3.

191. *See id.* at 4.

192. *Id.* at 5 (citing the Trail Smelter Arbitration, *U.S. v. Canada*, 3 UN Rep. Int'l Arbit. Awards 1911 (1941), at 5).

193. The Treaty provides that the IJC can hear "any questions or matters of difference" referred to it by the two governments, not just issues relating to boundary or transboundary waters.

194. *See* Gaines, *supra* note 17; CEQ Guidance, *supra* note 189, at 5-6; Brunneé, *supra* note 141 at 125-26.

195. *See* GARRISON JOINT TECHNICAL COMMITTEE, *supra* note 29, at 37-42.

which "has identified serious concerns with the ability to operate an outlet to meet existing water quality standards."[196] It is possible that Manitoba's concerns will be addressed in the context of the technical studies performed under the direction of the Corps. The Corps has been conducting or overseeing a wide variety of studies, including Devils Lakewater level, quality modeling, climate studies, modeling of downstream water quality, and reviewing the literature with respect to the biota transfer issue.[197] It would appear that whatever the ultimate scope of the environmental assessment is to be, the Corps of Engineers is well aware that downstream water quality and biota transfer are two of the issues which will have to be addressed. The February 15, 1996, Devils Lake Contingency Plan included a reference to the need to address the biota transfer issue, recognizing that:

> An emergency outlet to the Sheyenne River faces the same challenges of environmental, W.Q. [water quality], biota, political, cost and other issues as a permanent outlet. Thus, the same Federal, State, local, interstate and international players would be involved. The decision-making process must prioritize several factors, including biota transfer . . . .[198]

The section of the 1996 Contingency Plan dealing with biota transfer states that the issue was being considered by the "Garrison Joint Technical Committee, a technical arm of the Canadian-United States Consultative Group."[199] At that time, the Joint Technical Committee did compile existing data, review that material and attempt to identify gaps in the scientific and technical information and research, as a preliminary step to identifying the research requirements which should be addressed during a full assessment. It drafted a report which was intended to be an internal working document shared with government agencies.[200] As stated above, Canada also has contributed comments to the Corps in the scoping phase of the environmental impact assessment, as have many other interested persons, during the public review of the Corps' draft scoping document. While it is possible that each of the research needs identified by the Joint Technical Committee in its report will be taken into account by the Corps in setting the specific terms of each of the

196. *See Manitoba's Concerns*, *supra* note 3.

197. *See Corps Conducting Wide Range of Studies as Final Scoping Document Nears Completion*, DEVILS LAKE EMERGENCY OUTLET NEWSLETTER (U.S. Army Corps of Engineers, St. Paul District & North Dakota State Water Comm'n), Oct. 1998, at 1-4.

198. DEVILS LAKE CONTINGENCY PLAN, *supra* note 85.

199. *See* DEVILS LAKE CONTINGENCY PLAN, *supra* note 85.

200. Interview with Robert V. Oleson, *supra* note 117.

studies to be performed as part of the full environmental impact assessment, the NEPA process as it is formally structured does not ensure that this will occur. Nor does the process provide for Canadian representatives to participate with the Corps in making decisions with respect to setting the terms of those studies, assist in carrying them out or overseeing their completion, or considering the results and drafting the environmental impact statement with respect to Canadian interests.

C. FINDING A METHOD THAT WORKS

1. *A New Model for Assessing Transboundary Effects*

It would appear that the better plan would be to incorporate into all environmental assessment processes involving transboundary effects, not only consideration of transboundary effects, but a formal method for allowing all the interested governments to participate in the assessment. It is to be expected that both Canada and the United States intend to comply with Treaty obligations to each other, and that an assessment of potential environmental effects performed by a bi-national panel of credible, well-qualified experts whose mandate is to strive for impartiality would assist both in doing so. The IJC's method of appointing bi-national groups of technical experts to study the issues forms one example of the means by which this can be accomplished. It may be that such a method can be incorporated readily into the method of assessment which is followed in each jurisdiction with respect to projects which entail a risk of transboundary effects. Examination of the practice followed in Canada may provide a model for such a method, and a focus for its application to the international setting.

2. *A Digression: Canadian Division of Powers*

It may be helpful at this point to make a digression in order to provide a brief explanation of the Canadian constitutional division of powers, so that the relative positions of Canada and Manitoba will be clear with respect to a transboundary dispute of this nature. Canadian constitutional law does not allocate responsibility either for water issues or for the environment wholly to either level of government. Each has functional powers and general powers which include jurisdiction over environmental issues. At the risk of greatly over-simplifying the issues, the federal government has jurisdiction over specific matters, such as federal Crown lands (most Crown lands in the provinces being under the control of the Provinces), navigation, protection of fisheries, pollution of

coastal waters outside the boundaries of any province and likely the pollution of inter-provincial waterways.[201] Canadian constitutional law, for the most part, grants to provinces the regulation of property and civil rights, and ownership and jurisdiction over renewable and non-renewable natural resources, including the ownership and regulation of private proprietary rights in fish, water and water-related resources.[202] Thus, although federal jurisdiction over the environment is an evolving area of Canadian law, to date the provinces have exercised the most direct control over environmental decision making.

Jurisdiction with respect to the Treaty is clearer. American readers may have noticed that the full name of the Treaty indicates that the party contracting on behalf of Canada in 1909 was Great Britain. As constitutional law expert Professor Hogg explains, Canada did not acquire full international legal personality until 1926, when the Balfour Declaration conveyed to the federal government the practical right to conduct Canada's foreign affairs and make treaties, with the last vestiges of Great Britain's power to conduct foreign affairs eliminated in 1947.[203] Although there is no Supremacy Clause[204] in the Canadian constitution, such as there is in the American, the Canadian constitution does include a power to implement such treaties on behalf of both the federal government and the provinces.[205] That power belongs unquestionably to the federal government and, generally, must be exercised through the passage of legislation for that purpose.[206] The federal government has

---

201. For an overview of the division of powers with respect to environmental matters see Marie-Ann Bowden, *Jurisdictional Issues in* E.L. HUGHES, A.R. LUCAS & W.A. TILLEMAN, ENVIRONMENTAL LAW AND POLICY (2d ed. 1998) and Neil Finkelstein & Rachel Urman, *Constitutional Jurisdiction in Relation to Water Law*, in the CBA National Symposium on Water Law, *supra* note 141.

202. The *Constitution Act, 1867*, subsections 92(13) (property and civil rights in the province), and 92(16) (all matters of a local or private nature) section 109 (ownership of land, mines and minerals) and section 92A (ownership of non-renewable natural resources, forestry and electrical energy) and the *Natural Resource Transfer Agreement*(s), which transferred equivalent rights to the provinces which were not parties to confederation in 1867. Federal jurisdiction over navigation and shipping is in subsection 91(10), and protection of the fishery resource is in subsection 91(12). The extent of federal jurisdiction over protection of the environment, including water resources, is an evolving area of Canadian constitutional law. See Bowden, *supra* note 201, for an introduction to the case law which comprises the judicial debate over Canadian constitutional jurisdiction over the environment, and Finkelstein & Urman, *supra* note 197, for a detailed discussion of constitutional issues relating to water in Canada.

203. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 11-2 (loose-leaf ed. 1997).

204. U.S. CONST. art. VI, cl 2.

205. The treaty-implementation power is found in section 132 of the *Constitution Act, 1867.*

206. *See* Hogg, *supra* note 203, at 11-5. There are circumstances in which Canada can implement a treaty without legislation but not if the treaty affects any private or Crown right, or requires any government action other than executive action of the federal government. Professor Hogg contrasts the Canadian Constitution with the American Constitution, which in Article VI simply states that all treaties are "the supreme law of the land." While treaties made by the Empire could be implemented by the federal government alone, the implementation of treaties made by the federal government since 1926 is a different story. Until the 1937 decision in *A.-G. Can.* v. *A.-G. Ont.*, [1937] A.C. 326 (the "Labour Conventions" case), it was argued that the section 132 federal power to implement

enacted such legislation with respect to the Treaty. The federal statute which confirms and sanctions the Treaty states that it amends both federal and provincial statutes to the extent that they are inconsistent with the Treaty, and specifies that the Federal Court is the court of jurisdiction for Article IV claims.[207] For the purpose of applying the Treaty in the international context, then, the "Canadians" are represented by the federal government of Canada, and jurisdiction over international relations with respect to the Treaty belongs to the federal government.

Not so, however, for the enforcement of rights under Article II of the Treaty. To the extent that damage is suffered as a consequence of impacts to water quality or harm to fish, a right to take legal action on the basis of that harm likely lies with the Crown in right of the affected province and/or the persons whose private rights are affected. In addition, because of the more active role played by the provinces in regulation of the environment generally, including mining, forestry and in large part impacts to freshwater quality, it is the provincial ministries whose officials have much of the expertise which is required to assess and monitor a project such as the Devils Lake outlet. It may be seen, therefore, that both Manitoba and Canada have active roles to play in disputes such as Devils Lake and in ensuring that Treaty obligations with respect to environmental matters are met. It is to be expected that North Dakota and the federal government of the United States have a similar division of interests.

3. *The Canadian Model for Inter-Jurisdictional Cooperation*

Both the Canadian federal and provincial jurisdictions have enacted statutes which mandate environmental assessment in certain circumstances. In Manitoba, as an example, there is a requirement to obtain an environmental license to engage in developments which may be expected to have all sorts of environmental impacts, including point source emissions to air, land or water, and changes to the natural environment, such as interbasin diversions of water.[208] When a proposal for such a license is filed, the regulator sets an environmental assessment process which includes, at a minimum, a review of the proposal by a technical advisory committee (TAC) comprised of government officials (and on

---

Empire treaties had devolved on the federal government. The Labour Conventions case decided that the provinces each would have to enact legislation to make the parts of treaties which fell within their jurisdiction effective. The constitutional arguments for explicitly overruling the Labour Conventions case, or finding a treaty-implementation power in the general federal power, especially with respect to environmental protection treaties, contribute to lively discussion and speculation in Canadian legal literature and case law. For an overview, see the discussion in Hogg at 11-12-11-16.

207. *See* International Boundary Waters Treaty Act, R.S.C., c. I-20, s. 2.

208. *See The Environment Act*, S.M. 1987-88, c.26 and the *Classes of Development Regulation*, Man. Reg. 164/88.

occasion others) with relevant expertise. Since 1989, it has been fairly standard practice for Manitoba also to include in the TAC any federal officials who have relevant expertise.[209] For several years, Canadian jurisdictions have been involved at efforts toward formal "harmonization," which is creating symmetry between the types of requirements that may be made by each of the governments, and cooperation in conducting environmental assessments. The first formal agreement between Canada and Manitoba to work towards harmonization in environmental assessment was signed in 1994, and renewed in June, 2000.[210] The federal statute which mandates environmental assessment, the *Canadian Environmental Assessment Act* (CEAA), is relatively new, but was pre-dated by an executive order requiring environmental assessment which also had the force of law.[211] In similar fashion to NEPA, CEAA generally requires environmental assessment, of projects: that will receive federal funding; that require a disposition of federal lands; of which the federal government is the proponent; or which cannot take place without the issuance of specified federal permits.[212] The environmental assessment must be completed and a report issued before the federal authority may exercise the function which triggered the assessment.

In addition, one of the explicit purposes of CEAA is "to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out."[213] These include both internal transboundary effects and international effects.[214] In addition to the specific "triggers" described above, there is discretion for the federal government to initiate an environmental impact assessment if a proposed project could "cause significant adverse environmental effects in another province" or "outside Canada."[215] The federal authority is also empowered to forbid the proponent to carry out the project until the assessment has been completed.[216] These provisions would seem to cover all Canadian projects similar to the North Dakota State plan for Devils Lake.

---

209. Interview with Dan McNaughton, Canadian Environmental Assessment Agency (Oct. 2000).

210. *See* Canada-Manitoba Agreement for Environmental Assessment Corporation (1994); Canada-Manitoba Agreement on Environmental Assessment Cooperation (June 2, 2000).

211. *See Canadian Environmental Assessment Act*, S.C. 1992, c. 37; Environmental Assessment and Review Process Guidelines Order SOR/84-467; Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), 1 S.C.R. 3, 132 N.R. 321 (S.C.C.).

212. *See id.* section 5.

213. *See id.* section 4.

214. *See id.*

215. *See id.* sections 46, 47

216. *See id.* sections 46, 47, 50.

4. *Canadian and American Federal Assessment: A Joint Approach*

As does NEPA, the Canadian federal assessment process sets out specific substantive and procedural requirements which must be met, such as assessment of cumulative effects, consideration of comments from the public and the consideration of feasible mitigation measures.[217] The provisions contemplate three levels of assessment, called screening, comprehensive assessment, and panel review, with the panel review reserved for cases which have been specially selected because of the potential for serious adverse effects and/or the level of public concern.[218] In such cases, federal authorities have a duty to "consult and cooperate [with any other Canadian jurisdiction which has an obligation to perform environmental assessment of the project] respecting the assessment of the environmental effects of the project."[219] NEPA too requires cooperation with state and local agencies and the elimination of duplication by engaging in joint assessment processes where feasible.[220]

Although both CEAA and NEPA provide for assessment of transboundary effects, CEAA contains a provision that does not appear to have a parallel in American law. The CEAA provision allowing for a joint review panel to be formed between federal and provincial jurisdictions also allows for a joint review panel to be formed with the government of a foreign state.[221] The contemplation is that the terms of the environmental assessment process would be set by the two governments to meet the requirements of the law of both countries. While this provision has not been used as yet, there is a record of experience in Canada of joint assessment by federal and provincial jurisdictions which suggests that the joint assessment approach can be effective.[222] Manitoba has a similar provision permitting its Minister to enter into an agreement with another jurisdiction (federal or provincial) in order to conduct a joint assessment process.[223]

It is true that the Canadian federal joint impact assessment process does not formally come into play unless there is a requirement for a

---

217. *See id.* section 16.

218. *See generally id.*

219. *Id.* section 40(2)(b).

220. *See* 42 U.S.C. § 4332(C) (1994); 40 C.F.R. § 1501.7(a)(1) (inviting participation in the scoping process); 40 C.F.R. § 1506.2 (explicitly requiring the elimination of duplication with State and local procedures by requiring cooperation and joint assessment to the fullest extent possible).

221. *See* section 40.

222. See generally the discussion of the Canadian joint assessment process in Rodney Northey, The 1995 Annotated Canadian Environmental Assessment Act (Carswell, 1994).

223. *See* section 13.1 of *The Environment Act.*

jurisdiction(s) on both sides of the border to engage in an environmental assessment process. One of the purposes of the provisions, however, seems to be to create a practical means to allow joint participation in environmental decision-making which affects jurisdictions on both sides of the border. The principle behind the process appears to be that all the jurisdictions which would be affected by the project should share in the appointment of well-qualified experts instructed to work in an impartial fashion to gather and review the relevant scientific and technical data.

There does not appear to be any reason why the model could not be adapted for use in a circumstance such as that which exists for Garrison or Devils Lake. Either federal government could invite the other government to enter into a formal agreement to participate in the other's environmental assessment process by forming a panel to conduct the assessment, or to review the assessment results and make recommendations before a decision has been made. In the context of NEPA, this could be done as a voluntary effort on the part of the decision maker before drafting the required environmental impact statement and issuing the certificate of decision. The work of the Joint Technical Committee on the Garrison Diversion provides a practical example that such a process can be useful in the context of fulfilling requirements under NEPA. It would seem that such a step would further the fulfillment of environmental assessment of transboundary effects required by the CEQ.[224]

For the joint assessment approach to work over the long term, both federal jurisdictions would have to make a commitment to ensure that all projects with the potential for transboundary effects would be made subject to a federal environmental assessment process, or at least to a process with equivalent protections. As has been explained, the process for such federal involvement has already been incorporated into Canadian law. It would be necessary for American federal authorities to undertake an analysis of the steps that would be required to ensure that all projects which put compliance with American obligations under the Treaty in issue are made subject to appropriate environmental assessment law regimes. The North Dakota State Devils Lake outlet assessment plan, which would not proceed according to such standards, would not be sufficient. The assessment process that is required under the law of Manitoba, as described briefly above, may meet the criteria.

One can imagine that a joint process with respect to Devils Lake would involve an agreement or exchange of letters between Canada and the United States that would result in the appointment of a team of

224. *See generally* CEQ GUIDANCE, *supra* note 189.

Canadian experts to work together with the Corps of Engineers in scoping and carrying out those aspects of the environmental impact assessment which relate to transboundary effects. The experts, though appointed by Canada, would include those scientists and engineers employed by Manitoba who are most knowledgeable about the effects of such a project. The results would form part of the environmental impact statement which is ultimately produced. A report produced in that fashion is likely to be more readily accepted on both sides of the border as a credible basis for making decisions about the project than would a report prepared without adequate consultation and cooperation.

5. *Arguments in Favour of the Joint Approach*

The creation of such a process is attractive for a variety of reasons. The joint efforts would be incorporated into a legislated, structured process of environmental assessment with minimum standards to be met, a criterion which the *ad hoc* process proposed by the State of North Dakota clearly does not meet.[225] Formal consultation between diplomats with respect to Treaty compliance would be based on information gathered through international collaboration between technical experts working together to issue an impartial, credible report. The proposed joint process, unlike a referral to the IJC, provides for an active, shared role for the foreign jurisdiction in environmental impact assessment without taking the process outside the environmental assessment scheme of the country in which the project is proposed. Neither jurisdiction would run the risk of obtaining from an international tribunal a decision with which it may not agree. In addition, the environmental impact assessment itself, and the decision based on it, would remain subject to judicial review in the courts of the country which had conducted the assessment. No evolution in political will or statutory enactment would likely to be required in either country in order to implement it. In addition, if either side were to be displeased with the results, the opportunity to refer the issue to the IJC or consider other legal options would remain open.

IV. CONCLUSION

It has been well understood for many years on both sides of the border that effective environmental impact assessment is integral to sound planning. This is especially true with respect to decision making

225. *See* discussion *supra* Part II.S.

about water resources. Both the United States and Canada have a requirement to comply with requirements of the Treaty. Both have effective federal environmental assessment regimes in which planning for transboundary impacts to waterways can be managed. Both have an apparent reluctance to allow environmental impact assessment and decision making with respect to such projects to be managed at the first instance by an international tribunal. Both have an interest in creating a legal process to manage such disputes which maintains the protections offered by their internal political controls on decision making. Persons on both sides of the border who may be affected by the assessment have an interest in being able to apply to the courts for judicial review of both the process of assessment and the decisions which result. It would seem that the time has come for Canada and the United States to undertake an experiment in joint environmental impact assessment within the context of the mandatory environmental assessment process that forms part of the federal law of both countries. The apparently intractable dispute over Devils Lake, and others like it, may become manageable to the benefit of all concerned in the result.

* * *