

# **DEVILS LAKE OUTLET AND THE NEED FOR CANADA AND THE UNITED STATES TO PURSUE A NEW BILATERAL UNDERSTANDING IN THE MANAGEMENT OF TRANSBOUNDARY WATERS**

Andrea Signorelli\*

---

## **I. INTRODUCTION**

The image of Canada is based on pure and plentiful water. White snow, eternal glaciers, running rivers, and vast lakes are part of the idea the world has about this nation. Few things are more threatening to this picture than polluting national waterways, but now Canadians are also afraid of contaminated water coming from their southern neighbour, the United States. Devils Lake is a closed basin of water located in north-east North Dakota. In recent years water levels have risen, creating frequent flooding with grave damage for farmland, homes, and businesses. The only way to face the emergency seems to be draining excess water into a watercourse. The North Dakota Government decided to build an outlet that emptied into the Sheyenne River, just fifteen miles south of the lake. The Sheyenne River merges into the Red River, which flows north, crosses the border into Canada and empties into Lake Winnipeg. The decision to build this outlet created a lot of concern among people living in Manitoba who worried about the quality of their water.

The controversy might appear, at first glance, to be a simple dispute involving North Dakotan farmers and landowners on one side, and Manitobans, and in general Canadians, with an interest in protecting the quality of their lakes and rivers on the other side. As Devils Lake spreads, so does its capacity to affect the diplomatic relationship between Manitoba and North Dakota, and by extension Canada and the United States. This dispute could have a negative impact on the development of environmental protection measures at an international level. Behaviour of important neighbouring nations like the United States and Canada, which have enjoyed a long history of fruitful cooperation on environmental issues, will have important consequences

---

\* LL.B. (Milano – Bicocca); LL.M. (UM). Currently teaching Environmental Law at the University of Manitoba Faculty of Law, and Sustainability and Environmental Politics at the Department of Politics, University of Winnipeg.

for the international community and for the way nations negotiate the use of shared natural resources and the protection of these resources.

## II. THE HISTORY OF DEVILS LAKE OUTLET

Devils Lake is a lake with no natural outlet and is part of the Hudson Bay basin. The water level of the lake is closely connected to weather conditions. During periods of copious precipitation the water level rises. It naturally decreases through evaporation and diminishes significantly during dry periods.<sup>1</sup> In recent years Devils Lake has been the subject of a dispute regarding an outlet built to control its water level, which drains excess water into the Sheyenne River. Between 1993 and 1999, significant precipitation caused Devils Lake elevation to rise approximately 25 feet.<sup>2</sup> During this period the lake doubled its size and caused frequent and devastating flooding, including the inundation of over 80,000 acres of land.<sup>3</sup> The U.S. federal government, as well as North Dakota authorities, spent over \$350 million in emergency funding to combat the flooding.<sup>4</sup>

In 1997, to prevent the frequent flooding caused by fluctuation of the lake's water level, Congress directed the United States Army Corps of Engineers (Corps) to plan a project and to prepare an associated Environmental Impact Statement (EIS) for an emergency outlet from Devils Lake to the Sheyenne River.<sup>5</sup> The Sheyenne River was chosen because of its proximity to Devils Lake, which is only fifteen miles north of the river bed.<sup>6</sup> Devils Lake and the Sheyenne River are both geographically part of the Hudson Bay Basin and this choice would not involve the inter-basin transfer of water. Devils Lake water would naturally flow from the lake overland to Sump Lake and then to the Sheyenne River when it reaches an elevation of 1,459 feet above sea

---

<sup>1</sup> U.S. Army Corps of Engineers, St. Paul District, *Final Devils Lake, North Dakota Integrated Planning Report and Environmental Impact Statement*, (April 2003), vol. 1, S-4, online: U.S. Army Corps of Engineers <[http://www.mvp.usace.army.mil/fl\\_damage\\_reduct/default.asp?pageid=14&subpageid=83](http://www.mvp.usace.army.mil/fl_damage_reduct/default.asp?pageid=14&subpageid=83)> [EIS].

<sup>2</sup> *Ibid.* at I-1. The record elevation of 1,448.33 ft msl was reordered in July 2001.

<sup>3</sup> *Ibid.* at S-4.

<sup>4</sup> *Ibid.* at S-1.

<sup>5</sup> *Ibid.* see Abstract.

<sup>6</sup> *People to Save the Sheyenne River, Inc. et al. v. North Dakota Department of Health et al.*, 2005 ND 104, 697 N.W. 2d 319 at 323 (N. Dak. Sup. Ct. 2005). [*People to Save the Sheyenne River*, 2005].

level. However, the last natural spill is estimated to have happened 800 to 1,200 years ago.<sup>7</sup>

The Corps' final report and EIS are dated April 2003. Among several alternatives, the Corps proposed the construction of an outlet in the area of Pelican Lake, with a maximum discharge capacity of 300 cubic feet per second of water. In addition, the Corps recommended that the outlet be operated seven months per year, from May to November.<sup>8</sup> This proposal was subject to several conditions, including the assurance of the Secretary of State that the outlet would not violate the *Boundary Waters Treaty (BWT)* of 1909, and North Dakota's compliance with the *Clean Water Act* regulations.<sup>9</sup>

The Corps' project was estimated at a cost of \$186.5 million. Under the Corps' cost sharing schedule, North Dakota's share would have been approximately \$70 million.<sup>10</sup> Although the estimated cost was high, this project seemed to have the smallest environmental impact of the alternatives analysed.<sup>11</sup> The EIS required the construction of a sand filter to prevent the transfer of invasive species. It also included monitoring the Sheyenne River's water condition before opening the outlet and comparing information gathered in association with the operation of the outlet.<sup>12</sup>

The proposed outlet was never constructed. North Dakota officials did not agree with the provisions of the Corps' project concerning water quality and biota transfer, as well as the state's share for the cost of the outlet.<sup>13</sup> The North Dakota Legislature asked the North Dakota Water Commission to prepare a study in order to plan the construction of an outlet relying entirely on state funds.<sup>14</sup> The Water Commission required

---

<sup>7</sup> Federal Emergency Management Agency, *Final Programmatic Environmental Assessment Devils Lake Region, North Dakota*, (11 May 2006), at 1, online: Federal Emergency Management Agency <[http://www.fema.gov/library/file.jsessionid=598F9D6922473775ADD017E18E31A3E8.Worker2Library?type=publishedFile&file=pea\\_devils\\_lake.nd.pdf&fileid=f6884e10-592d-11db-8645-000bdba87d5b](http://www.fema.gov/library/file.jsessionid=598F9D6922473775ADD017E18E31A3E8.Worker2Library?type=publishedFile&file=pea_devils_lake.nd.pdf&fileid=f6884e10-592d-11db-8645-000bdba87d5b)>.

<sup>8</sup> EIS, *supra* note 1 at S-2.

<sup>9</sup> *Ibid.* at S-1.

<sup>10</sup> International Joint Commission, *Status Report on the Activities of the International Red River Board* (15 Apr 2004) at 5, online: IJC Publications <<http://ijc.org/php/publications/pdf/ID1551.pdf>>.

<sup>11</sup> For an evaluation of the alternatives, see EIS, *supra* note 1 at 5-53.

<sup>12</sup> *Ibid.* see Abstract.

<sup>13</sup> International Joint Commission, *Status Report on the Activities of the International Red River Board*, *supra* note 10 at 5.

<sup>14</sup> *People to Save Sheyenne River, 2005*, *supra* note 6 at 323.

and obtained a North Dakota Pollutant Discharge Elimination System (NDPDES) permit from the North Dakota Department of Health (NDDH).<sup>15</sup> This new project also planned to discharge excess water from Devils Lake to the Sheyenne River, but at a rate of 100 cubic feet per second and with a remarkable difference in construction and operation costs. The state's project cost was initially estimated to be around 28 million dollars, not even 15% of the cost of the Corps project.<sup>16</sup> The difference came from the decision not to include many of the environmental protection features adopted in the previous project, in particular the sand filter designed to limit the risk of invasive biota transfer.<sup>17</sup>

North Dakota's actions raised several concerns, especially on the other side of the border in Manitoba. The Sheyenne River is a tributary of the Red River, which crosses the border and empties into Lake Winnipeg. Many interests lay in the Canadian part of the Hudson Bay drainage basin. Lake Winnipeg is the tenth largest freshwater lake in the world and it supports an important commercial fishery. This industry is directly worth over C\$15 million and involves First Nation communities.<sup>18</sup> In addition, fresh waters in Manitoba are important sport fishing destinations and the Red River represents nearly 20% of the total value of this industry to the province.<sup>19</sup>

Manitoba opposed the Devils Lake outlet proposals because of the negative impact this kind of water diversion would have on the province's waters and ecosystems. Devils Lake's water quality is lower than the Red River's, since it contains a high level of total dissolved solids, sulphates, and high salt.<sup>20</sup> In addition, the long isolation of Devils Lake from the rest of the Hudson Bay drainage basin resulted in the diversification of the biota existing in its waters. Invasive species represent a real threat

---

<sup>15</sup> *Ibid.*

<sup>16</sup> International Joint Commission, *Status Report on the Activities of the International Red River Board*, *supra* note 10 at 6.

<sup>17</sup> *People to Save the Sheyenne River*, 2005, *supra* note 6 (Sup. Ct. Nos. 20040376 and 20040377) (Appellant's Brief at 8-9) [Appellant's Brief].

<sup>18</sup> Manitoba Water Stewardship, *Manitoba's Interests Regarding Transboundary Water Projects, Background*, online: Government of Manitoba <[http://www.gov.mb.ca/waterstewardship/water\\_info/transboundary/manitoba.html](http://www.gov.mb.ca/waterstewardship/water_info/transboundary/manitoba.html)>.

<sup>19</sup> *Ibid.*

<sup>20</sup> See generally Manitoba Water Stewardship, *A Limited Survey of Biota in Devils and Stump Lakes, North Dakota, Report No. 2005-03*, online: Government of Manitoba <[http://www.gov.mb.ca/waterstewardship/reports/transboundary/2005-10mb-devilslake\\_biota\\_rpt.pdf](http://www.gov.mb.ca/waterstewardship/reports/transboundary/2005-10mb-devilslake_biota_rpt.pdf)>.

when they come in contact with a new ecosystem and controlling their spread and effects can be almost impossible and expensive.

Manitoba, together with several groups opposing the outlet and the State of Minnesota, appealed to the North Dakota District Court to reverse the NDDH's decision to issue a NDPDES permit to the Water Commission. The district court affirmed the NDDH's issuance of the permit, so Manitoba appealed to the North Dakota Supreme Court.<sup>21</sup> Manitoba argued that the NDDH's decision "failed to adequately consider increased phosphorus loading in downstream waters".<sup>22</sup> In addition, the opponents raised concerns regarding a presumed permit violation of North Dakota's anti-degradation regulations<sup>23</sup> and a lack of measures to minimize the risk of biota transfer.<sup>24</sup> The North Dakota Supreme Court, like the district court, confirmed the NDDH's decision, affirming that it was not "arbitrary, capricious, or unreasonable".<sup>25</sup>

In April 2005 Canada wrote to the International Joint Commission (IJC) expressing its concern about the situation. The Canadian statement cited the IJC's recommendation on the Garrison Diversion Project, which asserted that a project involving the transfer of water between different drainage basins should not proceed "unless and until Governments agreed that methods had been proven that would eliminate the risk of biota and disease transfer or that those issues were no longer of concern".<sup>26</sup> Canada stated its apprehension that, in its opinion, the state project did not go through an environmental assessment. Other concerns were related to the prevention of invasive species transfer and pollution passing to the waters of the Sheyenne and Red Rivers, which would have grave economic and environmental consequences.<sup>27</sup> The Devils Lake outlet did not merely raise a matter of potential damage to Manitoba waters. This controversy would set a negative precedent. Both sides would have the opportunity to cite the Devils Lake project in support of any project and only take concrete actions to protect the environment if there is a real potential for damage.

---

<sup>21</sup> *People to Save Sheyenne River, 2005, supra* note 6 at 324.

<sup>22</sup> *Ibid.* at 239.

<sup>23</sup> *Ibid.* at 330.

<sup>24</sup> *Ibid.* at 331.

<sup>25</sup> *Ibid.* at 333. For a definition of the "arbitrary, capricious, or unreasonable" standard, see, *ibid.* at 323.

<sup>26</sup> Government of Canada, *Canada's Statement to the International Joint Commission*, online: Embassy of Canada in Washington <[http://geo.international.gc.ca/can-am/washington/shared\\_env/statementtoijc-en.asp](http://geo.international.gc.ca/can-am/washington/shared_env/statementtoijc-en.asp)>.

<sup>27</sup> *Ibid.*

The position of the U.S. Federal Government during the entire dispute has not been clear. The Corps's proposal was subjected to several conditions, in particular that the outlet would not violate the 1909 *BWT*. In effect, the United States requested that Canada join it in referring the matter to the IJC.<sup>28</sup> Canada declined the request at that time, arguing that a reference was premature because the U.S. Federal Government had not definitively decided to build the proposed outlet.<sup>29</sup> This dispute has shown the power difference between the two nations, not only diplomatic, but economic too.<sup>30</sup>

In early 2004, U.S. Secretary of State Colin Powell gave the formal assurance to the Corps that, in his opinion, the federal project would not "actually violate the 1909 Treaty as long as certain conditions are met".<sup>31</sup> The reference to the Corps' plan was clear, as well as the need to carry on activities to prevent transfer of biota from Devils Lake to the Sheyenne and Red Rivers. However, North Dakota officials, who had complained several times in the past about the delay of the federal project and the cost associated with the measures to prevent biota transfer, took the Secretary's letter as implicit authorization for the state's proposal as well.<sup>32</sup> Given that no federal funds were used and neither federal jurisdiction was involved, the state project was not subject to an environmental impact assessment. In addition, the federal government did not have any influence on North Dakota's plans.<sup>33</sup>

In 2005, after the Supreme Court of North Dakota upheld the NDDH's decision to issue the NDPDES permit, the U.S. Federal

---

<sup>28</sup> Hollis, Duncan B., "Disaggregating Devils Lake: Can Non-State Actors, Hegemony, or Principal-Agent Theory Explain the Boundary Waters Treaty" in *Responsibility of Individuals, States and International Organizations* (Ottawa: Canadian Council on International Law, 2007) 32 at 46.

<sup>29</sup> John Knox, "Environment: Garrison Dam, Columbia River, the IJC, NGOs" (2004) 30 *Can.-U.S. L.J.* 129 at 138.

<sup>30</sup> Herb Gray, "Proceedings of the Canada-United States Law Institute Conference on Understanding Each Other Across the Largest undefended Border in History" (2005) 31 *Can.-U.S. L.J.* 287 at 289.

<sup>31</sup> Letter from Colin Powell, U.S. Secretary of State, to General Flowers USA Army Corp of Engineers (20 Jan 2004), cited in Knox, *supra* note 29 at 133.

<sup>32</sup> Government of North Dakota, News Release, "Hoeven Welcomes Powell Ruling on Devils Lake Outlet" (22 January 2004), online: Government of North Dakota <<http://www.governor.nd.gov/media/news-releases/2004/01/040122.html>>.

<sup>33</sup> David Whorley, "The Devils Lake Outlet and Canada-U.S. Transboundary Water Relations; or, how George C. Gibbons got the Last Laugh" (2008) *Hamline L. Rev.* 615 at 626.

Government called for diplomatic negotiations with the Government of Canada and included the administrative bodies of North Dakota, Minnesota, and Manitoba.<sup>34</sup> An agreement was signed at the end of the negotiations, which allowed for the operation of the outlet under certain conditions pertaining to environmental protection and continued monitoring of water quality. The parties agreed that it was possible to operate the outlet “in a manner that [would] not pose an unreasonable risk to the other part of the Basin”.<sup>35</sup> In response to the concerns raised, especially regarding deterioration of water quality and other environmental effects, certain measures were taken. Specifically, the two governments agreed:

1. North Dakota would install a rock and gravel intermediate filter before opening the outlet;
2. The U.S. and Canada would cooperate in the design and construction of a more advanced filtration and/or disinfection system;
3. To develop and implement a shared risk management strategy for the greater Red River Basin in cooperation with the International Red River Board of the International Joint Commission;
4. To take immediate measures to prevent the spread of any invasive species that should be identified;<sup>36</sup>

In addition, both North Dakota and the U.S. federal government affirmed that they had no intention to propose or plan the construction of an inlet from the Missouri River to Devils Lake to help stabilize lake levels.<sup>37</sup>

North Dakota immediately closed the outlet in August 2005, after a few days of operation, due to increased sulphate levels in the Sheyenne River. In addition, North Dakota could not operate the outlet in 2006 because of state regulations.<sup>38</sup> In May 2006 the Water Commission asked

---

<sup>34</sup> John R. Crook, “United States and Canada Agree on Measures to Address Devils Lake Flooding and Ecological Protection” (2005) 99 A.J.I.L. 909 at 910.

<sup>35</sup> Government of Canada, News Release, No.142, “Joint Canada-U.S. Declaration on the Devils Lake Diversion Project” (5 August 2005), online: Canada News Centre

<<http://news.gc.ca/web/article-eng.do?crtr.sj1D=&mrhd=advSrch&crtr.mnthndVl=4&nid=162729&crtr.dpt1D=&crtr.tp1D=&crtr.lc1D=&crtr.yrStrtVl=2004&crtr.kw=devils%2Blake&crtr.dyStrtVl=26&crtr.aud1D=&crtr.mnthStrtVl=2&crtr.yrndVl=2010&crtr.dyndVl=1>>.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Hollis, *supra* note 28 at 40.

the NDDH to modify the permit, requesting an increase to the sulphate limit, a revision of the limit of total suspended solids (TSS), and an extension of the operating time.<sup>39</sup> On August 17, 2006, the NDDH modified the permit and accepted the Water Commission's request.<sup>40</sup> Once again, Manitoba appealed the decision to the North Dakota district, which affirmed the NDHH's decision, and again to the North Dakota Supreme Court.<sup>41</sup>

The Court, as in the 2005 case, analyzed the decision to issue the permit under an "arbitrary, capricious, or unreasonable" standard. At the end of this trial, the Court affirmed the NDDH's decision to modify the sulphate limit provided in the permit.<sup>42</sup> In addition, the Court held that an anti-degradation review was not required because the use of downstream waters would not be affected by the permit modification.<sup>43</sup> However, the Court revised the decision to modify the TSS standard and to extend the period of operation of the outlet, giving instruction to remove the modification.<sup>44</sup>

The outlet is currently operating under the modified permit. The lake's natural level continues to rise and fall and was diminishing considerably until the beginning of 2008.<sup>45</sup> It rose again in 2009 and by summer Devils Lake had reached a new record of 1,450.72 feet above sea level. On April 14<sup>th</sup>, 2010, the elevation registered by the USGS was 1,451.28 feet.<sup>46</sup> To confront the continuous emergency, authorities raised the levee protecting the City of Devils Lake and other urban areas. A more recent project plans to raise the levee from 1,460 feet to more than 1,465.<sup>47</sup> Another attempt to control flooding was to increase the limit of sulphate allowed in the Sheyenne River by operating the outlet for longer

---

<sup>39</sup> *People to Save the Sheyenne River, Inc. et al., v. North Dakota Department of Health et al.*, 2008 ND 34, 744 N.W.2d 748 at 751 (N. Dak. Sup. Ct. 2008).

[*People to Save the Sheyenne River, 2008*].

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* at 752.

<sup>42</sup> *Ibid.* at 757.

<sup>43</sup> *Ibid.* at 755.

<sup>44</sup> *Ibid.* at 759.

<sup>45</sup> Whorley, *supra* note 33 at 623.

<sup>46</sup> U.S. Geological Survey, "Elevation of Devils Lake" (14 April 2010), online: North Dakota Water Science Center

<<http://nd.water.usgs.gov/devilslake/data/dlelevation.html>>.

<sup>47</sup> Louise Oleson, "State approves more money for Devils Lake" *Devils Lake*

*Journal* (2 September 2009), online: Devils Lake Journal

<<http://www.devilslakejournal.com/news/x1886199767/State-approves-more-money-for-Devils-Lake>>.

periods of time and by allowing larger quantities of water. In July 2009, authorities in North Dakota had already raised the sulphate limit to 700 milligrams per litre of water on a temporary basis.<sup>48</sup> The aim is now to make a permanent change and raise the limit to 750 milligrams per litre, but this possibility creates new and stronger concerns on the Canadian side of the border.<sup>49</sup>

### III. LEGAL FRAMEWORK

#### a. The *Clean Water Act*

The most important legislation involved in this controversy is the *Clean Water Act* (CWA). Enacted by Congress in 1972,<sup>50</sup> its purpose is to prohibit the discharge of any pollutant unless a National Pollutant Discharge Elimination System (NPDES) permit is obtained.<sup>51</sup> To obtain a discharge permit, the applicant may request it from the Environmental Protection Agency (EPA) or from the state if it has adopted an EPA approved permit program.<sup>52</sup> Each state program must meet the minimum federal requirements provided for the CWA, but the EPA retains a right of veto for any permit issued by a state if the permit is outside the guidelines and requirements of the CWA.<sup>53</sup>

Under the CWA, a state is not only required to maintain the existing water quality standards, but also to create implementation plans to reach the standards required by the EPA.<sup>54</sup> When a state revises or adopts a new standard it must submit its decision to the EPA for approval. Specific uses must be assigned for navigable waters involved in

---

<sup>48</sup> Mia Rabson, "Devils Lake outlet pouring sulphate into Red" *Winnipeg Free Press* (23 October 2009), online: Winnipeg Free Press <<http://www.winnipegfreepress.com/world/devils-lake-outlet-pouring-sulphate-into-red-65736892.html>>.

<sup>49</sup> "Fargo hosting hearing about Devils Lake" *Winnipeg Free Press* (18 February 2010), online: Winnipeg Free Press <<http://www.winnipegfreepress.com/local/fargo-hosting-hearing-about-devils-lake-84681157.html>>.

<sup>50</sup> *Federal Water Pollution Control Act*, 33 U.S.C. § 1251 (2010) [*Clean Water Act*].

<sup>51</sup> *Ibid.*, § 1342.

<sup>52</sup> *Ibid.*, § 1342 (b).

<sup>53</sup> *Ibid.*, § 1342 (d) (2) (b).

<sup>54</sup> *Ibid.*, § 1313.

the process and the state must determine the water quality criteria related to these uses.<sup>55</sup>

The CWA is a strict set of rules with the purpose of limiting the discharge of pollutants into navigable waters. It is designed to maintain the integrity of waters and to facilitate the protection and propagation of fish, shellfish, and wildlife existing in these waters.<sup>56</sup> A NPDES permit is necessary to account for the addition of any pollutant to navigable waters from any point source.<sup>57</sup> Addition means any artificial movement of water from one body of water to another. The CWA does not explicitly define the term addition, but Courts have given it a broad definition.<sup>58</sup> Also, the term pollutant can be defined broadly under federal legislation to include almost everything from biological material to any kind of waste discharged into the water.<sup>59</sup>

In applying the permit program, each state is required to take a wide environmental approach and must consider the protection of waters as a priority, while also looking at the economical and social impact of the project.<sup>60</sup> North Dakota, like most states, has its own permit program.<sup>61</sup> Under its own statute, North Dakota requires compliance with the CWA requirements. In addition, the NDDH is designated as the water pollution control agency with all the powers provided by the *Federal Water Pollution Control Act*.<sup>62</sup> This means that the NDDH can lawfully issue, deny, modify, and revoke a permit. The Department can also hold public hearings before making a final decision regarding the

---

<sup>55</sup> *Ibid.*, § 1313 (c) (2) (a).

<sup>56</sup> *Ibid.*, § 1251.

<sup>57</sup> *Ibid.*, § 1362 (12) (a).

<sup>58</sup> *Roland C. Dubois and Restore v. United States Department of Agriculture, et al.*, 102 F.3d 1273 at 1299 (1st Cir. 1996).

<sup>59</sup> *Clean Water Act*, *supra* note 50, § 1362(6). The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. For a similar definition see also, *EPA Administered Permit Programs, The National Pollutant Discharge Elimination System*, 40 C.F.R. § 122.2 (b) (2010) [*EPA Permit Programs*].

<sup>60</sup> Joseph M. Flanders, “A Controversial Resolution to North Dakota’s Devils Lake Dilemma” (2006) 82 N. Dak. L. Rev. 997 at 1013

<sup>61</sup> *Control, Prevention, and Abatement of Pollution of Surface Waters*, N.D. Cent. Code § 61-28-04 (2010) [*Control of Pollution*].

<sup>62</sup> *Ibid.* § 4(12).

issuance and conditions governing a permit in order to receive comments about the permit process.<sup>63</sup>

**b. *People to Save the Sheyenne River, 2005***

In *People to Save the Sheyenne River v. North Dakota Department of Health*, the dispute concerned the compliance of North Dakota authorities with the state discharge permit program. Manitoba complained that the NDDH failed to consider the issue of phosphorus loading in downstream waters, to do a satisfactory anti-degradation assessment, and to evaluate accurately the risk of biota transfer. Considering that the NDDH had extensive discretionary power in its decision-making process, the North Dakota Supreme Court used an “arbitrary, capricious, or unreasonable” standard to evaluate the NDDH decision to issue the NDPDES permit.

Manitoba argued that the NDDH did not make a complete evaluation of the effects of water discharge on the Sheyenne River’s phosphorous standard.<sup>64</sup> All fresh waters in North Dakota have a phosphorous standard, which is set by NDDH at 0.1 milligrams per litre.<sup>65</sup> The Sheyenne River frequently exceeded this limit even prior to the outlet construction.<sup>66</sup> Therefore, there were serious concerns about the condition of water in the river and the possible degradation of quality with the outlet operating. In addition, the permit seemed to violate the CWA guidelines, which require an improvement of water standards.

The NDDH exclusively considered the possible consequences of excess phosphorous in downstream waters within domestic jurisdiction and pointed out that the phosphorous loading would not affect any valuable use of the Sheyenne River.<sup>67</sup> Doing so, the NDDH limited its evaluation of the effect of the outlet operation on waters in North Dakota and forgot about the bigger impact on the Red River basin. In addition, the permit did not consider phosphorous as a pollutant and their principal effect, eutrophication, was not considered to be a real problem when the permit was issued. Eutrophication results in the formation of algae blooms due to the

---

<sup>63</sup> *People to Save Sheyenne River, 2005*, *supra* note 6 at 324.

<sup>64</sup> *Ibid.* at 329.

<sup>65</sup> *Standards of Quality for Waters of the State*, North Dakota Admin. Code, § 33-16-02.1-09, Table 1 (2008) [*Standards of Quality*].

<sup>66</sup> EIS, *supra* note 1 at 5-83.

<sup>67</sup> *People to Save the Sheyenne River, 2005*, *supra* note 6 at 329.

collection of nitrogen and phosphorous and studies indicate a low quantity of nitrogen in Sheyenne River waters,<sup>68</sup> resulting in a low risk of eutrophication. However, this phenomenon will not end its effects at the border and there is a concrete risk that it will irreparably affect all downstream waters, especially Lake Winnipeg.

The Court, like the NDDH, evaluated the matter by mainly referencing the Corps' EIS study, which determined that phosphorus loading was not an impediment to the construction of the outlet.<sup>69</sup> The Court considered that receiving waters did not possess enough nitrogen to increase eutrophication.<sup>70</sup> In doing so, however, the judges did not apply the applicable rules under North Dakota law. There is a specific phosphorous standard for Sheyenne River waters. In addition, the Court evaluated consequences on immediate downstream waters without considering the effects that phosphorous loading could have in Manitoba.

Manitoba also argued that the permit did not accord with anti-degradation regulation as required by North Dakota law.<sup>71</sup> In Manitoba's opinion, the NDDH did not properly evaluate downstream degradation and did not consider less degrading alternatives. In addition, the NDDH did not demonstrate important economical and social development to justify activities causing water degradation, as required by law.<sup>72</sup> Under the CWA anti-degradation policy, states are required to maintain the uses of any water body and to implement water quality criteria in order to prevent any decrease to the water quality level.<sup>73</sup> For example, if it is possible to fish in a river, a state must take action in order to prevent the discharge of any pollutant that will represent a risk to the survival of aquatic species and in particular those allowing further fishing.

The Court held that adding phosphorous would not alter any beneficial use of downstream waters and that an anti-degradation review was not essential in order to issue the permit.<sup>74</sup> Additionally, in the Court's opinion, the NDDH did an appropriate evaluation of less degrading or non-degrading alternatives and the prevention of future damages caused by rising water. There were substantial economical and

---

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.* at 330.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Establishment of Water Quality Standards*, 40 C.F.R., § 131.12 (2010).

<sup>74</sup> *People to Save the Sheyenne River*, 2005, *supra* note 6 at 331.

social benefits supporting the NDDH's assessment of anti-degradation issues and the decision to give permission to operate the outlet.<sup>75</sup>

Manitoba also disagreed with the NDDH's consideration of the risk of invasive species transfer and the appropriate technology necessary to control this phenomenon.<sup>76</sup> The CWA considers invasive species as a pollutant and, in Manitoba's opinion, the NDDH did not evaluate this matter correctly before issuing the permit.<sup>77</sup> The permit program requires the use of the best available technology and does not set a numeric standard regarding biota transfer.<sup>78</sup> Manitoba argued that it was not necessary to prove a risk before taking action, but the NDDH responded that they did not consider biological materials as a pollutant and that no study showed a clear risk of damage.<sup>79</sup> Therefore, the permit was issued considering the absence of a specific concern regarding biota transfer and the NDDH concluded that the use of a mesh screen was enough to minimize the risk of transferring adult fishes.<sup>80</sup>

The Court did not answer the question of whether invasive species are pollutants. The judges relied, once again, on the Corps' EIS and decided that the NDDH's decision was correct. They cited the fact that the study did not show any biota able to create significant damage downstream. In addition, the Court said that any species living in Devils Lake would be found in other bodies of water, transferred through natural vectors, such as wind or other animals or even through recreational boats or trailers.<sup>81</sup> In the Court's opinion, the normal, natural risk of species transfer can be compared to the one arising from a project like an outlet, which is able to move a large quantity of water in a very short time.

Nevertheless, the Court's approach does not seem to be really coherent. Possible transfer of biota due to recreational uses cannot be equated to the risk arising from the continuous and permanent transfer of waters caused by the project.<sup>82</sup> Furthermore, the Court did not apply the applicable law, like they did when evaluating the other issues. The CWA clearly requires the use of the best available technology. North

---

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Appellant's Brief, supra* note 17 at 15.

<sup>78</sup> *Clean Water Act, supra* note 50, § 1331 (b) (2).

<sup>79</sup> *Appellant's Brief, supra* note 17 at 14-19

<sup>80</sup> *People to Save the Sheyenne River, 2005, supra* note 6 at 332.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Appellant's Brief, supra* note 17 at 24-25.

Dakota law seems also to be clear regarding this requirement.<sup>83</sup> The Court looked at the Corps' EIS report and directed its attention to the evaluation of the risk of invasive species transfer, but it did not adequately consider the technology the Corps required to prevent this phenomenon, specifically a sand filter able to minimize the risk of biota transfer.

**c. *People to Save the Sheyenne River, 2008***

In May 2006, the Water Commission asked the NDDH to modify three conditions of the permit:

1. Raise the sulphate limit at Bremen, in the Sheyenne River, from 300 milligrams per litre to 450 milligrams per litre, or alternatively, to increase the sulphate limit by 15 percent;
2. Operate the outlet for a longer period;
3. Remove or revise the 100 milligrams per litre limit for total suspended solids (TSS).<sup>84</sup>

In August 2006, the NDDH modified the permit by incorporating the Water Commission's requests. Manitoba challenged this decision and the dispute came once again in front of the North Dakota Supreme Court.

Manitoba argued that increasing the sulphate limitation without a proper anti-degradation review was against North Dakota regulations,<sup>85</sup> particularly that the possible degradation of downstream waters was a reason to complete a detailed anti-degradation review.<sup>86</sup> In addition, Manitoba argued that increasing the sulphate limitation and modifying the extension of the operating period at the same time would increase the total annual loading by more than the 15 percent above the provision of the initial permit.<sup>87</sup> The modification of the permit without conducting an anti-degradation review, which is required under North Dakota law, should be considered unlawful.<sup>88</sup> From the opponents' point of view, the possible increase of sulphate loading throughout the year requires an

---

<sup>83</sup> *Standards of Quality*, *supra* note 65, § 33-16-02.1-02 (2) (2001). "All known and reasonable methods to control and prevent pollution of the waters of this state are required."

<sup>84</sup> *People to Save the Sheyenne River, 2008*, *supra* note 39 at 751.

<sup>85</sup> *Ibid.* at 753.

<sup>86</sup> *Ibid.* at 754.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Standards of Quality*, *supra* note 65, § 33-16-02.1 (Appendix IV).

appropriate review to evaluate the potential consequences on the downstream environment. The NDDH replied with the same arguments used in front of the Supreme Court of North Dakota two years earlier. In the opinion of the NDDH, the anti-degradation review was not necessary because no beneficial use would have been affected by the permit modification. The belief was that increasing the sulphate limit to 450 milligrams per litre would not have deleterious effects in downstream waters. Sulphate standards are only intended to protect drinking water uses, the permit modification would not harm these uses.<sup>89</sup> In addition, the sulphate level in the Sheyenne River was often above the limit of 300 milligrams per litre stated in the initial permit, which prevented the operation of the outlet for long periods.<sup>90</sup>

The Court referred to the studies submitted by the NDDH and upheld the decision not to conduct an anti-degradation review as correct. The judges also considered that the modified permit limit would not be greater than 15 percent for any parameter of concern.<sup>91</sup> Moreover, the Court found the criteria applied by the NDDH for the evaluation of the sulphate concentration in the Sheyenne River water was correct. Under the law, the NDDH has wide discretion in interpreting the anti-degradation procedure.<sup>92</sup> In the Court's opinion, the NDDH correctly applied the rules in light of the concrete case. They presented various complexities in technical areas, which did not trigger the requirements for an anti-degradation review.<sup>93</sup>

Manitoba also argued that the permit modification did not meet a "cause", as required by law.<sup>94</sup> The North Dakota regulation, incorporating federal rules, required a cause for the modification of a permit. The director must have received new information or it was necessary to correct a technical mistake.<sup>95</sup> Manitoba claimed that the NDDH did not receive any new information. NDDH explained that the sulphate reading

---

<sup>89</sup> *People to Save the Sheyenne River, 2008, supra* note 39 at 755.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Standards of Quality, supra* note 65, § 33-16-02.1 (Appendix IV). "The characteristic of the receiving water body is relevant in regulating a parameter of concern". In this case the NDDH did not apply mass loading criteria, as Manitoba required, because they are usually applied to water bodies as lakes, which have a hydraulic residence time. Instead, the NDDH evaluated sulphate addition to water bodies with an established drinking water use in terms of concentration.

<sup>93</sup> *People to Save the Sheyenne River, 2008, supra* note 39 at 755.

<sup>94</sup> *North Dakota Pollutant Discharge Elimination System, North Dakota Admin Code, § 33-16-01-25 (2) (2001).*

<sup>95</sup> *EPA Permits Program, supra* note 59, § 122.62 (a).

at the two checkpoints on the Sheyenne River were not operating when the original permit was issued and several tests issued shortly after the outlet began operation indicated that the normal sulphate level in the river was above the limitations set in the initial permit.<sup>96</sup> The information available before 2005 was limited, but the measurement done later showed that the real level of sulphates at the discharge point was higher and more variable than previously believed. In NDDH's opinion, this was considered new information.<sup>97</sup>

The Court concluded that the NDDH's decision to treat the new readings as new information was correct because this information was not available when the initial permit was issued.<sup>98</sup> In addition, the judges considered how knowledge of these results when the initial permit was issued would have justified different permit conditions.<sup>99</sup> In its analysis, the Court cited agencies' decisions to modify a permit that were not considered arbitrary and capricious, even if the information was not new. In these cases, information was available when the original permit was issued, but the high degree of technical expertise required allowed changing the consideration.<sup>100</sup>

Manitoba's complaints were also directed to the NDDH's decision to remove the TSS limit and to extend the period of outlet operation on the basis that there was a lack of information to correctly assess the permit. The NDDH did not rely on a "technical mistake" to support its decision to modify the permit.<sup>101</sup> Instead, the NDDH replied that at the time the permit was issued there were no TSS stream standards for waters in North Dakota and that the TSS limit was set according with engineering practices. The Water Commission asked, and the NDDH agreed, to replace the numeric TSS limit with a best management practice. This practice still required examining the water and the implementation and maintenance of the system in order to minimize any harmful effect in the Sheyenne River.<sup>102</sup> In addition, the Health Department affirmed that the

---

<sup>96</sup> *People to Save the Sheyenne River, 2008*, *supra* note 39 at 756.

<sup>97</sup> *Ibid.* at 757.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Calcasieu League for Environmental Action Now v. Herbert W. Thompson*, 661 So. 2d 143 at 148-150 (La. Ct. App. 1995). See also *Marsh et al. v. Oregon Natural Resources Council, et al.*, 490 U.S. 360 at 372-385 (1989).

<sup>101</sup> *People to Save the Sheyenne River, 2008*, *supra* note 39 at 757.

<sup>102</sup> *Ibid.* at 758.

modification was necessary to correct “errors in calculation or mistaken interpretations of law made in determining permit conditions”.<sup>103</sup>

The Court turned its attention to the record submitted by the NDDH and pointed out that the Water Commission did not show evidence that TSS standards were unavailable at the time of the initial permit issuance. Neither facts nor the law supported the decision to undertake a different method to monitor TSS in the Sheyenne River. Regarding the “technical mistake”, there was no proof that an “error in mathematical calculations, computer errors, clerical mistakes, and the like” had been committed in issuing the permit, hence rejecting the justification to change the TSS standard.<sup>104</sup> As the Court stated, the only reason behind the decision to modify the permit was that the NDDH found that the best management practices was a more appropriate standard. This conclusion was not supported with convincing legal arguments or technical facts.<sup>105</sup>

In relation to the decision to extend the operation period, the NDDH claimed that the permit needed to be modified in order to improve flood-control. The Court decided that the NDDH had no reason to modify the permit because there was no evidence of new information or of the existence of an error.<sup>106</sup>

The Court took the same approach as the 2005 case, particularly concerning the sulphate limit increase and the anti-degradation review requirement. Instead of applying the pertinent regulation in the field, the Court decided to evaluate the matter by considering the technical reports showing that harmful effects downstream were not likely to occur. The attention of the Court was directed primarily to the effects on waters in the United States and it did not consider possible consequences on the other side of the border. Both cases demonstrate the limits of domestic jurisdiction in the resolution of transboundary issues. The application of national rules is confined to a state’s borders. The decision of the Supreme Court of North Dakota to direct its attention toward the effects of the diversion solely in the United States can be understood. Every court is automatically oriented to pay more attention to the effects of the decision in its own jurisdiction, rather than looking at others. In addition, the application of international law can be difficult for a court that is not familiar with those rules. Therefore, it is important to find

---

<sup>103</sup> *EPA Permits Program*, *supra* note 59, § 122.62 (a) (15).

<sup>104</sup> *People to Save the Sheyenne River, 2008*, *supra* note 39 at 758-759.

<sup>105</sup> *Ibid.* at 759.

<sup>106</sup> *Ibid.* at 759.

different legal regimes with different instruments and different ways to enforce them in order to solve the Devils Lake controversy and every other dispute rising along the border between Canada and the United States.

#### IV. THE ROLE OF INTERNATIONAL LAW

##### a. The Garrison Diversion Project

The Devils Lake Outlet controversy applied the important precedent of the Garrison Diversion Project. In 1974, the U.S. Department of the Interior submitted a Final Environmental Impact Statement for a very ambitious project. The aim of this project was to move water from the Missouri River to the semi-arid areas of north-central North Dakota in order to irrigate 250,000 acres of farmland.<sup>107</sup> The idea was to use the huge, artificial basin created with the construction of the Garrison Dam, Lake Sakakawea, and divert part of this water to areas largely situated in the watersheds of the Souris and the Red River, which are both part of the Hudson Bay drainage basin.<sup>108</sup>

This project raised several concerns because it involved inter-basin water transfer and connected two completely different ecosystems together. Opponents of the Garrison Diversion argued that this project would cause extremely serious environmental consequences. In particular, Canada focused on the possibility of increased flooding due to the additional volume of water. In addition, there was a concrete risk of increasing the salinity of the Souris River, which would have devastating consequences both for municipal and agricultural uses of the water and risk of increasing the phenomenon of eutrophication in Lake Winnipeg.<sup>109</sup>

In its complaint, Canada referred in particular to Article IV of the 1909 *Boundary Waters Treaty*, which states that parties agree to not pollute on either side waters flowing across the boundary that would

---

<sup>107</sup> Sanford E. Gaines, "The International Law Aspect of the Garrison Diversion Project" (1974) 4 *Envtl. L. Rep.* 50085 at 50085.

<sup>108</sup> Sheryl A. Rosenberg, "A Canadian Perspective on the Devils Lake Outlet: Towards an Environmental Assessment Model for Transboundary Disputes" (2000) 76 *N.D. L. Rev.* 817 at 823.

<sup>109</sup> Gaines, *supra* note 107 at 50087.

cause “injury of health or property on the other”.<sup>110</sup> Another concern taken into serious consideration by both parties was the serious threat of invasive species transfer from the Missouri River to the Hudson Bay basin. This would cause irreversible damage to Canadian waters.<sup>111</sup> Therefore, in 1975 the U.S. and Canada referred the question to the IJC in order to evaluate the effects of the Garrison Diversion on Canadian waters. The IJC was also asked to make recommendations to ensure that the provisions of Article IV were honoured.<sup>112</sup>

In 1977, the IJC issued its Report on the Garrison Diversion and recommended against the project. The IJC considered the risk of irreversible damage caused by foreign biota to be concrete and remarked that it was impossible to completely rely upon the proposed measures to minimize and control the effects.<sup>113</sup> The IJC adopted a precautionary approach on the matter. For the project to proceed, the two governments would have to agree on proven methods that “would eliminate the risk of biota and disease transfer or that those issues were no longer of concern”.<sup>114</sup>

North Dakota never gave up the dream of using the Missouri River’s water for irrigation purposes. In 1986 the North Dakota Government adopted a text called the Garrison Diversion Unit Reformulation Act. It was a compromise among several interests involved and took into account the previous IJC’s work on the potential problems associated with diverting water from the Missouri River basin to the Hudson Bay basin.<sup>115</sup> The *Reformulation Act* once again suggested the possibility of building a new dam to divert water from the artificial basin to arid areas of North Dakota. However, the project needed the approval of the Secretary of State and the Administrator of the Environmental Protection Agency. These two bodies had to explore possible violations of the 1909 *Boundary Waters Treaty*.<sup>116</sup>

---

<sup>110</sup> International Joint Commission, *Report to the Governments of Canada and the United States on Transboundary Implication of the Garrison Diversion Unit*, (1977) at 1-2, online: International Joint Commission <<http://ijc.org/php/publications/pdf/ID582.pdf>>.

<sup>111</sup> *Ibid.* at 54.

<sup>112</sup> *Ibid.* at 2.

<sup>113</sup> *Ibid.* at 102-119.

<sup>114</sup> *Ibid.* at 121.

<sup>115</sup> Manitoba Water Stewardship, *Potential Transboundary Water Projects*, online: Government of Manitoba <[http://www.gov.mb.ca/waterstewardship/water\\_info/transboundary/potential.html](http://www.gov.mb.ca/waterstewardship/water_info/transboundary/potential.html)>.

<sup>116</sup> Rosenberg, *supra* note 108 at 828-829.

In 2000 the *Reformulation Act* was amended by the *Dakota Water Resources Act*, a document with the same aim as the previous one but with several important differences.<sup>117</sup> In particular, the *Water Resources Act* made it easier to build a new diversion project. The *Water Resources Act* acknowledged the possibility of transferring water from the Missouri River into the Hudson Bay Basin provided certain conditions were met, including compliance with the 1909 *Boundary Waters Treaty*.<sup>118</sup> However, the act did not authorize a study to stabilize Devils Lake levels through an inlet draining water from the Missouri River drainage basin into the lake.<sup>119</sup>

The possibility that the Devils Lake outlet was just the precursor of a more ambitious project raised serious concerns in Canada. Canada and Manitoba based their opposition to the project “on the costly, unpredictable, irreversible and catastrophic economic and environmental damage which can occur from inter-basin diversions of water”.<sup>120</sup> Canada pointed out the devastating environmental and economic effects caused in the Great Lakes by invasive species like zebra mussels, sea lampreys, and Whirling disease, and included evidence that these invasive species were now found in the Missouri River system. In Canada’s opinion, both the Garrison Diversion and the Devils Lake Outlet projects would violate the 1909 *Boundary Waters Treaty* by polluting and damaging Canadian waters.<sup>121</sup>

#### **b. The Relevance of the *Boundary Waters Treaty***

One of the conditions for the Secretary of State to approve the Corps’ project was that the project would not violate the 1909 *Boundary Waters Treaty*. For this reason, opponents of the project invoked the duty not to pollute, as stated in Article IV, and they asked to refer the matter to the IJC for a review. However, the U.S. Federal Government refused to give its consent.<sup>122</sup> Instead, the United States preferred diplomatic

---

<sup>117</sup> *Dakota Water Resources Act of 2000*, Pub. L. 106-554, 114 Stat. 2763 at 2763A-281.

<sup>118</sup> *Ibid.* at 2763A-282.

<sup>119</sup> *Ibid.* at 2763A-289-290. However, this study is authorized under the *Energy and Water Development Appropriations Act of 1993*, Pub. L. 102-377, 106 Stat. 1315 at 1332 (1992).

<sup>120</sup> Government of Canada, *Garrison Diversion and the Devils Lake Outlet: The Canadian Position*, online: Embassy of Canada in Washington <[http://www.canadainternational.gc.ca/washington/bilat\\_can/garrison.aspx?lang=eng](http://www.canadainternational.gc.ca/washington/bilat_can/garrison.aspx?lang=eng)>.

<sup>121</sup> *Ibid.*

<sup>122</sup> Flanders, *supra* note 60 at 1019.

negotiations with Canada in order to solve the dispute without involving the IJC. On the other side, Canada refrained from unilaterally referring the matter to the IJC, probably because they were afraid to break 100 years of practice.

The lack of an explicit definition of pollution under the Treaty made it difficult to correctly assess the terms of the controversy. General practice of the IJC shows that phosphates are considered pollution due to the high risk of eutrophication. In fact, North Dakota stopped the operation of the outlet several times because of the high level of phosphate transfer into the Sheyenne River.<sup>123</sup> In Canada's opinion, invasive species ought to be also considered a pollutant due to the detrimental and irreversible effects the introduction of non-native species can have in water bodies.<sup>124</sup> Canada supported its concerns by affirming that the introduction of zebra mussels into the Great Lakes has affected the water quality and caused considerable economic loss.<sup>125</sup> According to the purpose of the *BWT* and considering previous cases, there is an evident violation of the provisions of the *BWT* in the case of Devils Lake due to the risk of invasive biota that could generate "injury of health and property" on the other side of the border.

It appears that North Dakota authorities did not properly evaluate the risk of invasive biota and did not consider it a matter of real concern. They minimized the risk by arguing that species can move naturally from one body of water to another.<sup>126</sup> In addition, North Dakota seemed reluctant to think about biological organisms as pollutants, even though this view differs from the *Clean Water Act*, which considers biological material as pollutant.

The problem of pollution in international law is very complicated. The most important international agreements do not uniformly define what a pollutant is. Several dissimilar definitions have been used. In the *Boundary Waters Treaty* there is no definition at all. However, the U.N. *Convention on the Law of the Non-Navigational Uses of International Watercourses* seems to include invasive species in the definition of

---

<sup>123</sup> Bart Kempf, "Draining Devils Lake: The International Lawmaking Problems Created by the Devils Lake Outlet" (2007) 19 *Geo. Int'l L. Rev.* 239 at 255.

<sup>124</sup> Rosenberg, *supra* note 108 at 845.

<sup>125</sup> Government of Canada, *Garrison Diversion and the Devils Lake Outlet: The Canadian Position*, *supra* note 120.

<sup>126</sup> *People to Save the Sheyenne River*, 2005, *supra* note 6 at 324.

pollutant.<sup>127</sup> Under Article 21 of the Convention, a pollutant is considered anything that could alter the quality of downstream waters.<sup>128</sup> Article 22 directly deals with the introduction of alien species. It states: “Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to the other watercourse States”.<sup>129</sup> Therefore, under the Convention guidelines, even if invasive species are not considered a pollutant, each state shall take measures in order to prevent any harm resulting from their introduction in downstream waters. Although the Convention has not yet entered into force, it represents an important instrument and is able to affect the conduct of states in the field. It includes recognized principles that should be followed by the international community and codifies generally accepted customary law.<sup>130</sup>

A major problem is the lack of direct enforceability of the *BWT*.<sup>131</sup> Only the IJC can directly enforce the treaty through its arbitrary function. Manitoba could not claim for the *BWT* to be respected by the North Dakota Supreme Court. In other words, the Court is under no obligation to apply the rules contained in the international agreements to which the United States is a party. It seems to be difficult for the U.S. Federal Government to force a state to comply with international law. Theoretically, the U.S. Federal Government has the capacity to sue a state in Federal Court and get a decision obligating the state to respect international law obligations.<sup>132</sup> Although there are some precedents supporting this opinion,<sup>133</sup> the U.S. Federal Government has not used this power for a long time, highlighting a clear wish not to begin dangerous debates over power division.

---

<sup>127</sup> The Convention is annexed to: *Convention on the Law of the Non-Navigational Uses of International Watercourses*, G.A. Res. 51/229, UNGAOR, 51st Sess., UN Doc. A/RES/51/229 (1997).

<sup>128</sup> *Ibid.* art. 21. “For the purpose of this article, “pollution of an international watercourse” means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct”.

<sup>129</sup> *Ibid.* art. 22.

<sup>130</sup> For the role of the Convention, see generally Stephen C. McCaffrey, *The Law of International Watercourses*, 2d ed. (Oxford: Oxford University Press, 2007) at 375-377.

<sup>131</sup> Daniel K. DeWitt, “Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909” (1993) 69 *Ind. L.J.* 299 at 323.

<sup>132</sup> Knox, *supra* note 29 at 135.

<sup>133</sup> *Sanitary District of Chicago v. United States*, 226 U.S. 405 at 425-426 (1925).

The IJC is able to directly enforce the *BWT* through its quasi-judicial function, but this does not find application in the Devils Lake dispute. The IJC has final authority “to approve uses, obstruction and diversion of boundary waters” that could have effects on water quantities on the other side of the border.<sup>134</sup> In this case, the parties would have an obligation to refer the matter to the Commission for its final approval. Nevertheless, none of the waterways involved in the controversy, that is Devils Lake, the Sheyenne River, and the Red River, constitute boundary waters under the *BWT*.<sup>135</sup> Although the Red River crosses the border between the United States and Canada, the definition of boundary waters in the *BWT* excludes this river.<sup>136</sup> Hence, there is no obligation for the United States to obtain the approval of the IJC for the Devils Lake outlet project.

Most of the problems arising in cases like Devils Lake could be solved by giving self-execution to the *BWT*. In this way all actors involved in the controversies would be able to ask any court to enforce provisions contained in the *BWT* and non-federal actors could be sued and forced to comply with international obligations.<sup>137</sup> The treaty contains very specific obligations and the IJC has a rich body of practice that would help courts called to apply these rules. However, what really seems to be missing is political will. While Canada would probably be more willing, the United States considers that no international treaty should be self-executing.<sup>138</sup>

---

<sup>134</sup> *Treaty between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada*, United States and United Kingdom, 11 January 1909, 36 U.S. Stat. 2448, Articles III and IV [*Boundary Waters Treaty*].

<sup>135</sup> Hollis, *supra* note 28 at 37.

<sup>136</sup> *Boundary Waters Treaty*, *supra* note 134, Preliminary Article. “Boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.”

<sup>137</sup> Knox, *supra* note 29 at 138.

<sup>138</sup> Curtis A. Bradley, “*Breard*, Our Dualism Constitution, and the International Conception” (1999) 51 *Stan. L. Rev.* 529 at 541.

The effectiveness of the *BWT* could be improved by assigning non-federal actors, like provinces in Canada, the capacity to claim international law remedies from international institutions. These actors usually suffer the most intense consequences and have fewer legal remedies to defend their rights. The active involvement of these actors in the international law process would also reinforce the role of the IJC in the resolution of disputes between the United States and Canada, a role that has been blunted by the behaviours of two federal governments reluctant to refer new disputes to the IJC.<sup>139</sup>

In the last decade the diplomatic relationship between the two countries has deteriorated. A long and fruitful cooperation on transboundary matters has turned into a strictly unilateral approach by both sides and this limits the role of international bodies.<sup>140</sup> Devils Lake is a clear example where the use of diplomacy, rather than international law instruments, is the favourite tool to solve bilateral controversies. Nevertheless, in this case the solution appears to be unsatisfactory for many of the actors involved, including the Province of Manitoba, and it demonstrates the very different power positions occupied by the United States and Canada.<sup>141</sup>

### **c. A New International Approach**

Devils Lake and its outlet became an irritating case for diplomats in both Canada and in the United States. Unfortunately, this controversy might set a precedent for other disputes along the border.<sup>142</sup> Domestic jurisdiction was little help in solving the legal issue of the outlet construction. National boundaries do not stop pollution and a unilateral approach does not improve standards of environmental sustainability. In environmental protection no nation can only look at its own business or postpone essential actions due to other economic interests. Devils Lake reduced cooperation between the United States and Canada on

---

<sup>139</sup> Austen L. Parrish & Shi-Ling Hsu, "Embracing Reciprocity: Revisiting Domestic Legal Solutions to Canada's Transboundary Pollution Problems" in *Responsibility of Individuals, States and International Organizations* (Ottawa: Canadian Council on International Law, 2007) 73 at 75.

<sup>140</sup> *Ibid.* at 76.

<sup>141</sup> Hollis, *supra* note 28 at 45.

<sup>142</sup> Austen L. Parrish & Shi-Ling Hsu, "Litigating Canada-U.S. Transboundary Harm: Environmental Lawmaking and the Threat of Extraterritorial Reciprocity" (2007) 48 *Va. J. Int'l L.* 1. The authors describe two other disputes. The first one is the Trail Smelter in British Columbia and the second one is the long dispute over the Canadian export of softwood lumber.

transboundary issues. Both countries raised several concerns regarding international institutions and international law instruments, which were seen as a threat to their national interests.<sup>143</sup> However, in a global economy only the application of globally accepted rules can have a tangible effect on environmental issues.

The international community has tried to respond to the heightened demand for certainty in the use of international rivers through codification. In the 1990s, after twenty years of work by the International Law Commission, the United Nations (U.N.) General Assembly adopted the 1997 U.N. *Convention on the Law of the Non-Navigational Uses of International Watercourses*. It codified principles of international customary law and required a broader and more cooperative approach on environmental issues. In particular, the Convention definitively recognized equitable and reasonable utilization and the no-harm rule as the main principles in the field. It required that countries not limit their attention to only the portion of a river flowing within their national borders, but demanded active participation in the joint management of watercourses and respect for the rights of the other riparians.

The Convention would be a useful tool in the resolution of controversies like Devils Lake. All international instruments in the field generally incorporate a guideline principle, equitable and reasonable utilization, leaving all the others orbiting around it. The consequence is often a separate application of the distinct rules, looking individually to the prevention of transboundary pollution and to the reasons a country has to implement some activities and the possible benefits resulting from these activities. This circumstance can allow harmful projects to be carried on and makes it difficult to prevent degradation of the environment. On the other hand, the Convention adopts an integrated approach that involves a balance between the prohibition to cause significant harm and the right to an equitable use of a shared watercourse. The most direct consequence of this approach is a compromise among all different and conflicting interests that usually lead to a dispute concerning an international watercourse. In the case of the Devils Lake outlet, for example, the need to prevent additional damage due to flooding in the lake's area contrasts with the will of Manitoban authorities to protect waters in the province. Through the integrated application of both the equitable and reasonable approach and the no-harm rule it would be possible to better achieve a satisfactory

---

<sup>143</sup> *Ibid.* at 20-22.

balance of those interests and to enhance the cooperation between the United States and Canada.

One of the biggest problems in the controversy arising around Devils Lake is the lack of an independent investigation able to advise on a reasonable compromise. The fact finding procedure contained in Article 33 of the Convention can be used to avoid long term disputes.<sup>144</sup> It would provide parties with incontrovertible information and would help in determining to what extent the diversion of Devils Lake water is reasonable compared to the possible damage to Canadian waters. The fact-finding Commission would have access to all necessary information and would be allowed to inspect the outlet and related facilities.<sup>145</sup> Unlike the IJC, where the United States and Canada have conventionally requested its advisory opinion jointly, the fact finding procedure in the Convention can be activated at the request of any of the parties. Therefore, each country would be able to get an independent point of view on the matter without affecting the delicate diplomatic balance created within the *BWT*.

In addition, the provisions concerning transboundary pollution contained in the Convention are less vague than those in the *BWT*. Even though the definition of what can be considered pollution is very general, it encompasses "any detrimental alteration in the composition or quality of the waters of an international watercourse."<sup>146</sup> The consequence of this approach is that the alteration in water quality downstream caused by the operation of the Devils Lake outlet would be considered a result of pollution. Furthermore, this is explicitly a qualified obligation requiring significant harm to be caused to another state,<sup>147</sup> which makes its application less open to different interpretations. Lastly, Article 22 of the Convention contains a specific prohibition to introduce alien or new species into international watercourses, which is one of the biggest concerns Canada and Manitoba have about the operation of the Devils Lake outlet. Although the obligation requires a causal relationship

---

<sup>144</sup> Convention, *supra* note 127, art. 33(3). "Subject to the operation of paragraph 10, if after six months from the time the request for negotiations referred to in paragraph 2, the parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with paragraph 4 to 9, unless the parties otherwise agree."

<sup>145</sup> *Ibid.* art. 33(7).

<sup>146</sup> *Ibid.* art. 21(1).

<sup>147</sup> *Ibid.* art. 21(2).