

January 2004

**Dicussion following the Remarks of Mr. Knox and Mr. Bankes
Proceedings of the Canada-United States Law Institute
Conference on Multiple Actors in Canada-U.S. Relations:
Environment: Garrison Dam, Columbia River, the IJC, NGOs**

Discussion

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

 Part of the [Transnational Law Commons](#)

Recommended Citation

Discussion, *Dicussion following the Remarks of Mr. Knox and Mr. Bankes Proceedings of the Canada-United States Law Institute Conference on Multiple Actors in Canada-U.S. Relations: Environment: Garrison Dam, Columbia River, the IJC, NGOs*, 30 Can.-U.S. L.J. 141 (2004)
Available at: <https://scholarlycommons.law.case.edu/cuslj/vol30/iss/26>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

DISCUSSION FOLLOWING THE REMARKS OF MR. KNOX AND MR. BANKES

MR. SMITH: Thank you. Thank you very much. I'd just add one thing, and that is that I wanted an opportunity to recognize Henry King's, not just his contribution here, but his contribution elsewhere. And he and I have been involved for many, many years in a Joint Bar Association activity.

And one of the results of that Bar Association activity has been some legislation on equal access, which John has said is a minimal solution. But every little brick in the wall helps. And in an evolving situation such as we have heard today on both counts, I think it is important to have an armory, as I think John used the expression one time, the toolbox of means to deal with these things. There is no magic bullet.

And so I want to say to Henry, who was instrumental in this other activity, that he - it certainly in my book deserves credit not only for this institution, not only for the conference, but also for the work he's done in the Bar Association activities.

And with that, we'll open the floor to questions or observations.

MR. DELVECCHIO: Since the IJC name has been invoked by both speakers -

MR. SMITH: I thought that was going to come.

MR. DELVECCHIO: - perhaps I could be allowed to make the initial comments.

MR. SMITH: Please do.

MR. DELVECCHIO: First, dealing with the Devil's Lake issue, the idea of letting Manitoba apply to the IJC for a review of the matter is very attractive, except that to enable that to happen, the Boundary Waters Treaty would have to be reopened and renegotiated, at least on that score.

And even if the two governments negotiated an amendment to allow a province or some other non - not non-federal - neither of the two Federal governments to apply, the Treaty in the United States would have to be approved by the Senate.

And with the Senate's acceptance of the amendment, where do the two U.S. Senators from North Dakota stand? I think that they are very concerned about this. And one of them is a very outspoken guy, Max Baucus. And there's another one that I don't really know. I have certainly met Mr. Baucus in the past, and they've already taken an interest.

So the suggestion is very useful, but I would be interested in hearing the speakers' views on whether the Senate would approve an amendment, assuming the two governments would negotiate it.

And there's another possibility, by convention. References have always come to the Commission from both governments, but that is not what it says in the Treaty. Either country can make a reference. And I'm not urging this, I'm taking no position on it for obvious reasons, but it's always open to either government to make a reference on their own to the Commission.

Now, that has never happened. If it does, whether the report of the Commission, which in the past has been respected and acted on, be given the same weight, you can argue that perhaps it would not be given the same weight.

Now, the final thing I wanted to say about the Devil's Lake issue, I do not have it with me, but my recollection of Secretary Powell's letter to the Corps of Engineers is its rather conditional. I think as the speaker pointed out, before the project could be completed and an outlet open, there has to be further reviews about whether foreign biota can get into the Red River system. And for that purpose, he's urging that the International Joint Commission be called upon to play a major role in that review. So the letter is quite conditional.

Now, if I could move on very briefly to say something about the Columbia River situation. The Columbia River Treaty has a dispute settlement mechanism in it which gives the parties the right to go to the International Joint Commission in the case a dispute arises out of operations of the Treaty. Fortunately, for all concerned, that clause has never been invoked.

However, the International Joint Commission is currently very involved, because it has oversight over the Grand Coulee dam and the Lake Roosevelt Reservoir behind it. And that arose because there was an application before the Treaty was negotiated, as the speaker pointed out, to the Commission for a control order approving the operation of the Grand Coulee dam, and the Commission as a Control Board carrying out the terms of the control order.

Now, I mention this, and I will just conclude very quickly here, the Federation of Indian Tribes involved with the Columbia River Treaty has formally applied to the Commission, and this is an area where they can make direct application, they do not have to go through the governments, for the Commission to reopen its control order.

The Indian tribes argue that the control order, when it comes to fisheries has not been complied with, or that it needs amendment, to restore the fisheries rights of the native tribes. The Commission is considering whether it should reopen the order. It cannot be compelled to do so. And so we're right in the middle of a very contentious issue involving the native tribes and the salmon.

So we're very much in the picture, both with respect to Grand Coulee dam, a major structure without which there couldn't be any Columbia River system. And as has been pointed out, the earlier studies of the International Joint Commission was the basis for the Treaty.

So I offer these comments and thank you for your indulgence of letting me start off the question and comment period.

MR. SMITH: John, do you want to start it with Devil's Lake?

MR. KNOX: Sure, okay. I don't think the North Dakota Senators would vote for this amendment, unsurprisingly. You know, I think that doesn't mean that it necessarily is impossible. You know, one possibility would be that Canada, perhaps, go first since at the moment it seems to be in the Canadian interest. And that the United States wait for the next transboundary issue that goes the other way.

When I was here three years ago, I was talking about the Taku River. I bet in that case, Alaska would have been happy to take it to the IJC, but British Columbia did not want to. You know, there will always be with any kind of reciprocal transboundary relationship, there will always be those who are opposed to it as well as those who are in favor. And the people who are on each side will change as the issues change.

There is a way around all of this that does not involve - would require minimal, although it would not make the big 100 in international law. As you pointed out, the governments can already unilaterally refer, either or both governments, unilaterally refer any request for a reference that is formally made to it by an affected government or state or province inside the border.

I think once one government announced that, the other would almost have to follow suit. I want to be clear about this. I don't think that this necessarily - I think there are many ways in which you could conduct this right to prevent it from getting totally out of control and make it more palatable to the Federal governments.

Again, looking at the American NAFTA agreement as a model, the CEC gives the governments power to stop the Secretary from carrying out certain reports. A variety of different checks and balances are built into the agreement. You could easily imagine similar checks and balances that allow the governments to veto certain types of proposed reports or they require federal approval for certain other types, particularly sensitive type of reports. I think, though, the conversation has to start, or it will never happen.

Oh, I should also say you mentioned the Secretary of State's letter. I do have it here, and you are absolutely right. It is conditional. It is very carefully drafted. Clearly, lawyers had their fingerprints all over this. One thing it does say is that, "I note that the outlet plans assume that there will be no inlet into Devil's Lake, operating the project as an inlet from the Missouri River basin, upon which my assurance is based." You know Colin Powell did not write that language.

I think that is a pretty clear warning to North Dakota. However, if North Dakota is doing it itself, this is a condition on the Corps of Engineers doing it. It does not mean North Dakota cannot go out and do it itself.

A SPEAKER: The North Dakota plan, how much - how much is the North - how much is the North Dakota plan going to cost?

MR. KNOX: I read 28 million.

A SPEAKER: North Dakota is a very small state. I'm not denigrating it. Does it have the money?

MR. KNOX: What I've read, it's already started work.

A SPEAKER: But they have to kick in 70 on the Federal plan. They are taking the low road.

MR. KNOX: Right. For the Corps project, close to 200. North Dakota - again, Congress can always change it, but if it does not, the Corps would send a bill to North Dakota for 70.

MR. BANKES: I guess quickly from me on the Columbia River, yes, I acknowledge the IJC has got continuing jurisdiction on the levels for a number of water bodies within the basin, including Grand Coulee, and, indeed, for Kootenay Lake. And I think the Kootenay Lake raises a question. And to go back to the Grand Coulee order will be an interesting task for the IJC.

I think it's fair to say fisheries issues were not that well dealt with at the time of the original order. I mean, remarkable that the dam cuts off escape-ment to the entire upper Columbia basin, and there's very little discussion about that when you look at the IJC minutes for that area in the 1990s.

MR. SMITH: Bob Hage.

MR. HAGE: Bob Hage from the Department of Foreign Affairs in Ottawa. It's just for a minute, the discussion again underlying the precedence of our forebears and putting together the Boundary Waters Treaty, a Treaty almost 100 years old, International Joint Commission, and the relevance to that today, especially in a world where the states often war over water shows that the Treaty to a certain high degree is relevant and working well.

Canada has had some experience in trying to escape responsibility for the activities of the provinces. There was a WTO request case several years ago when Ontario was found to be in violation of the WTO. And we went back and said, well, gee, you know, it's a province. We have no responsibilities for that. And the WTO, of course, disagreed.

So, I mean, if the boundary waters are polluted, I don't think we could, the United States Federal Government, cannot escape responsibilities for that activity. Having said that, that indicates, I think, that the two governments can hopefully find a solution to the problem. This has defied the ability of the two governments in the past to find solutions. Nigel had mentioned the Tech Cominco case involving pollution of the Columbia River, but again the two governments sitting down and trying to resolve that particular problem. John did mention the state of Minnesota as well, I think, has an interest in this, and would very much probably like to see a solution to the problem, as well. And that's another element in the U.S. equation. That they perhaps can find a resolution to the problem.

And, lastly, on the Columbia River, I think Nigel's comments demonstrate as far as the diplomacy is concerned, the importance of sometimes leaving the solution to the people that know the issue to the highest degree.

I remember in foreign affairs we looked at this, some of these questions, about power sharing and the benefits from downstream power, and how they should be distributed. And in the end, it's the entities that find the solution and the diplomats press the solution. So that's a lesson to us all that, I think, leaves the solutions to the people that know the questions the best.

MR. SMITH: Thank you. Any other questions or comments?

MR. ABRAHAMS: Hi. Robert Abrahams, U.S. Department of Commerce.

Regarding the Tech Cominco issue, and the pollution of the Columbia River, I have put out a very interesting article, I made several copies of that from the New York Times last month, but in that article it said that the U.S. Environmental Protection Administration try to weigh in with Tech Cominco. And the Canadian Government said to U.S. State Department, tell the U.S. EPA to back off.

That said, regarding the Devil's Lake issue, hasn't U.S. EPA weighed in on that to put a stop to North Dakota's attempts to dig their big ditch?

MR. KNOX: Well, U.S. EPA gave comments to the Corps of Engineers during a preparation. The environmental impact stated - it more specifically answered, it was part of the inter-agency process that answered the Secretary of State's questions from last July. But I'm not sure EPA has the - well, let me put it this way: EPA is not the enforcing agency for the 1909 Treaty. It's really the State Department has to decide ultimately both under, I think, general principles of domestic law, but also the specific authorizing acts for the outlet project. EPA could, if it chose, weigh in on the Clean Water Act issue. That's the one they can weigh in on. But as far as I know, EPA is not running an enforcement agency on that. Maybe I'm missing something.

MR. ABRAHAMS: Well, I just thought as an extension regardless of whether the Devil's Lake diversion eventually flows into Canada, just from the point of view of that possibly polluted water going into other streams and rivers within the United States, under the Clean Water Act, I would imagine EPA could put a stop to it under their regulations.

MR. KNOX: Well, again, that would be the subject of the Clean Water Act suit that Manitoba and a group of concerned citizens in North Dakota have brought that's starting off in North Dakota State Court. Although, it's easy to imagine it being removed to Federal Court and then going up to Federal Appellate Court.

And it will turn on an interpretation of Clean Water Act standards for addition of possible pollutants to navigable waters. Those standards are fairly strict, but they may not be strict enough to satisfy - and I tried to say earlier,

that may well take care of the problem. But on the other hand, they may not be strict enough to satisfy Manitoba's concerns.

Manitoba, I think, is largely again concerned about the potential for future exotic species crossing over. So even if the pollutant level is not high enough to trigger Clean Water Act prohibitions, I don't think that necessarily will resolve the issue from Manitoba's point of view.

MR. SMITH: Anything else here? Perhaps we'll take one more, and then - it's been a long day so far, and there's more tonight.

MR. SILVIA: This is a short one. It just occurred to me that this region is one where there are significant traditional native populations. And I wonder if digging a big ditch affects elk migration or something like that that might actually provide an end around.

MR. KNOX: I don't know. Although, since you mentioned it, it should be noted that the Garrison Dam, that the waters flooded by the Garrison Dam are actually reservation lands that have been guaranteed to an Indian tribe in North Dakota under a different U.S. Treaty, one that I think is, quite clearly, was not complied with.

MR. SMITH: With that, perhaps - and I think Henry will have something to say in just a moment, but without - perhaps, I can on your behalf thank our two speakers very much for their presentations, and the academic excellence that they displayed in telling us about those problems. So thank you very much.

(Session concluded)