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ENVIRONMENT: GARRISON DAM, COLUMBIA RIVER, THE IJC, NGOS

John Knox[†]
U.S. Speaker

Thanks very much, Brad. I am not sure I have a title yet, actually. Maybe, "The Garrison Diversion: Back to the Future," or something like that.

I would like to thank Henry for inviting me to participate in the conference this year. As always, it is a pleasure to be here, Henry. No one puts on a conference as well as Henry does. Matt Schaefer and I were talking earlier about why this is such an enjoyable conference to participate in and the fact that one reason is that the audience is so well informed, that you are so knowledgeable about the area.

However, that has its downside from the speaker's point of view. Bob Hage has already informed me that he is going to be happy to correct any misstatements I make about the Devil's Lake situation as I go, but I figure if I flatter you enough now about your knowledge, that maybe you will take it easier on me during the question and answer period later.

As Brad says, I am going to describe a brewing environmental dispute involving Devil's Lake, and by extension perhaps the Garrison Diversion. There are multiple actors involved in this problem. In fact, you could regard the dispute as taking place at three different levels. At one level, it is a dispute between the national governments of the United States and Canada. At another level, it is a dispute between the sub-Federal governments of Manitoba and North Dakota. Finally, at one level, it is a dispute between individ-

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ual farmers and landowners in North Dakota, and those who rely on the fisheries, the Red River, Lake Winnipeg, and other areas in Canada.

The dispute arises because Devil's Lake, a lake in northeastern North Dakota, keeps rising. Devil's Lake is an isolated sub-basin within the Hudson Bay watershed. It is isolated in the sense that it has no natural outlet. Water, it falls through rainfall, runs into Devil's Lake, and does not naturally leave except through evaporation. That means that during periods of heavy rainfall, the lake grows, the lake rises. It is now up 24 feet. It grew more than twenty-four feet in the 1990s.¹

Since Devil's Lake is not exactly in some kind of basin with high mountains surrounding it, it spreads. It has more than doubled in size in the 1990s, flooding more than 80,000 acres, primarily of farmland, and threatening the nearby town of Devil's Lake.²

Understandably, I think North Dakota would like to address this problem. The obvious way from the North Dakotan point of view to address it is to build an outlet from the lake, a kind of a giant ditch that would take water from the lake and dump it into the nearest river.³ The nearest river happens to be the Cheyenne River in North Dakota.⁴

This is where it starts to become of interest from an international point of view. The Cheyenne River flows into the Red River, which after usefully demarcating the boundary between North Dakota and Minnesota, flows across the boundary between the United States and Canada, and eventually makes its way into Lake Winnipeg, as part of the Hudson Bay watershed.⁵

Manitoba is not so enthusiastic about North Dakota's plan.⁶ Manitoba fears that this is going to allow various types of exotic species, foreign biota, to make their way from Devil's Lake into the Red River; and, thence, into Lake Winnipeg and points north and east.⁷

Moreover, Manitoba points out that Devil's Lake is not the best water in the world.⁸ Like other isolated lakes, notably the Great Salt Lake in Utah,

¹ Daniel Girard, *Manitoba Protests U.S. Water Project; Lake Diversion Called Threat Increased Pollution Feared*, THE TORONTO STAR, Apr. 17, 2004, at F01.

² Joseph B. Treastor, *Devil's Lake Slowly Chases Out Neighbors Since 1993, the Body of Water Has Risen 25 Feet, Forcing Nearly 400 Families to Move Their Homes*, PORTLAND OREGONIAN, July 11, 1999, at A07.

³ See Sheryl A. Rosenberg, *A Canadian Perspective on the Devil's Lake Outlet: Towards an Environmental Assessment Model for the Management of Transboundary Disputes*, 76 N. DAK. L. REV. 817 (2000).

⁴ *Id.*

⁵ *Id.*, at 818.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

isolated lakes tend to be highly salty because the water that comes in has a certain amount of salt.⁹ It evaporates out leaving the salt behind.

Manitoba also casts aspersions at the quality with respect to other types of pollutants.¹⁰ Even worse than all of this, though, is that Manitoba sees this as the thin entering wedge, the first step towards the rebirth of a project that has bedeviled Manitoba and Canada for, I think, close to 50 years, at least in prospect, and that is the Garrison Diversion.¹¹

What is the Garrison Diversion? The Garrison Dam was built in the great period of building dams that Nigel already referred to with respect to the Columbia, in the late 1940s and early 1950s.¹² At the time the Garrison Dam was built, it was part of a major system of dams along the Missouri River. It was the second largest manmade structure in the world, 2 ½ miles long, 210 feet high.¹³ It used 25 times the materials used for the Great Pyramid.¹⁴

North Dakota thought at the time it was built that it was promised that it would get a lot of water from the Garrison Dam, or more accurately, from Lake Sakakawea, the reservoir behind the Garrison Dam.¹⁵ This became known as the Garrison Diversion. The water would be diverted from the Missouri River east into eastern North Dakota where it would be used by farmers to irrigate their farms.

If you do not like Devil's Lake, you especially do not like the Garrison Diversion, because the Missouri River has a lot more exotic species from the Hudson Bay watershed point of view than Devil's Lake will ever have.¹⁶ Therefore, Manitoba fears that the Devil's Lake outlet will be only a preliminary step to an inlet that will bring water from the Missouri River via Lake Sakakawea to Devil's Lake.¹⁷ Why do they foresee the inlet? Well, because an isolated lake actually has two problems. One is it tends to rise too much in times of rainfall. The other is it tends to drop too much in times of

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, at 822-824.

¹² *Id.*, at 823

¹³ See http://www.nwo.usace.army.mil/html/Lake_Proj/garrison/dam.html (last visited Oct. 12, 2004).

¹⁴ Ron Wilson, *A Half Century Later*, ND OUTDOORS, June 2003, at 15, available at: <http://discovernd.com/gnf/ndoutdoors/issues/2003/jun/docs/garrison-dam.pdf> (last visited Oct. 12, 2004).

¹⁵ Rosenberg, *supra* note 3, at 823.

¹⁶ *Transboundary Implications of the Garrison Diversion Unit*, International Joint Commission Report to the Governments of Canada and the United States, at 1, 101 (1977), available at: http://www.ijc.org/php/publications/biblio_library.php?language=english (last visited Oct. 12, 2004).

¹⁷ William H.N. Paton, *Globalization and Water Resources Management: The Changing Value of Water*, AWRA/ILWRI –University of Dundee International Specialty Conference, Aug. 6-8 2001, at 1, 3.

drought. To stabilize the lake levels you need an inlet as well as an outlet. Where is the inlet going to bring water? Well, the obvious spot is Lake Sakakawea.¹⁸ There is a lot of water there if you could just get it across the divide into Devil's Lake.

What does the international law in question have to say about this? Well, there is actually international law kind of on point here. The 1909 Boundary Waters Treaty says 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.¹⁹

The Red River clearly qualifies as waters flowing across the boundary. Therefore, the United States is legally obligated not to allow it to be polluted to the injury of health or property in Canada.²⁰ Since the early 1970s, at least, when Canada began first making this argument to the United States, the U.S. government has actually agreed with Canada, that the U.S. should not allow any project to go forward that would cause the Red River to be polluted in violation of the 1909 Treaty.²¹

In addition, the U.S. government has pretty much soured on the Garrison Diversion for other reasons. However, despite that, the U.S. government has not soured on the idea of an outlet from Devil's Lake. In the late 1990s, the U.S. government began to appropriate money to the Army Corps of Engineers to explore the possibility of an outlet to relieve the high lake levels in Devil's Lake.²²

However, Congress said at the time in the Appropriations Acts that any such project would have to comply, or would have to receive an assurance from the Secretary of State that the outlet project, would not, in fact, violate the 1909 Treaty.²³ In addition, Congress has said that it should be pursuant to a full formal environmental impact assessment under the National Environmental Policy Act (NEPA), and that no money would be appropriated for any kind of inlet project.²⁴

Last year, the Corps of Engineers finished its environmental impact assessment after years of work.²⁵ The State Department still was not satisfied.

¹⁸ *Id.*

¹⁹ Boundary Waters Treaty of 1909, Jan. 11, 1909, U.S.-Gr. Brit., art. 4, 36 Stat. 244.

²⁰ *Id.*

²¹ International Joint Commission Report to the Governments of Canada and the United States, *supra* note 16, at 131.

²² See Notice of Intent to Prepare a Draft EIS, 51 Fed. Reg. 28973 (Aug. 13, 1986).

²³ See Pub. L. No. 105-62, 111 Stat. 1320, 1323-1324 (Oct. 13, 1997).

²⁴ *Id.*

²⁵ See U.S. ARMY CORP. OF ENGINEERS, DEVILS LAKE NORTH DAKOTA: INTEGRATED PLANNING REPORT AND ENVIRONMENTAL IMPACT STATEMENT (April 2003) available at: www.health.state.nd.us/PublicComment/DevilsLakeOutletDischargePermit/DevilsLakeEIS (last visited Oct. 12, 2004).

It did not think the EIA actually answered all of its questions.²⁶ Therefore, the State Department asked the EPA, the President's Council on Environmental Quality and the Fish and Wildlife Service to look at this question, the specific question of the potential for transboundary pollution, and tell the State Department what they thought.²⁷

After those agencies came back, finally just this last January, Secretary Powell issued a formal assurance to the Corps of Engineers saying, "In my opinion I can provide the assurance that you need that this project will not actually violate the 1909 Treaty as long as certain conditions are met."²⁸

In particular, the State Department wants the Corps to do a more complete survey of biota of species in the Red River and the Cheyenne River to establish for certain what the Corps already says, which is that there are no species in Devil's Lake that are not already in the Red River and the Cheyenne River.²⁹

So far, I actually think this is a hopeful story from an international environmental point of view. I think the U.S. government has at a minimum taken its obligations seriously. It has listened to the Canadian objections. It has required a full environmental impact assessment. It is said that the project will not go forward if the project would violate the 1909 Treaty.

Now, one can argue that this is still the wrong result. That is, the State Department is wrong, and this project will pollute across the border. However, I do not want to get into that issue, because I think there is a more interesting issue brewing here, that makes the story more problematic, and that ties into the theme of the conference about multiple actors.

First, that is, North Dakota has gotten somewhat tired of waiting around. North Dakota has announced that it is going to go ahead and build its own state outlet project. North Dakota has criticized the Federal Government in a couple of ways. One, the Governor of North Dakota, Jim Hoeven, has said, "I do not really think the Federal project is going to ever be built."³⁰

Second, and apart from that, the Corps of Engineers project is estimated to cost something like 200 million dollars.³¹ Under the Corps' cost sharing arrangements, North Dakota's share of that would be something like 70 mil-

²⁶ Bill Lambrecht, *Missouri Sees Colin Powell as an Ally in River Dispute; North Dakota's Plan Has International Implications*, ST. LOUIS POST-DISPATCH, Aug. 25, 2003, at A1.

²⁷ *Id.*

²⁸ Letter from Colin Powell, U.S. Secretary of State, to General Flowers USA Army Corp. or Engineers (Jan. 20, 2004).

²⁹ See Dale Wetzel, *Outlet Wouldn't Violate Treaty, Engineer Says*, Bismark Tribune, Sep. 24, 2003, at 7C.

³⁰ *Hoeven Says Federal Water Outlet "Will Never Be Built*, THE BULLETIN'S FRONTRUNNER, March 7, 2003.

³¹ *Id.*

lion dollars.³² North Dakota has shopped around, and it figures it can build the project itself using parts from Home Depot, I think, for under 30 million dollars.³³

Now, part of how it does this is cut out some of the frivolous extravagances of the Corps project like a sand filter to take out foreign biological materials.³⁴ They are also going to take the water from a part of the lake that is admittedly, even by the North Dakotans, a saltier part of the lake than the part that the Corps planned to drain.³⁵

Well, what do we think about this? There is no doubt that North Dakota's project is just as subject to the 1909 Treaty as the Federal project is. The question is what do you do with the state to make sure that it complies with national obligations under an international Treaty?

Since this is a conference on multiple actors, I will briefly talk about the options from three different points of view: Of the national government of the United States, and then Manitoba, and non-governmental actors.

THE U.S. GOVERNMENT

Assuming that the U.S. government agrees with Canada that North Dakota's project is at risk, at least, of violating the 1909 agreement, what exactly can the U.S. government do? Well, one thing the State Department can do is send a firm letter. In fact, it has already done that.

After Secretary Powell provided this January 2002 assurance that the federal outlet would not violate the Treaty, that North Dakota's Governor happily said, "we're so happy to see that this letter says that an outlet won't violate the Treaty," leaving out the adjective before the word outlet.³⁶

Last month an Assistant Secretary of State wrote to Governor Hoeven saying, "I wish to draw your attention to the fact that the Secretary of State's assurance concerned only the Federal project. The Secretary has not reviewed the State project and has expressed no view about that project. The Department of State urges that in the spirit of transboundary cooperation and to avoid unnecessary conflicts between the United States and Canada or its

³² *Id.*

³³ *Id.* (State anticipates the project will cost them \$25 million, no mention of use of Home Depot parts)

³⁴ Mia Rabson, *Devils Lake Outlet Plans Goes to Court: Manitoba, Two Citizen's Groups Join in N.D. Lawsuit to Stop Project*, WINNIPEG FREE PRESS, March 30, 2004.

³⁵ *See id.*

³⁶ Press Release, Hoeven Welcomes Powell Ruling On Devils Lake Outlet (Jan. 22, 2004) (on file with the State of North Dakota, Office of the Governor) *available at*: www.governor.state.nd.us/media/news-releases/2004/01/040122.html.

concerned provinces, you consult with us and appropriate other agencies at the earliest opportunity before proceeding with this temporary outlet.”³⁷

Now, as Brad said, I used to work for the State Department. I know David Colson is here. You know, the State Department can tell you in diplomatic terms the Marines are about to land, if we send this to another country, if you do not do what we say. You know, I am not sure that Governor Hoeven reads it that way, though. He may not have been trained to read diplomatic language.

After receiving the letter, he said, “Well, if State wants information, we’re happy to give them information. We will give Manitoba information, anybody that wants it. But we’re going ahead with the project.” What else can the State Department do to rein in a recalcitrant state? Well, this does not get much attention in international legal scholarship very often.

One thing it can do is literally send in the Marines. That is, the Federal Government can force states to comply with Federal law.³⁸ There is a lot of precedent for that. Politically, that will never happen, and as far as I know, has never happened, to force a state to comply with international legal obligations.³⁹

The Federal Government could sue the state in Federal Court to get a judgment confirming that the state has to comply with international law. Again, the textbooks all say that is something the Federal Government can do, and they cite a 1925 Supreme Court decision in which Justice Holmes said it in passing in one sentence, there are not many precedents since then because the Federal Government does not go around suing states to make them comply with international law.⁴⁰ I think what you can expect is blunter letters in the future.

THE PROVINCE OF MANITOBA

What can Manitoba do? Manitoba can cut off its diplomatic ties with North Dakota, or call the Ambassador, stop cooperating with North Dakota on water issues. In fact, Manitoba has said that it will do that.

It announced in a statement, the Provincial Water Stewardship Minister said that they are not going to cooperate with North Dakota anymore on wa-

³⁷ Dale Wetzel, *State Department Wants Consultation on Devils Bay Outlet*, BISMARCK TRIBUNE, March 11, 2004.

³⁸ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

³⁹ See *Peters v. McKay*, 238 P.2d 225 (1951), *But cf. Zschernig v. Miller*, 389 U.S. 429 (1968) (Court held that Oregon statute that stated how a person not living in the U.S. could take possession of property in Oregon through succession or testamentary disposition intruded into foreign affairs which the constitution entrusts to the President and Congress).

⁴⁰ See *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925).

ter issues.⁴¹ Then he said, "I hate to have had to make this statement today, but, quite frankly, I'm appalled at some of the statements coming out of North Dakota."⁴²

Again, one wonders if this was too polite to really make much of an impact on North Dakota. I think one wonders whether North Dakota is going to care so much that Manitoba is shocked at what North Dakota is doing. To Manitoba's credit, Manitoba is not putting all its eggs in that basket. Manitoba has actually already filed suit in North Dakota Court arguing that North Dakota is failing to follow Federal Clean Water Act standards.⁴³

In order to add a new source of pollution to waters in the United States, you have to get a permit under the Clean Water Act.⁴⁴ North Dakota itself implements that requirement.⁴⁵ North Dakota unsurprisingly issued itself a permit to do this.⁴⁶ Manitoba is now arguing that North Dakota violated Federal law in how it did that.⁴⁷ That may actually work. It is certainly worth following to see if it does.

However, the point I want to make is that that is not a way of enforcing international law. The Clean Water Act is not implementing the 1909 Treaty here. There are separate standards. If they happen to solve the problem, so much the better. What else can Manitoba do? Well, it does not have many other options. It could try to, and, in fact, it is considering, bringing a Federal Court suit in the United States arguing that the 1909 Treaty obligation has been violated.⁴⁸ This gets into complicated questions of U.S. Treaty Law involving whether the 1909 Treaty is self-executing or not.

However, I think most observers would say that is going to be a long shot for Manitoba to convince a Federal Court that the 1909 Treaty obligation is self-executing, and get an injunction against North Dakota.⁴⁹

⁴¹ *Manitoba Will No Longer Co-operate with North Dakota on Water Issues*, THE CANADIAN PRESS, March 18, 2004.

⁴² *Id.*

⁴³ Dale Wetzel, *ND Outlet opponents, Manitoba appeal Devils Lake Outlet Permit*, BISMARK TRIBUNE, March 29, 2004.

⁴⁴ Clean Water Act, 33 U.S.C. § 1344(a),(d) (2004).

⁴⁵ Press Release, Province Launches Legal Act Over Devils Lake Project: Manitoba Continues to Call for Joint Reference To International Joint Commission: Ashton (March 29, 2004) (on file with the province of Manitoba).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Rabson, *supra* note 34.

⁴⁹ See Stanford E. Gaines, *The International Law Aspects of the Garrison Diversion Project*, 4 ENVTL. L. REP. 50085 (Nov. 1974).

NON-GOVERNMENTAL ORGANIZATIONS

In general, I think NGOs have the same avenues more or less the same as Manitoba's. Essentially, they cannot bring an international claim.⁵⁰ They cannot have a reference to the International Joint Commission.⁵¹ They can try to sue in North Dakota in State Court, or in Federal Court.

Again, can they get the Court to hear their claim under the 1909 Treaty? I think most people would bet against them on that. There have been relatively few efforts to argue that the 1909 Treaty is self-executing in U.S. law, and they have failed when brought by a private individual.⁵²

WHAT IS THE BOTTOM LINE?

I think the bottom line is that this problem actually illustrates the difficulty of non-national governments enforcing or even receiving authoritative interpretations of international legal obligations. Traditionally, international law has been under the purview of national governments. Everyone else has depended on the national government's willingness to pursue claims for violation of international law. It is popular to argue that that is changing.

We are living kind of a post-Westphalian world, rather, where we are moving beyond the nations state as the be all and end all of international affairs. I think it is easy to get over-optimistic about that. When push comes to shove, the national governments still have access to international dispute resolution and other people do not.

What changes would help resolve a dispute like this one? How can you help other actors that are perhaps more directly interested, the real parties and interests, in a manner of speaking, have access to institutional methods of resolving disputes? Well, I have three possibilities to throw out.

One is a minimal change, one is more of a maximal change, and one is in between. The minimal change is that you could give foreigners, foreign governments, and non-governmental entities the right to pursue whatever remedies for transboundary pollution that local folks have to pursue remedies for domestic pollution. This has been called the principle of equal access.⁵³

Whatever rights North Dakotans would have to complain about this project, the Canadians could come across the border and make the same complaint. I say this is minimal for a couple of reasons. One is you should see that it does not really address the issue. That is, it does not really go to en-

⁵⁰ See generally *Burnell v. International Joint Commission*, 71 D.L.R. (3d) 725 (Fed. Ct. 1976).

⁵¹ See *id.*

⁵² See *id.*

⁵³ Ulrich Beyerlin, *Book Review: Restatement of the Law Third: The Foreign Relations Law of the United States*, 86 A.M. J. INT'L L. 608, 614 (1992).

forcing international law. What it does is go to equal rights, non-discrimination and the enforcement of domestic law. The other reason that it is minimal is that to a certain extent, these rights may already exist. They may just exist on a piecemeal basis. That is, I have already said, Manitoba is trying to do essentially this.⁵⁴ It may be thrown out on standing grounds, but it may not. However, I think it still would be a step in the right direction to give it assurances that it will not be thrown out on standing grounds, and that it can pursue the Clean Water Act suit just as U.S. nationals can.

The maximal change would be for the United States, and Canada to take the idea of self-executing Treaties seriously. If you have a Treaty that has specific obligations, as the 1909 Treaty does, why not let Courts enforce those obligations at the behest of the individuals who are directly affected by them.

It is maximal in the sense it would really solve the problem of enforcement of Treaty obligations against non-federal actors, because they could be sued and Courts could tell them you are in violation of the Treaty. It is also maximal to the degree that it would take an enormous amount of political will, which I do not think exists now. The trend in the United States is quite the opposite, away from the idea of self-executing Treaties, toward a presumption that Treaties are non-self-executing.⁵⁵

Third, and finally, the moderate change would be for the Federal governments to open international institutions to non-federal actors. In particular, I think this case shows the utility of the Federal governments opening up the IJC to non-Federal actors. I have an enormous amount of respect for the International Joint Commission, and I think it is underused. The Federal governments have gotten in the habit of never referring anything to the Joint Commission if it might be controversial. The Federal Governments can unilaterally refer something to the IJC, yet they have never done so.⁵⁶ They only refer something to the IJC for an independent investigative report if they both agree to do that. That means either one of them can block it.

Bob Hage and I agree that U.S. was temporarily willing to send Devil's Lake to the IJC, but the Canadians objected, so it did not go. Now, the U.S. is not willing to go even though the Canadians are, so it is not going to go. Why not let Manitoba ask the IJC to look at this? What possible harm could that do? Why not let non-governmental actors, who after all, are the directly affected individuals, request a reference to the IJC. There is a recent precedent for this. The environmental side agreement to NAFTA allows non-

⁵⁴ Press Release, *supra* note 45.

⁵⁵ See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the International Conception*, 51 STAN. L. REV. 529, 541 (1999).

⁵⁶ See Stephen J. Toope & Jutta Brunnee, *Freshwater Regimes: The Mandate of the International Joint Commission*, 15 ARIZ. J. INT'L & COMP. LAW 273, 285 (1998).

governmental actors to do just that.⁵⁷ Factual records have started to be produced. The world has not ended. I think it is a step in the right direction. It would not get us all the way there. The IJC still cannot order anyone to comply, but the IJC has enormous persuasive ability. An IJC report can clarify the facts, set out the legal standard. I think it would be useful if there were more of them.

On that note, I will conclude. Thank you very much.

⁵⁷ North American Free Trade Agreement, October 7, 1992, U.S.-Mexico-Canada, Chap. 20 Sect. A.

