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Selected Environmental Law Aspects of the Garrison Diversion Project

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NOTE

SELECTED ENVIRONMENTAL LAW ASPECTS OF THE GARRISON DIVERSION PROJECT

I. INTRODUCTION: GARRISON DIVERSION PROJECT

The historical origins of irrigation are ancient and diverse.[1] "The operation of watering lands for agricultural purposes by artificial means"[2] was carried out by the ancient Egyptians, Mesopotamians, Chinese, Incas and Aztecs well before the birth of Christ.[3] The decay of ancient irrigation is often associated with the collapse of civilizations; however, historians are not in agreement as to which is cause and which is effect.[4] In relation to this, it is interesting to note that several areas subject to intensive irrigation in ancient periods are now unfit for agriculture due to soil salinization.[5] This occurs when excess salts in irrigation water are left behind in the soil. Salinization inhibits plant growth by preventing water from reaching root systems, by chemically depriving plants of nutrients, and by outright poisoning.[6]

Early irrigation efforts in the Imperial Valley of California encountered substantial difficulties with salinization, but modern drainage methods have achieved a favorable salt balance in recent years.[7] Some questions have been raised in relation to the possibility of salinization by Garrison Diversion irrigation waters,[8] but

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1. *See* K. BIRKET-SMITH, THE PATHS OF CULTURE 155-56 (1965); C. DARLINGTON, THE EVOLUTION OF MAN AND SOCIETY 85-86 (1969).
2. BLACK'S LAW DICTIONARY 963 (Rev. 4th ed. 1968).
3. C. DARLINGTON, *supra* note 1.
4. A. TOYNBEE, A STUDY OF HISTORY 44-48 (1946); Brown, *Human Food Production as a Process in the Biosphere*, 221 SCI. AM. 163 (Sept. 1963).
5. Revelle, *Water*, 209 SCI. AM. 102-04 (Sept. 1963).
6. 1 I. HOUK, IRRIGATION ENGINEERING 456, 475 (1951).
7. E. COAPER, AQUEDUCT EMPIRE 75-76 (1968).
8. G. SHERWOOD, NEW WOUNDS FOR OLD PRAIRIES 48-49 (1972).

the Bureau of Reclamation has indicated that plans for the project include measures to avoid this difficulty.[9]

The feasibility of a Garrison Diversion type canal to transfer irrigation water from the Missouri River to the Red River of the North drainage basin was first investigated in 1890 by the United States Geologic Survey. The project was judged infeasible.[10] In 1927 such a proposal was favorably reported on by E. F. Chandler, Dean of the University of North Dakota College of Engineering.[11] The North Dakota Legislative Assembly supported the project by informing the United States Senate that North Dakota would make lands available for a dam and reservoir on the Missouri River to be located 80 miles northwest of Bismarck.[12]

The United States Army Corps of Engineers considered the project in 1937, but was not favorably impressed by its economic feasibility. The Corps indicated costs would be $54 million and benefits only $10 million. The North Dakota Waters Conservation Commission revamped the project and came up with a 20% reduction in costs and a one-to-four cost-benefit ratio.[13] The Corps modified its plan in light of the state proposal, but no congressional approval was forthcoming.[14]

Congressional approval for the first step of Garrison Diversion, the creation of a reservoir, was finally granted in 1944.[15] The legislation was a "reconciliation"[16] or "shotgun wedding"[17] of separate plans developed by the Corps of Engineers and Bureau of Reclamation.[18] Under the 1944 act, the Corps was granted authority over dam construction and flood control and the Bureau gained control of irrigation and hydro-electric power.[19] It has been suggested that fear of the creation of a Missouri Valley Association, similar in nature to the Tennessee Valley Authority, which would have replaced many of their functions in the area, prompted the agreement between the feuding agencies.[20] Construction on Garrison

9. U.S. BUREAU OF RECLAMATION, INITIAL STAGE GARRISON DIVERSION UNIT DRAFT ENVIRONMENTAL IMPACT STATEMENT III-7 (1973).

10. 1 BIENNIAL REP. OF N.D. ST. ENG. 47 (1904).

11. Chandler, *Missouri River Diversion in North Dakota*, 18 Q.J.U.N.D. 16 (Nov., 1927).

12. Con. Res. 5, 20th Leg. Assemb., Spec. Sess., S. & H. JOUR. 245-47 (1928) responding to the introduction of S. Res. 15, 69 CONG. REC. 352 (1927).

13. 1 BIENNIAL REP. OF N.D. WATER CONSERVATION COMMISSION 9-11 (1938).

14. 2 BIENNIAL REP. OF N.D. WATER CONSERVATION COMMISSION 69-77 (1940).

15. Flood Control Act of 1944, Pub. L. No. 78-887, ch. 665, § 9(a), 58 Stat. 887, 891.

16. *Hearings on H.R. 4795 Before the House Comm. on Irrigation and Reclamation*, 78th Cong., 2d Sess. 6 (1944).

17. H. HART, THE DARK MISSOURI 129 (1957).

18. H.R. Doc. No. 475, S. Doc. No. 191, 78th Cong., 2d Sess. (1944), reconciled in S. Doc. No. 247, 78th Cong., 2d Sess. (1944).

19. Flood Control Act of 1944, Pub. L. No. 78-887, ch. 665, § 9(a), 58 Stat. 887, 891.

20. H. HART, *supra* note 17, at 129; G. SHERWOOD, *supra* note 8, at 15; *see* H.R. Doc. No. 680 & 784, 78th Cong., 2d Sess. (1944). In reference to this point Senator Gillette stated:

> It was at about this time that both the distinguished Senator from Montana [Mr. MURRAY] and I introduced bills to create a Missouri Valley Authority. The effect of these two bickering, battling agencies was almost electric. Within

Dam began in 1947 and was completed in 1955.[21]

In anticipation of Garrison Diversion the North Dakota Legislative Assembly authorized the formation of Garrison Conservancy District to facilitate development and local administration of the project.[22] Two years later the Bureau of Reclamation submitted a proposal to irrigate 1,000,000 acres of North Dakota farm land with water from Garrison Reservoir.[23] Despite considerable support in North Dakota, the measure failed to get out of committee.[24]

In 1959 a modified project was proposed which reduced irrigated acreage by 75%.[25] The Bureau of Budget declared the revised project to be "at best" of "marginal" economic justification.[26] This measure also failed to win passage.[27]

The 250,000 acre project was further refined and resubmitted in 1962.[28] After extensive consideration,[29] Congress finally authorized the basic project.[30]

The initial stage project, as currently authorized and proceeding, involves the construction of a canal system to transfer water from "the Missouri River to the James River, Souris River and Sheyenne River basins, and Devils Lake basin."[31] The source of the water is Lake Sakakawea, the reservoir behind Garrison Dam.[32]

The principal features of the main supply works will be Lake Audubon, McClusky Canal, and Lonetree Reservoir. Water will be pumped from Lake Sakakawea into adjoining Lake Audubon. The water will then flow through McClusky Canal to Lonetree Reser-

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> 60 days after our bills were introduced—on October 16 and 17, 1944—the Army and the Bureau of Reclamation held a joint meeting in Omaha, Nebr., and in those 2 days claimed that they had completely integrated their conflicting plans. . . . The Bureau simply yielded the Army the right to build two or three mainstem dams that it had planned, and the Army got out of the Bureau's irrigation field. Then they agreed to quit criticizing each other, lest Congress create an MVA.

95 CONG. REC. 1710 (1949).

21. G. SHERWOOD, *supra* note 8, at 15.

22. N.D. CENT. CODE ch. 61-24 (1960); *see also* Beck & Newgren, *Irrigation in North Dakota Through Garrison Diversion: An Institutional Overview*, 44 N.D. L. REV. 465 (1967-68); Holand & Cooper, *An Agricultural View: Irrigation Organizations and a Case Study through North Dakota Law*, 38 N.D. L. REV. 302 (1962).

23. H.R. DOC. No. 325, 86th Cong., 2d Sess. XVI (1960).

24. 103 CONG. REC. 13, 1107-08 (Index 1957).

25. H.R. DOC. No. 325, *supra* note 23, at IX.

26. *Id.* at VI.

27. 107 CONG. REC. 17, 1001 (Index 1961); 105 CONG. REC. 16, 1102, 1104 (Index 1959).

28. *Hearings on S.* 178 *Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 88th Cong., 1st Sess. (1963).

29. *Hearings on S.* 34 *Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs*, 89th Cong., 1st Sess. (1965); *Hearings on H.R.* 1003, 1013 & 9046 *Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess. (1964); H.R. REP. No. 282, S. REP. No. 470, 89th Cong., 1st Sess. (1965); H.R. REP. No. 1606, S. REP. No. 870, 88th Cong., 2d Sess. (1964).

30. Act of Aug. 5, 1965, Pub. L. No. 89-108, 79 Stat. 433.

31. U.S. BUREAU OF RECLAMATION, *supra* note 9, at I-5. As the Environmental Impact Statement notes at I-1 the basic Garrison Diversion Project as set out in H.R. DOC. No. 325, *supra* note 23, consists of 1,007,000 acres, however, only an initial stage of the project consisting of 250,000 acres has been authorized.

32. *Id.* at I-8.

voir.[33] The Canal will be 74 miles long and of "river-size proportions."[34] Its construction will require the acquisition of over 10,000 acres of rights of way.[35] From Lonetree Reservoir the water is to be directed north to the upper McHenry County area through the Velva Canal and west to portions of Ramsey, Foster and Nelson Counties through the New Rockford Canal. Some of the water from the latter canal will be diverted into the James River for downstream irrigation. The Velva Canal will be 84 miles long and the New Rockford Canal with major extensions will be 108 miles long.[36]

The project also involves 1,000 miles of distribution and drainage systems in the form of open canals and closed conduits as well as the channelization of an as yet undetermined number of water courses in the project area.[37] Construction work is currently proceeding on several portions of McClusky Canal.[38] It is estimated that the entire 250,000 acres will be under irrigation by 1993.[39]

II. INTERNATIONAL CONSIDERATIONS: THE BOUNDARY WATERS TREATY

Despite near universal enthusiasm in North Dakota for the project during the blueprint phase, the construction has encountered a certain amount of opposition. On the international scene, Canada has voiced concern about salinization of downstream land areas and pollution of the Souris and Red Rivers.[40]

Apparently the Bureau of Reclamation previously did not view the international implications of Garrison Diversion as a serious problem. The Draft Environmental Impact Statement mentions a potential difficulty only in connection with the Souris River:

> When mixed with natural flows of the river, stream-flow at the Canadian border may be expected to average about 227,200 acrefeet annually and would contain about 1,320 mg/1 of TDS under equilibrium conditions. The change in the quality of the water has caused some concern to Canada and is under study (See Chapter IV-D). Release of project water to dilute return flows before they are discharged into Canada does not appear to be feasible. To avoid salt buildup in the soils of the area, no reuse of return flow is anticipated under initial stage development.[41]

Chapter IV-D states only that a meeting was held on February

33. *Id.* at I-6.
34. *Id.* at I-5.
35. *Id.* at I-11.
36. *Id.* at I-17 to 24.
37. *Id.* at I-20, -26, -29, -32, table 4.
38. *Id.* at I-3.
39. *Id.* at I-7.
40. Grand Forks Herald, Sept. 17, 1973, at 1, col. 2.
41. U.S. BUREAU OF RECLAMATION, *supra* note 9, at III-14.

8, 1973 between Canada and the United States and there a task force was proposed to study the problem.[42] However, it is now a year later and no solution has been reached.

The importance of the return flow problem was quickly brought to the Bureau's attention. A letter to the Honorable Gilbert C. Stamm, Commissioner of the Bureau of Reclamation, from John A. Green, Regional Administrator of Environmental Protection Agency, stated:

> In our view, the cursory nature of the discussion in the EIS concerning return flow accruals to Canada represents a major underestimation of the severity of this problem. In lieu of the brief outline of the situation as presented in the draft EIS, we urge that full consideration be given to this complex problem in a final statement, and that the responsibilities and obligations of the U.S. Government and the Bureau of Reclamation with regard to the provisions of the 1909 Boundary Waters Treaty be considered in full.[43]

The 1909 Boundary Waters Treaty[44] is certainly applicable to the present salination problem; but how the Treaty affects salination of the Souris and Red Rivers is highly debatable. The Treaty, itself, declares that it exists:

> to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along this common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise. . . .[45]

To implement the purposes of the Treaty the contracting parties established the International Joint Commission.[46] The Commission has differing functions which are dependent upon the nature of the problem presented and the classification of water involved.[47]

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42. *Id.* at IV-32.

43. EPA, COMMENTS ON GARRISON DIVERSION DRAFT EIS, Aug. 1, 1973, at 17. An accompanying letter contains comments regarding to Draft Environmental Impact Statement and describes it as inadequate. Letter from John A. Green to Gilbert C. Stamm, August 1, 1973.

44. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548, hereinafter referred to as the Treaty. For an historical discussion of events leading to the signing of the Treaty see L. BLOOMFIELD & G. FITZGERALD, BOUNDARY WATER PROBLEMS OF CANADA AND THE UNITED STATES 1-13 (1958).

45. Treaty with Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548.

46. *Id.* art. VII at 2451. For a detailed discussion of the function and operation of the International Joint Commission see Waite, *The International Joint Commission—Its Practice and Its Impact on Land Use*, 13 BUFFALO L. REV. 93 (1963).

47. The Treaty refers to boundary waters, *Id.* art. III at 2449-50; waters flowing from boundary waters, rivers flowing across the boundary, and waters in rivers flowing across the boundary. *Id.* art. IV at 2450.

Generally, these include a quasi-judicial function,[48] an investigative function,[49] an administrative function[50] and an arbitral function.[51]

The quasi-judicial authority of the International Joint Commission is dependent upon power granted in Article VIII. Article VIII provides that:

> The International Joint Commission shall have jurisdiction over and pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required. . . .[52]

Therefore, if under the Treaty, the International Joint Commission is to have compulsory jurisdiction over any project affecting the Souris or Red Rivers, authorization must be found in either Article III or IV. Article III refers only to boundary waters[53] and is not applicable.

However, Article IV provides:

> The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protect-

48. This judicial type function actually consists of approving any project that involves the use, obstruction, or diversion of waters over which the commission has control under Articles III and IV. Also included are projects located on boundary waters or trans-boundary rivers which raise the elevation of the natural level of the water on either side of the boarder. *Id.* art. VIII at 2451-52.

49. The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other. . . , along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the . . . questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

Id. art. IX at 2452.

50. *Id.* art. XII at 2453-54.

51. *Id.* art. X at 2453. Article X has never been used.

52. *Id.* art. VIII at 2451.

53. 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 . . . 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.

Id. Preliminary art., at 2448-49. Therefore, neither the Souris nor the Red River qualifies as a boundary water. Instead both are classified as rivers flowing across the boundary. L. BLOOMFIELD & G. FITZGERALD, *supra* note 44, at 251.

> tive works or any dams or other obstructions in waters flowing from boundary waters *or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.*[54]

Therefore, in order for the International Joint Commission to obtain jurisdiction under Article IV, the river in question must flow across the boundary, the natural level of waters on the other side of the boundary must be raised, and certain construction must take place at the lower reaches of the river.

A strong argument can be made that the Souris River is subject to the jurisdiction of the International Joint Commission. First, the Souris satisfies the requirement of being a river which flows across the boundary. Next, no one disputes that the natural level of the waters across the boundary will be increased by the return flows.[55] Finally, some type of drain into the river will have to be constructed to enable the return flows to enter the water.[56] This drain or drains will be installed at a lower level of the river.[57] The only real problem relates to the type of construction involved — does the construction of a drain meet the requirement of Article IV?

The Treaty indicates that any remedial[58] work on a lower level of a river whose waters cross the boundary would be subject to International Joint Commission jurisdiction. The Bureau of Reclamation in its Draft Environmental Impact Statement has argued:

> Although water quality of the Souris River will be degraded to some extent by project return flows, some positive environmental impacts will result from their accrual to the river. Streamflow will be stabilized with augmentation of low flows, high salt concentrations during low flow periods will be diluted, and no-flow conditions will be eliminated in most cases. Increased water supplies will become available to the storage and waterfowl facilities of the J. Clark Saylor National Wildlife Refuge near Upham.[59]

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54. Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548, art. IV (emphasis added).

55. U.S. Bureau of Reclamation, Initial Stage Garrison Diversion Unit Draft Environmental Impact Statement III-13 to -14 (1972); Grand Forks Herald, Sept. 17, 1973, at 1, col. 2.

56. U.S. BUREAU OF RECLAMATION, *supra* note 9, at I-15 to -20.

57. *Id.* frontispiece.

58. Remedial is defined as "affording a remedy; intended for a remedy or for the removal or abatement of an evil. . . ." Remedy is defined as "that which corrects or counteracts an evil of any kind. . . ." Synonyms of remedy are "aid" and "help". WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2016 (2d ed. 1934).

59. U.S. BUREAU OF RECLAMATION, *supra* note 9, at III-14.

The Bureau of Reclamation is stressing the remedial effects of the discharge of return flows into the Souris River. Thus all requirements of Article IV of the Treaty have been met and the International Joint Commission has established jurisdiction.

There is also a possibility that previous dockets have established a basis for jurisdiction. The International Joint Commission has, in the past, considered applications for reclamation works affecting rivers which are subject to Commission jurisdiction under Article IV.[60] Perhaps by analogy this jurisdiction can be extended to embrace irrigation projects which also have an affect on Article IV waters.

Once jurisdiction has been established, the Bureau of Reclamation and the United States Government need approval by the International Joint Commission for that part of the Garrison Diversion Project that affects the Souris River. Over one-third of the total Project depends upon the release of return flows into the Souris River.[61] If Commission approval were not forthcoming, the results to the Project would be disastrous. Even if approved, however, the Commission is required to make certain that all interests adversely affected across the border are compensated.[62] Such payments could be substantial.

If compulsory jurisdiction by the International Joint Commission is not established under Article VIII, the Treaty remains relevant to the return flow issue. Article IV of the Treaty contains a prohibition against pollution of both boundary waters and waters flowing across the boundary.[63] Discharge of return flows containing on the average 1,740 mg/l of total dissolved solids (TDS) will increase the salinity of the Souris River to 1,320 mg/l of TDS under equilibrium conditions.[64] There is no doubt that this increase in salinity constitutes pollution.[65]

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60. L. BLOOMFIELD & G. FITZGERALD, *supra* note 44, at 251.

61. U.S. BUREAU OF RECLAMATION, *supra* note 9, at frontispiece.

62. In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams . . . or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548, art. VIII.

63. It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

Id. art. IV at 2450. For a history of this pollution provision see Ross, *National Sovereignty in International Environmental Decisions*, 12 NATURAL RESOURCES J. 242 (1972).

64. U.S. BUREAU OF RECLAMATION, *supra* note 9, at III-14.

65. The Helsinki Rules in Article IX define water pollution as "any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of the international drainage basin." Gantz, *United States Approaches to the Salinity Problem on the Colorado River*, 12 NATURAL RESOURCES J. 496, 506 n. 30 (1972).

Unfortunately, the mandatory provisions of Article VIII have no application to the provision in Article IV banning pollution. The International Joint Commission can become involved in pollution controversies only when they are referred under Article IX[66] or X.[67] In 1928, a reference under Article IX involving air pollution was made to the Commission.[68] It involved pollution in Washington resulting from a smelter operated in British Columbia. A convention[69] resulted from this reference which established an arbitral tribunal to make a final settlement of the air pollution problem. In its final decision, the tribunal cited cases from the United States Supreme Court dealing with both air and water pollution as authority and ordered the smelter to refrain from causing further damage through air pollutants to the State of Washington. The tribunal extablished controls to regulate the smelter's activity[70] and stated:

> The tribunal finds that under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.
>
> The Tribunal therefore holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter and that it is the duty of the Government of the Dominion of Canada to see to it that this conduct is in conformity with the obligation of the Dominion under international law as herein determined.[71]

As indicated in the decision, the Tribunal referred to cases involving water pollution when seeking tenets of international law applicable to the dispute. Therefore, precedent applicable to the pollution of the Souris River has already been established by the Commission and there is no doubt that the Commission would have the authority to either prohibit the salination of the Souris River or establish conditions under which the return flow could be discharged into the river.

Even if mandatory International Joint Commission jurisdiction cannot be established, and the United States does not honor its

66. Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548; *see also* text, *supra* note 49.

67. Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 (1910), T.S. No. 548; *see also* text, *supra* note 51.

68. Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, British Columbia, April 15, 1935, 49 Stat. 3245 (1935), T.S. No. 20.

69. Trail Smelter Investigation No. 25 *cited* in L. BLOOMFIELD & G. FITZGERALD, BOUNDARY WATER PROBLEMS OF CANADA AND THE UNITED STATES 183 (1958).

70. Trail Smelter Arbitral Tribunal, 35 AM. J. INT. L. 648 (1941).

71. *Id.* at 684.

obligation under the terms of the Treaty not to pollute rivers flowing across the boundary, some sort of agreement will have to be reached with Canada. Canadian officials have repeatedly stated that they "want no degradation of water."[72] In a similar situation involving the salination of the Colorado River, the United States has only recently come to an agreement with Mexico. For the past 12 years Mexican authorities have been complaining that the salination of the Colorado River in the United States has ruined irrigable cropland in Mexico. Over 185 million dollars in damages have been claimed as a direct result of American irrigation projects. In the IBWC MINUTE NO. 242,[73] the United States has agreed to spend over 115 million dollars to alleviate the problem.[74] It is hoped that the 115 million dollars will informally settle all private damage claims.[75] In any event, salination of the Colorado River has cost the United States a great deal of money.

From previous discussion it seems that the United States has two alternatives. It can allow the International Joint Commission to make a determination of the Souris River controversy or it can negotiate independently with Canadian officials. Foreign policy dictates that some sort of arrangement be made. In either case the final result will be either the abandonment of the one-third of the Garrison Diversion Project which will cause the salination of the Souris or an agreement whereby the United States will guarantee a certain quality of water to Canada and will agree to a settlement of all just claims resulting from increased salinity of the river. If one-third of the project is abandoned, the economic benefits of the remainder of the project are questionable. If a monetary settlement is reached, experience with Mexico shows that the expenditure will be enormous. As a result, the seriousness of the Souris River salination problem becomes material to any substantive review of the Garrison Diversion Project under the National Environmental Policy Act.

III. NATIONAL CONSIDERATIONS: THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Close to home, the Committee to Save North Dakota filed suit

72. Grand Forks Herald, Sept. 17, 1973, at 1, col. 2.

73. Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, 69 DEP'T STATE BULL. 395 (1973).

74. United States and Mexico Reach Agreement on Colorado River Salinity Problem, 69 DEP'T STATE BULL. 388 (1973). The methods to be used include construction of a desalination plant, use of water stored behind dams on the Colorado River for dilution and purchase of agricultural lands to take them out of production.

75. For a discussion of access to American courts by Canadian citizens to settle private damage claims caused by pollution see McCaffrey, *Trans-Boundary Pollution Injuries: Jurisdictional Consideration in Private Litigation Between Canada and the United States*, 3 CAL. W. INT'L. L.J. 191 (1973).

against Rogers Morton as Secretary of the Department of the Interior in the federal district court of North Dakota on December 11, 1972.[76] The plaintiffs alleged causes of action under the National Environmental Policy Act of 1969[77] (NEPA) and other environmen-

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76. Committee to Save N.D., Inc. v. Morton, No. 73-1198 (D.N.D., filed Dec. 11, 1972).

77. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852. Text of Title I is as follows:

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, included financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agenices of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources

tal statutes.[78] The court denied the plaintiff's motion for a preliminary injunction and ordered the suit scheduled at the earliest possible date for determination on the merits.[79] The defendant indicated that a final environmental impact statement (EIS) pursuant to the requirements of NEPA would be available to the public on November 15, 1973, and that no new major construction would be initiated prior to that date.[80] The denial of the motion for a preliminary injunction was upheld by the Eight Circuit Court of Appeals.[81]

Litigation on the NEPA cause of action will probably focus on two main points: 1) the adequacy of the final EIS; and 2) the depth of the court's review of the agency decision to proceed.

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which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies. *Id.* at 852-54.

78. Brief for Appellee at 6, Committee to Save N.D., Inc. v. Morton, No. 73-1198 (D.N.D., filed Dec. 11, 1972); *see also* Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 114; Fish and Wildlife Coordinating Act, Pub. L. No. 73-121, 48 Stat. 401 (1934), Pub. L. No. 79-732, 60 Stat. 1080 (1946), Pub. L. No. 85-623, 72 Stat. 563 (1958); Water Bank Act of 1970, Pub. L. No. 91-559, 84 Stat. 1468.

79. Committee to Save N.D., Inc. v. Morton, No. 73-1198 (D.N.D., order of Feb. 12, 1973).

80. Brief for the Appelees, Appendices B and C, Committee to Save N.D., Inc. v. Morton, 476 F.2d 1284 (8th Cir. 1973). Current indications are that the final EIS will be available to the public by March, 1974. *See* Grand Forks Herald, Jan. 11, 1974, at 8, col. 4.

81. Committee to Save N.D., Inc. v. Morton, 476 F.2d 1284 (8th Cir. 1973).

A. PROCEDURAL ISSUES

Section 102(2)(C) of NEPA requires the filing of an EIS by the lead or project agency. That requirement has been described as part of that great volume of law which "make the land fit for lawyers to live in, with no great impact on the environment itself."[82] This section was not included in the legislation originally proposed for consideration by the Senate Committee on Interior and Insular Affairs. The legislation was redrafted to include the requirement after testimony at the committee hearings which suggested the inclusion of "action forcing or operational measures."[83]

The Council on Environmental Quality (CEQ) was formed by Title II of NEPA.[84] Its main function consists of advising the President on envinronmental concerns. Pursuant to Executive Order 11514,[85] the CEQ has issued guidelines for the preparation of an EIS.[86] In response to the requirements of these guidelines, the major federal agencies have issued their own internal guidelines for compliance with this requirement of NEPA.[87]

The exact requirements of an adequte EIS are not clear. The question has been voluminously covered elsewhere[88] and will not be considered in this note. One factor relevant to Garrison Diversion is the weight to be given comments of other agencies required to be solicited under CEQ guidelines.

NEPA requires that each EIS be made available to the CEQ, but the duties and functions of the CEQ do not include review and evaluation.[89] The CEQ budget and staff are too limited to do anything but give a general overview and point out the most glaring difficulties.[90] The power of the CEQ lies mainly in negotiation with agencies and its ability to persuade the President to halt ill-conceived projects.[91] While it has been suggested that sub-

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82. *Interview with Peter Walker, Minister of the Dep't. of Environment, U.K.*, in *S. Lindsay*, 55 SAT. REV. 64, 70 (Jan. 1, 1972).

83. *Hearings Before the Senate Comm. on Interior and Insular Affairs, on S.* 1075, 237 & 1752, 91st Cong., 1st Sess. 116 (1969). In response to this testimony Senator Jackson stated:

> I agree with you that realistically what is needed in restructuring the governmental side of this problem is to legislatively create those situations that will bring about an action-forcing procedure the departments must comply with. Otherwise, these loftly declarations are nothing more than that. It is merely a finding and statement but there is no requirement as to implementation.

Id.

84. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 854.

85. 3 C.F.R. 902 (1971).

86. 36 Fed. Reg. 7724 (1971); 38 Fed. Reg. 20550 (1973).

87. 37 Fed. Reg. 22668 (1972).

88. *E.g.*, Kross, *Prepartion of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81 (1972-73); Comment, *Impact Statement under the NEPA*, 1973 U. ILL. L.F. 353.

89. Geise, *NEPA Federal Guidelines*, INSTITUTE ON NATURAL RESOURCES AND ENVIRONMENTAL LAW 3-1, 3-18, -19 (1972).

90. Hansen, *NEPA: Problems and Outer Limits, Institute on National Resources and Environmental Law* 7-1, -12 (1972).

91. Geise, *supra* note 89, at 3-18.

92. 3 C.F.R. 902 (1971).

section 3(i) of Executive Order 11514[92] authorizes continued remand by the CEQ until an adequate EIS is filed, it has never been exercised.[93] The CEQ has requested the suspension of a government project on three occasions. On two of these occasions, the Cross Florida Barge Canal and the Everglades Airport extension, the projects were halted. The third occasion was in relation to Garrison Diversion, and the project was not suspended. In his request Russell Train, Chairman of the CEQ, voiced concern about loss of wetlands, irrigation methods, increased river salinity, and lowered water tables.[94]

The Environmental Protection Agency (EPA) has rated the most recent draft EIS on Garrison Diversion as inadequate and offered 43 pages of specific objections and concerns ranging from carp introduction and their effect on duck breeding to increased river salinity.[95] The Bureau of Reclamation is thus confronted with the issue of the extent to which it may ignore the comments of agencies with environmental expertise. In the landmark case, *Calvert Cliff's Coordinating Comm. v. A.C. Comm'n*,[96] the Atomic Energy Commission was chastized for attempting to defer its own judgment on water quality to the certification process of another agency. The court emphasized that "individualized balancing analysis" was required. However the court differentiated between NEPA balancing judgments and certifying judgments.[97] The latter merely required a determination of whether pollution exceeds pre-set limits. The case did not speak directly to the role of agency comments, but gave support by implication to the absolute independence of lead agency judgments.[98]

Few courts have directly considered the weight to be accorded the comments of other agencies. One district court stated explicitly that "[w]hile impact statements are to be filed with CEQ for comment, such comment is advisory only."[99] The Tenth Circuit has described the CEQ's functions as "in no way regulatory."[100] This is an affirmance of the generally acknowledged limitations of the CEQ's role. This, however, does not speak to EPA comments.

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93. 1 A. REITZE, JR., ENVIRONMENTAL LAW one-112 (1972).
94. Letter from Russell Train to Rogers Morton, June 15, 1973.
95. EPA, COMMENTS ON DRAFT ENVIRONMENTAL STATEMENT FOR THE INITIAL STAGE GARRISON DIVERSION UNIT (Aug. 1, 1973).
96. Calvert Cliffs' Coordinating Comm., Inc. v. United States A.E. Comm'n., 449 F.2d 1109 (D.C. Cir. 1971).
97. *Id.* at 1123.
98. For example:

> Thus the Congress was surely cognizant of federal, state and local agencies "authorized to develop and enforce environmental standards." But it provided, in Section 102(2) (C), only for full consultation. It most certainly did not authorize a total abdication to those agencies. Nor did it grant a license to disregard the main body of NEPA obligations.

Id.
99. Brooks v. Volpe, 350 F. Supp. 269, 275 (W.D. Wash. 1972).
100. National Helium v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

The EPA was established as an environmental overseer by Reorganization Plan 3 of 1970.[101] It has assumed duties in relation to the environment originally vested in other executive departments. The CEQ guidelines on EIS preparation[102] and § 309 of the Clean Air Act[103] both provide that the EPA shall comment on projects subject to NEPA requirements and if the action is determined to be unsatisfactory the matter shall be referred to the CEQ.

While this provision for EPA comment does not directly support the thesis that such comments have a binding effect on lead agencies, in the most exhaustive judicial discussion of NEPA requirements to date[104] it was suggested that lead agencies were in most cases required to defer to other agencies' commentary in the latter's area of expertise. Pointing out that Congress did not intend that mandated consultation with an agency in its area of expertise be ignored by the lead agency, it was suggested that the process was a form of environmental check and balance within the executive branch.[105]

B. Substantive Issues

Before discussing the issue of substantive review by the courts of an agency decision to proceed with a particular project, it is necessary to differentiate between substantive rights of citizens and substantive duties of agencies under NEPA.

Section 101 (b) of NEPA as originally approved by the Senate read as follows:

> The Congress recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.[106]

In conference this language was deleted and was replaced by § 101 (c), which reads:

> The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.[107]

This milder language "was adopted because of doubt on the part of House conferees with respect to the legal scope of the

101. 3 C.F.R. 1072 (1971).
102. 36 Fed. Reg. 7724 (1971); 38 Fed. Reg. 20550 (1973).
103. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1709.
104. Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973).
105. *Id.* at 1348-49.
106. S. Rep. No. 91-296, 91st Cong., 1st Sess. 2 (1969).
107. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 853.

original Senate provision."[108] In commenting on this change Senator Henry M. Jackson, the bill's primary sponsor, stated:

> I opposed this change in conference committee because it is my belief that the language of the Senate-passed bill reaffirmed what is already the law of this land; namely, that every person does have a fundamental and an inalienable right to a healthful environment. If this is not the law of this land, if an individual in this great country of ours cannot at the present time protect his right and the right of his family to a healthful environment, then it is my view that some fundamental changes are in order.[109]

That statement leads directly to the issue of whether the United States Constitution creates a right to environmental quality. The Fifth, Ninth, and Fourteenth Amendments have been suggested as the source of such a right by several commentators;[110] the courts, however, have yet to find a constitutional right of this nature.[111] In a rather cynical analysis of constitutional rights not specifically enumerated, one commentator has suggested that "we stand marking time, anticipating a moment when the environment deteriorates to such a point that the Court is compelled to confirm that, along with free speech and religion, there exists a right to an environment fit for human habitation."[112] Perhaps the blame for the failure of courts to recognize such a right lies partially with attorneys for their failure to press such claims with sufficient vigor.[113]

Senator Jackson further stated:

> To dispel any doubts about the existence of this right, I intend to introduce an amendment to the National Environmental Policy Act of 1969 as soon as it is signed by the President. This amendment will propose a detailed congressional declaration of a statutory bill of environmental right.[114]

Several such bills have been introduced, but none have been enacted into law.[115]

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108. CONG. REP. No. 91-765, 91st Cong., 1st Sess. 8 (1969); 2 U.S. CODE CONG. & ADMIN. NEWS 2767, 2768-69 (1969).

109. 115 CONG. REC. 40416 (1969).

110. *E.g.*, Nate, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970); Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A.J. 1061 (1971); Roberts, *Right to a Decent Environment; E=MC2: Environmental Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1969-70).

111. *E.g.*, EDF v. TVA, No. 1130 (E.D. Tenn. Dec. 11, 1972); Tanner v. Armco Steel, 340 F. Supp. 532, 534-35 (S.D. Tex. 1972); Environmental Defense Fund v. Corps of Eng'rs., 325 F. Supp. 728, 739 (E.D. Ark. 1971) *aff'd* 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1973).

112. Roberts, *supra* note 110, at 691.

113. *See* Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

114. 115 CONG. REC. 40416 (1969).

115. Muskie & Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 ME. L. REV. 163, 178-85 (1973).

In relation to § 101(c), individual rights, and the above sequence of events, one commentator has stated that "[t]he legislative history . . . is ambiguous; one can only say that such a possibility was thought of and not categorically rejected."[116] In support of the existence of individual rights pursuant to section 101(c), it has been claimed that the change in language altered but did not eliminate a special congressional interest in health. This special interest may recognize a substantive legal right leading to private legal action and the preclusion of balancing of interests in threat to life situations.[117] This analysis is supported by the section-by-section analysis submitted to the Senate by Senator Jackson:

> This subsection asserts congressional recognition that each person should enjoy a healthful environment. It is apparent that the guarantee of the continued enjoyment of any individual right is dependent upon individual health and safety. It is further apparent that deprivation of an individual's healthful environment will result in the deprivation of all of his rights.[118]

A more restrained, and perhaps a more correct, analysis is that the language was altered because of a fear that the original language would lead to injunctions against actions of the federal government that in any manner decreased the healthfulness of the environment.[119] Thus § 101(c) "does not appear to *create* any express individual right to a healthful environment."[120]

The federal courts hav universally accepted this analysis.[121] Their position is best stated in *Upper Pecos Assoc. v. Stans*:

> [T]hese words are almost precatory in nature. Had the

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116. Coleman, *Possible Repercussions of the National Environmental Policy Act of* 1969 *on the Private Law Governing Pollution Abatement*, 3 NATURAL RESOURCES LAW 647, 655 (1970).

117. Hanks & Hanks, *Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of* 1969, 24 RUTGERS L. REV. 230, 250-51 (1969-70). In expounding this contention the authors stated:

> Life is *the* primary value. Without it, all other rights are meaningless. It would seem appropriate and entirely in keeping with the spirit of the Act, therefore, to read subsection 101(c) exactly as had been intended in the Senate version. That is to say, aside from the interests created by the remainder of title I, and enforceable in public actions, subsection 101(c) recognizes a "legal right" in every individual to a healthful environment. What does such a right mean? First, anyone suing to enforce it, is entitled to his remedy if his right is found to have been abridged. His suit, in other words, is a private, not a public action. Second, a legal right to a healthful environment could, in certain circumstances, preclude any balancing or weighing of interests during the governmental decision making process; that is, in some situations no amount of dollars will outweigh the threat to life.
>
> (emphasis in original)

Id.

118. 115 CONG. REC. 40419 (1969).

119. Yannacone, *National Environmental Policy Act of* 1969, 1 ENVIRONMENTAL L. 8, 13-14 (1970-71).

120. Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of* 1969, 13 B.C. IND. & COM. L. REV. 685, 687 (1971-72) (emphasis in original)

121. *E.g.*, Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1236 (10th Cir. 1971), *cert. granted*, 406 U.S. 944, *vacated*, 409 U.S. 1621 (1972).

> Congress intended to create a positive and enforceable legal right or duty, it would have said so, and would not have limited itself to words of entreaty. In the absence of any clear statement, this Court must assume that no such intention existed.[122]

Using a broader approach, some plaintiffs have claimed that § 101 of NEPA creates rights in individuals to "safe, healthful, productive, and esthetically and culturally pleasing surroundings."[123] The courts have not been impressed.[124]

The importance of distinguishing between substantive rights in individuals and substantive duties of agencies under NEPA is that most courts which deny have a duty to substantially review agency decisions to proceed to do so on the basis of lack of substantive rights in individuals.[125] "But that should not be the end of the matter, for 'substance' inheres in more than the creation of an enforceable right."[126] It has been suggested that "the courts' refusal to enforce the substantive provisions of NEPA frustrates the legislative intent of the statute and impedes the Act's declared purpose of protecting the environment."[127] This is supported by an inventive analysis and "independent reading" of NEPA's language and legislative history. The interpretation is based on a structural analysis of the Act's phraseology.[128]

The *Calvert Cliffs'*[129] decision took a more direct approach to interpretation of NEPA's language. In that case the court determined that "to the fullest extent possible" applied to procedural duties which would be rigorously enforced by the courts. As to substantive duties "all practicable means"[130] was declared to be

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122. Tanner v. Armco Steel Corp., 340 F. Supp. 532, 538-39 (S.D. Tex. 1972).

123. EDF v. TVA, No. 1130 (E.D. Tenn. Dec. 11, 1972); Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1236 (10th Cir. 1971), *cert. granted*, 406 U.S. 944, *vacated*, 409 U.S. 1621 (1972); EDF v. Corps of Eng'rs, 325 F. Supp. 728, 755 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1973).

124. *Id.*

125. *E.g.*, Conservation Council of N.C. v. Froehlke, 340 F. Supp. 222, 225 (M.D.N.C.), *aff'd*, No. 72-1276 (4th Cir. May 2, 1971), *summary judgment remanded*, 473 F.2d 664 (4th Cir. 1973); EDF v. Corps of Eng'rs, 348 F. Supp. 916, 925 (N.D. Miss. 1972); Pizitz v. Volpe, No. 3595-N (M.D. Ala. May 1, 1972), *aff'd*, 467 F.2d 208 (5th Cir. 1972).

126. Coggins, *Preparing an Environmental Lawsuit, Part I: Defining a Claim for Relief under the National Environmental Policy Act of* 1969, 58 IOWA L. REV. 277, 314 (1972-73).

127. Cohen, *supra* note 120, at 689.

128. "To the fullest extent possible" modifies not only the "action forcing" procedures of § 102(2), but also § 102(1), which provides that "the policies, regulations and public laws of the United States *shall be* interpreted and administered in accordance with the *policies* set forth in the act. . . ." These policies are set out in § 101. Legislative support for the importance of § 102(1) is found in the Conference Report which states that "the phrase 'to the fullest extent possible' applies with respect to those actions which Congress authorizes and directs to be done under both clauses (1) and (2) of section 102. . . ." (CONG. REP. No. 91-765, *supra* note 108, at 9.) The analysis under discussion further suggests that § 101 policy is limited only by "other essential considerations of national policy." "Thus section 101 imposes a substantive duty upon all instrumentalities of the government to decide in favor of preserving or enhancing environmental quality in a given case, unless there is a contravening consideration of *essential* national policy which justifies an environmentally adverse decision." (Cohen, *supra* note 120, at 694.)

129. 449 F.2d 1109 (D.C. Cir. 1971).

130. See note 36 for full text of act.

an operative phrase indicating more flexible requirements.[131] The decision does not indicate that the previous analysis was investigated.[132]

In light of the possibility that § 101 may create court enforceable substantive duties in agencies, one commentator has stated that "[w]e can all join in hoping that the independent regulatory agencies will heed the advice of the Congress while praying even more fervently that no court will try to give those provisions any binding effect."[133]

At least some courts are not susceptible to "fervent prayers." In approving judicial review of agency decisions to proceed, the Eighth Circuit emphasized that procedural duties under NEPA were "action forcing" in relation to substantive duties, rather than ends in themselves.[134] The court declared that the decision to review could be supported either by the Administrative Procedures Act (APA)[135] or the common law. They supported their conclusion regarding the APA by drawing on *Citizens to Preserve Overton Park, Inc. v. Volpe*.[136] In that case, the Supreme Court held that agency action is subject to review on the merits, unless review is statutorily prohibited, or the action is committed to agency discretion by law. This exception was narrowly limited to those situations where statutes are drafted in such broad terms that there is no law to apply.[137]

1. *Rationales for Substantive Review*

Before discussing the standard of review, it is important to examine the philosophical and practical rationales behind advocacy of a searching review under NEPA standards of agency decisions to proceed and the countervailing considerations. The most frequently cited reason for prefering broader review power in the courts with respect to environmental matters is a basic distrust of agencies. "[T]he New Deal optimism at having found, in the administrative agency, the panacea for our ills has been replaced by almost total disillusionment, distrust and cynicism on the part of the citi-

131. Calvert Cliffs' Coordinating Comm., Inc. v. United States A.E. Comm'n., 449 F.2d 1109, 1112-14 (D.C. Cir. 1971).

132. Calvert Cliff's Coordinating Comm., Inc. v. United States A.E. Comm'n., 449 F.2d 1109 (D.C. Cir. 1971).

133. Voight, *The National Environmental Policy Act and the Independent Regulatory Agency: Some Unresolved Conflicts*, 5 NATURAL RESOURCES LAW 13, 15 (1972). Others have advocated the concept of substantive duties with rear equal but opposite vigor. *See* Note, *Substance and Procedure in the Construction of the National Environmental Policy Act*, 6 J. L. REFORM 491, 506-10 (1972-73); Comment, *Judicial Review of Factul Issues Under the National Environmental Policy Act*, 51 ORE. L. REV. 408, 413-17 (1971-72).

134. EDF v. Corps of Eng'rs, 470 F.2d 289, 298 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1973).

135. 5 U.S.C. §§ 701-706 (1970).

136. 401 U.S. 402 (1971).

137. *Id.* at 410.

zens of this country. . . ."[138] Much of this distrust is based on the capture theory. This has been described as the concept "that administrative agencies are either captives of those whom they regulate or wedded to the promotional missions that lead to their creation . . . ."[139] The vulnerability of agencies to outside pressure, especially when compared to the courts' relative immunity, is another factor in the distrust syndrome.[140] Despite legislation such as NEPA, conservationists also consider the judiciary more dependable than politicians because of the latter's predelictions toward compromise.[141] It has also been charged that agencies have a tendency to insulate themselves from all but special interest groups.[142]

Another factor is the growing desire on the part of the general public to shed the feeling of alienation and exclusion from government:[143]

> [the] elements of the judicial process strongly support the need . . . for citizens to feel that they are not merely passive bystanders in making their government work. The opportunity for anyone to obtain at least a hearing and honest consideration of matters that he feels important must not be underestimated. The availability of a judicial forum means that access to government is a reality for the ordinary citizen . . . .[144]

A related concept is that there is no other feasible method of correcting certain incorrect agency decisions.[145]

One of the primary considerations raised in opposition to broader judicial review is lack of expertise in the courts to handle complex environmental issues.[146] Frequently cited in support of this objection is *Ohio v. Wyandotte Chemicals Corp.*[147] However, careful examination of the case reveals that the decision not to exercise original jurisdiction hinged more on the changing role of the Supreme Court as an appellate body as opposed to a trial court, than on the Court's lack of expertise in the environmental area.[148]

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138. *Hearings on S.* 1032 *Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 17, pt. 2, at 275 (1971).
139. Cramton & Berg, *Enforcing the National Environmental Policy Act in Federal Agencies*, 18 PRAC. LAW. 79, 97 (May, 1972).
140. J. SAX, DEFENDING THE ENVIRONMENT 108 (1970). In a similar vein Justice Douglas, in a dissenting opinion, stated, "But they [federal agencies] are notoriously under the control of powerful interests who manipulate them . . ., or who have that natural affinity with the agency which in time develops between the regulator and the regulated." He went on to document and trace the history of the phenomenon. Sierra Club v. Morton, 405 U.S. 727, 745-48 (1972).
141. Rosenbaum & Roberts, *The Year of Spoiled Pork: Comments on the Court's Emergence as an Environmental Defender*, 7 L. & SOC'Y REV. 33, 49 (1972-73).
142. Hanks, *supra* note 117, at 246.
143. *Id.*
144. J. SAX, *supra* note 140, at 112.
145. Coggins, *supra* note 126, at 317; *see* Hanks, *supra* note 117.
146. Comment, *America's Changing Environment—Is the NEPA a Change for the Better?* 40 FORDHAM L. REV. 897, 918 (1971-72).
147. 401 U.S. 493 (1971).
148. *Id.* at 497-99.

The lack of expertise argument has been countered with references to other complex matters that the courts handle, such as patent, antitrust, and rate regulation litigation.[149] Consideration must also be given to the fact that in reviewing an agency decision to proceed, courts do not substitute their knowledge for that of experts but rather determine whether the agency decision to proceed is supported by sufficient evidence.[150] The corollary supposition of agency expertise has also been subject to attack.[151] It has been suggested that the decision makers in administrative agencies are usually attorneys, rather than scientists or engineers, and thus, not so different from judges in expertise or training.[152]

A more philosophical argument raised to oppose the type of judicial review under consideration relates to the proper role of the judiciary. It is based either on the institutional infirmity of the courts[153] or the impropriety of having courts make policy decisions.[154] In relation to the former, it has been pointed out that the scope of environmental questions is so broad that a balancing of social and economic values is required. This process is more of an art than a science; an art which the courts are both particularly suited for and proficient at.[155] Courts have generally shown themselves to be more sensitive to the changing values of society than administrative agencies.[156]

The policy contention is met most often by the argument that the courts do not make public policy by review of administrative decisions to proceed, but rather insure that public policy is made rationally — in accordance with proper process and by the proper entity.[157] A less frequently used, but better reasoned response is an honest acknowledgment that courts do in fact have a public policy making role. This requires a step beyond the simple civics analysis of our tri-partite government and a consideration of the role of the courts in our common law system and the evolution of our written Constitution.[158] The courts have shown themselves

149. Hanks, *supra* note 117; Note, *Environmental Law—NEPA of* 1969, 18 LOYOLA L. REV. 717, 727 (1971-72).
150. J. SAX, *supra* note 140, at 150.
151. Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511, 531 (1972-73).
152. J. SAX, *supra* note 140, at 110.
153. *Hearings on S.* 1032, *supra* note 138, pt. 1 at 21.
154. J. SAX, *supra* note 140, at 149; *Hearings on H.R.* 49, 290, 4517, & 8050 *Before the Comm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess., ser. 28, at 57 (1971).
155. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629-30 (1970).
156. Comment, *Preservation of the Environment Through the Doctrines Governing Judicial Review of Administrative Agencies*, 15 ST. LOUIS L.J. 429, 430 (1970-71). Similarly it has been noted that the ability of a complex bureaucracy to explore alternative courses of action is inherently limited. Cramton, *supra* note 151, at 531.
157. J. SAX, *supra* note 140 at 151.
158. *See Hearings on S.* 1032, *supra* note 138, at 274; *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

to be more expert in determining the public interest than administrative agencies.[159]

In relation to the alleged institutional infirmities of the court, it has been pointed out that solution of environmental problems requires affirmative programs and such is not the courts' domain.[160] This overlooks the basic role of judicial review under NEPA of an agency decision to proceed. The inquiry goes to whether the agency has met the duties imposed upon it by the act, rather than to the formulation of broad designs to preserve environmental quality.

The danger that judicial review will be used to impede environmental action, the "two edged sword" theory, has been employed by those opposed to substantive judicial review under NEPA.[161] This theory has also received support in case law.[162] This specter has been at least partially exorcised by pointing out that industry currently has full access to the courts in relation to rights infringed by agency action and that broader judicial review under NEPA would act as an equalizer.[163]

The problem of environmental control and restoration has been described as, "to a large extent, the problem of the control of administrative agencies by the courts."[164] It has been claimed that NEPA will not lead to significant self reform by agencies because of basic institutional behavior patterns.[165] In contrast, it has been suggested that those who look to the courts for salvation are "completely innocent of history" — history which indicates that the "judiciary is inherently reactionary" and that agencies have been effective agents of reform.[166]

2. *Judicial Application*

Court application of the rationales for and against substantive review under NEPA have varied.[167] The Tenth Circuit is currently

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159. "Many agencies historically have been concerned more with economic cost-benefit ratios, creation or protection of certain industries than with the spiritual, aesthetic, health or other unquantifiable needs of man." Coggins, *supra* note 126, at 317.

160. Cramton, *supra* note 139, at 97-98.

161. Cramton, *supra* note 151, at 535.

162. *E.g.*, Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006 (D. Del. 1972), *aff'd*, 467 F.2d 349 (3d Cir. 1972), *remanded with directions*, 409 U.S. 1125 (1973).

163. J. SAX, *supra* note 140, at 112-23. In reference to the trans-Alaskan oil pipeline litigation it has been stated that: "In a case such as this the National Environmental Policy Act certainly can take on the sobriquet once reserved for the Colt revolver: 'the great equalizer'." A. REITZE, JR., *supra* note 93, at one-113.

164. Sive, *supra* note 155, at 615.

165. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 245 (1972-73).

166. Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231, 231-32 (1970-71).

167. To limit confusion it is important to note that this is not a discussion of standards of court review of agency decisions not to file an EIS. The various circuits have expressed differing opinions on the appropriate standard of review under such circumstances. *E.g.*, Wyoming Council v. Butz, No. 73-1477 (10th Cir. Sept. 21, 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973).

the only federal appellate court to completely reject the concept of substantive judicial review under NEPA of an agency decision to proceed. The issue was first considered in *National Helium Corp. v. Morton*, where the possibility was dismissed in one sentence.[168] Later, in *Upper Pecos Ass'n. v. Stans*, the court devoted an entire paragraph to the issue.[169] Careful readng of that decision raises the possibility that the court is confusing the issues of substantive right in citizens and substantive duties required of agencies.[170] In a more recent decision the court stated:

> Reading the Act and its legislative history together, there is little doubt that Congress intended all agencies under their authority to follow the substantive and procedural mandates of NEPA.[171]

This case, however, was decided on the basis of failure to file an EIS, thus making the court's statement nothing more than dicta.[172]

This dicta was relied on in a subsequent litigation of *National Helium Corp. v. Morton*[173] at the district court level. In that case, the court cited the Department of Interior for failure to comply with NEPA's substantive and procedural requirements. The conclusion of non-compliance with substantive requirements was based on the decision that the EIS was so inadequate that the decision-maker could not have given fair consideration to environmental amenities. It was emphasized that "the court does not reach the propriety of the Secretary's actual decision," and the possibility of substantive review despite an adequate EIS was not discussed.[174]

Thus, while the Tenth Circuit remains the lone explicit hold out, their attitude seems to be softening.[175] Further indication is a recent decision imposing strict and searching review on an agency decision not to file an EIS.[176]

Before considering the approaches of courts that recognize the requirement of substantive judicial review under NEPA of agency

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168. "The decisions are also clear that the mandates of the NEPA pertain to procedure and do not undertake to control decision making within the departments." 455 F.2d 650, 656 (10th Cir. 1971).

169. The mandates of the N.E.P.A. pertain to procedure and not to substance, that is, decision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision. The N.E.P.A. creates no substantive rights in citizens to safe, healthful, productive and culturally pleasing surroundings. Instead, the responsible agency is required to take these factors into account at some point before commencement of the project.
452 F.2d 1233, 1236 (10th Cir. 1971).

170. See text accompanying notes 121-26 *supra*.

171. Davis v. Morton, 469 F.2d 593, 596 (10th Cir. 1972).

172. *Id.* at 598.

173. 361 F. Supp. 78, 96 (D. Kan. 1973).

174. *Id.* at 107.

175. *See* Davis v .Morton, 469 F.2d 593, 596 (10th Cir. 1972); Upper Pecoes Ass'n v. Stans, 452 F.2d 1233, 1236 (10th Cir. 1971), *cert. granted*, 406 U.S. 944 (1972), *vacated*, 409 U.S. 1621 (1972); National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

176. Wyoming Council v. Butz, No. 73-1477 (10th Cir., Sept. 21, 1973).

decisions to proceed, it is important to consider the Supreme Court's interpretation of the APA in the *Overton Park case.*[177] In that case, plaintiffs challenged the Secretary of Transportation's authorization of federal funds for a highway extension through a park in Memphis, Tennessee. The challenge was based on violation of § 138 of the Federal Aid Highways Act of 1968[178] and § 4(f) of the Department of Transportation Act of 1966.[179] These acts require that the Secretary of Transportation not approve highway projects which will destroy parks unless "there is no feasible and prudent alternative to the use of such land." The Court stated that "protection of parkland was to be given paramount importance."[180] It was further noted that if cost, community disruption, and directness of route are set on an "equal footing" with parkland preservation, then parks must generally yield to highways. "Thus if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes."[181]

The Court's review of the Secretary's authorization of federal funding was based on the APA.[182] The substantial evidence test of § 706(2)(E) was rejected as applicable only when agency action is pursuant to rulemaking power, or based on a public adjudicatory hearing. Further, de novo review of § 706(2)(F) was also rejected as applicable only where agency action is adjudicatory in nature and inadequate fact finding procedures are used, or in judicial proceedings to enforce nonadjudicatory agency actions where new issues are raised.[183]

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177. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
178. 23 U.S.C. § 138 (1970).
179. Federal Aid—Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 815, 824.
180. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412-13 (1971).
181. *Id.* at 412.
182. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdictions, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of its cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1970).
183. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-15 (1971).

The standard of review approved by the Court consisted of two parts. First, it was necessary to decide "whether the Secretary acted within the scope of his authority." Second, the Court had to determine whether the decision was, in the terms of § 706(2)(A), "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In making a decision, the court must consider whether "all relevant factors" were taken into account and whether the decision-maker made a "clear error in judgment."[184] The Court emphasized that although "searching and careful inquiry" into the facts was authorized the court may not "substitute its judgment for that of the agency."[185]

The *Overton Park* decision is important to substantive review under NEPA in three respects. First, the decision points toward broad boundaries for the applicability of review.[186] Second, it sets out a standard, clear in wording if not application, that is apparently applicable to NEPA.[187] Finally, the "paramount importance" analysis of parkland lends credence to creation of a preferred status[188] for the environment under NEPA.

As noted previously, the Eight Circuit was the first to specifically rule that "judicial review of substantive merits" was appropriate under NEPA.[189] It adopted the bifurcated *Overton Park*[190] test consisting of "scope of authority" followed by "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law." The court stated:

> Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.'[191]

The case was resolved at the appellate level by a decision that the agency decision to proceed was not arbitrary and capricious. The court emphasized that the project was 63% complete when the action was instituted.[192]

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184. *Id.* at 416.
185. *Id.*
186. See text accompanying note 137, *supra.*
187. See text accompanying note 184, *supra.*
188. See note 128, *supra.*
189. EDF v. Corps. of Eng'rs, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1973).
190. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
191. EDF v. Corps of Eng'rs, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1973).
192. *Id.* at 301.

In a later case of a similar nature, the Eighth Circuit reiterated its opinion on substantive review under NEPA.[193] The court held that the appropriation of funds for the project by Congress after the EIS was filed did not alter the nature or standard of judicial review.[194]

The above cases are important to the pending Garrison Diversion litigation because they discuss the standard of substantive review likely to be applied, and the method of its application. As compared to the 63% completion figure of the previous case, Garrison Diversion was less than 16% complete[195] when suit to halt construction was filed.[196] It is also apparent that continued Congressional appropriation should not alter judicial review.

The Eighth Circuit's holdings on applicable standards of review have been closely followed by several other circuits. Most recently, the Seventh Circuit ignored its own prior dicta to the contrary[197] and drew heavily on *EDF v. Corps*[198] declaring that substantive review under NEPA was obligatory. The court applied the bifurcated *Overton Park* test in declaring the agency action neither arbitrary nor capricious.[199] The Fourth Circuit has expressly followed the Eighth Circuit in relation to applicable standard of review.[200]

In considering substantive review the D.C. Circuit has stated:

> The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.[201]

Considering the proper roles of courts and agencies in a later case, the court reiterated its position.[202]

The Ninth Circuit quoted the above remarks with approval in *Jicarilla Apache Tribe of Indians v. Morton*.[203] However, earlier

193. EDF v. Froehlke, 473 F.2d 346, 352-53 (8th Cir. 1972).
194. The holding was based on Rule XXI of the House of Representatives which provides that no provision in a continuing appropriation or amendment thereto changing existing law shall be in order. L. Deschler, Manual and Rules of House of Representatives, 92d Cong., H.R. Doc. No. 439, 91st Cong., 2d Sess. 464-65 (1971). The holding also referred to the similar holding in Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 785 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 917 (1971), and the general rule against repeal by implication.
195. In terms of dollar expenditures.
196. Brief for the Appellees at 4, Committee to Save N.D., Inc. v. Morton, 476 F.2d 1284 (8th Cir. 1973).
197. Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537, 540 (7th Cir. 1972), *cert. denied*, 409 U.S. 1047 (1972).
198. 470 F.2d 289 (8th Cir. 1972).
199. Sierra Club v. Froehlke, 486 F.2d 946, 952 (7th Cir. 1973).
200. Conservation Council of N.C. v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973).
201. Calvert Cliffs' Coordinating Comm., Inc. v. United States A.E. Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).
202. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).
203. 471 F.2d 1275, 1281 (9th Cir. 1973).

in that case, the court stated that its review was limited to whether "the Secretary's action followed the necessary procedural requirements."[204] In its most recent pronouncement on the subject, the Ninth Circuit set out the bifurcated *Overton Park* test as appropriate for setting aside "agency action," but does so with respect to review of the "substantive content of the EIS."[205] Thus it is probable, but not absolutely certain, that this circuit allows substantive review of an agency decision to proceed.

The Fifth Circuit, in a case relating to judicial review of an agency decision not to file an EIS, indicated that the "ultimate merit decision . . . should be reviewed under the arbitrary, capricious or abuse of discretion standard. . . ."[206] Subsequent district court decisions in the Fifth Circuit have acknowledged the requirement of substantive review.[207] In a recent opinion from the Southern District of Texas, the court followed the appellate court's dicta in referring to the process as the "substantial inquiry test." The court drew on *Overton Park* and stated:

> As the Supreme Court remarked about the highway statutes, the very existence of NEPA indicates that protection of the environment was to be given paramount importance and thus was not to be placed on an equal footing with the usual economic and technical factors.[208]

The Second Circuit was among the first appellate courts to consider judicial review under NEPA. In *Scenic Hudson v. Federal Power Commission* the court adopted the "substantial evidence" test. This was defined as less than the weight of evidence. The court stated that the possibility of a different conclusion being reached on the same evidence does not make it impossible for an agency's decision to be based on substantial evidence.[209] Judge Oakes dissented and suggested that review under the substantial evidence was insufficient. He stated that the Federal Power Commission had acted arbitrarily and abused its discretion.[210] Unimpressed by the dissents, a district court in this circuit stated that

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204. *Id.* at 1280. Some district courts of the Ninth Circuit have adopted the language of the former case as controlling while another has followed the latter case. Citizens v. Brinegar, 357 F. Supp. 1269, 1275 (D.C. Ariz. 1973); EDF v. Armstrong, 356 F. Supp. 131, 139 (N.D. Cal. 1973); as opposed to Brooks v. Volpe, 350 F. Supp. 269, 274-76 (W.D. Wash. 1972).

205. Life of the Land v. Brinegar, 485 F.2d 460, 469 (9th Cir. 1973).

206. Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973).

207. Montgomery v. Ellis, 364 F. Supp. 517, 531 (N.D. Ala. 1973); Sierra Club v. Lynn, 364 F. Supp. 834, 842 (W.D. Tex. 1973).

208. Sierra Club v. Froehlke, 359 F. Supp. 1289, 1333 (S.D. Tex. 1973); compare with Cohen, *supra* note 120, at 692-94.

209. Scenic Hudson Preservation Conference v. Federal Power Comm'n., 453 F.2d 463, 467 (2d Cir. 1971), *cert. denied,* 407 U.S. 927 (1972).

210. *Id.* at 482-84. Justice Douglas echoed these concerns in a dissent from denial of cert. 407 U.S. 927, 931 (1972).

it was doubtful than an agency decision under NEPA was subject to judicial review even under the substantial evidence or abuse of discretion test.[211]

The First Circuit recently paralleled the ruling of the Ninth Circuit in describing judicial review of "findings and conclusion" in an EIS by using the "arbitrary, capricious, abuse of discretion or not in accordance with law" formula.[212] It seems apparent that reviewing the "findings and conclusions"[213] in an EIS is tantamount to reviewing an agency decision to proceed, but this is not made explicit by any reference to courts specifically authorizing the latter.[214]

The Sixth Circuit has indicated the existence of the issue of substantive review under NEPA, but has stated no opinion.[215] The district courts of the Sixth Circuit which have considered the issue have held that agency decisions to proceed under NEPA are reviewable under the *Overton Park* test.[216]

Senator Jackson described NEPA in the following terms:

> A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations.[217]

NEPA has been described as an "Environmental Bill of Rights" and legislation of a "constitutional character."[218] It has been suggested that NEPA creates a presumption in favor of the environment.[219] This suggestion has been given credence by *Overton Park's* "paramount importance" of parkland analysis.[220] At least one court has followed and stated that environmental protection shall be given "paramount importance."[221]

Judicial review of agency decisions is flexible in terms of depth of inquiry. The more important the right, the sharper the review.[222] The Supreme Court, by analogy, and several of the circuit courts, drectly, have indicated that in substantive review under NEPA, they will inquire whether the agency decision was based on con-

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211. City of N.Y. v. United States, 344 F. Supp. 929, 939-40 (E.D.N.Y. 1972).
212. Silva v. Lynn, 482 F.2d 1282, 1283 (1st Cir. 1973).
213. *Id.*
214. At the district court level in this circuit one court has specifically cited to such cases in explicating the dicotomy of procedural and substantive review. Conservation Society of Southern Vt., Inc. v. Secretary of Transp., 362 F. Supp. 627, 632-33 (D. Vt. 1973).
215. EDF v. TVA, 468 F.2d 1164 (6th Cir. 1972).
216. EDF v. TVA, No 1130 (E.D. Tenn., Mar. 21, 1973); Akers v. Resor, 339 F. Supp. 1375, 1380 (W.D. Tenn. 1972).
217. 115 CONG. REC. 40416 (1969).
218. Hanks, *supra* note 117, at 230, 245-47.
219. Cohen, *supra* note 120, at 694.
220. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412 (1971).
221. Sierra Club v. Froehlke, 359 F. Supp. 1289, 1333 (S.D. Tex. 1973).
222. Sive, *supra* note 155, at 642.

sideration of all relevant factors or was a clear error of judgment. The *Calvert Cliff's* decision declared that the substantive portion of NEPA requires agencies to reach the "optimally beneficial" decision.[223] Given the "paramount importance" of the environment, these requirements would seem a difficult hurdle; however, no projects subject to substantive review have been halted solely on failure to comply with the substantive portions of NEPA. Procedural difficulties are generally called in to bolster the attempt to halt the continuation of a project by injunction. It is not clear whether this is due to the narrow scope of substantive review or judicial reluctance to halt a project solely on substantive grounds.

IV. CONCLUSION

The fructification of American opposition to the Garrison Diversion Project in the legal arena is imminent. It seems clear that the project will be subject to substantive review under Eighth Circuit precedent. The record of this Circuit on major cases relating to substantive review under NEPA is, from the Environmental Defense Fund's point of view, a mediocre 0-1-1.

In *Environmental Defense Fund v. Corps of Engineers*[224] the court explicated the concept of substantive review under NEPA,[225] but on the basis of the record declared that the Corps was not "arbitrary and capricious" in its decision to proceed with the project.[226] In *Environmental Defense Fund v. Froehlke*,[227] the court reiterated its position on substantive review under NEPA[228] and remanded the case to the district court with instructions to subject the agency decision to substantive review if such was promptly requested by the plaintiff.[229] In the former case, the court balanced project benefits against environmental values. The ten million dollars already expended, which would have been lost if the Gillham project had been abandoned, and the fact that the project was more than half complete when the suit was first filed were mentioned as factors considered in the balancing process.[230] By comparison, the Garrison Diversion Project was less than sixteen per cent complete and had cost almost sixty million dollars when suit was first filed.[231] The international difficulties described in this

223. 449 F.2d at 1112, 1123.
224. EDF v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1973).
225. *Id.* at 297-300.
226. *Id.* at 301.
227. 473 F.2d 346 (8th Cir. 1972).
228. *Id.* at 352-53.
229. *Id.* at 356.
230. EDF v. Corps of Eng'rs, 470 F.2d 289, 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1973).
231. Brief for the Appellees at 4, Committee to Save N.D., Inc. v. Morton, 476 F.2d 1284 (8th Cir. 1973).

note will be another input in the balancing process involved with substantive review. The terms of NEPA require the inclusion of this factor in the deliberations.[232]

Current indications are that the Garrison Diversion Project will not be halted by action in the political arena. It is likely that sufficient appropriations to continue the project's advance will be available from Congress at least in the near future.[233] However, interntonal complications and questions as to the project's ability to withstand the judicial scrutiny of substantive review under NEPA indicate a prognosis which, if not critical, is at least serious.

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232. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102(2)(E), 83 Stat. 852, 854.
233. See Grand Forks Herald, Jan. 29, 1974, at 1, col. 5.