

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**GOVERNMENT OF THE PROVINCE
OF MANITOBA,**

Plaintiff,

v.

**GALE A. NORTON, Secretary, United
Stated Department of the Interior, *et al.*,**

Defendants.

Civil Action No. 02-cv-02057 (RMC)

ORDER

The United States Government and the State of North Dakota have planned to transfer water through a mountain range from the Missouri River Basin into the Hudson Bay Basin for purposes of providing water to numerous small communities in North Dakota. This would be the first inter-basin transfer of water and it has raised concerns that biota found in the Missouri River Basin but not in the Hudson Bay Basin will be transferred along with the water.

The Province of Manitoba, Canada ("Manitoba") has filed suit against Gail A. Norton, Secretary of the Department of the Interior, John W. Keys, III, Commissioner of the Bureau of Reclamation, Maryanne C. Bach, Great Plains Regional Director of the Bureau of Reclamation, and Dennis E. Breitzman, Dakotas Area Manager of the Bureau of Reclamation ("Federal Defendants"), challenging the adequacy of an April 30, 2001, Final Environmental Assessment ("EA") and a May 18, 2001 Finding of No Significant Impact ("FONSI"), as revised September 10, 2001, that were issued in connection with this project, known as the Northwest Area Water Supply project ("NAWS"). Manitoba seeks a declaratory judgment and injunction requiring the Federal Defendants

to prepare, circulate for comment, and consider in decision-making an environmental impact statement ("EIS") relating to the NAWS project, pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA"). In addition, Manitoba seeks an injunction prohibiting the Federal Defendants from authorizing or expending federal funds on NAWS, or taking further steps relating to the project until the Federal Defendants comply with these requirements of NEPA.

Manitoba asserts that the Bureau has failed to fully analyze the risks associated with the project, including

accidental spills, routine operational releases and waste water discharges, resulting in the introduction of non-native biota into the Hudson Bay Basin and adversely affecting fish and wildlife resources in Manitoba. The resulting social, cultural, and economic consequences of such adverse effects, which are required to be explored in [a] competent assessment satisfying the provisions of NEPA, were ignored in the EA and FONSI.

Compl. at ¶ 23. The complaint further asserts that "the risks of inter-basin transfer of non-native biota from NAWS remain significant, and there is a high probability of accidental or operational releases of untreated or insufficiently treated Missouri River Basin water during the lifetime of the Project." *Id.* at ¶ 24. Manitoba advocates complete treatment of Missouri River water south of the divide between basins, rather than the planned partial pre-treatment, to protect against the risk of inter-basin biota transfers.

Pending before the Court are Motions for Judgment on the Pleadings pursuant to FED. R. CIV. P. 12(c), filed by the Federal Defendants and Intervenor-Defendant the State of North Dakota. Manitoba has filed its opposition, as have amici curiae the State of Missouri and the Government of the Dominion of Canada. Federal Defendants and Intervenor-Defendant North Dakota argue that they are entitled to judgment because (1) Manitoba's claims present a non-justiciable political

question and (2) NEPA's EIS requirement does not extend outside U.S. boundaries or to matters of foreign policy. Federal Defendants also present the additional argument that Manitoba does not have standing to challenge alleged non-compliance with NEPA.

The language of NEPA is very broad, referring generally to "the interrelations of all components of the natural environment" and the importance of protecting the environment to ensure the "overall welfare and development of man." 42 U.S.C. § 4331; *see also Andrus v. Sierra Club*, 442 U.S. 347, 349-50 (1979) ("NEPA sets forth its purposes in bold strokes. . . . The thrust of [the EIS requirement] is thus that environmental concerns be integrated into the very process of agency decisionmaking."). Given the breadth of the statutory language, the Court finds that it is not necessarily inconsistent with the purpose of the statute to allow a non-citizen, including a party such as Manitoba, to file suit to enforce NEPA.

In 1909 the governments of the United States and Great Britain executed the "Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada" ("Boundary Waters Treaty" or "Treaty"), which is still in force today. *See* 36 Stat. 2448 (1909). Defendants assert that this action is precluded by the Boundary Waters Treaty and that this matter presents a non-justiciable political question.¹ Treaties define the relationships between sovereign nations and any action that is determined by a treaty would be, indeed, non-justiciable. But the fact that a treaty exists between sovereigns does not necessarily preclude an inferior party from challenging agency action within the United States that allegedly

¹ In relevant part, Article IV of the Treaty provides, "[i]t 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 and property on the other." 36 Stat. 2450. The Boundary Waters Treaty also contains binding and non-binding mechanisms for resolving disputes arising from the use of boundary waters. *See id.* at 2452-53.

violates a U.S. law, will allegedly cause injury in the United States, and will allegedly cause inevitable injury outside U.S. boundaries. It is not unusual for multiple avenues to exist under the law to secure rights and enforce obligations.

NEPA speaks to the protection of the "welfare and development of man," not just residents of the United States. This Circuit has not precluded citizens of foreign countries from maintaining suit under NEPA. *See Swinomish Tribal Cmty. v. FERC*, 627 F.2d 499, 510-512 (D.C. Cir. 1980) (NEPA challenge to adequacy of agency's assessment of environmental impacts in Canada brought by Canadian intervenors); *Wilderness Soc'y v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (Canadian citizen and Canadian environmental group permitted to intervene in suit brought under NEPA). Defendants argue, however, that Manitoba is a political subdivision of Canada and is therefore governed by the Treaty. Given that Canadian citizens may have standing to sue under NEPA, the existence of a treaty between the Canada and the United States does not necessarily preclude an action brought by Manitoba on behalf of its citizens. The Court does not mean to imply that it has found that NEPA has true extraterritorial application. But it is impossible on this limited record to determine that there is no set of facts on which Manitoba might advance a legitimate NEPA claim for potential injury originating in the United States that would, if it occurred, inevitably flow into the Province.

Defendants cite general language in NEPA as support for the proposition that this is an international matter between the United States and Canada that is governed entirely by the Boundary Waters Treaty. *See* 42 U.S.C. § 4332(F) ("[A]ll agencies of the Federal Government shall. . . recognize the worldwide and longrange 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 "). The cited language is not specific enough to limit the entire range of environmental issues to the Treaty, when those issues allegedly arise between the United States and Canadian persons or entities that are inferior to the national government of the Dominion of Canada.

Defendants' motion has focused its arguments on the specter of the extraterritorial application of NEPA or a non-justiciable political question.² However, the limited information before the Court at this point implies that any inter-basin biota transfer will occur in the United States, that such inter-basin transfer would eventually and inevitably impact Manitoba, and that appropriate restraints within the United States may be sufficient to avoid that result. The Complaint argues that the 2001 EA and FONSI are based on outdated, outmoded and erroneous information and technology that could address these concerns if updated and corrected. Reviewing these allegations in the light most favorable to Manitoba, the Court cannot find on this record that it is not possible as a matter of law for Manitoba to assert rights under NEPA.

Therefore, it is this 14th day of November, 2003, hereby **ORDERED** that the Motions for Judgment on the Pleadings are **DENIED**.

SO ORDERED.

/s/
ROSEMARY M. COLLYER
United States District Judge

² Because of the current posture of the case, defendants have not addressed the merits under NEPA of the work that has been done on the EA and otherwise, as to which the Court expresses no opinion.

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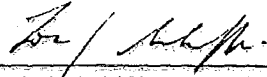
Case No. 1:02CV02057-RMC

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

The Government of Canada respectfully submits this uncontested Motion for Leave to Participate as *Amicus Curiae* in this matter. In support of its Motion, the Government of Canada respectfully refers the Court to the attached Memorandum of Points and Authorities and states that Plaintiff Province of Manitoba and Intervenor State of North Dakota consent to *amicus* participation by the Government of Canada, and counsel for defendants Norton *et al.* do not oppose such participation.

The Government of Canada requests that this Court grant its uncontested Motion for Leave to Participate as *Amicus Curiae*.

Respectfully submitted,



Lois J. Schiffer, #056630

Manuel S. Varela, #461331

BAACH ROBINSON & LEWIS, PLLC

One Thomas Circle, N.W., Suite 200

Washington, D.C. 20005

Ph: (202) 833-8900

Fax: (202) 466-5738

Date: March 19, 2003

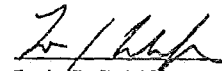
CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Motion For Leave to Participate as *Amicus Curiae*, Memorandum of Points and Authorities, and Order to be served this 19th day of March 2003, via first class mail, to the following counsel of record:

Richard A. Wegman
Eldon V. C. Greenberg
GARVEY SCHUBERT BARER
1000 Potomac Street, NW
Suite 500
Washington, DC 20007

Roscoe C. Howard, Jr.
Mark E. Nagle
Michael Harvey
UNITED STATES ATTORNEY'S OFFICE
Judiciary Center Building
555 4th Street, N.W.
Tenth Floor
Washington, DC 20530

Charles M. Carvell
NORTH DAKOTA OFFICE OF ATTORNEY GENERAL
500 N. 9th St.
Bismarck, ND 58501-4509


Lois J. Schiffer