

THE GOVERNMENT OF THE
PROVINCE OF MANITOBA,

V.

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES OF THE
GOVERNMENT OF CANADA IN SUPPORT OF ITS MOTION
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE**

This case involves a challenge by the Government of the Province of Manitoba to the failure of the United States Department of the Interior, an agent of the United States government, to prepare an environmental impact statement ("EIS") under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ("NEPA"), in connection with its review of the Northwest Area Water Supply ("NAWS") Project -- the first United States interbasin water transfer project to breach the barrier between the Missouri River Basin and the Hudson Bay Basin. The project

raises concerns about transfer of biota into the Hudson Bay drainage basin that is shared by Canada and the United States.¹

Canada has an interest in this litigation, and its participation would assist the Court in resolving the issues presented by the parties. Accordingly, Canada respectfully requests that this Court grant its uncontested Motion for Leave to Participate as *Amicus Curiae*.

I. This Court should exercise its broad discretion to allow *amicus* participation by the Government of Canada.

It is well established that U.S. District Courts have broad discretion to allow participation of an *amicus curiae*. See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) ("The district court has broad discretion to appoint *amici curiae*."); *Harris v. Champion*, 938 F.2d 1062, 1071 (10th Cir. 1991); *Ellsworth Associates, Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996); *Firestone Tire & Rubber Co. v. Pension Benefit Guar. Corp.*, 695 F. Supp. 43, 44 (D.D.C. 1988). Participation by *amici curiae* has been permitted on numerous prior occasions in this District. See, e.g., *Stillman v. Dep't of Defense*, 209 F. Supp. 2d 185, 193 (D.D.C. 2002), *rev'd on other grounds by Stillman v. Central Intelligence Agency*, 2003 U.S. App. LEXIS 3437 (D.C. Cir. Feb. 25, 2003); *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 136 (D.D.C. 2002).

Additionally, it is Canada's understanding that the U.S. Department of State has expressed the view that foreign governments should be permitted to file *amicus* briefs on matters that are of concern to them, so that the "courts be made aware of the international implications of their decisions and that they give appropriate weight to these considerations in the process of making their decisions." Letter from Roberts B. Owen, Legal Advisor of the U.S. Department of State, to John H. Shenefield, Assistant Attorney General (Antitrust Division), dated March 17, 1980, *quoted in* 74 Am. J. Int'l L. 665, 656 (1980).² United States government defendants have

¹ See Final Environmental Assessment, April 2001 at 70, *et seq.*

² The American Journal for International Law further states that on March 18, 1980, the Associate Attorney General

followed that practice here through non-opposition to *amicus* participation by the Government of Canada.

II. The Government of Canada has significant interests in the resolution of this litigation.

The Government of Canada has a number of significant interests at stake in this lawsuit.

First, the Government of Canada has concerns about the potential trans-boundary environmental effects of the NAWS project including the effects on the shared Canada-United States ecosystem. These concerns are longstanding. Because of these concerns, the Government of Canada, through its subsidiary agencies, fully and actively cooperated in all stages of the U.S. Department of the Interior's review of the NAWS Project. The Project was first referred for consideration in 1993 to the Garrison Canada/U.S. Consultative Group, a group made up of senior Canadian and U.S. federal, provincial and state representatives. On August 7, 1997, Environment Canada, a Department of the Government of Canada, submitted comments to the Garrison Joint Technical Committee on the Department of the Interior's draft Environmental Assessment (the "EA"). On July 9, 1999, representatives of Environment Canada actively participated in an international consultation conducted by the Garrison Consultative Group and the Garrison Joint Technical Committee.

Following issuance of a final Environmental Assessment and a Finding of No Significant Impact (the "FONSI") in the spring of 2001, Environment Canada, together with its provincial counterpart, Manitoba Conservation, filed an administrative appeal of the EA and FONSI in order to foster a better understanding of Canada's views. In this connection, they produced an extensive written submission to the Department of the Interior in support of the appeal. The Government of Canada has consistently taken the position that the United States must assess fully the cross-frontier environmental impacts of diversions of water between drainage basins because of the potentially costly, unpredictable and irreversible damage that may result.

forwarded the Legal Adviser's letter to the Clerk of the United States Court of Appeals for the Seventh Circuit with an accompanying letter expressing the full concurrence of the Department of Justice. 74 A.J.I.L. at 667.

Second, the nature of the review of the potential environmental consequences of this project—the first U.S. project to connect the Missouri River and Hudson Bay drainage basins artificially—establishes a precedent for the conduct of both countries in the review and evaluation of risks of interbasin water transfers. That issue will be addressed in this case.

Third, the Boundary Waters Treaty between Canada and the United States provides important background for the decision here, and Canada is affected by the way in which that Treaty is considered as part of the environmental review of the project.³ In Canada's judgment, Boundary Waters Treaty issues must be assessed in the environmental review in the most fulsome way.

Finally, this case raises issues with respect to the nature and scope of U.S. obligations to address potential trans-boundary pollution. How Canada and the United States each goes about examining projects that may impact its neighbor is important to both Canada and the United States.

III. Canada's participation as an *amicus curiae* would assist the Court in understanding the interests and issues involved in this litigation.

Canada will provide in its *amicus* brief information helpful to the Court in deciding this case. Information that Canada may provide in an *amicus* brief includes the following. Canada is uniquely positioned to comment on its own policies and practices with respect to proposed interbasin water transfers and the environmental threats they may pose. Indeed, Canada has longstanding policy concerns about the wisdom of interbasin transfers in general and the impact of such transfers on the receiving basin. In its *amicus* brief, Canada may set out examples where

³ Treaty Between the United Kingdom and the United States of America concerning Boundary Waters, and Questions arising along the Boundary between Canada and the U.S.A., signed on January 11, 1909, CUS 312 ("the Boundary Waters Treaty" or "BWT"), a treaty concluded by Great Britain on behalf of Canada, to which Canada became party through State Succession.

water transfers between basins have been prohibited to the benefit of the United States.

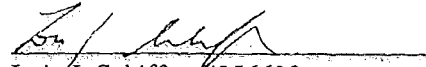
Further, Canada may provide information about its own environmental law that provides useful guidance in applying the United States' law at issue in this case. Canadian legislation, including the *Canadian Environmental Assessment Act*, S.C. 1992, Ch. 37, the *Canadian Environmental Protection Act*, S.C. 1999, c.33 and the *Fisheries Act*, R.S. 1985, c. F-14 provide for the evaluation and prevention of international environmental effects. Canada's own experience with the environmental assessment and control of projects with potential trans-frontier impacts may help the Court understand the nature of the tasks that the Plaintiff seeks to have the United States undertake under NEPA.

As one of the two parties to the Boundary Waters Treaty, Canada is particularly qualified to comment upon the way in which the parties' compliance should be made part of the environmental review here. Finally, as a sovereign nation, Canada is highly qualified to comment on the effect of customary international law on this dispute.

CONCLUSION

For all the reasons stated above, Canada respectfully submits that its uncontested motion for leave to participate as an *amicus curiae* should be granted.

Respectfully submitted,



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