IN THE MATTER OF

THE APPLICATION OF THE MICHIGAN
NORTHERN POWER COMPANY

FOR APPROVAL OF THE OBSTRUCTION, DIVERSION, AND
USE OF THE WATERS OF THE ST. MARYS RIVER ON THE
UNITED STATES SIDE OF THE INTERNATIONAL
BOUNDARY AT SAULT STE. MARIE, MICH.

ORDER AND OPINION

FILED JUNE 30, 1913. DECIDED MAY 26, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914
INTERNATIONAL JOINT COMMISSION.

CANADA.
TH. CHASE CASGRAIN, K. C., Chairman.
HENRY A. POWELL, K. C.
CHARLES A. MAGRATH.
LAWRENCE J. BURKE, Secretary.

UNITED STATES.
JAMES A. TAWNEY, Chairman.
OBADIAH GARDNER.
R. B. GLENN.
WHITEHEAD KLUTZ, Secretary.
INTERNATIONAL JOINT COMMISSION.

APPLICATION OF THE MICHIGAN NORTHERN POWER CO. FOR
THE APPROVAL OF THE OBSTRUCTION, DIVERSION, AND USE
OF THE WATERS OF THE ST. MARYS RIVER ON THE UNITED
STATES SIDE OF THE INTERNATIONAL BOUNDARY AT SAULT
STE. MARIE, MICH.

ORDER OF APPROVAL.

The above application having come on for final hearing at the city
of Detroit, in the State of Michigan, March 9 and 10, 1914, and the
hearing having been continued to and concluded at the city of Wash-
ington April 9, 1914, the commission, after hearing all the parties,
examining the locus in quo, and carefully considering the application
and all the evidence presented, including the statements of engineer
representatives of the United States and of the Dominion of Canada
in respect thereto, finds as follows, viz:

1. The Michigan Northern Power Co. is a corporation duly or-
ganized and existing under the laws of the State of Michigan; it is
the owner and successor in title and interest to all the property and
to all the rights and privileges claimed and set forth by Clarence M.
Brown, receiver for the Michigan Lake Superior Power Co. in its
application for approval of the obstruction, diversion, and use of the
waters of the St. Marys River on the United States side of the bound-
ary at Sault Ste. Marie, Mich., filed June 30, 1913, as described
therein; and, by order of the commission entered at Ottawa October
7, 1913, the said Michigan Northern Power Co. was duly substituted
for said receiver of the said Michigan Lake Superior Power Co. as
applicant.

2. Due and official notice of the filing of said application and of
the time and place of the final hearing thereon was given to all
parties interested in both countries; the right to appear and be
heard on the final hearing was duly extended, under the rules of
the commission, to all municipalities on both sides of the interna-
tional boundary and to private corporations and to others who
appeared and were heard and participated in the examination of
witnesses; and no application was made by anyone so appearing for additional protective works or for any other relief on account of anticipated injury or damage in consequence of the construction, maintenance, and operation of the proposed works, upon said final hearing.

3. The compensating or remedial works mentioned and described in the said application as amended on the final hearing will, when constructed, be located wholly within the jurisdiction and upon property owned by the United States south of the international boundary line in the St. Marys River, at Sault Ste. Marie, Mich., and upon the upper side of the International Bridge crossing the St. Marys River. According to the plans therefor, as finally approved, said compensating works when completed will consist of a certain dike about 200 feet in length and 8 Sloney sluice gates about 50 feet in the clear, and are intended to obstruct and divert the waters of said river on the United States side thereof through a power canal. The Government of the United States in time will become the owner of said compensating works.

4. Said St. Marys River is the natural outlet of Lake Superior and said river and lake are boundary waters as defined by the treaty of January 11, 1909, between Great Britain and the United States.

5. It is conceded by the applicant and both Governments that the construction and operation of the proposed works will affect the natural level and flow of the waters of said river and of Lake Superior on the other side of the line, and that the effect will therefore be international; and the interest of both Governments, as well as the interests of navigation and other public and private interests in both countries, will be suitably and adequately protected and indemnified by international or joint control of said works. Said compensating works when constructed according to the finally approved plans and under the conditions with respect to their construction and operation hereinafter prescribed will constitute a mechanically operated discharge cross section for the discharge of the waters of said lake on the United States side of the international boundary, which, with the existing power canal of the applicant, which has a discharge capacity of about 30,000 cubic feet per second, and the United States power canal, known as the Chandler-Dunbar Canal, which has a discharge capacity of about 5,000 cubic feet per second, will afford an aggregate discharge capacity equal to the existing discharge capacity of said river on the United States side of the international boundary; and the levels of Lake Superior under these conditions can be regulated within a more restricted range than is now possible under existing conditions of discharge.

6. From 1860 to 1913, or for a period of 54 years, the extreme range of levels of Lake Superior, that is, between the highest and the lowest monthly mean level, as shown by the United States official
records thereof, was about 3.5 feet; from the evidence it would seem that if the said compensating and other works of the applicant are constructed, maintained, and operated according to the said approved plans and the conditions hereinafter stated in respect to their construction and operation, the range of monthly mean levels of Lake Superior may be reasonably confined within 2.5 feet and ordinarily within the lesser range of 1.5 feet between an elevation of 602.1 and 603.6 above mean tide at New York, according to the system of levels established by the United States in 1903; and that under proper international joint control the levels of said lake may be regulated so as to benefit navigation and reasonably protect the property and interests, public and private, in both countries above said works.

7. The equal division of the waters of said St. Marys River between the United States and Canada was conceded upon the hearing by their duly appointed representatives.

8. At the time and place of the final hearing on the said application of the Michigan Northern Power Co., the application of the Algoma Steel Corporation (Ltd.), a corporation organized and existing under the laws of the Province of Ontario, for approval of its proposed obstruction, diversion, and use of the waters of the said St. Marys River on the Canadian side of the international boundary by constructing certain compensating or remedial and other works therein for that purpose, was also finally heard and approved.

9. Said Michigan Northern Power Co. and the Algoma Steel Corporation are separate and distinct organizations; they are in no way related in interest, financially or otherwise; and they are not owned or in any way operated or controlled by the same interests, and have no working or other relations between them. Their several works are intended, planned, and will accomplish only the obstruction and diversion of the waters on the respective sides of said river in the United States and Canada for power purposes, and each of said works will be constructed and can be operated independently of the other; when the said works are finally completed on both sides of the boundary in said river, the interests of navigation and reasonable protection to public and private property on both sides of the international boundary line will require that they be operated under international joint control as one complete work or project.

Now, therefore, it is hereby ordered, that subject to the conditions hereinafter stated in respect to the construction of said compensating or remedial works of said applicant, its successors or assigns, and subject also to such conditions and rules as are hereinafter stated and authorized in respect to the control and operation of said works, the obstruction, diversion, and use of the waters of said river on the United States side of the international boundary for power purposes as prayed and found herein, and the construction and maintenance of said compensating works to be constructed for that purpose, to-
gether with the plans therefor as finally approved by the Secretary of War and the Chief of Engineers of the United States, April 6, 1914, and submitted upon the final hearing, be, and the same are all hereby approved upon the conditions following as to their construction, maintenance, and operation, and as to their control, which conditions with the said remedial, protective, or compensating works the commission deems to be, and requires as suitable and adequate conditions for the protection and indemnity of all interests on both sides of the international boundary, and which conditions are hereby made a part of this order of approval.

CONDITIONS AS TO CONSTRUCTION.

1. The works to be built hereunder by the said Michigan Northern Power Co., its successors or assigns, shall consist of a dike about 200 feet long and eight Stoney sluice gates and their appurtenances, each gate to be about 52 feet in the clear and located in said river, as described in said application and shown by the approved plans therefor.

2. The sills of said Stoney sluice gates shall not be higher than elevation 591.2 above said mean tide at New York, and the river bed, both upstream and downstream from said works, shall be excavated to an elevation of 590.7 above said mean tide or lower if required by the Secretary of War.

3. All the detail plans for the construction of said works by the said Michigan Northern Power Co., its successors or assigns, and the order in which they are to be built shall be subject to the approval of the Secretary of War of the United States or of any officer duly designated by him for that purpose; and the Secretary of War or any officer designated by him shall guard against any undue rise of Lake Superior during the construction of the compensating works of the Michigan Northern Power Co. by requiring said company to do any and all things which, in his judgment, may be deemed necessary for that purpose: Provided, however, That at no time during the construction of any of said works shall there be more than one cofferdam in the whole width of the St. Marys River, and such cofferdam shall not be larger than is ample for the construction of four Stoney sluice gates of the dimensions above mentioned.

4. The said works shall be constructed by the applicant within such time and upon such further requirements as to the detail of construction as the Secretary of War may hereafter prescribe.

CONDITIONS AS TO CONTROL AND OPERATION.

Ordered further, that as additional conditions of approval of said application, the said compensating works, power canal, head gates
and by-passes of the applicant, the Michigan Northern Power Co., its successors or assigns, shall be maintained, operated, and controlled, whether operated independently or in connection with the works of said Algoma Steel Corporation (Ltd.), its successors or assigns, or in connection with any other works in said river in accordance with the following provisions, viz:

5. All compensating works heretofore built and all such works built under this order of approval and all power canals, including their head gates and by-passes, shall be so operated as to maintain the level of Lake Superior as nearly as may be between levels 602.1 and 603.6 above said mean tide at New York, and in such manner as not to interfere with navigation. The operation of all the said works, canals, head gates and by-passes for the above purposes shall be under the direct control of the board hereinafter authorized, which board shall be known as "the board of control."

6. The mean elevation of Lake Superior shall be ascertained by taking the mean of the readings of at least four automatic gauges, half the number to be maintained by the United States, and half by Canada; these gauges to be located so that their combined readings will indicate as nearly as may be the mean or average condition of the whole lake. The records of these gauges shall be furnished to the board charged with the control of the compensating works referred to at such intervals as it may require.

7. The officer of the Corps of Engineers charged with the improvement of the Falls of the St. Marys River on the American side and an officer appointed by the Canadian Government shall form said board whose duty it shall be to formulate rules under which the compensating works and power canals and their head gates and by-passes shall be operated so as to secure as nearly as may be the regulation of Lake Superior as set forth herein. It shall be the further duty of said board to see that any rules or regulations now or hereafter made by proper authority for the control of said works are duly obeyed.

8. To guard against unduly high stages of water in Lake Superior the rules formulated by said board, when tested by the physical conditions which existed during any year of recorded high water in Lake Superior, when the monthly mean elevation of the lake exceeded 603.6 above said mean tide at New York, shall give no monthly mean level of the lake greater than the maximum monthly mean actually experienced in said year.

9. To guard against unduly high stages of water in the lower St. Marys River, the excess discharge at any time over and above that which would have occurred at a like stage of Lake Superior prior to 1887, shall be restricted so that the elevation of the water surface
immediately below the locks shall not be greater than 584.5 above said mean tide.

10. Each power company shall keep continuous records satisfactory to said board, which will show the quantity of water used by it, and shall furnish to the board when required full information from said records.

11. At all times said board shall determine the amount of water available for power purposes. Said board will cause the amount of water so used to be reduced whenever in its opinion such reductions are necessary in order to prevent unduly low stages of water in Lake Superior, and will fix the amounts of such reductions: Provided, That whenever the monthly mean level of the lake is less than 602.1 above said mean tide of New York, the total discharge permitted shall be no greater than that which it would have been at the prevailing stage and under the discharge conditions which obtained prior to 1887: Provided further, Before any flow of primary water on either side of the river is reduced, the use of all secondary water shall be discontinued.

12. If the compensating works constructed in accordance with the plans hereby approved, together with those already constructed, and the power canals, head gates, and by-passes, can not be operated independently or in conjunction with similar works in the St. Marys River on the Canadian side of the boundary so as to secure the regulation of the level of Lake Superior, as provided herein, they may be altered so as to provide for a greater flow, and in a manner to be determined by the International Joint Commission upon the application of either or both Governments, or upon the application of any person or corporation, either public or private, transmitted to said commission through his or its Government; and any change or alterations in said works or in the discharge cross-section area in said river at the outlet of Lake Superior ordered by this commission on such application shall be made in accordance with said order by either or both of the owners of the compensating works in said river, their successors or assigns, as a further condition of the approval herein. Whenever it is required that the said works shall be altered, any greater flow desired shall be secured in equal parts on each side of the boundary line, and the cost of securing such total greater flow shall be borne equally by the owners of the two parts of the said works, or the commission may on like application make such other order as it may deem necessary.

13. Should ice interfere with navigation, due to the presence of the compensating works, the board shall take measures to obviate this difficulty, and may call upon the owners of said works to do any work necessary for this purpose.
14. Should currents which unduly interfere with navigation be developed by the operation of the power works on either side of the river, the power company operating said works shall alter them or construct such other works as its Government may deem necessary to remedy this condition and in a manner approved by such Government.

15. The cost of maintaining all parts of the compensating works shall be borne by the respective owners thereof, and this work of maintenance shall be done in a manner satisfactory to said board. The rules to be adopted by said board for the operation of the compensating works shall be framed so as to equalize the cost of maintenance between the owners of the component parts of the entire system as nearly as may be in proportion to the amount of primary water used for power development on each side of the international boundary.

16. Should the Government of the United States or any corporation or municipality acquire title to the said power canal, head gates, by-passes, and compensating works of the Michigan Northern Power Co. already constructed, or the compensating works by this order approved, the approval of the construction and maintenance of all of said works hereby given shall, subject to the conditions herein provided, inure to the benefit of such Government or corporation, and all the powers, duties, and obligations hereby conferred or imposed upon the Michigan Northern Power Co. shall apply to and are hereby conferred and imposed upon its successors or assigns.

17. In the event of a disagreement between the members of said board, in respect to anything required of said board herein or in respect to the duties or powers of said board or as to the exercise of such duties or powers, the question at issue shall, upon the application of either Government, be referred to this commission for its decision.

18. The approval herein granted is subject to all rights of navigation in the St. Marys River now or hereafter existing.

19. Until the compensating works of the said Algoma Steel Corporation (Ltd.), or any other compensating works of like character and extent are constructed in said river on the Canadian side thereof the conditions herein, not reasonably applicable to the control and operation of the compensating works and power works of the Michigan Northern Power Co., its successors or assigns, or that can not be complied with independently of said compensating works on the Canadian side of said river, shall not be operative, but as to such conditions they shall become operative when said works on the Canadian side of the international boundary are constructed and in operation: Provided, however, That this shall not be construed so as to render

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inoperative the condition that said compensating works of said applicant, its successors or assigns, are to be operated under international joint control as herein provided and subject to any rules hereafter prescribed by said Board of Control for their operation.

20. "Primary water" as used herein shall be understood to mean the amount of water which is continuously available for use for power purposes. "Secondary water" shall be understood to mean an amount of water, over and above that designated as primary water, which is intermittently available for use for power purposes.

Dated at New York City, N. Y., May 26, 1914.

TH. CHASE CASGRAIN.
JAMES A. TAWNEY.
HENRY A. POWELL.
OBADIAH GARDNER.
CHARLES A. MAGRATH.
ROBERT B. GLENN.

OPINION.

By substitution, the Michigan Northern Power Co., a corporation organized under the laws of the State of Michigan, duly filed its application June 30, 1913, for approval of its proposed obstruction, diversion, and use, as therein described, of the waters of the St. Marys River at Sault Ste. Marie, Mich., wholly within the jurisdiction of the United States, together with plans for the construction of the compensating works for that purpose.

Statements in response were filed by the Governments of the Dominion of Canada and the Province of Ontario, to which reply statements were filed by the applicant and by the Government of the United States. A brief was also filed on behalf of the United States. The final hearing was begun at the city of Detroit, in the State of Michigan, March 9, 1914, and was there continued to April 7, following, and concluded at the city of Washington April 9, 1914.

The obstruction, diversion, and use of these waters and the compensating works contemplated to make the same effective, constitute, as claimed by the applicant, "uses, obstructions, and diversions" of the waters of said river within the meaning of Article III of the treaty between the United States and Great Britain, signed at Washington, January 11, 1909.

The jurisdictional questions, therefore, to be determined, are—
First. Has the Government of the United States authorized the obstruction, diversion, and use of the waters in question?
Second. Are the plans accompanying the application finally approved by the Chief of Engineers and the Secretary of War of the United States, as required by law?
Third. Are the waters of the St. Marys River and other waters affected by the proposed obstruction and diversion boundary waters within the meaning of the treaty?
Fourth. Will the obstruction and diversion of these waters, as proposed, affect their natural level and flow on the other side of the international boundary?

Fifth. Will such effect be to raise the natural level of the waters in question, on either side of the boundary, so as to require "additional remedial or protective works" to compensate for the proposed use and diversion, and what other provisions, if any, are necessary to suitably and adequately protect the interests on both sides of the boundary, which otherwise may be injured thereby?

These questions affect the Governments, as well as the interests of their respective peoples living along the boundary marked by the St. Marys River and Lake Superior. They also relate to a project, which, in some respects, exceeds in importance and magnitude anything of the kind ever before undertaken. These questions, therefore, are not alone international in their character and effect, but their determination by the commission being final, they are of the highest importance to all those whose interests in the two countries are involved.

Appreciating its responsibility in the premises, and the necessity of ascertaining all the facts as to the character of the proposed obstruction and the effect thereof upon public and private interests in both countries, and also realizing the importance of avoiding every opportunity for unnecessary conflict upon questions of fact between the governments and their people, the commission, from the beginning to the close of the hearings, afforded to all concerned, every opportunity to confer and acquaint themselves with all the essential facts in the possession of either, in relation to the purpose, character, extent and effect of the proposed obstruction and diversion of these waters and the compensating works and their operation and control, and to present the same as finally ascertained and mutually agreed upon.

Before the conclusion of the hearing, with few exceptions, everything of a controversial nature in connection with the proposed project and its effect on the boundary waters in question, was eliminated and a common understanding reached and presented by both Governments as to almost all the facts not admitted by the pleadings. The principle conditions under which the works of the applicant should be constructed and operated and their operation controlled, if constructed and operated in connection with similar works on the Canadian side of said river, was in the main agreed upon by both Governments.

From the pleadings, the evidence of the parties, and from the agreement of the two Governments, thus presented and received, it appears that the proposed obstruction and diversion of the waters referred to are located wholly within the jurisdiction of the United States;
that they have been duly authorized by that Government, and that the plans for the construction of the compensating works intended for this purpose have been finally approved as required by the laws of that country.

It likewise appears that the waters in question are boundary waters and that their obstruction and diversion as proposed will affect the natural level and flow, and to some extent raise the low levels thereof on both sides of the international boundary. These facts being thus admitted the jurisdiction of the commission over the subject matter of the application is conclusive.

It is not demanded nor is it claimed by anyone that any additional “remedial or protective works” are necessary to prevent injury on either side of the international boundary. On the contrary, both Governments and all of the parties agree that if the construction and diversion is effected as proposed, and if the compensating works for that purpose are constructed according to the approved plans and agreed conditions, and they are then properly and efficiently operated, they will not alone compensate for the diversion, but will also make it possible to regulate the levels of Lake Superior within a more restricted range of levels than is now possible under the existing discharge capacity of the outlet of said lake. For 54 years prior to 1914 the highest and lowest monthly mean level was about 3.5 feet. With the works of the applicant in place and properly operated it was shown that the monthly mean levels of Lake Superior can be reasonably confined within 2.5 feet, and ordinarily within the lesser range of 1.5 feet, between the elevation of 602.1 and 603.6, above mean tide at New York City, according to the system of levels established by the United States in 1903. Therefore, the sufficiency of the works as planned, to accomplish the diversion sought and also for regulating the levels of Lake Superior to the advantage of navigation and to the advantage of the people in both countries, is not questioned.

To accomplish these necessary results, however, two things are absolutely essential. First, the works as planned must be constructed under proper conditions; and, second, when constructed they must be properly operated and controlled. While no “remedial or protective works” in addition to the works of the applicant, as planned, are deemed necessary, yet the treaty places upon the commission the responsibility of requiring as a condition of its approval “that suitable and adequate provision, approved by it, be made for the protection and indemnity against injury of any interest on either side of the boundary.”

The compensating works of the applicant can not be operated automatically. They will be operated mechanically, with the aid of human agencies, and if they are not properly maintained and op-
erated, they would be capable of causing irreparable injury to public and private interests on both sides of the international boundary. The responsibility, then, for the proper construction and operation of these works having been placed by the high contracting parties upon the commission, it is our duty to make suitable and adequate provision, both as to the conditions of construction and control and operation.

As to the conditions under which the works should be constructed, there is no difference between the Governments or the respective parties on either side of the line. Upon the question of control, however, and the authority under which such control shall be exercised so long as the works of the applicant, including its power canals, head gates, and by-passes, are maintained and operated independent of and disconnected with similar works on the Canadian side, there is wide difference of opinion. As to this, the two Governments disagree, and public and private interests in both countries are not in accord with the position of the United States.

The Dominion of Canada claims that the possible effect of inefficient or improper control of the works in question would be serious, and necessarily international, and that therefore the operation of these works should be under international control, whether maintained and operated as an independent project or in connection with other or similar compensating works on the Canadian side of said river.

On the other hand, the position of the Government of the United States is that the works of the applicant, being located wholly within its jurisdiction, it should be given full and final authority and control over their operation; also that it would be responsible to its own people and to the Government and people of Canada for the proper and efficient exercise of that authority and control.

The municipalities on both sides of the line support the position of the Canadian Government. They also claim that under no circumstance should the control of these works be under the authority of the owner, and that, it appearing that the Government of the United States will become the owner of these compensating works, their control and operation should not be under the exclusive authority of the United States, but should be under international joint control.

Upon this question the power of the commission, as a condition of its order, to place the control of these works, and the authority for the exercise of that control, exclusively under the Government of the United States, or under the joint control of both Governments is not disputed. The question, therefore, is one of expediency, to be determined in the light of all the facts, and also in the light
of that provision of the treaty which places on the commission the responsibility of suitably and adequately providing for the protection of the interests of the people in both countries against injury on account of the works of the applicant or on account of the manner in which such works are thereafter controlled and operated.

Lake Superior is a body of water about 32,000 square miles in area. The natural outlet of this lake is the St. Marys River. The discharge cross section of this river at the outlet of the lake was, in a state of nature, about 16,000 square feet. This has been reduced by obstructions heretofore placed in the river to about 6,000 square feet. It is now proposed to entirely obstruct the remaining cross section on the United States side with the compensating and other works of the applicant. At the same time it is proposed to likewise obstruct the remaining unobstructed cross section on the Canadian side with the compensating and other works of the Algoma Steel Corporation (Ltd.). These obstructions when in place will consist of 16 Stoney sluice gates, each about 52 feet in the clear, 8 on each side of the boundary. These sluice gates will be operated mechanically and will be capable of entirely obstructing the remaining natural discharge cross section of the river or outlet of Lake Superior. While it is claimed that with the power canal of the applicant and other canals on the United States side of the river, and the discharge capacity of these eight Stoney sluice gates, the present discharge capacity at the outlet of the lake will be increased, nevertheless, the fact remains that the greater part of this discharge cross section, for the discharge of the waters of Lake Superior, must be operated mechanically, which emphasizes the importance of the control and operation of these works as the only means of safety to the people and their interests in both countries.

It is not the fact that the works in question will in time become the property of the United States or that the diversion of these waters and the maintenance and operation of these works will, from the beginning, be a source of revenue to that Government, or that the ability of the United States to control their operation is questioned that impels us to believe that international rather than national control will more suitably and adequately protect the interests of the people in both countries and at the same time protect navigation interests. It is rather because of the magnitude of the undertaking involved in the attempt to regulate the levels of such a vast body of water within that range of levels necessary to insure adequate protection to the interests of the people in both countries, and the serious international consequences and possible international complications that would almost certainly follow if for any reason the undertaking failed under national control that prompts the commission to favor international rather than national control. It must be remembered,
too, that the attempt to utilize the waters on either or both sides of this river for power purposes, and at the same time improve existing conditions as to the discharge capacity of the outlet of Lake Superior and regulate lake levels, is in its effect international and largely experimental, or as stated by one of the witnesses—

The body of water sought to be controlled in Lake Superior, with its area of between 31,000 or 32,000 square miles, is a project that has never before been taken hold of by man.

It is for these reasons the commission concludes that, whether the works of the applicant are maintained and operated independently or in connection with any other works on the Canadian side of the river, they should be maintained and operated under international control. Also, that the exercise of this control should be in the manner and under substantially the same conditions the two Governments proposed and recommended for the international control of said works if maintained and operated in connection with the works of the Algoma Steel Corporation (Ltd.) or other similar works on the other side of the international boundary.

To make international joint control over the works of both companies effective, the two Governments proposed, as a condition of the order of approval, that there should be a board of control, consisting of two members, one to be appointed by each Government; that this board be authorized to formulate rules under which the compensating works of the applicant, its power canals and their head gates and by-passes, shall be operated so as to secure as nearly as may be the regulation of Lake Superior within the range of monthly mean levels recommended and found necessary. Having concluded to place the works of the applicant under international control without reference to similar works on the other side, the commission also concludes that the exercise of such international control shall be through and under the direction of a board as above suggested.

But the Governments also proposed that in the event of a disagreement between the members of this board in respect to anything required of them under the order of approval such questions of difference “shall upon the application of either Government be referred to this commission for its recommendation.”

In view of the purpose for which such questions are to be referred it is the judgment of the commission that they should be referred for decision rather than for recommendation. Such questions could relate only to the maintenance or operation of the works. They could arise only in connection with the execution of the order of approval. If, as the Governments concede, the commission has the power to impose, as a condition of its order, the reference of these questions to it for recommendation, it certainly has the power to
make that condition a reference for a decision. It is obvious that these questions of difference would not be comparable in importance to the many questions which, under the treaty, the commission is authorized to decide. The nature and importance of these questions are not relevant therefore to the question of the power of the commission to reserve as a condition of its order the decision of these questions.

It seems equally clear that it would be advisable as well as desirable that this should be done. The differences between the members of the board may be vital to the protection of the interests of the people on both sides of the line, and require a prompt, if not an immediate, decision. If the commission were to act only in an advisory capacity, leaving the final determination to the two Governments, it might be months before a final decision could be reached, and most likely would be. Then, too, the differences may be of such a character, and affect the interests of the Governments in a manner, that would prompt them to sustain the position of their representative on the board of control rather than yield to or compromise with the other Government, thus creating rather than settling differences between the Governments as contemplated, and necessitating a reference of the question under the treaty.

Realizing the magnitude of the problem involved in the proposed utilization of these waters for power purposes, and at the same time improving the present discharge conditions at the outlet of Lake Superior and regulating the levels of that lake within a given desired range, and that possibly the works for that purpose when constructed as authorized and approved might be found inadequate, necessitating alterations therein, it was agreed by both Governments that authority for such future alterations should be provided for as a condition of our order of approval, as follows:

If the compensating works constructed in accordance with the plans hereby approved, together with those already constructed, can not be operated so as to secure the regulation of the level of Lake Superior, as provided herein, they shall be altered so as to provide for a greater flow, and in a manner satisfactory to the two Governments.

Although Mr. Stewart, the engineer representative of the Canadian Government, joined Lieut. Col. Patrick in submitting the foregoing condition, yet when explaining this condition in connection with other conditions proposed, he said: "As to the fourteenth paragraph, in regard to the 'manner satisfactory to the two Governments,' I think your suggestion of the joint commission would probably be better, and would carry things out a little more rapidly than the other way." He then added, "They could get a verdict much quicker." That is, he favored leaving the question of any alteration
of the compensating works hereafter found necessary to the commission as the representative of both Governments.

This was also the position of the principal municipalities on both sides of the line. The mayor of Fort William, Ontario, Mr. S. C. Young, said:

We do not feel justified, Mr. Chairman, in offering any objection to these compensating works at Sault Ste. Marie, but we would like to have something to say about the control. If the control is to be in the hands of the Governments of the United States and Canada, we have nothing whatever to say, because we feel that our interests will be properly safeguarded. On the other hand, if control is to be left in the hands of a private corporation, then we will have to continue to fight our way through until the conditions are such that we know beyond any doubt that our interests will be safeguarded.

The Chairman. Well, suppose it were left to the International Joint Commission, would that suit your two cities?

Mr. Young. That would suit us absolutely. We would be quite content to leave the matter absolutely in the hands of the two Governments through the joint commission; and if that is the case, we will simply retire and leave the matter in your hands.

In discussing this condition Mr. W. H. Hoyt, an engineer representing the cities of Duluth, Minn., and Superior, Wis., and the commercial interests in both cities, said:

I think that the suggestions that came out in your discussion with the engineers in regard to that are good. In other words, to keep that control, if possible—and I do not see why it is not possible—entirely in the hands of the commission. It will be much easier for the public to reach the commission directly and quickly and get results, in our opinion, than it will be if we have to go in a roundabout way through the channels of the Governments.

As to the pecuniary interest of the applicant and the Government of the United States in the use of these waters for power purposes, Mr. Hoyt also said:

I will state that question came out in public discussion, and while we do not like to admit that such a condition might exist, nevertheless that feeling is quite common in the minds of the public, that the interests at the Soo are diametrically opposed to the interests at the upper end of the lake, and that when the control is in the hands of the Government, drawing a certain amount of income from it, the interests of the Government and our interests are in conflict. Everything at the Soo and below is diametrically opposed to the interests above the minute you leave the Soo going north.

In explaining this condition Lieut. Col. Patrick, of the Corps of Engineers, United States Army, said: "It was drafted with a view that the applications were to be considered jointly"; that is, as the commission understands it, if the application of the Michigan Northern Power Co. was to be approved independent of similar works on the other side, and that if said works were to be maintained and operated under United States control, that then this condition was not to be considered as a condition of our order of approval in this case.
In that event the right to require any future changes or alterations in the works of the applicant to make them adequate for the purposes intended would be in the United States alone. On the other hand, if these works are maintained and operated in connection with similar works on the Canadian side, then the United States is willing to share with Canada the responsibility of hereafter determining the necessity of any alterations in said works and authorizing the same in a manner satisfactory to both Governments. The United States in effect concedes that the commission has the power under the treaty, as a condition of its order, to vest in both Governments the right to hereafter determine the questions of the sufficiency of the works, and authorize the Governments to make or order changes therein and to prescribe the manner in which such changes shall be made, if the works are constructed, maintained, and operated in connection with similar works on the other side.

To the suggestion, however, that under the treaty the works could not be constructed at all without the approval of this commission, and that whether approved as an independent project or otherwise, it might be deemed necessary in order to suitably and adequately protect the interests on either or both sides of the line for the commission to reserve to itself, as a condition of its order, the right to hereafter direct alterations in said works if found necessary, counsel for the United States contended that the commission does not have the power to thus retain jurisdiction for any purpose whatever. On this question counsel claims that the power of the commission "is limited to approving or disapproving the application and the plans presented." That when its decision is made the commission will have done all it is required to do and that it should then leave to the United States any changes or alterations if the works are maintained and operated independent of similar works on the other side, and that otherwise such changes and alterations should only be authorized and made in a manner satisfactory to both Governments as suggested in the condition under consideration.

Counsel further claims that if conditions are attached to the order of approval they "should be such as look to the respective Governments for enforcement or compliance rather than to the commission," and also "that the burden of responsibility incident to the accomplishment of the project and for the carrying out of the commissions' orders should be placed upon the two Governments, and in no case should they be assumed by the commission." In support of these claims it is argued that "the commission is a creation of the two Governments and that its power and authority are only such as have been vested in it by the treaty." "I do not think," says counsel, "that it has any administrative functions; certainly it has no powers of an executive character. It has no way of enforcing its orders, but
must rely upon the executive authority of the respective Governments. In fine, it is an instrumentality for ascertaining, fixing, and expressing international purposes concerning the things with which it has to do, but it is not an arm for executing the international will."

This presents two important questions:

First. What are the powers of the commission under the treaty in respect to the conditions it may impose as conditions of its order of approval; and

Second. Is its duty and responsibility under the treaty, to provide "suitable and adequate protection and indemnity of all interests on either side of the line which may be injured thereby," discharged and fully met when conditions for that purpose are imposed, leaving it to either or both Governments to execute and enforce its order, even to the extent of, in effect, reconstructing these works which, in the first instance, neither Government had the power to do without the approval of this commission?

The power of the commission under the treaty, to reserve as a condition of its order the right to hereafter, on application, modify such order in any manner found to be necessary to make the works of the applicant fully adequate for all the purposes they were originally intended, is so obvious from the language of the treaty, that if this power were questioned by anyone, other than by one of the high contracting parties, it would not call for serious consideration.

This power is not only conferred by the treaty, but its existence is a necessary concomitant to the carrying out of the true intent and purpose of the treaty in respect to the prevention and settlement of disputes between the two Governments and their people regarding the use of boundary waters. Without this power to approve conditionally, in cases where the proposed obstructions and diversions affect the rights and interests of the people on the other side, the purpose of the treaty would entirely fail.

In Tucker v. Alexandross (183 U. S., 424), Justice Brown, in discussing the treaty involved in that case, said:

As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or of those principles of personal liberty which lie at the foundation of our jurisprudence.

The rule here laid down is the general rule of interpretation recognized and applied by courts in their interpretation of treaties. This treaty implies, and it is a matter of common knowledge that for many years prior, questions of difference and in some instances serious controversies existed between the United States and Canada, and
between their people, growing out of the use of the waters that mark the boundary between them. One purpose of the treaty, therefore, was to provide for the final settlement of existing differences and to prevent differences arising thereafter from this cause. This purpose is clearly expressed in the preamble, as follows:

Being equally desirous 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 their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends.

In furtherance of the purpose thus stated, and in all cases like the one in question, Article III of the treaty expressly prohibits any further or other uses, or obstructions, or diversions of boundary waters, except those theretofore permitted or thereafter provided for by special agreement between the parties, where the natural level or flow of these waters on the other side of the line would be affected, except when authorized by the Government within whose jurisdiction the proposed obstructions and diversions were to be accomplished, and then only with the approval of this commission.

As was well said by Mr. Turner in a previous opinion in this case—

Neither Government needed the aid of the commission to prevent it from acting improvidently in granting persons or corporations authority to use, obstruct, or divert its navigable waters. They were fully capable of taking care of themselves. But in taking care of themselves on their own side of the line, they did not always consider, or at least did not always adequately provide for taking care of the interests of their neighbor on the other side of the line.

It was for these reasons and because of this situation that provision was made in Article VIII of the treaty, giving to this commission discretion, limited only by its judgment, as to the conditions under which any proposed obstruction, diversion, or use of boundary waters should thereafter be approved. And for this purpose this article divides the cases in which this discretion may be exercised into two classes, as follows:

The commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed. And in such cases may require that suitable and adequate provision, approved by the commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

It will be observed from this paragraph that only in cases where remedial or protective works proposed are necessary to compensate, so far as possible, for the particular use or diversion proposed, that
the commission may in its discretion require suitable and adequate provision for the protection and indemnity against injury of interests on either side of the boundary.

Since no remedial or protective works in addition to those of the applicant in this case are necessary, the question of the power of the commission under this paragraph need not be considered. The next succeeding paragraph of Article VIII, however, clothes the commission with discretionary power in a different class of cases, as follows:

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 other obstructions in boundary waters 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.

It will be observed from the language of this paragraph that in the cases therein referred to the commission is not only given discretionary power in respect to the conditions of its order of approval, but it is made the duty of the commission to "require" such conditions in connection with its order of approval, as in its judgment may be necessary to suitably and adequately protect and indemnify all interests which may be injured on the other side of the line.

It is conceded in this case that the elevation of the natural level of the boundary waters in question on the other side of the line will follow as one of the effects of the obstruction and diversion in question. It will be observed, therefore, under these circumstances that the commission not only has the power to impose such conditions, as conditions of its order of approval, as it may in its judgment deem necessary to suitably and adequately protect all interests on the other side of the line, but it is made its duty to do so.

In the exercise of this power there are no limitations whatever, except the judgment of the commission, as to what is suitable and adequate for that purpose. To hold otherwise, would be to make the commission and its final decisions under the treaty a source of international disputes rather than the instrumentality, as contemplated by the treaty, for the settlement and prevention of controversies between these two countries. This would be so because, if the works in question proved inadequate (and both Governments manifest doubt as to their ultimate adequacy), injury on the other side of the line would follow. In that case these works would have to be altered. The nature of these alterations and the manner in which they should be made would, under these circumstances, lead almost inevitably to differences, to settle which it might be necessary to again invoke the jurisdiction of this commission. In holding, therefore,
that the commission has the power under the treaty to retain jurisdiction for the purposes above stated, we are at the same time exercising that power in harmony with the intent and purpose of the treaty and in a manner “calculated to make for the existence of a perpetual amity” between these two countries without sacrificing, or in any way jeopardizing, the rights or the privileges of either.

In construing this paragraph of the treaty, it is especially significant that the Governments have not reserved to themselves any responsibility whatever for protecting the rights and interests of the people on the other side of the line from injury on account of the obstructions and diversions proposed. They do not even recognize that they have any responsibility in the premises beyond the power they have given the commission to protect the interests on the other side of the line by suitable provisions placed in its order for that purpose. Therefore, where, as in this case, the contemplated project is of such exceptional magnitude, and doubt is manifested by both Governments as to the adequacy of the works intended to make the obstructions and diversions effective, thereby involving possible injury to large public and private interests, it is clear that if, in the judgment of the commission, it is necessary to suitably and adequately protect the interests on the other side of the line, it retain jurisdiction over these works to the end that such jurisdiction may at any time hereafter be invoked for that purpose, it is the duty, as well as the responsibility, of the commission to do so, and for this purpose full power is conferred by the treaty.

It is unnecessary to consider the question of whether, under the treaty, the commission has or has not administrative or executive powers. In requiring the reference to it of questions of difference between the members of the Board of Control for the decision of the commission, rather than for its recommendation, and also in reserving jurisdiction over the subject matter of the application for the purpose hereafter of modifying its present order by requiring alterations in the works of the applicant, if such alterations should become necessary, the commission is not exercising either administrative or executive powers. It is exercising only the judicial powers given to it by the treaty to finally determine whether or not the works in question shall be approved; and if so, upon what condition that approval shall be based.

Accordingly, the order of approval in this case has been made, entered, and filed, as required under the provisions of the treaty.

Opinion by Mr. Tawney.