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ENVIRONMENTAL OPTIONS IN THE REPUBLIC OF MEXICO
JAIME PALAFOX*

I worked with a group of environmental attorneys to produce the Packard Report on Immediate Options for Augmenting Water Flows to the Colorado River Delta in Mexico.¹ The problems along the Colorado River confronting us are summarized in the first paragraph of the Report:

"The Colorado River Delta in Mexico was a world-class ecological resource until the river’s flows were harnessed and depleted by a vast network of water facilities constructed to serve water and power needs in the United States and Mexico. Historically, the Delta included wetlands and riparian vegetation along approximately 100 miles of the Colorado River corridor in Mexico and the intertidal area where the Colorado River meets the Gulf of California. Increased water demands on the Colorado River by the United States and Mexico, however, have deprived the Delta of water, causing loss of fish, wildlife, and plants whose habitats depend on the Delta’s ecosystem."²

When I began to work on the project, it seemed fairly straightforward: figure out how to take a legal approach to transferring water rights within Mexico. I will examine what can be gleaned from our experience in drafting the Packard Report and used in creating a model for resolution of other water issues still facing the United States and Mexico.

In drafting the Report, the Mexican participants in the project learned about things they were unaware were happening in the United States, while the U.S. participants involved in drafting the Packard Report achieved a better understanding of Mexico’s issues. One of the difficulties of approaching these bi-national questions is achieving the understanding that there are different approaches to the same issues by its stakeholders – the two countries with vested interests.

I worked on behalf of the Mexican government during the negotiation of the North American Free Trade Agreement (NAFTA), and on drafting the North American Development Bank (NADB) Charter.³ The agreement that creates the NADB Charter defines the border infrastructure projects that will be certified by the Bank.⁴ For example, there is a preference listed in the NADB Charter for drinking

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2. Id.

3. The North American Development Bank (NADB) is an international financial institution established and capitalized in equal parts by the United States and Mexico for the purpose of financing environmental infrastructure projects. All NADB-financed environmental projects must be certified by the Border Environment Cooperation Commission (BECC), be related to potable water supply, wastewater treatment or municipal solid waste management and be located within the border region. For more information see http://www.nadbank.org/.

water projects even though Mexico's drinking water does not come from the taps.\(^5\) There was a heated discussion between the Mexican and U.S. representatives over this project because the U.S. representatives could not understand the Mexican preference for simple water availability rather than a preference for drinking water.

A huge gap separates Mexico and the United States, which must be addressed, not only in the particular aspects of finance issues, but in understanding environmental and other issues. Trying to focus on the legal issues while drafting my section of the Packard Report, I came to understand quickly enough that it was not possible to simply draft a legal document, summarizing the necessary changes to be implemented. As a group, we determined which concerns needed to be addressed with the goal of developing something we could work with. Having worked in the private sector, our focus was to produce a document that we could use to move forward when the right time came.

We understood that many solutions on the Colorado Delta relating to the Treaty for Utilization of Waters of the Colorado Tijuana Rivers and of the Rio Grande were adopted during a time of crisis.\(^6\) Governments react to crisis. For example, in getting U.S. funding for restructuring irrigation districts outside of the border areas in Mexico through the NADB in 2002, it was valuable to have pre-established practical solutions already in place.

In order to understand the water situation in Mexico when producing the Packard Report, the group had to go through a learning process. First, there was little knowledge within the group about the importance of public participation in Mexico. I have worked on public participation in Mexico for ten years, and I have seen the development of U.S. perspectives on environmental issues in Mexico, along with non-governmental organization involvement, both of which have been evolving since 1992. Coming back ten years later has given me some perspective on the changes that have occurred.

One of the changes that has occurred is increased bilateral non-governmental organization participation. U.S. non-governmental organizations began working on issues of common concern with NAFTA. Recently there has been a noticeable improvement in the interaction and cooperation between U.S. and Mexican non-governmental environmental groups on issues such as the debate over the environmental impact of the proposed, but since cancelled, Mexico City Airport project in Texcoco. In that case, several Mexican and U.S. environmental groups, such as the Natural Resources Defense Council,\(^7\) took out newspaper ads, including one ad in the New York Times, denouncing an issue that in the past might have been regarded as a purely local or domestic Mexican issue. Such cooperation between these groups was one of the elements that had to be taken into consideration when preparing the Packard Report, due to the different constituencies that could play a

\(^{5}\) BECC Draft Guidelines for Project Submission and Criteria for Project Certification. 60 Fed. Reg. at 30866.


\(^{7}\) Natural Resources Defense Council uses law, science, and the support of more than 500,000 members nationwide to protect the planet's wildlife and wild places and to ensure a safe and healthy environment for all living things. For more information see http://www.nrdc.org/.
role in implementing the recommendations of the Report. New stakeholders are one of the first things to take into account when looking for a solution.

In 1944, there were few environmental concerns clearly defined or drafted into law in either the United States or Mexico. Most of the environmental concerns in the 40s dealt with hunting and conservation activities. However, in the post-NAFTA era, as compared with 1944, there are numerous environmental laws in both the United States and Mexico.

One of the reasons for this increase in environmental awareness is that lobbying by new stakeholders has created a higher profile for these issues. This increase in environmental awareness was something we needed to consider, because it could be used to our advantage. Lobbying led to an increased awareness of environmental issues, which in turn led to more media coverage, resulting in greater overall environmental education.

We felt that whatever we were going to propose had to be successful. Implementation is based on one's ability to find the right buttons and push them at the right times. The media is now interested in environmental issues in Mexico, whereas previously these issues were not important. There are now many new institutions that concern themselves with the environmental issues shared by Mexico and the United States. The NADB, created within the framework of NAFTA negotiations, and the Commission on Environmental Cooperation (CEC) are two such institutions. There are also other environmental side agreements that stem from the implementation of NAFTA. These are just some of the key differences between 1944 and 2002.

Further, when drafting the Packard Report, we had to identify key stakeholders. We had to beg, borrow and steal to get water into Mexico. In order to do this, the key stakeholders needed to be identified. One class of stakeholders that needed to be identified was Mexican farmers. Irrigation District 14 in Mexicali was identified. After identifying this district, we had to determine the water availability in the area. This meant not fallowing land to get water for the Colorado Delta, because that would not be as politically feasible in Mexico. Identifying water rights that could be bought without having a negative impact was an important issue.

Another issue was that acquisition of water rights by a foreign entity, especially a U.S. entity, was politically untenable. Farmers in Mexico frequently operate within typical communal associations called ejidos, and are typically part of the Confederación Nacional Campesina, essentially a rural arm of the Partido Revolucionario Institucional. Therefore, the farmers in Irrigation District 14 have great influence in that particular district. The challenge at the time of the Report was how to focus on the acquisition of water rights by a foreign entity as something Mexicans should be interested in, considering that we were dealing with farmers.

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8. The CEC is an international organization established to address regional environmental concerns, help prevent potential trade and environmental conflicts, and to promote the effective enforcement of environmental law. For more information see http://www.cec.org/.
9. An ejido is a corporate body that receives a governmental grant of rural land that is typically held in common.
10. The Confederación Nacional Campesina is part of the PRI (Partido) that represents Mexican agricultural workers.
11. For more information on the Partido Revolucionario Institucional see http://www.pri.org.mx/.
who, while politically influential in the area, may not be aware of environmental issues.

These issues led to the question of how to deal with the Mexican government. There were two distinct approaches to this issue. The first approach was to use engineers who could identify the location of acquirable water rights. In Irrigation District 14, water rights are allocated outside of the district’s distribution area. Irrigation District 14 has water that cannot be delivered because there is no infrastructure to do so, even though the district has a right to use it. The engineers identified these areas, helped develop relationships with individuals in the districts, and helped us understand what the specific approach to water resource management had been in the past.

We also noticed, in researching the Packard Report, that the Mexico City approach at the Comisión Nacional de Aguas (CNA)\textsuperscript{12} was totally different. Mexico disregarded this project because it was too attenuated from the issues to really be concerned about it. Therefore, centralization in the Mexican government would not have allowed us to get the information to set forth some of the solutions that we highlight here because they had different views. We had to be very careful in selecting sources of information. The Mexican government, due to the decentralization that is occurring, is a different animal at different levels. The government’s decision-making is vertical, so this was another issue we had to resolve before coming up with a legal solution.

There were other parties that were stakeholders, like local non-governmental organizations such as Pro-Natura,\textsuperscript{13} along with private parties in the Mexican state of Baja California. Once all of the above was done, we began the difficult process of creating a structure to tackle the real legal issues. Some of the impediments we encountered included differences in irrigation ownership rights versus concession rights (as defined in the Packard Report), differences in implementation, or entering into force the law that was enacted in 1992 during a ten-year period that ends this year, and lack of registration of water rights.

On September 11, 2001, at a conference on the Colorado Delta water issues, the Assistant Administrator of CNA reported that CNA did not have a good registry of who held water rights. It was beginning to cross-reference a list of people who were receiving subsidized electricity rates as agricultural users with the list of people who registered their water rights. There was approximately a 40% gap in these two lists, meaning 40% of the farmers who were subsidized had not registered their water rights.\textsuperscript{14}

The issue here was integrating legal water ownership structures with legal security. How could we convince our stakeholders, whether governmental or

\textsuperscript{12} CNA’s (National Water Commission) mission is to administer and preserve national waters, with the participation of the community to achieve sustainable use of resources. For more information see http://www.cna.gob.mx/portal/inicial.asp.

\textsuperscript{13} Pro-Natura is a non-governmental organization that specializes in sustainable development. Their mission is to conserve biodiversity through integrated sustainable development projects adapted as models that are replicable at a regional level, in partnership with public entities, private initiatives, and organizes civil society.

private institutions, to acquire such water rights? We had to assure them our proposal would work in the medium and long term in order to be able to buy a water right, put that right to use, and keep it in use. Another issue was figuring out how to use Mexican legal provisions that had not been used in the past. One such provision was the Mexican water law regulation that creates an ecological use, which may be designated as an appropriate use under a concession issued for a water right holder.\textsuperscript{15} While the referenced ecological regulation has never been used, it could prove useful for bringing water to the Colorado Delta.

Over the past 15 years, and most certainly after 1992, many natural protected areas have been created in Mexico. Most of these areas are called biosphere reserves, and included in these protected areas is the biosphere reserve for the Higher Gulf of California and the Delta of the Colorado River. Such special protection status could have posed a problem for our draining of water into the Colorado River and the Delta given the different, and sometimes more constrictive ways of regulating natural protected areas, and specifically biosphere reserves, as compared to the regulation of water infrastructure projects. We had to focus on where and how to use the water so that we could comply with any special regulation derived from the ecological status of the Colorado Delta.

One of the last issues we had to take into consideration was NAFTA’s Chapter 11 investment protection provisions. Chapter 11 sets international norms for fair treatment of foreign investors and protects investors of each of the three NAFTA parties by prohibiting the taking of their investments in the territory of another party.\textsuperscript{16} While Chapter 11 is applicable to foreign investments, domestic law is still applicable to domestic investments. Therefore, Chapter 11 has essentially been used to redress regulatory takings for Canadian and U.S. investments in Mexico, but not domestic Mexican investments, because domestic Mexican law may not provide redress for Mexican Nationals from regulatory takings.\textsuperscript{17}

These differences in domestic Mexican law and international law, and differences in recognized rights of Mexican Nationals and foreigners provided another way to approach the issues. They raised the question whether Mexico’s rights in the territorial waters, recognized in Article 27 of its Constitution, and Mexico’s resulting broad authority to regulate these waters, could be jeopardized by the protection provided to foreign investors under NAFTA. Because a U.S. investor has redress for regulatory takings of foreign investments under NAFTA, arguably there is a way to counter governmental entities that threaten to take away water rights.\textsuperscript{18} This is the other angle we reviewed in trying to devise the legal structure that is in the Packard Report.

\textsuperscript{15} Ley de Aguas Nacionales, available at http://www.cddhcu.gob.mx/leyinfo/16/. Under the Mexican water law concession system, a water right has to be used for a specific purpose identified in the Concession Title under which such right is recognized by the Mexican Government. Having such “ecological use” recognized in the applicable regulation arguably created a way to legitimately use water for the Delta in compliance with Mexican law.


\textsuperscript{17} Terri L. Lilley, Note, Keeping NAFTA “Green” for Investors and the Environment, 75 S. CAL. L. REV. 727, 728 (2002).

\textsuperscript{18} See generally Lilley.
Essentially, the issues we dealt with were very complex. The Report highlights ways in which people with different interests and backgrounds worked together to develop a proposal that could work in the Colorado Delta and would be recognized as a good example of progress. The project also emphasized that increased concern for environmental issues must be acknowledged. This is a key point that can be used today, that was not even a formal issue between the United States and Mexico until 1983, when the La Paz agreement on environmental border cooperation took effect.19

Also, new institutions like the NADB have the opportunity and may be used to resolve some of these problems. While these institutions may not be able to resolve the issues completely, they may useful in resolving at least some components of the problems. Some of these new approaches, such as those suggested in the Packard Report, work better when new parties take a fresh look at the issues. These new parties include the CEC, and the NADB, who has the financial resources that could be made available to the Colorado River Delta region, even though the money is provided by the United States. The Packard Report lays out a framework that could provide a solution for the Colorado River Delta, that would also set a good example for the United States and Mexico to follow in other border related water disputes.