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Introduction

Leonard Dworsky

Albert E. Utton

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LEONARD DWORSKY
ALBERT E. UTTON*

Introduction

The Natural Resources Journal is happy to publish in this issue and the next the commissioned papers and the prepared commentaries presented at the Tri-National Conference on The North American Experience Managing International Transboundary Water Resources: The International Joint Commission and the International Boundary and Water Commission.* The conference was held at the Gasparilla Inn, Gasparilla Island, Boca Grande, Florida, April 19–23, 1991. (1)

These papers reflect the core issues under consideration in a Project moving toward completion under the auspices of the International Transboundary Resources Center (CIRT) of the School of Law, The University of New Mexico. The goal of CIRT is to provide a focus and stimulus for the multidisciplinary, multiresource and multinational examination of transboundary resources. Specifically, it aims to improve policymaking in terms of the rational and equitable use of these resources in a cooperative, amicable way with full respect for the territorial sovereignty of each state concerned with resources extending across political boundaries.

The Project was initiated in September 1990, and will be completed in mid-1993. A planning committee (2) met in late 1990 to help chart the Project agenda. Major planning decisions included the selection of principal issues to focus Project objectives and resources; selection of principal writers of background documents on selected issues; and the convening of a workshop in April 1991, to review, discuss, critique and expand the issue papers from the points of view of some 70 scholars and administrators in the United States, Canada and Mexico. (3)

Twelve major papers, 27 written commentaries and the oral record resulting from the conference were assessed, and the main themes expressed were organized into four classes.

Subsequently, to test the validity of the broader set of issues resulting from these activities and to examine the applicability to and the potential value of the Project to the international community, a special workshop was held December 7–11, 1992, at the Rockefeller Foundation

*Leonard Dworsky is Professor (Emeritus) of Civil and Environmental Engineering at Cornell University and Senior Associate, CIRT, University of New Mexico. Albert Utton is Professor of Law at the University of New Mexico School of Law.

Editor's note: Space limitations have required us to divide the publication of the full set of Conference papers and Commentaries in two issues of the Journal.

Conference Center, Bellagio, Italy. The workshop participants consisted of a small group from CIRT and a larger group of international invitees reflecting global interests in the management of transboundary water and related environmental resources.

The Project leaders are indebted to the Ford Foundation for Project support and to the Ford and Rockefeller Foundations for the special additional support that made possible the convening of the international Conference at the Bellagio Center.

In examining North American institutions responsible for managing international water and related natural and environmental resources, we and our colleagues are not proposing institutional vehicles for adoption elsewhere. The assessment we make is directed to improvements we perceive may usefully be considered by the three North American governments. Whether the International Joint Commission serving the United States and Canada, or the International Boundary and Water Commission serving the United States and Mexico are institutions that have elements which may be usable in other situations we leave for others to determine.

We hope this appraisal made within a university—essentially a nongovernmental—setting will be a prototype that may be followed by others. By doing so, we may all gain through the improvements that may take place in the institutions on which we all depend for both social well-being and comity among nations.

Formation of the Boundaries

When the uncertain and unsecured northern boundary between the newly independent United States and Great Britain was established in 1783 by the Treaty of Paris, it opened the door to disputes that ranged, ultimately, over a 4,000-mile boundary for 126 years. President Thomas Jefferson added his contribution to the boundary with his purchase of the Louisiana Territory from France in 1803, and President James Polk carried the boundary to the Pacific Ocean in his Oregon Territory compromise with Great Britain in 1846. It was not until the beginning of the twentieth century that the United States and Great Britain, representing Canada, arrived at a means to better manage boundary disputes. The vehicle they selected to do this was the International Joint Commission, established by the Boundary Waters Treaty of 1909. Since then, over 130 disputes have been reconciled or averted between the United States and, now, Canada.

From the time Hernan Cortez entered Mexico in 1519, starting Spain on its road to empire, until 1821, Spanish rule was an obstacle to United States expansion into the west and southwest. After Mexico gained her independence from the dissolving Spanish Empire in the western hemisphere in 1821, Texas sought independence from Mexico within 14 years. And in 1846, President Polk devoted his energies to complete two more of the four objectives he had for his nation—bring Texas into the

Union and open the way to extend the United States to the Pacific Ocean by way of California. After the Mexican War, the Gadsden Purchase, along the present New Mexico–Arizona southern border, completed the modern boundary with Mexico.

Here, again, boundary disputes in an arid land were plentiful, and institutional inventions were in demand. Since the last half of the nineteenth century, impressive treaties have been drawn for application to the Rio Grande, Colorado and Tijuana rivers and for other areas along the boundary between the United States and Mexico. The vehicle established by the two governments to manage and implement these treaties is the International Boundary and Water Commission. North American experience in the management of international boundary resources is linked to the two agencies already identified: The International Joint Commission between the United States and Canada, and the International Boundary and Water Commission between the United States and Mexico. This report assesses this experience. Not much has been written about these two important bodies and we hope it will prove to be of interest to many, both here in North America and elsewhere.

About the Project

This report contains extracts of a Project Report, now in process and not yet completed. The Project proposal was initially submitted to the Ford Foundation and subsequently approved and funded by the Foundation.

Key concepts in the rational use of resources that are divided by political boundaries have to include future orientation, international cooperation, coordination and preventive diplomacy. In a time of increasing populations, advancing economic growth, environmental awareness, and all within the context of hazards to global well-being, it is urgently becoming important to address the issues of the prudent and cooperative use of shared resources before a state of contention is reached. Preventive diplomacy is a necessity to minimize debilitating disputes.

The inherent nature of the resources that are both migratory and divided by political boundaries makes their prudent use and development and the avoidance of disputes over their use an unusual challenge. The general objectives of the project are twofold: a) to assist in the quest for avoidance and resolution of international conflict arising from the use of transboundary shared water and related environmental resources, and b) to provide for the better management of these limited international resources. The specific method is to examine, critique and compare the two international Commissions, and to analyze and report on this North American experience in order to make suggestions for improvement in North America. In addition we highlight the unique characteristics found in this experience that may be valuable for use in other international

resource management situations. The institutions examined are the three governments (United States, Mexico and Canada) and the two boundary Commissions that serve them: the International Joint Commission (United States–Canada) and the International Boundary and Water Commission (United States–Mexico).

By comparing the practice of the two Commissions, we have attempted to determine why they are different and what each Commission can learn from the other.

The general conflict arenas are defined primarily by the trans-boundary regions of the three countries and the potential ecosystems comprising the shared water resources and the related land, air, biological resources and social systems.

In addressing conflict resolution and water management, institutional adaptation is a central theme. The improvement of institutions and policies is essential to the avoidance of resolution of conflict. Thus, a major objective is the sharing of information, models, and thinking between the two North American Commissions in a way that has not been done before so as to enhance both improved water management and conflict resolution.

Although these two Commissions are similar in some respects, they are also quite different. Why are they different? What can each learn from the other? What can these lessons contribute to resolving similar problems elsewhere in the world? What changes and accommodations need to be made to deal with emerging issues and changing conditions?

Now, with the advantage of a better part of a century of actual experience for each Commission, the project examines these and other questions. The actual practice of the International Joint Commission, sitting astride the 4,000-mile Canadian border to the north and the additional 1,500 miles between Alaska and the Canadian Northwest Territories, and the International Boundary and Water Commission, with jurisdiction over our 2,000-mile border to the south, has provided a rich North American experience.

From the beginning the dispute resolution agendas of the Commissions have been broad and, over time, have been concerned with domestic, municipal, agricultural and industrial water supplies; with fish and wildlife and recreation; with floods, drought and pollution; and with land use and environmental relationships. Disputes have occurred on such matters as water allocation for irrigated agriculture, flood control applications, hydroelectric power generation, water levels, navigation, dams, remedial works, obstructions of water, water-quality control over surface and ground waters, and diversion and consumptive uses of water.

In the past 15 years, agenda items reflecting new concerns have become more pronounced. As a result, the project gives special attention to matters such as improved management techniques; information shar-

ing and institutional innovation. In addition, of concern are the effects of the chemical age on water quality, both surface and underground, the land and the atmosphere; a much greater respect for natural systems and environmental implications including biodiversity; new trade arrangements and a strong movement toward a comprehensive ecosystem approach to planning and management.

These changes in the nature of water planning and management practices in the United States, Canada and Mexico have been and are being reflected in policies and programs affecting transboundary resources along both borders. One of the important questions posed by the study is whether the two boundary Commissions will be able to meet this emerging future.

Throughout the world, population growth, economic development, changing conditions in political arrangements and a widening concern for the environment dominate water planning and related environmental policy formation. These dynamic forces, exemplified by the provisions of Agenda 21 approved by the United Nations Conference on Environment and Development, are creating new challenges for institutions to manage resources that are international by geographic location and difficult to address because of political fragmentation.

THE ISSUES: QUESTIONS SEEKING ANSWERS

The centerpiece of the project process included the Tri-National working conference (April 1991) of invited participants to consider the issues for which papers had been commissioned, to identify new issues or to bring new viewpoints to bear on Project objectives, and to aid in developing and synthesizing project findings.

The major issues were:

- emerging boundary environmental challenges;
- improving management capacity of governments and commissions;
- commissions' relation to states and provinces;
- improving public participation;
- ecosystem management;
- how to accommodate an uncertain future.

Classes of Possible Recommendations

Before describing the character of questions posed by the issues, reference is made to a classification scheme that will be used. This arrangement evolved from the review of the prepared papers and, we expect, will provide a way of prioritizing the recommendations in terms of time, practicality and responsiveness to public demands as the project develops its findings and conclusions.

One major theme contained in the prepared papers viewed the two Commissions as constrained by their charters and, therefore, limited in their flexibility to respond either to new challenges or to the tasks thought important and demanded by vocal publics. Accordingly, one class of conclusions reflects this view.

A second major theme concentrated on the set of needs identified both by the Commissions and the watching public to meet unmet current and emerging issues. These issues are of concern to public health and welfare; welfare includes the natural systems with which humans evolved and which are linked to their future well-being. In addition, these are issues that are (or are thought to be) either meeting opposition or are not of priority concern for the two governments; they preclude further allocation of authority to the Commissions.

A third major theme presented to the Trinational Conference is that of significant change related to a North American ecosystem. The presence of a North American trade agreement will demand that attention be given to the concerns expressed in the Trinational Conference about the effective management of the water and environmental resources at boundary regions under these and perhaps other comparable North American arrangements. Thus, this theme of change is articulated for the early consideration of decisionmakers to prepare the three governments to better meet future conditions.

A fourth theme focused on the changes that have taken place in recent years that made assumptions, valid at that time, which are now subject to serious question.

It will be noted, generally, that the approach to change is cautious. This caution is based largely on a recognition of the value of long-standing treaties or other agreements. There is an evident concern not to upset, or possibly destroy, political, economic or other well-established consensual arrangements that have proven valuable in the management of transnational water and environmental resources and the management of disputes.

These main themes are important and are present in the discussions that take place among governments as they attempt to cope with unmet and new problems in rapidly changing social contexts.

Former IJC Chairman Maxwell Cohen must have had some of these concerns in mind when he presented his paper on "The Commission from the Inside" on the seventieth anniversary of the IJC.¹ Chairman Cohen observed that:

Given the complexity that environmental-ecological values have imposed on all parties, and given the

1. The Centre for International Studies: The University of Toronto, 1981.

highly vocal public pressures from a variety of sectional interests, a certain mature understanding must be developed by the IJC on the one hand, and the governments on the other, as to how they deal with each other so as to minimize any sense of exceeding mandates at the same time as the Commission is not inhibited from exploring, in its wisdom, all the implications of issues properly before it. The IJC has little chance of maintaining its stature and credibility without convincing evidence of a capacity to adapt to new social values and related physical situations, while at the same time, in the process of such adaptation it retains a tough-minded binational independence. The Commission will be of little use to governments if it does not have wide public confidence, and it will not be able to maintain that confidence without a public belief in both countries in the Commission's determined impartiality as well as its actual and legal autonomy.

The issue areas addressed by the conference were the following:

Emerging Boundary Environmental Challenges

What new circumstances are redefining transboundary resource issues? Are new institutional arrangements needed to monitor these new conditions and to facilitate the coordination and administration of transboundary policies? Transboundary relationships; information on transboundary monitoring systems; early warning of adverse changes; water quality policies; uses and diversions of water; watershed protection; ecosystem management; environmental effects of transboundary movements of people and trade need to be explored.

Are There Ways to Improve the Capacity and Responsiveness of the Governments and the Commissions to Manage Transboundary Resources?

How well are the governments doing in managing boundary relations? Are they responding effectively to new and changing boundary environmental issues? How useful are the commissions to their governments? How responsive are governments to commissions; how responsive are both to the public?

Is the Public Participation Process Adequate? If Not, How Can It Be Improved?

Is public participation having an impact on the governments? On commissions? Should more opportunity be made available? If so, how? What is the role of the several publics in decisionmaking? What can it be?

Has experience provided a new foundation for future expectations from public participation?

Ecosystem Management

What is implied by the notion of ecosystem management? Do the traditional roles of the commissions still have a place within ecosystem management? How would the commissions' roles of advising governments about potential boundary disputes be altered? Are there new institutional changes that are required to adopt and implement ecosystem management within and outside the traditional roles of the boundary commissions?

How Have the Commissions Related to States and Provinces?

What changes have brought about increased direct involvement of subnational governments? In boundary management matters? What is the nature of the new institutions established by the subnational governments? What do the new institutions portend for the future? For the role of national governments? Can there be an effect on the legal regimes of the three federal systems as a result of these direct involvements?

How to Accommodate an Uncertain Future through Institutional Responsiveness and Planning

What is the nature of boundary uncertainties for which governments and commissions ought to be prepared? What have we learned from experience about our ability to meet uncertainty? What new policies and new tasks need to be addressed if we are better to prepare ourselves to meet uncertainties? Are new or revised institutional initiatives called for?

Of these issues the last three, i.e., those relating to public participation, ecosystem management and how to accommodate an uncertain future will be published in the next issue of the *Natural Resources Journal* (Vol. 33, number 2).