



---

Volume 33

Issue 1 *The North American Experience Managing International Transboundary Water Resources: The International Joint Commission and the International Boundary and Water Commission, Part 1*

---

Winter 1993

## Commentary

Neil R. Fulton

### Recommended Citation

Neil R. Fulton, *Commentary*, 33 Nat. Resources J. 191 (1993).  
Available at: <https://digitalrepository.unm.edu/nrj/vol33/iss1/16>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact [amywinter@unm.edu](mailto:amywinter@unm.edu), [lsloane@salud.unm.edu](mailto:lsloane@salud.unm.edu), [sarahrk@unm.edu](mailto:sarahrk@unm.edu).

NEIL R. FULTON\*

## Commentary

### INTRODUCTION

I, like those before me, thank you for the invitation to this meeting. I have found it very informative and will go away knowing more than when I arrived. I came as a learner. With the idea that within groups like this and with the intelligence and knowledge and wisdom that each of you bring, I will go away just a little bit smarter, and that when the opportunity comes along I will be able to find a solution to a problem that perhaps you proposed, and that I can bend a little bit to fit the particular need at the time.

The comments and recommendations of David Allee and Helen Ingram provide good background information and establish a starting point for discussions of the relationships between the Commissions and the states and provinces. I will provide my perspective on the involvement of the states and provinces, their relationship to the International Joint Commission (IJC), and then make some additional recommendations I believe would improve the cooperation between them.

I served in local government for about a decade, state government for about a decade, and as a consultant to the federal government. I was directly involved in the negotiations that took place in the early 1980s when the federal river basin commissions, and for our purposes the Great Lakes Basin Commission, were dissolved.

My staff and I supported the IJC in responding to the reference that resulted in the report on Great Lakes diversions and consumptive uses. I was involved in the founding of the Council of Great Lakes Governors, and served as a member of the Council's Water Resource Management Committee. I was a member of the task force that produced the report to the governors on water diversions and Great Lakes institutions. I also chaired an advisory committee that reported to the governors on the issue of Great Lakes institutions that looked at how best to manage regional resource issues and the relationship between the Council of Great Lakes Governors and the Great Lakes Commission.

This involvement has given me a good opportunity to watch some significant changes that are occurring or are beginning to occur in the water resource management field, specifically from the perspective of the relationship of the states to states, states to provinces, states to local

---

\*Neil R. Fulton is a consultant to the U.S./Canadian International Joint Commission.

governments, and states to international organizations such as the International Joint Commission.

It is from this perspective that I come to this conference. And I come with a concern about our perspective. It is all too easy to focus on the institution(s) instead of focusing on the problem. I hope that during this conference we will focus on the problems and ask the question: what institution exists, or can be modified, or should be created, to best respond to the problem and how do we move it from being a problem to an opportunity to a solution?

We were encouraged early in the conference to focus on the future, to try to move ourselves away from the past. There was specific reference made to Part II of the Diversions and Consumptive Uses Study report that was issued by the IJC in 1985. I reread the report to see how we had done and whether we had moved in the direction recommended in the report. One of the areas that was discussed in detail was climate change. The IJC was saying to the governments: "This is an emerging issue. We really don't know how to deal with it, but we know that people ought to be dealing with it." I would suggest that within the Commission, the federal governments on both sides of the border and the states and provinces, there is a considerable effort under way to define the problem, and to reach beyond the problem to potential solutions. Are we where we should be? No. We have started on a trail, but it is an uncertain trail. And that is where the caution comes in and why we don't move faster. Because of the degree of uncertainty.

There was concern expressed about the issue of consumptive uses, with a concern that increases in consumptive uses could be significant and have an impact on lake levels and flows. While the federal government has done little on this issue, the states and provinces have responded. In a report to the Great Lakes governors in 1985 this was identified as a critical issue. And instead of just saying, "somebody ought to do something about it," the provinces and states recognized that one of the problems within the area of consumptive uses was knowing where we had been or where we were. Without this information it is hard to figure out where we are going. So collectively the eight states and two provinces set up a data collection mechanism which was uniform across the states and provinces and across the border. The third report on Great Lakes water use is either in final preparation or has been issued, establishing data that will help us predict the future. That is the success side of that story.

On the non-success side of the story, an effort was made to get a reference sent to the IJC to look at the issue of consumptive uses in greater detail. It is an issue where quality and quantity meet. You can't deal with consumptive use without dealing with both quantity and quality and possible trade-offs. We couldn't get enough people interested to move for-

ward. So we tried within the United States Congress and the 1986 Water Resource Development Act has a section which authorizes the Corps of Engineers to study a number of issues dealing with levels and flows including consumptive uses. But we were never able to get an appropriation to implement it. So it is just sitting there as an authority.

The issue of the legal framework for governance of the Great Lakes was raised in the report. The Center for the Great Lakes and the State of Illinois have done some good work in this area trying to define how existing law relates to the problems in the basin.

### **The Commission**

The IJC is just one forum for communications between the United States and Canada on water resource related issues. There are now state and provincial organizations that are binational as well as a number of nongovernmental binational organizations. Examples of both types are the Water Resources Management Committee of the Council of Great Lakes Governors, the Center for the Great Lakes, Great Lakes United, and the Great Lakes Coalition. Each of these organizations is actively involved in some or a range of important water related Great Lakes issues.

Some argue that the importance of the Commission is in decline because of a change in the form of communications between the two countries. There was a time when communications of a formal nature were extraordinarily important. Before the advent of modern communications and transportation, these formalized channels were almost the only channels available for binational negotiations. This was true of the time when the Commission was formed in the late nineteenth and early twentieth century. Today on issues of significance and high priority and where there is a desire for a quick solution, shuttle diplomacy and picking up the phone and calling one's counterpart on the other side of the border is an easy way to begin action. While this may be true for some issues, there are many issues that exist along the long common border between the United States and Canada that will not fall in this category and are best handled by organizations such as the IJC.

### **The States**

As communications have improved and travel has become easier, the states have been changing. The states in 1990 are much different than the states in 1909. States today have become much more competent and qualified in dealing with natural resource and water resource issues, and have permanent staff removed from political influence who make a career out of natural resource and water resource management. This has allowed the states to become much more involved in the management of these issues, and often, take the lead in areas of natural resource management with the federal government watching, and sometimes following.

This became clear in the mid-1980s when the 1986 Water Resource Development Act (WRDA) was passed. Cost-sharing of water resource projects had been discussed for decades but there had been continued resistance from the Congress, states, and interest groups in cost-sharing of water resource projects. As states came into their own and matured as natural resources and water resource managers, it became clear that the best way to have real input into the federal decisionmaking process would be to have non-federal cost-sharing as part of major water resource projects. The states banded together and worked with the Corps of Engineers and Congress to support this concept and it is my view that this is the only reason that the 1986 WRDA included non-federal cost-sharing. Without support of the states, cost-sharing would still be something talked about and not something that has been implemented. This cost-sharing required a new partnership between the states and federal government in water resource project planning and implementation. I expect we will see this transition continue in the future as states become more competent as water resource managers.

This did not require much of a change in philosophy by the states, since most state water resource managers believe that water is a state issue and have not encouraged federal intrusion in this area. In many states it is a "state's rights" issue where states assert they have an ownership interest in the public waters of their state. The "public trust" doctrine used in many states emphasizes that water and land related resources are held in trust for the people of the state, and this trust is administered by a state agency. What has really been happening then is that states have become more competent in exercising their responsibilities under the public trust doctrine that has existed for many years.

A number of comments of Richard Darman, Director of the Office of Management and Budget, in the first full budget of the Bush administration recognized the importance of state and local governments.

A sampling:

- In numerous instances states and localities are moving on their own, with their own funds, to try new and innovative approaches to problem solving.
- This blossoming of state and local innovation is welcome.
- State government structures have been modernized.
- The United States Advisory Commission on Intergovernmental Relations, in a 1985 report entitled "The Question of State Government Capability," made an unequivocal judgment: "This study concludes that state governments have been transformed in almost every facet of their structure and operations."

In addition, the following conclusions were drawn about what the Administration will do:

- continue to encourage the “states as laboratories”;
- work with governors, mayors, county officials, and their various associations to foster innovation and identify obstacles to it;
- ensure sound evaluation of experiments and publicize lessons learned; and
- together with state and local governments, facilitate the more general application of the “state of the art” where innovation has shown the way to better results.

A cynical person might see this as an attempt by the federal government to reduce the federal liability for water resource and natural resources management in the name of the New Federalism. I like to make the interpretation that the federal government is recognizing that states have matured and do in fact provide a living laboratory for testing new program initiatives. States tend to be much less bureaucratic than the federal government, much closer to the people who are served by the government, have an ongoing relationship with local government, and are typically able to respond quicker to changing conditions and changing needs.

This increased importance and influence of the states is not new. The consistency requirement of the Coastal Zone Management Program requires federal agencies to comply with approved and adopted coastal zone management plans in federal program states. This was a significant departure from the traditional concept of federal sovereignty and a movement toward a concept of jointly managed resources.

An example of the innovative approaches the Great Lakes states are involved in is the Great Lakes Protection Fund. This fund is the first multistate environmental endowment and was capitalized at \$100 million. This fund grew out of the Great Lakes Toxic Substances Control Agreement signed by the states in 1986. The fund provides grants for projects that:

- help institutions and agencies of the Great Lakes region better work together toward cleaning up their shared lake resources and the region;
- educate the general public about the importance of the Great Lakes and what citizens and businesses can do to help restore them;
- apply existing scientific findings to cleanup efforts; and
- work with citizens and industries to develop means for preventing lake contamination.

The states and provinces are leaders in finding better ways to utilize and manage resources. They should be involved as full partners in national and international water resource management activities.

### The Commission and the States

There have been a number of shifts that have occurred in the last decade that are important to note within the context of the relationship of the IJC to the states and provinces. In the early days of the Reagan Administration, the decision was made to do away with the federal river basin commissions. The Great Lakes Basin Commission was an eight state/federal river basin commission for the Great Lakes. There was debate about what would best serve the needs of the states and the federal government in the region. There was some discussion about the possibility of creating within the Great Lakes basin a federal/state commission that would have actual implementation and regulatory powers, such as existed in the Susquehanna and the Delaware river basins. This model would have included a state/federal commission with one federal member (an appointee of the President) plus state members (appointees of the governors). In the end, it was decided not to proceed on this path, but to transfer the funds and what the states felt were important functions from the Basin Commission to the Great Lakes Commission, an eight state compact commission that was formed in the middle 1950s.

The desire of the states to manage their resources cooperatively continued to increase as the decade proceeded. In 1977, the United States and Canadian governments asked the IJC to look at Great Lakes diversions and consumptive uses. The study board, which had state and provincial representation, completed its report in September 1981. As was pointed out by David Allee in his presentation, the IJC did not complete their report to the governments until January 1985, over three years later. The states were considerably frustrated by the length of time it took for the IJC to translate the recommendations from the study board to recommendations acceptable to the Commission for transmission to the governments.

The states recognized that a number of items within the Great Lakes Diversions and Consumptive Uses Study report were primarily the responsibility of the states, and therefore took action to begin to implement those recommendations. This led to the establishment of a task force under the Council of Great Lakes Governors which, coincidentally, issued its report at approximately the same time the IJC sent its report to the federal governments.

The only recommendations of the study board that have been carried out have been the recommendations implemented by the states and provinces acting cooperatively. This includes the establishment of a prior notice and consultation process for any new diversions out of the Great Lakes Basin, the development of a data gathering network that is consistent among the states and provinces (so there is better base information for future planning), and the beginning of a process for a developing a strate-

gic plan for managing the resources of the basin. These actions came out of the commitment of the states and provinces to managing the resources of the system and the recognition that a number of weaknesses identified during the diversions study needed action. The ability of the states to respond to these weaknesses came because of state and provincial involvement in the study board.

Although the Great Lakes Diversions and Consumptive Uses report was sent to the federal governments in January 1985, there has been no official federal action on the United States side in response. As David Allee pointed out (and as the General Accounting Office report also points out), there is no good system of tracking these responses. And sometimes one is suspicious that there may be an implicit agreement between the federal governments that action is not warranted and therefore the recommendations die a dusty death on some shelf within the State Department or other federal agency.

The current levels reference study before the IJC is a result of the high levels in 1985 and 1986. An interim report was issued by the IJC to the governments in October 1988. Again, two and one half years later, there has been no response to recommendations made in this report on measures that could be implemented under crisis conditions and recommendations for binational discussions on important items under consideration by the IJC that would help them in deliberations needed before a final report in response to the reference is completed.

The states are not the only government organizations undergoing transition. The IJC is also undergoing transition. This applies both in the relationship of the IJC to responsibilities under the Great Lakes Water Quality Agreement, as well as water quantity issues. The present Commission recognized the need for and, in my view, wants state, local, and public involvement in its activities. Referring again to the Levels Reference Study currently undergoing investigation by a board of the IJC, the first phase of this activity took place without significant state and provincial involvement at the study management level. The states and provinces were consistent during Phase I of the study in recommending that there be a higher level of state and provincial involvement. The Phase II effort which should produce the final response to the governments has significant state, provincial, local, and public involvement.

The Study is overseen by an 11 member board that has two federal representatives, four state and provincial representatives, four public representatives (one is a mayor), and a study director. This is a significant departure from past practices, but one that was purposely done to make the process more open. In addition, an 18 member Citizens Advisory Committee has been established that includes representation from a broad group of interests in the Basin. This committee serves in an advisory



capacity to the Study Board and provides important input to the study as well as serving as a "reality check." Over the next 24 months, before the submission of the report to the IJC, there are 60 weeks of time dedicated to public involvement. Over one million of the six million dollar study budget is being spent on public participation.

The IJC that I see in the 1990s is making a conscious effort to move from what used to be a very closed (for diplomatic purposes) process to one that is much more open. Part of this transition is intriguing to watch. Control boards, which have traditionally been staffed by senior level federal representatives and are responsible for managing the levels of Lake Superior and Ontario, the Niagara River, and the St. Lawrence, are beginning to fit into the new, more open model. These control boards are now required to hold one public meeting every year. The first series of these will be held in the next few months and it will be instructive to see what the results of these meetings are.

It is clear that our capability to manage our natural resources and water resources is improving. As our competence and knowledge increases, it is very apparent that it is cheaper to prevent than it is to cure. Within this context, state and local government is in a much better position to implement the preventive means than is the federal government or international government organizations. At the same time, if the efforts of local and state governments are not coordinated, nationally and internationally, the efforts may be for naught. A good example of this is the issue of nonpoint source pollution. There are two choices in controlling this significant cause of pollution. It can either be treated at the point of discharge using structural measures (treatment plants) that are very expensive to construct and operate and externalize costs, or the pollution can be prevented at its source and the costs internalized. Only local and state government can accomplish the latter, which will be cheaper in the long term and puts the cost burden where it belongs. At the same time, if these efforts are not coordinated, then the effort of one local government or one state government may not have the maximum impacts possible.

I have argued that there is increased state involvement and competence in regional water resource management, but I must put a caveat on this argument. The federal government in the United States faces a significant deficit this year and next year. Some estimates of the current fiscal year deficit are \$300 billion. This has forced a cutback in programs, and unfortunately, some of that effects natural resource and water resource programs. The states are experiencing similar problems in the flattening of economic growth that has reduced revenues. The states though do not have the option used by our federal government to defer hard decisions by deficit spending. Most states are required by their constitutions to live within their means. (A standard some of us feel would be appropriate at

the federal level.) This is requiring significant cutbacks in programs in many states, especially in the northeast and the Great Lakes Basin. A significant portion of the burden of program reductions has fallen on natural resource programs. This is making it difficult for states to participate in some of the important national and international coordination efforts that can bring efficiencies in the long term.

Traditionally IJC activities and studies have been funded through the participating federal agencies. The Commission's budget has been fairly small, though there has been a recent effort to establish a fund in the United States section of the Commission to start work on new references from the governments.

The traditional method of major funding through the principal agencies may have worked well in the past when the prime actors were the federal agencies who were also the prime implementers. With the change in the involvement of states, local government, and the public in the IJC activities, and particularly study boards, it may be time to consider change in this area. Federal agencies tend to be protective of the dollars that are appropriated to them and are accountable for the proper expenditures of those dollars. Members of study boards who are given the responsibility by the Commission to undertake a specific task also feel that same level of responsibility and accountability. Sometimes these two items come into conflict where the federal agency puts restrictions on the expenditures of the dollars consistent with their priorities and these priorities may not be the same as the priorities of the study board with state and provincial representation as well as nongovernmental participants.

The argument has been made in the past that the IJC would be better served by having an independent source of funds for undergoing investigations of water resource related issues. Perhaps the argument is stronger now, recognizing that the golden rule is, "he who has the gold makes the rules" and this applies to federal agency involvement in water resource related issues.

## SUMMARY

In summary, the whole area of natural resource and water resource management is in transition. I believe that improvements are being made at all levels. As states mature and their ability to manage water resource issues from a regional perspective increases, the level of state involvement, in both national and the international areas needs to increase. I believe that this is recognized by the current Commission and that steps are being taken to ensure that this happens.

My recommendations for improving the process include:

The recent efforts of the Commission to open up its processes needs to continue. The involvement of the public, states and provinces, as well as federal agencies is critical to successful regional and international water resource management.

There needs to be much better accountability of the federal government response to recommendations of the Commission. It is no longer satisfactory for there to be an implicit "no" by not having a response. I believe the Commission, the federal agencies, the states and provinces, and the public deserve an answer, and if it is "no" then people should be willing to say that and accept the political response and reaction of involved and impacted constituencies.

For major investigation efforts funding ought to be provided directly to the IJC from the federal government for the Commission to use in conducting the investigation. This is not to diminish the role of federal agencies, but to improve the ability of the Commission to manage its own affairs consistent with priorities that are being set by federal agencies and states. It recognizes the reality of the current situation and the need for stronger state and public involvement in activities of the Commission.