



Winter 1993

Commentary

Peg Rogers

Recommended Citation

Peg Rogers, *Commentary*, 33 NAT. RES. J. 183 (1993).

Available at: <https://digitalrepository.unm.edu/nrj/vol33/iss1/15>

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 disc@unm.edu.

PEG ROGERS*

Commentary

I'd like to begin by saying that I am honored to participate in this conference. Unlike many of you who have observed and evaluated the complex relationships between Canada, the United States, and Mexico for many years, this is my first chance. Much of what I know about the IJC and the IBWC comes from the writings of members of this audience, and I'm very glad now to meet the people behind the printed pages.

By most accounts, these two commissions have been remarkably successful at meeting their mandates. We're meeting here this week to try to make a good thing even better. To that end, David Allee and Helen Ingram have analyzed our two border commissions and offered several thought-provoking suggestions for further involvement of states, provinces, and local governments in the commissions' work. To their thorough evaluations, I have only one suggestion: include Indian tribes. They are subnational governments, too.

Many North American Indian tribes inhabit transboundary watersheds along the international borders. Their interests (and in the United States, their sovereign responsibilities for the well-being of tribal members and tribal resources) parallel those of the states and provinces. Yet, relatively little interaction has occurred between tribes and the two transboundary water commissions. I'll give a few examples of past dealings and then offer suggestions on how the future relationships might build on the past.

To begin with, let's consider the IJC reference to apportion the flows of the Poplar River—a relatively obscure, prairie stream flowing south from Saskatchewan into Montana. In 1948, the Commission received a reference to make advisory recommendations on the uses and apportionment of waters crossing the Canadian/United States border between the Milk and the Red rivers. One of those watersheds is the Poplar basin. In 1975, motivated by Saskatchewan Power Corporation's planned development of a coal-fired electrical generating plant and reservoir on the East Fork of the Poplar, the IJC began the task of apportioning the Poplar River.

The Poplar River drains a semiarid, high plains region of southern Saskatchewan and northeastern Montana. The three forks of the Poplar flow south from Canada into the United States, enter the Fort Peck Indian Reservation, unite into a single channel and then empty into the Missouri

*Peg Rogers is an attorney with the Native American Rights Fund in Washington, D.C.

River. Today, most people in the basin are farmers and ranchers, raising wheat, alfalfa, and hay. But a little more than 100 years ago, the Poplar basin was the exclusive domain of Plains Indians.

In the mid-1800s, the land lying north of the Missouri River (including the Poplar basin) was set aside by the United States government exclusively for Indian tribes. It was known as the "Great Sioux Reservation." On May 1, 1888, Congress carved the much smaller Fort Peck Indian Reservation out of the Great Sioux Reservation to serve as the permanent homeland of the Sioux and Assiniboine tribes. (A few other reservations were established for other tribes as well.) The other nine million acres of the Great Sioux Reservation were opened up for settlement. The year after Congress established the Fort Peck Reservation, Montana became a state.

For most of the next century the basin languished in near obscurity, until plans for development of a thermal power plant and the associated reservoir on the East Fork of the Poplar in Canada roused the attention of the IJC. The Commission instructed its Souris-Red Rivers Engineering Board to investigate and make recommendations on water apportionment pursuant to the ongoing 1948 reference.

The Board appointed a Poplar River Task Force, with members drawn from the federal governments of Canada and the United States, the Province of Saskatchewan, and the State of Montana. Several informational meetings and public hearings were held to gather factual information and allow public participation. The end product was the 1978 report of the IJC, which recommended an approximately equal apportionment of the waters of the Poplar between Canada and the United States. The IJC's recommendations have not been formalized by the two governments.

The Sioux and Assiniboine tribes took a keen interest in the IJC proceedings on the Poplar. About a third of the Poplar basin lies on the Fort Peck Reservation. Tribal representatives testified at the public hearings and attended a special meeting between Montana, Saskatchewan, Saskatchewan Power Corporation, and the tribes. They requested a seat on the Poplar River Task Force, on the ground that the tribes exert sovereignty over the lower third of the Poplar basin. Instead, the tribes were granted observer status at Task Force meetings.

At the IJC public hearings, the tribes asserted that their reserved water rights were paramount to all other rights in the basin. Their argument was based on the United States Supreme Court decision in the *Winters* case, which established that when Congress created Indian reservations by reserving land from the public domain, it impliedly reserved water for tribal use as well. Under *Winters*, the tribes arguably possessed implied rights to all present and future uses of water—rights which predated the Boundary Waters Treaty of 1909.

For that reason, the tribes opposed any apportionment, stating that the United States and Canada could not enter into any agreement that would adversely affect the reserved rights of the Sioux and Assiniboiné tribes. The tribes revealed their own plans to build a large irrigation project, which would be left high and dry in low flow years under the IJC's proposed apportionment. Furthermore, if interference to tribal rights occurred as a result of actions taken in Canada, the tribe predicted a successful lawsuit in Canadian courts based on Article II of the Boundary Waters Treaty.

The IJC responded to these tribal arguments by declaring that the Commission was not the proper forum to decide the validity of the tribe's legal theories. Instead, the IJC suggested that water rights issues be addressed by the tribe and appropriate government agencies in the United States, which is exactly what happened. The effect of the Boundary Waters Treaty on Indian tribal water rights was sidestepped—for the moment.

So, why does any of this matter today? After all, the IJC's recommended apportionment of the Poplar River was never formalized by the United States and Canada. The thermal power plant and reservoir have been operating for some years now. And, in the mid-1980s, the Fort Peck tribes settled their water rights through negotiation with the State of Montana. The tribes settled for about one million acre-feet of water, most of which will come from the mainstem of the Missouri River. They may use Poplar River water only if no harm comes to existing uses. Today, the tribe is developing a water code to regulate the use of tribal water.

Nevertheless, the Poplar River IJC proceeding merits attention today because it raised two unanswered questions—one legal, and one primarily political: first, how does the Boundary Waters Treaty affect tribal rights; and second, what is the appropriate relationship between Indian tribes and the IJC? With regard to the first question, the Poplar River apportionment may foretell the shape of things to come.

In a letter to the IJC during the apportionment proceeding, the United States Department of State explained the reserved water rights doctrine and stated that the Fort Peck Tribes clearly had reserved rights. However, the State Department expressed no opinion on how tribal reserved rights related to the Boundary Waters Treaty. That issue has not been squarely addressed by a court of law, although it may well be in the future.

I say this because the same congressional legislation which created the Fort Peck Reservation in 1888 also created two other reservations—the Fort Belknap and the Blackfeet reservations. Both lie in northern Montana along the Milk River—a stream which originates in Montana, flows into Canada, and then returns to Montana where it emp-

ties into the Missouri River. The Boundary Waters Treaty itself apportioned the Milk River. Fort Peck, Fort Belknap, and the Blackfeet reservations lie in a relatively straight line along a geographic continuum on the northern high plains of Montana, just south of the Canadian border. Blackfeet and Fort Peck lie on each end, with Fort Belknap in the middle.

The reservations lie along a philosophical continuum as well. At one extreme is Fort Peck, which eventually stopped arguing that the Boundary Waters Treaty had no effect on its reserved rights and settled its water rights without regard to international law. On the opposite end of the philosophical spectrum are the Blackfeet. They contend that their reservation with its implied rights to water predates the apportionment of the Milk River made in the Boundary Waters Treaty. For that reason, the tribe asserts that Canadian and United States rights under the treaty are subordinate to the Blackfeet Tribe's rights.

The Blackfeet recently terminated settlement talks with the State of Montana, and unless negotiations are resumed, they will litigate their water rights in Montana state court. The relationship between the Boundary Waters Treaty and prior tribal reserved rights may well be litigated in the context of quantifying Blackfeet water rights.

Between the two geographic and philosophical poles occupied by the Fort Peck and the Blackfeet tribes lie the Assiniboiné and Gros Ventre tribes, who are negotiating their water rights with the State of Montana. Like the Blackfeet, the Fort Belknap tribes assert that their rights predate the Canadian/United States apportionment of the Milk River in the Boundary Waters Treaty. However, unlike the Blackfeet, the Fort Belknap tribes agree that the Boundary Waters Treaty is the supreme law of the land, and they do not contest the Treaty's validity.

Nevertheless, the Fort Belknap tribes believe that by entering into the Boundary Waters Treaty, the United States took their water rights in violation of the United States Constitution's Fifth Amendment. The tribes contend that they possessed the right to use the entire flow of the Milk River prior to the Boundary Waters Treaty, and should be compensated by the United States for diminishing their water rights. The tribes are pursuing this strategy in negotiations with the state, and hope to incorporate federal compensation for damages in a settlement of their rights. Ironically, the same reservation which generated the reserved water rights doctrine in the 1908 *Winters* decision may again set another standard—that of defining the relationship between tribal water rights and an international apportionment.

Aside from raising interesting and unanswered legal questions, the Poplar River apportionment has current relevance for a second reason: it raises political questions about the proper role of indigenous people in the mechanics of the IJC. For example, did the IJC correctly refuse the Fort Peck tribes' request for membership on the Task Force? After all, the tribe

exerts sovereignty over the lower third of the basin—roughly the same amount of acreage in that basin which is subject to state sovereignty. The reservation was established before Montana became a state. Tribal water rights predate any rights based on state law. Why, then, could Montana technical representatives fully participate on the Task Force, while the tribes could only watch?

Requests for great tribal participation in IJC activities arose not only in the Poplar River apportionment, but in the Great Lakes region as well. The issue facing Great Lakes tribes on both sides of the border is not water quantity, but water quality. In Canada alone, more than 60 native communities ring the Great Lakes and the St. Lawrence River. Clean water for traditional and other purposes is essential to their cultural survival.

In the Great Lakes region, tribal participation in IJC activities is not only a matter of respect for tribal sovereign rights, it is a matter of public health. Native people risk greater harm from Great Lakes pollution than nonnatives due to their greater exposure to it, according to a recent report by the Assembly of First Nations.

Factors contributing to this include bioaccumulation of toxics due to consuming relatively high quantities of wild meat, fish, and other traditional foods, living in one location for generations, drinking untreated or inadequately treated water, swimming in polluted water, working in polluting industries, and consuming produce grown in contaminated soil. Several tribes live in toxic hotspots and those that don't are affected by the overall pollution levels in the basin. Despite the disproportionate impacts of Great Lakes pollution on native populations, many Great Lakes tribes believe the IJC has not been responsive to their interests.

In late 1989, the IJC held its Biennial Meeting on Great Lakes Water Quality to discuss the current status and efforts needed to clean up the lakes. A number of tribal leaders testified that tribes should be more centrally involved in Great Lakes issues, with positions on the two advisory boards. At that time, the Science Advisory Board had one Indian member who has since left the board. Today, the Science Advisory Board has another native member—a biologist from the Akwasasne reserve.

In addition to contributing their technical expertise, these native board members can share an Indian perspective on land and resources and interact with native communities links between the IJC and its native constituents. The Water Quality Board, currently composed entirely of nonIndians, would surely benefit from the addition of a native colleague as well.

Placing Indians on advisory boards is a great first step. But other steps must be taken in order to really hear and respond to native concerns. Surely no one would argue that tribes should be excluded from participating in IJC activities, but participation is not that simple. Lack of information and insufficient funds sometimes preclude full tribal participation.

David Allee stressed the importance of local capacity building, and suggested that the IJC might facilitate local linkages on an informal basis. These suggestions apply equally well to tribes as to other subnational governments. Although interest in environmental issues is generally high in Great Lakes tribes on both sides of the border, many tribes don't have the infrastructure or the funds to effectively participate in the IJC process. Local linkages may help overcome these barriers.

Some tribes have already organized into coalitions—an important step which enables them to pool expertise. But in addition to these tribal coalitions, tribes should be included in general state and local coalitions as well. By incorporating native people into state and local coalitions, tribes might share their expertise and experience with not only with each other, but their nonIndian neighbors, thereby maximizing everyone's ability to participate in the IJC's activities.

Tribes inhabiting toxic waste sites, such as the Mohawks of Akwesasne and the Fond du Lac and Bay Mills Chippewa, are already working with nonIndian communities to develop Remedial Action Plans under the Great Lakes Water Quality Agreement. Although the interaction of native and nonnative communities in the RAP process has sometimes been less than ideal, development of these plans shows that Indians and nonIndians have much to share with one another, particularly where their common environment is threatened. The ecosystem approach to Great Lakes management, as David Allee so appropriately points out, takes into account social and economic factors, extending the ecosystem to our entire culture. This expanded definition of "ecosystem" must include native cultures as well.

Well, I've just about used up all my time discussing United States/Canadian border issues, but let me say a word or two about one area that may attract the attention of the IBWC along the United States/Mexico border at some point in the future. I'm speaking about the Tohono O'odam Reservation in southern Arizona. The reservation's southern boundary coincides with the international border, but the border was superimposed upon both the water resources and the O'odam people without regard to hydrologic boundaries or native cultural patterns. As a result, the border splits the O'odam people as well as their water resources.

North of the border in the United States, the tribe operates a farm called Papago Farms, which is irrigated by groundwater. The groundwater, like the O'odam people, frequently crosses the border. From what little is known of this aquifer's characteristics, groundwater flows north from Mexico into the Tohono O'odam Reservation, then turns back to Mexico, and flows westward toward Organ Pipe National Monument, where it surfaces at Quitobaquito Springs. The Springs provide a natural habitat for an endangered, indigenous species of desert pupfish.

Groundwater withdrawals for irrigation in Mexico have increased substantially in recent years with the continuing influx of people to the border region. The O'odam people are concerned that Mexican irrigation development will lead to decreased groundwater levels on the United States side, making irrigation at Papago Farms uneconomical. Currently, not enough is known about the aquifer to identify the source or nature of the impacts.

The IBWC, while aware of the situation, is not yet involved. Given its trust responsibility to protect Tohono O'odam water rights, and to protect its own federal reserved water rights at Quitobaquito Springs, the United States may request IBWC involvement at some point in the future. While the IBWC's authority does not clearly extend to groundwater regulation, Minute 242, which amended the 1944 Water Treaty to require consultation before undertaking any new surface or groundwater development, would seem to permit IBWC involvement.

At the very least, the IBWC could serve as a repository for technical information. With the proper funding, the IBWC could identify basic aquifer characteristics and determine the nature and source of any impacts. This may only happen, however, with congressional support. Obtaining political support may be a difficult task for some tribes, who tend to be less accustomed to dealing with Congress than with executive and judicial branches of government.

The IBWC's role, and the relationship between the Commission and the O'odam people, although minimal today, should grow at least as fast as competition for border groundwater, if not faster. This may be a good opportunity for the IBWC to move out of the reactive pattern which, as Helen Ingram pointed out, has characterized much of the Commission's past. Instead of waiting for emergencies like the Ambos Nogales sewage problems, the IBWC might address the Tohono O'odam border groundwater issue before a critical stage is reached.

Next year our nations will celebrate the 500th anniversary of Columbus' journey to the western hemisphere. He arrived on a continent vibrant with indigenous civilizations, many of which survived European domination to enrich our nations today. It is my hope that 1992 will be remembered as the year our nations and their international water commissions discovered Indians.