
NATURAL RESOURCES JOURNAL

Volume 33
Issue 2 *The North American Experience Managing International Transboundary Water Resources: The International Joint Commission and the International Boundary and Water Commission, Part 2*

Spring 1993

The Matter of Public Participation

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PRELIMINARY OBSERVATIONS

The first serious attempt to make close comparisons topic-by-topic between the two North American binational water resources commissions, the International Joint Commission (IJC) and the International Boundary and Water Commission (IBWC), offers the opportunity to appraise the functioning of each of the bodies from various points of view. This paper will not step back and review the historical record, or assay the commissions' strengths and weaknesses, except in the specific target area assigned to this working session: Is the public participation process adequate? If not, how can it be improved?

Other dimensions of the commissions' roles and their historical and legal records have been ably and amply set forth in the earlier papers. In the interest of gaining maximum input for the annals of this meeting from the commentators and the participants present, this author proposes (after these brief prefatory remarks) to dispense with the customary flurry of footnotes and focus immediately on the matters that concern those of us interested in what is called 'public participation.' For years there have been exhortations for strengthening on this score, directed not only to the Canadian, Mexican, and United States governments, but also directed to developing countries with international water resources institutions, with very disappointing results to say the least, as part of the persistent policy of concerned public international organizations, such as the United Nations.

We are dealing here with two venerable, respected, and viable intergovernmental agencies, as compared with most of the rest of the world. That they could stand improvement should be taken for granted. Whether the policy and institutional changes requisite to the better achievement of our goals of more rational and responsive management of transboundary water resources and related interests are practicable or even wise in the long run poses, we must realize, different, difficult questions. Careful weighing of any change in the light of political reality, larger border region issues, budgetary impacts and aptness for the purpose, is not to be slighted. That is not to say, however, that administration officials,

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legislators, or officers of competing agencies, no matter how vocal, should suffice to quash advocacy of well-thought-out reform measures. If it takes 15 to 25 years to plan and build a dam, why should we believe that institutional progress should take any less? As it is said, "the times are changing." The vexatious dynamics of frontier affairs have in fact already created pressures for more responsive, effective, and forward-looking courses of action by the governments. This need is nowhere more clearly expressed than in the demand for increased and more appropriate access by concerned public and private persons to the problem assessment, planning, and implementation process. Indifferent or ill-advised politicians may over time become persuaded. Or they can be replaced. Still, a proposal must commend itself to the informed, in order to generate the requisite support.

With caution and with courage, let us begin to explore this business of public participation by these two commissions: al grano.

THE CHARGE OF THE TOPIC

The planning committee and our two distinguished principal investigators, Professors Len Dworsky and Al Utton, have suggested that this working session address four salient questions:

(1) Is public participation having an impact on governments? On commissions?

(2) Is the opportunity for public participation adequate? Should more opportunity be made available? If so, how?

(3) What publics should provide input to decisionmaking: nongovernmental organizations? local government officials? state officials? national agency representatives?

(4) Has experience provided a new foundation for future expectations from public participants?

Before we attempt to answer those questions expressly, we can make a general overview and comparison of the present status of public participation as practiced by the two commissions being studied here. The scope of the jurisdiction and the powers conferred on each commission are deemed beyond the mission of this working session, though these may need to be considered in an ancillary fashion, because there are some linkages between jurisdictional reach, authority to act, and a commission's willingness or capacity openly to involve interested persons in its work. These connections have, in fact, already been demonstrated in some of the other papers presented at this conference.

THE IJC AND THE IBWC BROADLY COMPARED

The International Joint Commission

With respect to public participation, the Canada/United States International Joint Commission (IJC) is justly renowned for this aspect of its activities. Considerable attention is paid to the informing function. The Commission (jointly) publishes a monthly newsletter, Focus, which is distributed widely, reporting on Commission meetings, conferences (sometimes co-sponsored by the IJC), meetings of experts, articles on work in progress (for example, on the preparation of remedial action plans for the designated areas of concern in the Great Lakes Basin), agreement summaries, and other topics of interest to the frontier region's interested public and state/provincial and local officials. It publishes a sleek, very readable and illustrated annual, bilingual report on its activities, made available to the public; all its projects are listed and described; the various technical boards (control, advisory, et cetera) are listed and described briefly, along with their personnel. Its biennial reports to the Parties under the Great Lakes Water Quality Agreement (and executive summaries thereof) are similarly made available. In short there is a major 'public relations' program, befitting the highly interested and sophisticated audiences the IJC has on both sides of the border.

Seminars, workshops, and panels are conducted by technical staffs or others with IJC participation. Commission hearings are publicized in advance in order to encourage attendance and participation by interested individuals and groups, of which there are many, especially concerning the water quality and water levels problems of the Great Lakes. This is a two-way street: the Commission is informed of diverse views and needs, and in turn, its people inform the public about plans and progress on projects.

The IJC's special boards, which are the chief vehicles of the Commission in the field, are made up of engineers, hydrologists, and other technical experts, drawn usually in equal numbers from each country, often state and provincial personnel. This is a very important 'public participation' by the technical people involved locally in dealing with the problem that is under the purview of the particular board. These boards and special task forces make reports and studies addressed to the Commission, which are also published.

One recent example of the unflagging commitment in this area is worth mention. As Phase II of the IJC Reference Study into ways to alleviate problems associated with fluctuating Great Lakes/St. Lawrence River water levels, the Commission's Study Board sent out to a mailing list of persons with demonstrated interest, a letter saying the Study Board welcomes a public comment on its Plan of Study. Recipients were invited to

continue their involvement by offering opinions on that Plan; the complete 24 page Plan (with appendices) would be sent on request (French or English). Responses were to be "recorded and included with questions and concerns from other interested citizens and groups that will be regularly tabulated and conveyed to the 11-member Study Board and taken into account in their deliberations."

Finally, the IJC is expressly directed in its governing treaty, with respect to any inquiry, proceeding or question within its jurisdiction, that "all parties interested therein shall be given convenient opportunity to be heard." Thus, the mission of providing public participation is part of the IJC's formal terms of reference.

The International Boundary and Water Commission

What has just been pointed out briefly about the Commission serving its Canadian and United States border area constituencies stands in rather stark contrast to the public participation situation of the International Boundary and Water Commission (IBWC). Not only is little substantive public information made available, but the tradition of hearings, open meetings, workshops, and briefings, bringing interested persons and groups into interaction with the Commission and its staff, is lacking. The IBWC clearly evolved in a quite different binational context.

The IBWC nonetheless is widely regarded as one of the most successful international water resources commissions in the world, for other reasons. Its reputation stems in particular from its engineering skills, its efficiency, and its quiet mediation proficiency. It has always preferred to work out of the spotlight. But there is no institutionalized public review of the Commission's operations or public participation generally. It is authorized to obtain public input as it deems necessary, but it is not required to provide public participation. The United States commissioner in practice informally does confer with border-area congressmen, and certain high-level officers of the involved states and water resources agencies.

The Commission feels that its responsibility is to the respective federal governments, and not to the border area people. This is particularly true of the Mexican national section. Those are the constituencies that it must please and respond to. It has worked effectively in 'private' carrying out its public mission— some would say "in splendid isolation." Traditionally, information and data, plans and studies were not available so that there could be informed public reactions or expressions of views.

This situation has begun to change, now that environmental concerns have intruded. The United States National Environmental Policy Act, and the United States Environmental Protection Agency are very much part of the new scene. Impact statements are required now by governments' legislation, which will finally bring some public scrutiny. That, however, is not the public participation that meaningfully involves all

interested persons throughout the Commission's labors and undertakings.

The 1983 La Paz Agreement between the United States and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area, and the subsequently agreed annexes thereto, also pose a disquieting challenge to the IBWC's accustomed reactive functioning. Although the fine work of the IBWC is acknowledged, and the Commission is regarded as part of the Agreement's institutional machinery, new forums will now encroach on the Commission's jurisdiction. This may result in forcing the IBWC 'out of its shell,' at least partially. The systematic dissemination of some information and a more active role in multi-agency public studies are possible, even though the Commission has up to now felt comfortable circumscribed by its rather limited mission. Without substantial, formal amplification of its terms of reference, including the requirement of hearings and studies with participation from outside the conventional close circle, major opening up is unlikely.

BALANCE SHEET AND RECOMMENDATIONS FOR THE IBWC

Based on the description above of the IBWC's grave shortcomings in the field of public participation, it will come as no surprise that some affirmative recommendations will here be made for institutional reform in that regard.

In truth this matter was very closely weighed in connection with the substantial augmentation of the provisions of what is now called "The Bellagio Draft Treaty" on transboundary groundwaters, which constitutes something of a 'model' agreement, but began and remained rather site-specific to the Mexico/United States border region. Prior versions of that draft agreement had not gone so far as to take up public participation, though the 'commission' designated in the draft was always expected to be, in the United States/ Mexico case, the IBWC.

Thus, Article XIII of the Bellagio Draft was elucidated as follows:

INQUIRY IN THE PUBLIC INTEREST

1. The Commission shall by general notice invite written statements and information from all persons professing interest in the groundwater-related conditions and activities in the portion of the border region for which a Transboundary Groundwater Conservation Area declaration, a Comprehensive Management Plan, a Depletion Plan, a Transboundary Transfer, or a Drought Alert or Emergency Declaration is under consideration.

2. All submissions received pursuant to Paragraph 1 shall be taken into account by the Commission.
3. Whenever the Commission deems that public interest warrants, it shall schedule and conduct hearings open to the public in appropriate places and facilities in the border region, and shall make and publish a record of such hearings.
4. Any person professing an interest may also petition the Commission at any time requesting the Commission to schedule a hearing or to invite written statements and information concerning groundwater conditions in the border region, or urging the Commission to take a particular action under this Agreement.
5. When deemed useful by the Commission, technical meetings, workshops and briefings relating to transboundary groundwater matters may be held under the auspices of the Commission or in cooperation with authorities and organizations concerned with the welfare of the border region.

It will be noticed that a broad spectrum of public participation is elaborated (and obviously expected) of the Commission under this article; recognizably, some patterning after the practices of the IJC was made. It is risky to attempt institutional transplants, but the relevant experience of others similarly situated must at least be contemplated; in the case of the IBWC, there was little to build on.

Nonetheless, the proposal retains the authority of the Commission to decide whether public hearings are warranted, and when technical meetings and such would be useful. It was felt that both governments would be more comfortable with this 'reservation' of decisionmaking, given the IBWC's habitually seclusive way of conducting its affairs. But, that is admittedly barely half of the recommendation. The Commission would be obliged to invite written contributions when major decisions are being considered; if hearings are held, they would be public and the record would be published. Interested persons could petition the Commission, which exposes it to pressures and to criticism should it not be receptive.

One of the values of public participation is to inform the Commission about the interests and views 'out there,' including those of experienced professionals and specialized private associations. State and local governmental authorities also would be accorded the same guaranteed access to the Commission on the same terms. Those who participate with written contributions or make oral statements at hearings should, moreover, feel that the Commission is endeavoring to respond to their concerns. Health emergencies, as we well know, cause serious anxiety and a clamor for somebody qualified to do something.

The public participation provisions here put forward for the IBWC will sound far too ambitious, even preposterous to many conscien-

tious students of United States/Mexican relations. At least they provide adequately for public participation— something everyone says is increasingly important.

BALANCE SHEET AND RECOMMENDATIONS FOR THE IJC

A long dissertation here about the advantages of some reform of the way the IJC goes about fulfilling its public participation duties would in the end be out of place. In good conscience, at least with respect to this particular matter, major overhaul is definitely not called for. Minor tampering with the practices would not be worth the effort or be likely to yield significant positive results. Thus, for the International Joint Commission, the evaluation is that it is more than satisfactory. Indeed, its public participation functions are without equal in the world. The IJC long ago adopted and internalized a sense of mission with regard to openness, characterized by enhanced public participation.

CONCLUSIONS AND PROSPECTS

Those who expected recommendations for change of the IJC's practices can only be disappointed with the result of this student's evaluation. On the other hand, those who are extremely cautious about attempting any institutional alterations, and rightly so, the bold proposal for the Mexico/United States Commission will be depressing, if not shocking. It must be remembered that the likelihood of such proposals being implemented is remote, at least today. The day may be coming, however, when the pressures for openness and participation, will no longer be able to be denied. At that time, something akin to what has here been put forward will be needed, if even as a preliminary "working document."

Praise has been heaped on both Commissions from many quarters. Most international water commissions in this world are not in the same league with our IJC and IBWC, even with their deficiencies and failings. These are trying times along the border, however, and there is growing demand and need for planning and initiative. Governments could improve both Commissions' effectiveness and responsiveness, but that is a matter of political will in the context of many competing developments and issues, which is beyond the aspect of public participation. Through ample public participation, however, strengthening of the Commissions may be facilitated or made patently necessary. These Commissions are far too useful to their governments, and to their border communities, to be allowed to languish.