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Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S. - Mexico

Robert J. McCarthy

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**EXECUTIVE AUTHORITY, ADAPTIVE TREATY
INTERPRETATION, AND THE INTERNATIONAL
BOUNDARY AND WATER COMMISSION, U.S. –
MEXICO**

ROBERT J. MCCARTHY*

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INTRODUCTION

A. AN ANACHRONISTIC AGENCY

Conceived as a nineteenth century outpost of Manifest Destiny¹ to

1. "Manifest Destiny" was a term that gained popularity in the 1840s to justify the United States' westward expansion, including the appropriation of Mexican lands. *See, e.g.,* Richard Griswold del Castillo, *Manifest Destiny: The Mexican-American War and the Treaty of Guadalupe Hidalgo*, 5 SW. J.L. & TRADE AM. 31, 32 (1998).

demarcate and guard expanded U.S. borders against erosion by meandering rivers;² re-engineered in the mid-twentieth century in order to impound and develop the boundary waters;³ its friends and critics alike say the International Boundary and Water Commission, U.S. – Mexico (IBWC) has become a dangerous anachronism, left behind by twenty-first century social, environmental, and political issues that it is unwilling or unable to address.⁴

Scholars routinely catalogue the alleged failings of the IBWC's dominant U.S. Section (USIBWC):⁵ secretive;⁶ beholden to regional agricultural interests;⁷ indifferent to disappearing water sources;⁸

2. The IBWC traces its institutional roots to the Convention of 1889. Convention to Avoid the Difficulties Occasioned by Changes in the Beds of the Rio Grande and Colorado Rivers, U.S.-Mex., Mar. 1, 1889, 26 Stat. 1512 [hereinafter Convention of 1889].

3. The 1944 Water Treaty, which ushered in the modern age of the IBWC, allocated boundary waters and provided for joint construction of international dams, canals and other facilities. Treaty Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 Water Treaty].

4. See generally Helen Ingram & David R. White, *International Boundary and Water Commission: An Institutional Mismatch for Resolving Transboundary Water Problems*, 33 NAT. RESOURCES J. 153 (1993); Alberto Szekely, *How to Accommodate an Uncertain Future into Institutional Responsiveness and Planning: The Case of Mexico and the United States*, 33 NAT. RESOURCES J. 397, 399-400 (1993); Vivienne Bennett & Lawrence A. Herzog, *U.S.-Mexico Borderland Water Conflicts and Institutional Change: A Commentary*, 40 NAT. RESOURCES J. 973, 974 (2000); D. Rick Van Schoik et al., *Water Issues in the U.S.-Mexican Border Region, 1-4 Dynamics of Human-Environment Interactions*, in THE U.S.-MEXICAN BORDER ENVIRONMENT: DYNAMICS OF HUMAN-ENVIRONMENT INTERACTIONS 123, 130 (Edward Sandalla ed., 2005) ("the treaty and the commission [...] are thought of by critics and friends alike as anachronistic and unable to deal with today's problems") available at <http://www.scorp.org/pubs/ml1/chapter 1-4.pdf>.

5. See generally Mark A. Sinclair, *Note, The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87, 113-14 (1986); Stephen P. Mumme, *New Directions in United States-Mexican Transboundary Environmental Management: A Critique of Current Proposals*, 32 NAT. RESOURCES J. 539, 545 (1992) [hereinafter Mumme, *New Directions*]; Geoffrey Land, *North American Free Trade and the Environment: Border Environmental Groups and the NAFTA*, 5 FRONTERA NORTE 99, 108-109 (1993) available at http://aplicaciones.colef.mx:8080/fronteranorte/articulos/FN10/3-f10_Nafta_and_the_future_of_Mexico_US_border.pdf; Stephen P. Mumme, *Managing Acute Water Scarcity on the U.S.-Mexico Border: Institutional Issues Raised by the 1990's Drought*, 39 NAT. RESOURCES J. 149, 156-57 (1999) [hereinafter Mumme, *Managing Acute Water Scarcity*]; Stephen P. Mumme, *The US-Mexico International Boundary and Water Commission in the Sustainable Development Era*, 9 IBRU BOUNDARY & SECURITY BULLETIN 117, 122 (2001) [hereinafter Mumme, *Sustainable Development Era*] available at http://www.dur.ac.uk/resources/ibru/publications/full/bsb9-2_mumme.pdf; Mark Spalding, *Addressing Border Environmental Problems Now and in the Future: Border XXI and Related Efforts*, in THE U.S.-MEXICAN BORDER ENVIRONMENT, 105, 118 (Sw. Ctr. for Env'tl. Research & Policy et al eds. 2003) available at <http://scorp.org/pubs/mlc6.pdf>; Stephen P. Mumme & Debra J. Little, *Leadership, Politics, and Administrative Reform at the United States Section of the International Boundary and Water Commission, United States and Mexico*, 47 SOC. SCI. J. 252, 260 (2010).

6. See generally Roberto Sanchez, *Public Participation and the IBWC: Challenges and Options*, 33 NAT. RESOURCES J. 283, 284, 292 (1993); Robert D. Hayton, *The Matter of Public Participation*, 33 NAT. RESOURCES J. 275, 277, 279 (1993).

7. See, e.g., M.H. Jamail & S.J. Ullery, *International Water Use Relations Along the*

apathetic about associated ecological crises;⁹ abusive to its employees;¹⁰ lacking essential diplomatic and professional skills;¹¹ unresponsive to the needs of a growing population;¹² and hamstrung by a too-timid reading of treaty language.¹³ Proposals for abolition or radical reformation of the USIBWC are legion.¹⁴

The boundary and water treaties are also criticized as archaic and inequitable, in part because they give the United States a disproportionate share of boundary waters.¹⁵ In addition, the 1944

Sonoran Desert Borderlands, in ARID LANDS RESOURCE INFORMATION PAPERS 1, 17-18 (Ariz. Univ. Office of Arid Lands Studies ed. 1979); Stephen P. Mumme, *State Influence in Foreign Policy Making: Water Related Environmental Disputes Along the United States-Mexico Border*, 38 W. POL. Q. 620, 635 (1985) [hereinafter Mumme, *State Influence*]; Mary E. Kelly, Commentary, 33 NAT. RESOURCES J. 299, 301-02 (1993); Stephen P. Mumme, *Advancing Binational Cooperation in Transboundary Aquifer Management on the U.S.-Mexico Border*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 77, 89-90 (2005) [hereinafter Mumme, *Advancing Binational Cooperation*]; Nicole Ries, Note, *The (Almost) All-American Canal: Consejo De Desarrollo Economico De Mexicali v. United States and the Pursuit of Environmental Justice in Transboundary Resource Management*, 35 Ecology L.Q. 491, 524-26 (2008).

8. See, e.g., Szekely, *supra* note 4, at 399-400; Stephen Mumme, *Minute 242 and Beyond, Challenges and Opportunities for Managing Transboundary Groundwater on the Mexico-U.S. Border*, 40 NAT. RESOURCES J. 341, 341-42 (2000); Robert E. Hall, *Transboundary Groundwater Management: Opportunities Under International Law for Groundwater Management in the United States-Mexico Border Region*, 21 ARIZ. J. INT'L & COMP. L. 873, 907, 910 (2004).

9. See, e.g., Charles R. Johnston, Jr., Comment, *Effluent Neighbors: The Mexico-United States Water Quality Dilemma*, 3 CAL. W. INT'L L.J. 152, 164 (1972); Michael Gregory, *Environment, Sustainable Development, Public Participation and the NAFTA: A Retrospective*, 7 J. ENVTL. L. & LITIG. 99, 165 (1992); Spalding, *supra* note 5, at 120; Jennifer Pitt, *Dredging for Diplomacy? Colorado River Management at the United States-Mexico Border*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 47, 53-54 (2006); *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1550, 1578 (1991).

10. See, e.g., Mumme & Little, *supra* note 5, at 262-63.

11. See, e.g., Bennett & Herzog, *supra* note 4, at 974; Jurgen Schmandt, *Bi-National Water Issues in the Rio Grande/Rio Bravo Basin*, 4 WATER POLICY 137, 150, 152-53 (2002); MARY KELLY & ALBERTO SZEKELY, CTR. FOR LATIN AM. STUDIES, MODERNIZING THE INTERNATIONAL BOUNDARY AND WATER COMMISSION 2-3 (Feb. 2004), available at <http://escholarship.org/uc/item/4hj9d7nw.pdf>.

12. See e.g., Sinclair, *supra* note 5, at 113-114; John Altomare, Comment, *Stemming the Flow: The Role of International Environmental Law in Seeking a Solution to the Sewage Treatment Crisis at the Tijuana-San Diego Border Region*, 21 CAL. W. INT'L L.J. 361, 390 (1990); Sanford E. Gaines, *Bridges To A Better Environment: Building Cross-Border Institutions For Environmental Improvement In The U.S.-Mexico Border Area*, 12 ARIZ. J. INT'L & COMP. L. 429, 442 (1995).

13. See, e.g., Barbara G. Burman & Thomas G. Cornish, *Needed: A Ground-Water Treaty Between the United States and Mexico*, 15 NAT. RESOURCES J. 385, 399 (1975); Sinclair, *supra* note 5, at 113-114; Steven G. Ingram, *In a Twenty-First Century "Minute,"* 44 NAT. RESOURCES J. 163, 164 (2004).

14. See, e.g., Sinclair, *supra* note 5, at 114, 116-17; Gregory, *supra* note 9, at 165; Mumme, *New Directions*, *supra* note 5, at 545; Ingram & White, *supra* note 4, at 174; Szekely, *supra* note 4, at 399; Kelly, *supra* note 7, at 301-02; Gaines, *supra* note 12, at 442; Bennett & Herzog, *supra* note 4, at 974; KELLY & SZEKELY, *supra* note 11, at 2-3.

15. The 1944 Water Treaty and an earlier agreement entitled the United States to a disproportionate share of boundary waters. See 1944 Water Treaty, *supra* note 3, art. 4 (Lower Rio Grande), art. 10 (Lower Colorado River); Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mex., May 21, 1906, 34 Stat. 2953 [hereinafter, Convention of 1906]; see, e.g., Melissa Lopez, *Border Tensions and the Need for Water: An Application of Equitable Principles to*

Water Treaty has been criticized for giving preference to irrigation while ignoring groundwater and ecological uses,¹⁶ and also for its designation of “Engineer-Commissioners,”¹⁷ which privileges construction expertise over essential management skills.¹⁸ Although some have called for a new treaty to be administered by a new institution,¹⁹ others, doubting the political viability of such proposals, suggest that amendments to treaties, combined with a thorough housecleaning of inept leadership in the U.S. Section, and an infusion of badly-needed professional and diplomatic talent, can salvage the IBWC.²⁰

B. CAN'T SEE THE STATUTES FOR THE TREATIES

Notwithstanding this crescendo of criticism, the IBWC literature is strangely devoid of reference to U.S. domestic law, including statutes that implement the boundary and water treaties,²¹ serve as the enabling legislation of the USIBWC,²² place the agency under the supervision and control of the U.S. State Department,²³ and make its duties subject to reassignment by the President.²⁴ In addition to these statutes, and even the treaties themselves endowing executive authority,²⁵ the U.S. Constitution gives the President vast executive powers over foreign affairs²⁶ and administrative agencies.²⁷ Indeed,

Determine Water Allocation from the Rio Grande to the United States and Mexico, 9 GEO. INT'L ENVTL. L. REV. 489, 498-99 (1997).

16. See, e.g., Stephen P. Mumme, *Revising the 1944 Water Treaty: Reflections on the Rio Grande Drought Crises and Other Matters*, 45 J. SW., 649, 651-52 (2003); Allie Alexis Umoff, *An Analysis of the 1944 U.S.-Mexico Water Treaty: Its Past, Present, and Future*, 32 ENVIRONS ENVTL. L. & POL'Y J. 69, 84-87, 97 (2008).

17. The 1944 Water Treaty designates five officials for each section: an “Engineer-Commissioner,” two principal engineers, a legal adviser, and a secretary. 1944 Water Treaty, *supra* note 3, art. 2.

18. See, e.g., Sanchez, *supra* note 6, at 283; Schmandt, *supra* note 11, at 152-53; Kelly & Szekely, *supra* note 11, at 2-3.

19. See, e.g., Burman & Cornish, *supra* note 13, at 397; Mumme, *New Directions*, *supra* note 5, at 545.

20. See, e.g., Mumme, *New Directions*, *supra* note 5, at 545; Stephen P. Mumme, *The Case for Adding an Ecology Minute to the 1944 United States-Mexico Water Treaty*, 15 TUL. ENVTL. L.J. 239, 246, 255 (2002); Kelly & Szekely, *supra* note 11, at 2-3; Mumme & Little, *supra* note 5, at 266-67.

21. See 22 U.S.C. §§ 277-277h (2010).

22. See *id.* § 277.

23. See, e.g., *id.* § 277a.

24. See *id.*, §§ 277, 277b(a)(1), 277b(a)(2), 277c(a). See also *infra* note 32 and corresponding text.

25. The 1944 Water Treaty itself recognizes the right of each nation to construct treaty works through any public or private agency in accordance with domestic laws. See 1944 Water Treaty, *supra* note 3, art. 24 and Protocol. The Treaty also specifies that the State Department handle any joint action or agreement on the part of the United States. *Id.* art. 2.

26. See U.S. CONST. art. II, § 2, cl. 2 (authority to appoint ambassadors); U.S. CONST. art. II, § 3, cl. 1 (authority to “receive ambassadors and other public ministers”); U.S. CONST. art. II, § 2, cl. 1 (authority as “commander in chief”).

27. Article II, section 1, clause 1, commonly referred to as the “Vesting Clause,”

scholars debate whether the President has nearly exclusive powers in certain foreign²⁸ and domestic matters.²⁹

Eschewing any reference to this body of law, critics and government agencies alike focus exclusively on intricate treaty language that supposedly makes the USIBWC an autonomous agency.³⁰ This myopia begins with the USIBWC, which “considers itself an independent federal government agency whose leader is answerable only to the President.”³¹ Even the IBWC website, which provides the full text of the boundary and water treaties and hundreds of additional international agreements, somehow avoids any mention of statutory authority.³²

Many prominent academic scholars have a different view of the agency’s alleged autonomy, confidently claiming that “the U.S. IBWC was structured, in effect, as a congressional agency.”³³ The Legal Adviser’s office at the State Department, presumably agnostic as to whom the USIBWC should report, if anyone, acknowledges responsibility for giving foreign policy guidance, as specified in the treaties but believes “there is sufficient independence provided for in

states that “The executive Power shall be vested in a President of the United States of America.” *Id.* art. II, § 1, cl. 1. Section 2 establishes the executive departments, stating that “[the President] may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.” *Id.* § 2, cl. 1. Section 2, clause 2, commonly referred to as the “Appointments Clause”, states the President may “nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.” *Id.* § 2, cl. 2. Finally, the “Take Care Clause,” at Article II, section 3, states that the President “shall take care that the laws be faithfully executed.” *Id.* § 3.

28. It has been argued that the president has “unilateral authority” to interpret or reinterpret treaties, notwithstanding their domestic law effect. See John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 868-870, 878 (2001); but see, e.g., Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263 (2002).

29. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549-50 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001); Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 697 (2007); Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 359 (2010).

30. The 1944 Water Treaty appears to vest expansive powers in the IBWC and its U.S. and Mexican sections; but, a careful reading discloses that exercise of those powers is made subject to approval by the respective governments. 1944 Water Treaty, *supra* note 3, *passim*. In addition, Congress has enacted a comprehensive statutory scheme to implement the 1944 Water Treaty and other boundary and water treaties. See 22 U.S.C. § 277 (2011).

31. U.S. DEP’T. OF STATE, OFFICE OF INSPECTOR GEN., REPORT OF INSPECTION, U.S. SECTION OF THE INTERNATIONAL BOUNDARY AND WATER COMMISSION 10 (2005) [hereinafter OIG, 2005 REPORT], available at <http://oig.state.gov/documents/organization/44344.pdf>.

32. See U.S. INTERNATIONAL BOUNDARY & WATER COMMISSION, <http://www.ibwc.gov/home.html> (last visited Jan. 29, 2011).

33. Mumme & Little, *supra* note 5, at 256.

administrative matters that it cannot be considered as an organizational part of the Department.”³⁴ The State Department’s Office of Inspector General (OIG) similarly contends: “It is not within OIG’s or the Department’s jurisdiction (or competence or desire) to provide oversight of USIBWC operations.”³⁵ Ironically, the OIG acknowledges “that most U.S. government agencies and the Congress view the [State] Department as the parent agency and that no other logical choice exists.”³⁶

C. GROSS MISMANAGEMENT, IMMINENT CATASTROPHE, AND PLAUSIBLE DENIABILITY

A limited investigation of USIBWC headquarters in 2005, during which no attempt was made to inspect levees or “follow up each allegation of neglect,”³⁷ nevertheless led the State Department OIG to warn: “Internal management problems have engulfed USIBWC, threatening its essential responsibilities for flood control and water management in the American Southwest.”³⁸ Among other things, the investigation found that the U.S. Commissioner “feels he can fire and hire, set salaries including his own, and generally run his agency without reference to other authority.”³⁹ A follow up report in 2006 stated that, while there is no immediate crisis, a major storm or flood could cause considerable damage and “usher in bouts of finger pointing between [d]epartments, agencies, and jurisdictions concerned.”⁴⁰

In response, the State Department insists that legislation would be needed to give it control over the USIBWC, yet still refuses to seek the mythical missing mandate.⁴¹ Ironically, however, the Department jealously guards its supposedly small patch of bureaucratic Astroturf.⁴²

34. Stephen P. Mumme & Scott T. Moore, *Agency Autonomy in Transboundary Resource Management: The United States Section of the International Boundary and Water Commission, United States and Mexico*, 30 NAT. RESOURCES J. 661, 679-80 (1990).

35. U.S. DEP’T. OF STATE, OFFICE OF INSPECTOR GEN., REPORT OF INSPECTION, U.S. SECTION OF THE INTERNATIONAL BOUNDARY AND WATER COMMISSION 10 (2006) [hereinafter OIG, 2006 REPORT], available at <http://oig.state.gov/documents/organization/83888.pdf>.

36. *Id.* See also, e.g., U.S. – Mex. Transboundary Aquifer Assessment Act, Pub. L. 109-448, § 3, 120 Stat. 3328, codified at 42 U.S.C. § 1962 (2006) (defining the IBWC as “an agency of the Department of State.”).

37. OIG, 2005 REPORT, *supra* note 31, at 31 (noting that the OIG found “disturbing evidence ... that maintenance of infrastructure is falling behind”).

38. *Id.* at 3.

39. *Id.* at 5, 11 (noting that the U.S. Commissioner set his own salary at a level equivalent to that of an armed forces secretary, even though the USIBWC has fewer than 300 employees).

40. OIG, 2006 REPORT, *supra* note 35, at 4; see also Press Release, Public Employees for Environmental Responsibility, *Obscure Border Agency Worst in Federal Government* (Aug. 10, 2009), http://www.peer.org/news/news_id.php?row_id=1228.

41. See OIG, 2006 REPORT, *supra* note 35, at 5.

42. See, e.g., Mumme & Moore, *supra* note 34, at 678-79 (describing the USIBWC’s success in resisting “predatory initiatives of other domestic Agencies”, through the support and political influence of the Secretary of State).

Watching from the sidelines, the State Department thus preserves “plausible deniability” that it should be held responsible for the ensuing devastation.⁴³ The State Department’s cloak of plausible deniability, however, does not shield the President, who is extremely ill-served by such gamesmanship.⁴⁴

Meanwhile, the White House shuffles Commissioners in and out of the U.S. Section on an almost yearly basis,⁴⁵ making little effort at substantive reform and, at times dramatically increasing the agency’s budget,⁴⁶ thus rewarding gross malfeasance. This all-too-familiar pattern of incentivizing failure⁴⁷ results in still more reports of fraud, waste and abuse,⁴⁸ leading one prominent environmental group to

43. The State Department may hope to hide among the alphabet soup of agencies implicated in other recent disasters, such as the British Petroleum (BP) oil spill or Hurricane Katrina, where the “finger pointing” implicated the former Minerals Management Service (MMS), or the Federal Emergency Management Agency (FEMA) and U.S. Army Corps of Engineers (USACE), respectively. See, e.g., Sandra Zellmer, *A Tale of Two Imperiled Rivers: Reflections from a Post-Katrina World*, 59 FLA. L. REV. 599, 600-01, 600 n.5 (2007) (regarding agency blame for failed levees and weak emergency response). The State Department is well-schooled in plausible deniability. See, e.g., David Barnhizer, *Waking from Sustainability’s “Impossible Dream”: The Decisionmaking Realities of Business and Government*, 18 GEO. INT’L ENVTL. L. REV. 595, 657-658 (2006) (“One need only recall the account given by former Terrorism Czar Richard Clarke concerning when the second Bush administration and National Security Advisor Condoleezza Rice had information concerning possible terror attacks prior to 9/11. Rice demonstrated as clearly as possible during her statements the ways that imprecise record keeping allows plausible deniability as part of a strategy to avoid accountability.”).

44. No one knows this better than President Obama’s pick to head the State Department’s Office of Legal Advisor, former Yale Dean and long-time international human rights advocate, Harold Hongju Koh. Indeed, one would expect Mr. Koh to waste no time pursuing comprehensive reform throughout the State Department, having denounced its most recent decade of depredations. See generally Harold Hongju Koh, *Restoring America’s Human Rights Reputation*, 40 CORNELL INT’L L.J. 635 (2007).

45. See OIG, 2005 REPORT, *supra* note 31, at 11 (“There have been five commissioners, permanent or acting, in the past five years, contrasting dramatically with the stability of the past.”) There have been three more U.S. Section Commissioners since 2004. *History of Section Commissioners*, U.S. INTERNATIONAL BOUNDARY & WATER COMMISSION, http://www.ibwc.gov/About_Us/Commish_History.html (last visited Mar. 10, 2011).

46. See generally SEC’Y OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION 683-696 (2011) [hereinafter STATE DEP’T BUDGET 2011], available at <http://www.state.gov/documents/organization/136355.pdf>; U.S. DEP’T OF STATE, AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 31, 36, 56 (2010) [hereinafter STATE DEP’T ARRA Plan 2009], available at <http://www.state.gov/documents/organization/126110.pdf>.

47. See Zellmer, *supra* note 43, at 600-01 (regarding increased agency budgets in the wake of Katrina malfeasance).

48. See, e.g., Memorandum from Robert McCarthy, USIBWC General Counsel, to Inspector General, Department of State (July 28, 2009) [hereinafter McCarthy Memo to OIG], available at http://www.peer.org/docs/tx/09_29_9_McCarthy_IG_complaint.pdf. See also 5 C.F.R. § 2635.101(b) (11) (2011) (“Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities”); Laura D. Francis, Bureau of National Affairs, Inc., *MSPB Appeal Claims General Counsel Fired for Making Protected Disclosures*, 47 GOV’T EMPL. REL. REP. 1124 (Oct. 6, 2009).

proclaim the USIBWC “arguably the most incompetent and abusive agency in federal service”.⁴⁹

Today, the USIBWC oversees a boundary region on the cusp of calamity, as polluted aquifers threaten to run dry,⁵⁰ irrigation gobbles up nearly all available water,⁵¹ ecological devastation spreads,⁵² and the flow of sewage imperils border communities.⁵³ In addition, flood control levees are beginning to crumble,⁵⁴ while millions of dollars are wasted on projects having nothing to do with the agency’s mission.⁵⁵ Furthermore, the USIBWC employs special interest advisory committees that mimic public participation,⁵⁶ whereas agency environmental regulations that were adopted without public input exclude a vast array of agency projects from significant review.⁵⁷ Meanwhile, inside the agency, deeply disillusioned employees rate

49. Press Release, Public Employees for Environmental Responsibility, *Obscure Border Agency Worst in Federal Government* (Aug. 10, 2009), http://www.peer.org/news/news_id.php?row_id=1228. (As a matter of full disclosure, PEER attorneys have represented the author in a whistleblower retaliation appeal to the MSPB).

50. See, e.g., FAR WEST TEXAS PLANNING WATER GROUP, FAR WEST TEXAS WATER PLAN 1-47, 1-71 (2011) [hereinafter FWTWPG 2011 Plan], available at http://www.twdb.state.tx.us/wrpi/rwp/3rdRound/2011_RWP/RegionE/PDFs/Complete_Final_Report.pdf; PAUL WESTERHOFF ET AL., DRINKING WATER QUALITY IN THE US-MEXICO BORDER REGION NUMBER W-03-19 35-36 (2004), available at scerptfiles.org/cont_mgt/doc_files/W-03-19-final.pdf.

51. See, e.g., LOWER RIO GRANDE REGIONAL WATER PLANNING GROUP, NRS CONSULTING ENGINEERS FINAL PLAN: REGION M 2011 REGIONAL WATER PLAN 2-14 (2010) [hereinafter LRGRWPG 2011 Plan], available at <http://www.riograndewaterplan.org/waterplan.php> (follow “Chapter 2: Current and Projected Population & Water Demand for the Rio Grande Region” hyperlink).

52. See, e.g., *Once a Mighty Delta: History*, ENVT’L DEF. FUND, <http://www.environmentaldefense.org/article.cfm?ContentID=2642> (last updated June 20, 2003).

53. See e.g., Wren Abbott, *State Orders IWBC to Clean up Discharge into River*, NOGALES INT’L, <http://www.nogalesinternational.com/articles/2010/10/27/news/doc4cc6f1c82f37c825012667.prt> (Oct. 26, 2010, 10:42 AM).

54. See, e.g., David Crowder, *Losing Money on the Levees*, EL PASO, INC., <http://elpasoinc.com/readArticle.aspx?issueid=300&xrec=5583> (last visited Jan. 29, 2011, 2:12 PM); McCarthy Memo to OIG, *supra* note 48, at 2-3.

55. See, e.g., McCarthy Memo to OIG, *supra* note 48, at 3-4 (regarding subsidies to Department of Homeland Security for a barrier portion of a joint levee-border barrier structure).

56. See Federal Advisory Committee Act (1972), Pub. L. No. 92-463, § 5, 86 Stat. 770 (as amended (1997)) (prohibiting special interests from inappropriately influencing the advice and recommendations of the advisory committee). See generally Press Release, USIBWC Seeks Applicants For Colorado River Citizens’ Forum (May 20, 2009), available at http://www.ibwc.gov/Files/PressRelease_052009.pdf; *Lower Rio Grande Citizens’ Forum Meeting*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Citizens_Forums/CF_Lower_RG.html (last visited Jan. 29, 2011).

57. See Operational Procedures for Implementing Section 102 of the National Environmental Policy Act of 1969, 46 Fed. Reg. 44083, 44086 (Sept. 2, 1981) [hereinafter, USIBWC NEPA Procedures].

their leadership as among the worst in the federal government.⁵⁸ And, most alarming of all, the agency conceals essential information, and downplays the threat of imminent catastrophic dam failures and disastrous flooding.⁵⁹

D. EXECUTIVE AUTHORITY AND ADAPTIVE TREATY INTERPRETATION

Due to the State Department's pusillanimous refusal to live up to its statutory responsibility for oversight of the agency, and its admitted lack of competence or desire to do so, both it and the USIBWC should be stripped of responsibility for all but the diplomatic aspects of treaty administration. All other treaty projects, personnel, and funds should be turned over to more competent domestic agencies. Not coincidentally, this would also permit the IBWC to eliminate the antiquated treaty requirement that engineers dominate agency leadership, rather than an array of competent professionals from a variety of appropriate disciplines. The agency would thus be free to focus on adaptive treaty interpretation, pursuant to treaty provisions giving the IBWC the authority to interpret the treaty and adopt new binding international agreements,⁶⁰ and to pursue new policy initiatives, with maximum public participation, in areas such as water conservation, water quality, groundwater protection, and environmental restoration.⁶¹

Admittedly, whether the USIBWC can or should survive, even as a diplomatic institution, is open to question. Even without a conscious policy to divest the USIBWC of responsibilities, the agency's role is increasing secondary to other agencies and institutions, such as the Border Environment Cooperation Commission (BECC).⁶² Even more

58. , Partnership for Public Service and American University's Institute for the Study of Public Policy, BEST PLACES TO WORK 2010, (*last visited* Jan. 29, 2011, 2:37 PM), available at <http://www.bestplacestowork.org/BPTW/rankings/detail/GW00/pdf>.

59. See, e.g., Emma Perez-Trevino, *Deficiencies Remain at Two Dams*, BROWNSVILLE HERALD, Aug. 1, 2010, <http://www.allbusiness.com/government/government-bodies-offices-us-federal-government/14877090-1.html>.

60. See 1944 Water Treaty, *supra* note 3, art. 25; *c.f.*, e.g., Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 705-713 (1998) (discussing constitutionally-implied judicial powers for dynamic treaty interpretation among private parties).

61. Although the IBWC has been loath to exercise its power to interpret and extend the treaty to adapt to changing circumstances, critics have recognized the wasted potential. See, e.g., Ingram & White, *supra* note 4, at 164-165. The United States has also been unwilling to risk an unfavorable outcome by referring disputes to impartial mediation in the IBWC. Note, *The International Joint Commission (United States-Canada) and the International Boundary and Water Commission (United States-Mexico): Potential for Environmental Control Along the Boundaries*, 6 INT'L L. & POL. 499, 516 (1973).

62. U.S. GEN. ACCOUNTING OFFICE, GAO/NAISD-00-26, U.S.-MEXICO BORDER 16 (2000) ("With the creation of the Border Environment Cooperation Commission and North American Development Bank, the role of the Boundary Commission in transboundary environmental infrastructure issues has been reduced."), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA374250&Location=U2&doc=GetTRDoc.pdf>. See also Michael

likely to displace the USIBWC, by dint of their size, powerful constituencies, technical competence and record of remarkable engineering accomplishments, are the U.S. Army Corps of Engineers,⁶³ and the U.S. Department of the Interior's Bureau of Reclamation.⁶⁴ Unfortunately, both also have dismal records of environmental destruction, secrecy, wasteful spending, and allegiance to regional special interests.⁶⁵ The best hope for U.S.-Mexico boundary water relations to achieve enlightened national and international policies is to separate diplomacy from the money-driven, regionally-controlled agenda of such institutions.⁶⁶ This is also the last best hope for the salvation of the USIBWC, and it can be accomplished without new legislation or treaties, by exercise of executive authority and adaptive treaty interpretation.

II. THE BOUNDARY AND WATER TREATIES

A. TREATY SOURCES

The word "treaties" refers to agreements made "by and with the Advice and Consent of the Senate."⁶⁷ International agreements that are not submitted to the Senate for its advice and consent may be concluded solely on the basis of presidential authority or on some form of legislative authorization, including authority derived from a treaty to which the Senate has already given its advice and consent.⁶⁸

Robins, *The North American Free Trade Agreement: The Integration of Free Trade and The Environment*, 7 TEMP. INT'L & COMP. L.J. 123, 134 (1993) ("The IBWC, however, has not been effective in addressing the major environmental problems on the border.").

63. See, e.g., Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572 (2000) (authorizing the Secretary of the Army to manage various projects for flood control including the Nogales Wash and its tributaries).

64. See, e.g., BUREAU OF RECLAMATION, A BRIEF HISTORY OF THE BUREAU OF RECLAMATION (2000), <http://www.usbr.gov/history/BRIEFHist.pdf> (recounting the construction of the Hoover Dam, the Central Valley Project, the Colorado River Storage Project, and the Central Arizona Project).

65. See, e.g., A. Dan Tarlock, *A First Look at a Modern Legal Regime for a "Post-Modern" United States Army Corps of Engineers*, 52 U. KAN. L. REV. 1285, 1285-87 (2004); Christine A. Klein, *On Dams and Democracy*, 78 OR. L. REV. 641, 679-82 (1999); Zellmer, *supra* note 43, at 602; William deBuys, *Navigating the River of Our Future: The Rio POCO-Grande*, 41 NAT. RESOURCES J. 265, 269 (2001) ("Through the post-war years the Bureau and the Army Corps of Engineers, in one of the unhealthiest bureaucratic competitions of all time, sought to outdo each other in building dams and reservoirs throughout the West. The Rio Grande did not escape their attention.").

66. See, e.g., A. Dan Tarlock, *Four Challenges for International Water Law*, 23 TUL. ENVTL. L.J. 369, 374-376 (2010) (International water law assumes "that transboundary rivers should be shared in such a way that allows each riparian state a realistic opportunity to make an equitable and reasonable utilization of this water. . . . All current formulations of equitable apportionment derive from the 1966 Helsinki Rules and the refinement of the Rules in the July 8, 1997, United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses").

67. U.S. CONST. art. II, § 2, cl. 2.

68. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32528 INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 1, 3 (2010), available at

Pursuant to the 1944 Water Treaty, the IBWC has entered into numerous such international agreements in the form of “Minutes,” which serve to implement or extend treaty provisions.⁶⁹

The State Department is responsible for compliance with statutory reporting and publishing requirements for international agreements other than treaties submitted to Congress. These authorities provide that an international agreement may not be concluded on behalf of the United States without prior consultation with the Secretary of State, and that reportable agreements must be transmitted to Congress within sixty days of entry into force.⁷⁰ The Department’s Office of Legal Adviser delegates this responsibility to the Office of Treaty Adviser, which in 2003 acknowledged with “shock and chagrin” that it had failed to comply with this responsibility with respect to over 600 agreements between 1996 and 2003.⁷¹

The IBWC treaties and selected Minutes are included in “Treaties in Force,” a list maintained by the State Department,⁷² and (since 1945) in the “Treaties and Other International Acts Series” (TIAS), also published by the State Department.⁷³ Citations to IBWC treaties and Minutes in this article are to one of the above sources, if available, or to another U.S. Treaty source,⁷⁴ if available. In the case of many IBWC Minutes not published elsewhere, the text of the Minutes may be found on the IBWC website.⁷⁵

B. TREATY OF GUADALUPE HIDALGO AND GADSDEN TREATY

The creation of the IBWC — and perhaps its karma — was foreshadowed by the 1848 Treaty of Guadalupe Hidalgo⁷⁶ and the

<http://www.fas.org/sgp/crs/misc/RL32528.pdf>.

69. See 1944 Water Treaty, *supra* note 3, art. 25; see also Minutes Between the United States and Mexican Sections of the IBWC, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Treaties_Minutes/Minutes.html (last visited Mar. 10, 2011).

70. Case-Zablocki Act of 1972, Pub. L. No. 92-403, 86 Stat. 619 (1972).

71. OFFICE OF INSPECTOR GEN., REPORT NO. ISP-C-05-01, REVIEW OF TREATY MANAGEMENT RESPONSIBILITIES IN THE OFFICE OF TREATY AFFAIRS 2 (2004), available at <http://oig.state.gov/documents/organization/146709.pdf>.

72. UNITED STATES STATE DEP’T, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE 178-79 (2010), available at <http://www.state.gov/s/l/treaty/tif/index.htm>.

73. *Treaties and Other International Acts Series (TIAS)*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/tias/index.htm>.

74. United States Treaties and Other International Agreements (UST) (1950-1982); Executive Agreement Series (EAS) (1928-1945); Treaty Series (TS) (1795-1945); U.S. Statutes at Large (Stat.) (until 1948); Treaties and Other International Agreements of the United States of America 1776-1949, compiled under the direction of Charles I. Bevans (Bevans); United Nations Treaty Series (UNTS).

75. *Minutes Between the United States and Mexican Sections of the IBWC*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Treaties_Minutes/Minutes.html (last visited Mar. 10, 2011).

76. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. 5, Feb. 2, 1848, 9 Stat. 922, [hereinafter Treaty of Guadalupe Hidalgo].

Gadsden Treaty of 1853,⁷⁷ which established temporary joint commissions to survey, map, and demarcate with ground landmarks the United States and Mexico boundary. The Treaty of Guadalupe Hidalgo ended the war between the United States and Mexico, designated the Rio Grande as the Texas border, reduced the size of Mexico by more than half, and doubled the territory of the United States, including parts of present-day Arizona, California, New Mexico, Texas, Colorado, Nevada, and Utah.⁷⁸ The Gadsden Treaty reestablished the southern boundary of New Mexico and Arizona to enable the United States to construct a railroad to the west coast along a preferred southern route, and transferred an additional twenty-nine million acres from Mexico to the United States.⁷⁹ Shamefully, the State Department attempts to foster collective American amnesia about this imperialist conquest of Mexico,⁸⁰ the basis for a continuing neocolonial relationship.⁸¹

C. CONVENTION OF 1884

As lands adjacent to boundary rivers were settled and developed for agriculture into the late nineteenth century, questions increasingly arose as to the location of the boundary when the rivers changed their courses and transferred tracts of land from one side of a river to the other. The two Governments established from time to time temporary commissions to resurvey and demarcate the boundaries. One such temporary Commission was established pursuant to the Convention of 1882,⁸² which specified that each nation appoint a “surveying party,

77. See Treaty of Boundary, Cession of Territory, Transfer of Isthmus Tehuantepec, U.S.-Mex., art. I, Dec. 30, 1853, 10 Stat. 1031 [hereinafter Gadsden Treaty].

78. Treaty of Guadalupe Hidalgo, *supra* note 76; See, e.g., *The Treaty of Guadalupe Hidalgo*, OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=26> (last visited Jan. 11, 2011); See generally, *Symposium: Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary*, 5 SW. J.L. & TRADE AM. 1 (1998).

79. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO-04-59, TREATY OF GUADALUPE HIDALGO, FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO 32 (2004), available at <http://www.gao.gov/new.items/d0459.pdf>. See also Treaty Terminating Article VIII of the Boundary Treaty of December 30, 1853 (Gadsden Treaty), U.S.-Mex., April 13, 1937, 52 Stat. 1457.

80. For example, a recent “Background Note” on Mexico describes the country’s demographics, economy, geography, political history, and foreign relations, with specific reference to the “decade-long struggle for independence from Spain” between 1810 and 1820, and “the invasion of French forces in 1862,” but cynically skips over the Mexican-American War without mention. See *Background Note: Mexico*, U.S. STATE DEP’T (Dec. 14, 2010), <http://www.state.gov/r/pa/ei/bgn/35749.htm>.

81. See, e.g., MICHAEL PARENTI, AGAINST EMPIRE 33, 38-39 (1995) (discussing the impacts of United States global domination); SIDNEY WEINTRAUB, UNEQUAL PARTNERS: THE UNITED STATES AND MEXICO 2 (2010); Gilbert G González & Raúl Fernández, *Empire and the Origins of Twentieth-Century Migration from Mexico to the United States*, 71 PAC. HIST. REV. 19, 19 (2002).

82. United States-Mexico Convention Providing for an International Boundary Survey to Relocate the Existing Frontier Line Between the Two Countries West of the

consisting of an Engineer-in-Chief, two Associates, one of whom shall be a practical astronomer, and such number of assistant engineers and associates as it may deem proper."⁸³ Meeting together, the two surveying parties were deemed the International Boundary Commission (IBC).⁸⁴ By adoption of the Convention of November 12, 1884, the two nations agreed to maintain as the boundary the center of the normal channels of the Rio Grande and Rio Colorado, notwithstanding "slow and gradual" changes in the courses of those rivers.⁸⁵

D. CONVENTION OF 1889

By the Convention of March 1, 1889, the Governments of the United States and Mexico re-established the IBC, which was intended as another temporary body to apply the boundary principles previously agreed upon.⁸⁶ This time, however, its life was extended indefinitely, first by agreement in 1900,⁸⁷ and again by article 2 of the 1944 Water Treaty.⁸⁸ The Convention of 1889 vested exclusive jurisdiction over boundary questions along the Rio Grande or Colorado Rivers in the IBC.⁸⁹ The convention specifies the appointment of a Commissioner, a Consulting Engineer, Secretaries, and Interpreters by each nation to compose the IBC.⁹⁰ The IBC was empowered to investigate any changes to the river boundary caused by avulsion or erosion and to apply the respective principles of the 1884 Convention.⁹¹ The IBC was to determine whether any works constructed in the rivers were permitted or prohibited by prior treaties,⁹² subpoena witnesses,⁹³ and make binding determinations.⁹⁴ The Banco Convention of 1905 modified the Convention of 1884 to retain the Rio Grande and the

Rio Grande, U.S.-Mex., art. II, July 29, 1882, 22 Stat. 986 [hereinafter Convention of 1882], available at http://www.ibwc.gov/Files/TREATY_OF_1882.pdf. The Convention was renewed on Dec. 5, 1885, 25 Stat. 1390, and again on February 13, 1889, 25 Stat. 1493.

83. Convention of 1882, *supra* note 82, at art. II.

84. *Id.*

85. Convention Between the United States of America and the United States of Mexico Touching the International Boundary Line Where it Follows the Bed of the Rio Grande and the Rio Colorado, U.S.-Mex., art. I, Nov. 12, 1884, 24 Stat. 1011 [hereinafter Convention of 1884].

86. Convention of 1889, *supra* note 2, at art. I.

87. Convention Between the United States of America and the United States of Mexico, Extending for an Indefinite Period the Treaty of March 1, 1889, Between the two Governments, Known as the Water Boundary Convention, U.S.-Mex., Nov. 21, 1900, 31 Stat. 1936. There were numerous temporary extensions: Aug. 24, 1894, 28 Stat. 1213; Nov. 6, 1896, 29 Stat. 857; Oct. 29, 1897, 30 Stat. 1625; Dec. 2, 1898, 30 Stat. 1744.

88. 1944 Water Treaty, *supra* note 3, at art. 2.

89. Convention of 1889, *supra* note 2, at art. I.

90. *Id.* at art. II.

91. *Id.* at art. IV.

92. *Id.* at art. V.

93. *Id.* at art. VII.

94. *Id.* at art. VIII.

Colorado River as the international boundary.⁹⁵

E. CONVENTION OF 1906

The Convention of May 21, 1906, provided for the distribution between the United States and Mexico of the waters of the Rio Grande above Fort Quitman, Texas for the eighty-nine-mile international boundary reach of the Rio Grande through the El Paso-Juárez Valley. This Convention allotted to Mexico 60,000 acre-feet annually of the waters of the Rio Grande to be delivered in accordance with a monthly schedule at the headgate to Mexico's Acequia Madre just above Juárez, Chihuahua. To facilitate such deliveries, the United States constructed, at its expense, the Elephant Butte Dam in New Mexico. The Convention includes the proviso that "[i]n case . . . of extraordinary drought or serious accident to the irrigation system in the United States, the amount of water delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States," downstream of Elephant Butte Dam.⁹⁶

F. CONVENTION OF 1933

At the Convention of February 1, 1933, the two governments agreed to jointly construct, operate, and maintain, through the IBC, the Rio Grande Rectification Project, which straightened and stabilized the 155-mile river boundary through the highly developed El Paso-Juárez Valley. The project further provided for the control of the river's floods through this Valley.⁹⁷

G. 1944 WATER TREATY

The Treaty of February 3, 1944 for the "Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande" marks the modern era of the IBWC.⁹⁸ Article 1 defines various terms used in the treaty. Article 2 indefinitely extends the Convention of 1889; changes the name of the IBC to the IBWC; specifies a structure comprising a United States Section and a Mexican Section; requires that each section designate an "Engineer Commissioner . . . two principal engineers, a legal advisor and a secretary"; entrusts the IBWC with authority for "settlement of all disputes" that may arise under the

95. Convention Between the United States and Mexico for the Elimination of the Bancos in the Rio Grande from the Effects of Article II of the Treaty of November 12, 1884, U.S.-Mex., arts. I, II, Mar. 20, 1905, 35 Stat.1863.

96. See Convention of 1906, *supra* note 15. A 1987 agreement provided for re-division of Rio Grande waters allocated to Mexico under the Convention of 1906. Boundary Waters Agreement Between the United States of America and Mexico, June 24-Nov. 10, 1987, U.S.-Mex., T.I.A.S. 11,549.

97. Convention for the Rectification of the Rio Grande, U.S.-Mex., Feb. 1, 1933, 48 Stat. 1621 [hereinafter Convention of 1933].

98. See 1944 Water Treaty, *supra* note 3; see also *Mexican Water Treaty Reservations: Hearing Before the S. Comm. on Foreign Relations, 79th Cong. 3 (1945)*.

treaty; provides that the IBWC "shall in all respects have the status of an international body"; and specifies that "wherever . . . Treaty [provisions call] for joint action or joint agreement by the two [g]overnments, or for the furnishing of reports, studies or plans to the two [g]overnments, or similar provisions . . . [such] matter[s] . . . shall be handled by or through the Department of State of the United States and the [Secretariat] of Foreign Relations of Mexico."⁹⁹

Article 3 sets forth a "guide" for the joint use of international waters, with the following order of preference: "(1) Domestic and municipal uses, (2) Agriculture and stock-raising, (3) Electric power, (4) Other industrial uses, (5) Navigation, (6) Fishing and hunting, (7) Any other beneficial uses which may be determined by the Commission." In addition, the treaty provides that "[a]ll of the foregoing uses shall be subject to any sanitary measures or works which may be mutually agreed upon by the two [g]overnments, which hereby agree to give preferential attention to the solution of all border sanitation problems."¹⁰⁰

Article 4 of the 1944 Water Treaty allocated the waters of the Rio Grande from Fort Quitman to the Gulf of Mexico, between the United States and Mexico. The treaty allocates to Mexico: (1) "all of the waters reaching the main channel of the Rio Grande from the San Juan and Alamo Rivers"; (2) "[t]wo-thirds of the flow [in] the main channel of the Rio Grande from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo," subject to certain provisions; and (3) "one-half of all other flows . . . occurring in the main channel of the Rio Grande" downstream from Fort Quitman.

The treaty then allocates to the United States: (1) "[a]ll of the waters reaching the main channel of the Rio Grande from the Pecos and Devils Rivers, Goodenough Spring and Alamito, Terlingua, San Felipe and Pinto Creeks"; (2) one-third of the flow reaching the main channel of the river from the six named measured tributaries from Mexico and provides that "this third shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet annually"; and (3) "[o]ne-half of all other flows . . . occurring in the main channel of the Rio Grande" downstream from Fort Quitman.¹⁰¹

Article 4 also provides that if an "extraordinary drought" prevents Mexico from being able to deliver the 350,000 acre-feet annual average required from the Mexican tributaries to the Rio Grande, "any deficiencies existing at the end of the . . . five-year cycle shall be made up in the following five-year cycle with water from the . . . measured tributaries" to which the United States has the right to a one-third share. The term, "extraordinary drought," is not defined.¹⁰²

99. 1944 Water Treaty, *supra* note 3, arts. 1-2. Article 2 also terminated the Convention of November 21, 1900 between the United States and Mexico. *Id.* at art. 2.

100. *Id.* at art. 3.

101. *Id.* at art. 4.

102. *Id.* at art. 4.

Article 5 provides for the two Governments to jointly construct dams on the main channel of the Rio Grande, for the conservation, storage and regulation of the river's flow.¹⁰³ Articles 6 and 7 provide for the IBWC to study, investigate and report to the governments on such flood control works, including levees, floodways, works for canalization and rectification, and hydroelectric facilities that the IBWC finds should be built on the boundary rivers.¹⁰⁴

Article 8 provides for regulations to be adopted, subject to amendment, providing that dams above the lowest on the Rio Grande maintain the maximum quantity of water in storage consistent with irrigation use, flood control, and power requirements.¹⁰⁵ Article 9 provides that in the event of "extraordinary drought," which again is not defined, "water stored in the international storage reservoirs and belonging to the country enjoying . . . abundant water supply may be withdrawn, with . . . consent of the [IBWC], for use of the country undergoing the drought."¹⁰⁶

Article 10 provides that a guaranteed annual quantity of 1.5 million acre-feet of the waters of the Colorado River are allotted to Mexico. In the event of "extraordinary drought" (again not defined) deliveries to Mexico are reduced proportionately to the reduction in U.S. consumption.¹⁰⁷ Article 11 provides for timelines, places, and methods of delivery of Mexican water, including by use of the All-American Canal.¹⁰⁸

Article 12 allowed Mexico to divert its allocation of water by providing Mexico the authority to construct a main diversion structure in the Colorado River, below the California-Baja California boundary line. It further provides Mexico with the authority to build, at its own expense, within the United States, any works it may need to protect Mexican lands from floods and seepage that the construction and operation of the diversion structure might cause.¹⁰⁹

Article 13 provides that the IBWC will study the need for construction of flood control works on the Lower Colorado and to make recommendations to the two governments for construction of such works as are deemed necessary.¹¹⁰ Article 14 provides that in exchange for use of the All-American Canal to deliver Mexican waters, Mexico shall pay a share of the cost of construction and operation of the Imperial Dam and a section of the canal.¹¹¹ Article 15 concerns schedules for delivery of Mexico's share of Colorado River waters.¹¹²

103. *Id.* at art. 5.

104. *Id.* at arts. 6-7.

105. *Id.* at art. 8.

106. *Id.* at art. 9(f).

107. *Id.* at art. 10.

108. *Id.* at art. 11.

109. *Id.* at art. 12(a).

110. *Id.* at art. 13.

111. *Id.* at art. 14.

112. *Id.* at art. 15.

Article 16 calls for the IBWC to investigate and make recommendations to the two governments for equitable distribution of the waters of the Tijuana River system and for construction of flood control works and works to promote "domestic, irrigation and other feasible uses of the waters."¹¹³

Article 17 concerns general provisions allowing use of international river channels for discharge of flood waters.¹¹⁴ Article 18 makes international reservoirs formed by IBWC dams free for use by residents of both countries and prohibits their use for military purposes.¹¹⁵ Article 19 provides for adoption of regulations concerning international power plants.¹¹⁶ Article 20 specifies that each country is free to construct its share of works through any public or private entity, not limited to the IBWC itself, with the portion of works located in each country being subject to its respective laws.¹¹⁷

Article 21 provides that the international boundary shall not be affected by the creation of reservoirs pursuant to construction of international dams.¹¹⁸ Article 22 provides that the Convention of 1933 shall govern boundary matters where canalization or rectification works are carried out on the Rio Grande or Colorado River.¹¹⁹ Article 23 provides that where private property is required for construction of treaty works, the country in which such property is located will bear the cost of acquiring such property and that joint works or portions thereof shall be subject to the jurisdiction of the country in which they are located.¹²⁰

Article 24 provides the IBWC with the authority to "to initiate and carry on investigations and develop plans for the works which are to be constructed . . . in accordance with the provisions of this and other treaties or agreements"; to construct, operate and maintain such works "in accordance with the respective domestic laws of each country"; and "[t]o settle all differences that may arise between the two [g]overnments with respect to the interpretation or application of this Treaty, subject to the approval of the two [g]overnments."¹²¹

Article 25 empowers the IBWC to interpret and apply the provisions of the treaty through the "Minute" system. The decisions of the U.S. and Mexican Sections are to be recorded as Minutes and sent to each government within three days of signature by the Commissioners. Each government, the Department of State of the United States and the Secretariat of Foreign Relations of Mexico must approve the Minute within thirty days of receiving it. If there is no

113. *Id.* at art. 16.

114. *Id.* at art. 17.

115. *Id.* at art. 18.

116. *Id.* at art. 19.

117. *Id.* at art. 20.

118. *Id.* at art. 21.

119. *Id.* at art. 22.

120. *Id.* at art. 23.

121. *Id.* at art. 24.

objection, the Minute becomes a binding agreement and extension of the treaty between the two countries.¹²²

Articles 26 and 27 of the 1944 Water Treaty are transitory provisions for implementation of the treaty, and Article 28 provides for ratification of the treaty.¹²³ The Protocol, which is made a part of the treaty, re-emphasizes that where public works are located wholly within one country and used only partly for meeting requirements of the treaty, jurisdiction and control over such works will remain with the designated federal agencies of that country, and such agencies are to coordinate with its section of the IBWC. International works and those constructed exclusively for treaty purposes are to remain under the jurisdiction of the IBWC, in accordance with the treaty, although each government may utilize the services of any public or private entity pursuant to its respective domestic laws.¹²⁴

H. 1963 CHAMIZAL CONVENTION

The Chamizal Convention of August 29, 1963, resolved the Chamizal dispute, a nearly 100-year-old boundary problem at El Paso-Juárez. The dispute arose in the late nineteenth century when the course of the Rio Grande river moved, and in the process transferred some six hundred acres of territory to the north side of the river. The dispute grew increasingly bitter after the United States refused to abide by a 1911 arbitration award in favor of Mexico.¹²⁵ The 1963 Convention provided for the relocation of 4.4 miles of the channel of the Rio Grande, thereby transferring over four hundred acres to the south side of the river.¹²⁶

I. 1970 BOUNDARY TREATY

The Boundary Treaty of November 23, 1970 provides that the Rio Grande and the Colorado Rivers would remain the international boundaries, and also resolved other pending boundary disputes.¹²⁷ The treaty also recognizes the necessity for implementing legislation in each country.¹²⁸ It then provides for restoration and preservation of

122. *Id.* at art. 25.

123. *Id.* at arts. 26-28.

124. *Id.* at Protocol.

125. *See* Convention for the Arbitration of the Chamizal Case, U.S.-Mex., June 24, 1910, 36 Stat. 2481; Supplementary Protocol to the Chamizal Arbitration, U.S.-Mex., Dec. 5, 1910, 33 Stat. 2487. *See, e.g.*, SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT 1864-1964 33-36 (1965).

126. *See* Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21.

127. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mex., art. VIII, Nov. 23, 1970, 23 UST 371 [hereinafter 1970 Boundary Treaty] (terminating the Convention of 1884 and any inconsistent provisions of prior agreements, including the Convention of 1889, the Convention of 1933, the Treaty of Guadalupe Hidalgo, and the Gadsden Treaty).

128. *See id.* at 374-75.

the character of the Rio Grande as the international boundary, in order to minimize changes in the channel, and resolve potential future sovereignty issues that might occur as a result.¹²⁹ The treaty further provides for a procedural framework that attempts to prevent the loss of either country's territory due to future changes in the river's course.¹³⁰ It specifically recognizes the right of each Government to protect its banks from erosion, and its responsibility to avoid construction in the Rio Grande channel that may cause deflection or obstruction of normal or flood flows.¹³¹ Finally, the treaty establishes maritime boundaries in the Gulf of Mexico and the Pacific Ocean.¹³²

As a result of the 1970 Boundary Treaty, together with earlier agreements:

[T]he [international] boundary extends 1,954 miles, excluding the maritime boundaries of 18 miles in the Pacific Ocean and 12 miles in the Gulf of Mexico. Beginning at the Gulf of Mexico, the U.S.–Mexico continental boundary follows the centerline of the Rio Grande a distance of 1,255 miles from the Gulf to a point in El Paso, Texas and Ciudad Juárez, Chihuahua. From this point, the boundary follows a westward alignment marked by monuments and markers overland below New Mexico and Arizona a distance of 534 miles to the Colorado River. The boundary continues northward along the centerline of the Colorado River for 24 miles, where it once again follows a westward alignment marked by monuments and markers overland below California to the Pacific Ocean a distance of 141 miles.¹³³

III. THE IBWC MINUTES

A. ADAPTIVE TREATY INTERPRETATION UNDER THE 1944 WATER TREATY

Some argue that the power to interpret treaties, at least those governing relations among private actors without the direct involvement of states, is implicitly delegated to the judiciary under constitutional principles.¹³⁴ According to this view, the doctrine of “dynamic treaty interpretation” permits the judiciary to fashion new substantive law as normative gaps emerge in a treaty's express provisions, thus preventing rapid obsolescence under constantly changing technological and social conditions.¹³⁵ The constitutional basis for such a judicial delegation has been challenged; the opposing argument is that the president has “unilateral authority” to interpret

129. *Id.* at 381.

130. *Id.* at 383.

131. *Id.* at 390-91.

132. *Id.* at 393-94.

133. See *The International Boundary: United States and Mexico*, INT'L BOUNDARY & WATER COMM'N, http://www.ibwc.gov/About_Us/About_Us.html (last visited Mar. 12, 2011).

134. See Alstine, *supra* note 60, at 690-92.

135. *Id.* at 761-84.

or reinterpret treaties, notwithstanding their domestic law effect.¹³⁶ There is general agreement that the president may interpret treaties that are not “self-executing,” and thus do not have the force of federal law absent statutory implementation.¹³⁷

Luckily, the 1944 Water Treaty largely evades this debate by explicitly placing authority for treaty interpretation with the IBWC.¹³⁸ The Treaty similarly provides the IBWC with the authority to make decisions that arguably could extend the provisions of the treaty through the “Minute” system, subject to the right of the respective Governments to timely disapprove such agreements.¹³⁹ Unfortunately, the IBWC has been reluctant to use the latter power, leading to a static reading of a sixty-five-year-old treaty, as if time stood still and the vast growth and development of the border region never happened. The USIBWC celebrates the “Minute” process, even posting on its website the full text of pre-1944 decisions of the Commission, but an examination of all 318 Minutes adopted by the IBWC since 1906 indicates there have been only a few occasions when IBWC Minutes even hint at the promise of adaptive treaty interpretation.¹⁴⁰

B. PRE-1944 MINUTES

Although the application of the term “Minute” to mean a joint decision of the Mexican and American sections would not be referenced in a Treaty until 1944,¹⁴¹ the IBC nevertheless adopted 140 Minutes between 1906 and 1933. The character of these Minutes, however, is more in line with the traditional meaning of the term, as applied to a record of a meeting rather than a new binding agreement. Several of the Minutes, for example, merely record the exchange of credentials of members of both Sections of the Commission.¹⁴²

136. Yoo, *supra* note 28, at 868-70, 878; *contra* Alstine, *supra* note 28, at 1263.

137. See, e.g., Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1942-44 (2005) (distinguishing the presidential power concerning treaties that are not “self-executing” from the exclusive and final authority that the federal courts have to interpret “self-executing” treaties); see also Alstine, *supra* note 28, at 1267-68.

138. 1944 Water Treaty, *supra* note 3, at 1222, 1255-56. The IBWC’s unique status as a non-judicial body able to resolve treaty disputes has been widely admired, even if its application has been somewhat exaggerated. See, e.g., Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT’L L. 808, 826 (2006) (citing only the IBWC’s own publication, unfortunately, to support the claim that “the commission has successfully managed many aspects of the border—typically, very technical work involving demarcation, sanitation, dam management, and water-quality control”).

139. 1944 Water Treaty, *supra* note 3, at 1258.

140. See *Minutes Between the United States and Mexican Sections of the IBWC*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Treaties_Minutes/Minutes.html (last visited Mar. 12, 2011).

141. 1944 Water Treaty, *supra* note 3, at 1258.

142. International Boundary Commission [IBC], *Minute 97: Credentials of Lawrence M. Lawson Presented as Commissioner, Study to be Made of an International Convention for Rectification of Rio Grande*, at 1 (June 4, 1927), available at <http://www.ibwc.gov/Files/Minutes/Min97.pdf>; IBC, *Minute 38: Credentials of Joaquin*

Although many Minutes record decisions taken in apparently routine IBC meetings, these were mostly mundane, such as directions given to IBC engineers to inspect and report on various works or obstructions in the river channels.¹⁴³ The thirty-six Minutes adopted pursuant to the Convention of 1933 are mostly indistinguishable in character from the earlier Minutes, except they include numerous references to rectification works.¹⁴⁴

C. Bustamante Presented as First Engineer of Mexican Section, at 1 (May 9, 1924), available at <http://www.ibwc.gov/Files/Minutes/Min38.pdf>; *IBC, Minute 12: Gustavo P. Serrano Presented Credentials as Commissioner and Presented Armando Santacruz, Jr., as Consulting Engineer* (Nov. 27, 1923), available at <http://www.ibwc.gov/Files/Minutes/Min12.pdf>; *IBC, Minute 1: Exchange of Credentials of Members of both Sections of the Commission* (Oct. 3, 1922), available at <http://www.ibwc.gov/Files/Minutes/Min1.pdf>.

143. E.g., *IBC, Minute 138: Elimination of El Morilo Banco*, at 1 (Feb. 25, 1932), available at <http://www.ibwc.gov/Files/Minutes/Min138.pdf>; *IBC, Minute 129: Report on Rio Grande Rectification*, at 1-2 (July 31, 1930), available at <http://www.ibwc.gov/Files/Minutes/Min129.pdf>; *IBC, Minute 118: Levee for Protection of Town of Guadalupe, Chihuahua*, at 1 (Dec. 30, 1929), available at <http://www.ibwc.gov/Files/Minutes/Min118.pdf>; *IBC, Minute 111: Preliminary Report on Stabilization of the Boundary Line and Rectification of the Rio Grande by the Commissioners*, at 1 (Dec. 21, 1928), available at <http://www.ibwc.gov/Files/Minutes/Min111.pdf>; *IBC, Minute 96: Brownsville, Texas Re-survey and Inspection of 40 Alleged Bancos*, at 1 (Apr. 22, 1927), available at <http://www.ibwc.gov/Files/Minutes/Min96.pdf>; *IBC, Minute 70: Consulting Engineers Instructed to Make Survey of Colorado River and Investigate Changes, Aerial Survey Suggested*, at 1 (Jan. 14, 1926), available at <http://www.ibwc.gov/Files/Minutes/Min70.pdf>; *IBC, Minute 57: Report of Consulting Engineers Submitted Relative to Construction of Revetment on Rio Grande near Matamoros*, at 1 (May 27, 1925), available at <http://www.ibwc.gov/Files/Minutes/Min57.pdf>; *IBC, Minute 32: Instructions Given Consulting Engineers for Construction and Placement of Markers in English and Spanish on Gaging Stations*, at 1 (Mar. 11, 1924), available at <http://www.ibwc.gov/Files/Minutes/Min32.pdf>; *IBC, Minute 19: Consulting Engineers Requested to Report in Writing if Obstructions Placed in River near Brownsville Have Been Fully Removed*, at 1 (Dec. 7, 1923), available at <http://www.ibwc.gov/Files/Minutes/Min19.pdf>; *IBC, Minute 8: Channel of Rio Grande at Point Called "El Mulato" Ordered Marked by Stakes*, at 1-2 (Oct. 16, 1922), available at <http://www.ibwc.gov/Files/Minutes/Min8.pdf>; *IBC, Minute 3: Consulting Engineers Instructed to Investigate Case or Construction of Dam in Rio Grande Opposite Colonia "El Porvenir"*, at 1 (Oct. 16, 1922), available at <http://www.ibwc.gov/Files/Minutes/Min3.pdf>; *IBC, Minute 2: Mexican Commissioner Requested Investigation of Certain Bank and Obstruction Cases, American Commissioner Suggested Their Submission in Writing for Consideration*, at 1 (Oct. 3, 1922), available at <http://www.ibwc.gov/Files/Minutes/Min2.pdf>.

144. *IBC, Minute 172: Monumentation of New Bridge over the Rio Grande Between Hidalgo, Texas and Reynosa, Tamaulipas*, at 1 (Aug. 30, 1941), available at <http://www.ibwc.gov/Files/Minutes/Min172.pdf>; *IBC, Minute 168: Works Which Each Government Should Undertake on Account of Existing Conditions in the Channel of the Rio Grande at El Paso, Texas, and Ciudad Juarez, Chihuahua*, at 1-2 (Dec. 20, 1939), available at <http://www.ibwc.gov/Files/Minutes/Min168.pdf>; *IBC, Minute 158: Plan of Location of the Rectified Channel of the Rio Grande in the El Paso-Juarez Valley*, at 1 (June 14, 1937), available at <http://www.ibwc.gov/Files/Minutes/Min158.pdf>; *IBC, Minute 145: Regulations Pertaining to Elimination of Tracts Segregated by the Rio Grande Rectification Works, Pursuant to Convention of Feb. 1, 1933*, at 1-2 (June 11, 1935), available at <http://www.ibwc.gov/Files/Minutes/Min145.pdf>; *IBC, Minute 144: Plans of Final Location of Rectified Channel of the Rio Grande in the El Paso-Juarez Valley*, at 1 (June 14, 1934), available at <http://www.ibwc.gov/Files/Minutes/Min144.pdf>.

C. MINUTES ADOPTED PURSUANT TO THE 1944 WATER TREATY

Article 25 of the 1944 Water Treaty imbues the term “Minute” with extraordinary powers, stating, in part:

Decisions of the Commission shall be recorded in the form of Minutes Except where the specific approval of the two Governments is required by any provision of this Treaty, if one of Governments fails to communicate to the Commission its approval or disapproval of a decision of the Commission within thirty days reckoned from the date of the Minute in which it shall have been pronounced, the Minute in question and the decisions which it contains shall be considered to be approved by that Government.¹⁴⁵

Notwithstanding the seminal “minute” language in the 1944 Water Treaty, the vast majority of the one hundred forty-two additional Minutes adopted since 1944 are again mostly indistinguishable from earlier Minutes, except for the emphasis on new works to be constructed under the Treaty, such as international storage dams and water treatment facilities, as well as arrangements for water deliveries.¹⁴⁶ The scale of many of these decisions and projects, however, suggests that the considerable power delegated to the IBWC has been exercised to some extent.

In a 1958 Minute, the IBWC agreed to joint operation and maintenance of the Nogales International Sanitation Project,¹⁴⁷ for the first time breathing life into the sanitation clause of the 1944 Water Treaty.¹⁴⁸ A 1967 agreement followed, to enlarge the international facilities for the treatment of Nogales sewage,¹⁴⁹ and in 1988, the two governments adopted a joint report concerning the “conveyance, treatment and disposal of sewage from [Ambos Nogales (both Nogales)] exceeding the capacities previously allocated to [the United States and Mexico] at the Nogales International Sewage Treatment

145. 1944 Water Treaty, *supra* note 3, at 1257-58.

146. *E.g.*, IBWC, *Minute 304: Joint Grant Contribution Program for Drinking Water and Wastewater Infrastructure Projects for Communities in the United States - Mexico Border Area*, at 1 (Oct. 26, 2000), available at <http://www.ibwc.gov/Files/Minutes/Min304.pdf>; IBWC, *Minute 216: Operation and Maintenance of the International Plant for Treatment of Agua Prieta, Sonora, and Douglas, Arizona Sewage*, at 1 (Mar. 18, 1964), available at <http://www.ibwc.gov/Files/Minutes/Min216.pdf>; IBWC, *Minute 187: Determinations as to Site and Required Capacities of the Lowest Major International Storage Dam to be Built on the Rio Grande, in Accordance with the Provisions of Article 5 of the Treaty Concluded Feb. 3, 1944*, at 1 (Dec. 20, 1947), available at <http://www.ibwc.gov/Files/Minutes/Min187.pdf>; IBWC, *Minute 185: Proposing Agreement Relative to the Emergency Use of the All-American Canal for the Delivery of Water for Use in Mexico During the 1947 Irrigation Season*, at 1 (Jan. 25, 1947), available at <http://www.ibwc.gov/Files/Minutes/Min185.pdf>.

147. IBWC, *Minute 206: Joint Operation and Maintenance of the Nogales International Sanitation Project*, at 1 (Jan. 13, 1958), available at <http://www.ibwc.gov/Files/Minutes/Min206.pdf>.

148. 1944 Water Treaty, *supra* note 3, at 1225.

149. IBWC, *Minute 227: Enlargement of the International Facilities for the Treatment of Nogales, Arizona and Nogales, Sonora Sewage*, at 1 (Sept. 5, 1967), available at <http://www.ibwc.gov/Files/Minutes/Min227.pdf>.

Plant.”¹⁵⁰ Similarly, a 1964 Minute provided for joint “operation and maintenance of the international plant for treatment of Agua Prieta, Sonora, and Douglas, Arizona sewage,”¹⁵¹ and in 1965, the IBWC agreed to improve and expand the Douglas - Agua Prieta international sewage treatment plant.¹⁵²

A similar evolution of Minutes led to the development of additional sanitation works elsewhere along the border, pursuant to a 1979 Minute in which the IBWC agreed to develop plans for the solution of sanitation problems all along the border.¹⁵³ In 1985, the IBWC approved plans for construction of a first stage treatment plant near Tijuana,¹⁵⁴ followed in 1990 by a conceptual plan for joint construction of a secondary treatment plant,¹⁵⁵ and in 1997 by recommendations for construction of sewage treatment works near Tijuana.¹⁵⁶ In 2004, the IBWC made further recommendations for secondary treatment in Mexico of Tijuana River area sewage, in a Minute that is especially notable because Congress had specifically requested the Secretary of State to negotiate such a Minute.¹⁵⁷ The IBWC made tentative recommendations in 1980 “for solution of the

150. IBWC, *Minute 276: Conveyance, Treatment and Disposal of Sewage from Nogales, Arizona and Nogales, Sonora Exceeding the Capacities Allocated to the United States and Mexico at the Nogales International Sewage Treatment Plant Under Minute No. 227*, at 1 (July 26, 1988), available at <http://www.ibwc.gov/Files/Minutes/Min276.pdf>.

151. IBWC, *Minute 216: Operation and Maintenance of the International Plant for Treatment of Agua Prieta, Sonora and Douglas, Arizona Sewage*, at 1 (Mar. 18, 1964), available at <http://www.ibwc.gov/Files/Minutes/Min216.pdf>.

152. IBWC, *Minute 220: Improvement and Expansion of the International Plant for the Treatment of Douglas, Arizona, and Agua Prieta, Sonora Sewage*, at 1 (July 16, 1965), available at <http://www.ibwc.gov/Files/Minutes/Min220.pdf>.

153. IBWC, *Minute 261: Recommendations for the Solution to the Border Sanitation Problems*, at 1-2 (Sept. 24, 1979), available at <http://www.ibwc.gov/Files/Minutes/Min261.pdf>.

154. IBWC, *Minute 270: Recommendations for the First Stage Treatment and Disposal Facilities for the Solution of the Border Sanitation Problem at San Diego, California-Tijuana, Baja California*, at 4 (Apr. 30, 1985), available at <http://www.ibwc.gov/Files/Minutes/Min270.pdf>. The IBWC had earlier provided for emergency connection of the sewage system of the city of Tijuana to the metropolitan sewage system of the city of San Diego. See IBWC, *Minute 222: Emergency connection of the sewage system of the city of Tijuana, Baja California, to the Metropolitan sewage system of the city of San Diego, California*, at 1-2 (Nov. 30, 1965), available at <http://www.ibwc.gov/Files/Minutes/Min222.pdf>.

155. IBWC, *Minute 283: Conceptual Plan for the International Solution to the Border Sanitation Problem in San Diego, California/Tijuana, Baja California*, at 1-3 (July 2, 1990), available at <http://www.ibwc.gov/Files/Minutes/Minute283.pdf>.

156. IBWC, *Minute 298: Recommendations for Construction of Works Parallel to the City of Tijuana, B.C. Wastewater Pumping and Disposal System and Rehabilitation of the San Antonio de los Buenos Treatment Plant*, at 7-8 (Dec. 2, 1997), available at <http://www.ibwc.gov/Files/Minutes/Min298.pdf>.

157. IBWC, *Minute 311: Recommendations for Secondary Treatment in Mexico of the Sewage Emanating from the Tijuana River Area in Baja California, Mexico*, at 2, 5 (Feb. 20, 2004), available at <http://www.ibwc.gov/Files/Minutes/Min311.pdf>; see also Act of Nov. 7, 2000, Pub. L. No. 106-457, 114 Stat. 1957, (codified as amended at 22 U.S.C. § 277d-45(b) (2006)) (encouraging the restoration of estuary habitat through more efficient project financing and enhanced coordination of Federal and non-Federal restoration programs).

New River border sanitation problems at Calexico, California – Mexicali, Baja California Norte.”¹⁵⁸ A plan for joint funding of sewage treatment operations in Mexicali followed in 1987,¹⁵⁹ with another report in 1992 concerning Mexico’s sewage treatment operations,¹⁶⁰ and ultimately an agreement to monitor pollution in the New River.¹⁶¹ Since then, Mexico has built wastewater treatment plants known as Las Arenitas and Mexicali II.¹⁶²

In 1987, the IBWC adopted recommendations for the solution of the border sanitation problem at Naco, Arizona-Naco, Sonora, which essentially assigned responsibility for the problem to Mexico.¹⁶³ A 1989 Minute recommended joint construction of sewage treatment facilities at Laredo, Texas/Nuevo Laredo, Tamaulipas.¹⁶⁴ The Nuevo Laredo International Wastewater Treatment Plant (NLIWTP) was constructed in the 1990s.¹⁶⁵ In 1998, the IBWC provided for cooperative agreements with the Border Environment Cooperation Commission (BECC) in development of projects for the solution of border sanitation problems, thereby implicitly acknowledging BECC’s leadership role.¹⁶⁶

Pursuant to Article 4 of the 1944 Water Treaty, which distributed the waters of the Lower Rio Grande between the two countries,¹⁶⁷ the IBWC adopted numerous Minutes concerning the storage,

158. IBWC, *Minute 264: Recommendations for Solution of the New River Border Sanitation Problem at Calexico, California – Mexicali, Baja California Norte*, at 5 (Aug. 26, 1980), available at <http://www.ibwc.gov/Files/Minutes/Min264.pdf>.

159. IBWC, *Minute 274: Joint Project for Improvement of the Quality of Waters of the New River at Calexico, California-Mexicali, Baja California*, at 3-4 (Apr. 15, 1987), available at <http://www.ibwc.gov/Files/Minutes/Min274.pdf>.

160. IBWC, *Minute 288: Conceptual Plan for the Long Term Solution to the Border Sanitation Problem of the New River at Calexico, California – Mexicali, Baja California*, at 2 (Oct. 30, 1992), available at <http://www.ibwc.gov/Files/Minutes/Min288.pdf>.

161. *Id.*, at 9.

162. INTERNATIONAL BOUNDARY AND WATER COMMISSION UNITED STATES AND MEXICO, 2006 ANNUAL REPORT 15 (2006), http://www.ibwc.gov/Files/2006_Annual_report.pdf [hereinafter 2006 ANNUAL REPORT].

163. IBWC, *Minute 273: Recommendations for the Solution of the Border Sanitation Problem at Naco, Arizona-Naco, Sonora*, at 1-2, 4 (Mar. 19, 1987), available at <http://www.ibwc.gov/Files/Minutes/Min273.pdf> (amended on Sept. 19, 1996). See IBWC, *Minute 295: Recommendations to Incorporate into Commission Minute No 273, the Project Proposed by the State of Sonora for Conveyance and Treatment of Naco, Sonora Sewage Certified by the BECC on April 30, 1996*, at 2 (Sept. 19, 1996), available at <http://www.ibwc.gov/Files/Minutes/Min295.pdf>.

164. IBWC, *Minute 279: Joint Measures to Improve the Quality of the Waters of the Rio Grande at Laredo, Texas/Nuevo Laredo, Tamaulipas*, at 2, 4 (Aug. 28, 1989), available at <http://www.ibwc.gov/Files/Minutes/Min279.pdf>.

165. 2006 ANNUAL REPORT, *supra* note 162, at 17.

166. IBWC, *Minute 299: International Boundary and Water Commission Support to the Border Environment Cooperation Commission in Development of Projects for the Solution of Border Sanitation Problems*, at 2-3 (Dec. 3, 1998), available at <http://www.ibwc.gov/Files/Minutes/Min299.pdf>; see also IBWC, *Minute 304: Joint Grant Contribution Program for Drinking Water and Wastewater Infrastructure Projects for Communities in the United States - Mexico Border Area*, at 1 (Oct. 26, 2000), available at <http://www.ibwc.gov/Files/Minutes/Min304.pdf>.

167. 1944 Water Treaty, *supra* note 3, at 1225-28.

conveyance, and delivery of waters of the Rio Grande, including several dealing with drought-induced water shortages.¹⁶⁸ Pursuant to Article 5 of the 1944 Water Treaty, which provided for joint construction of dams on the Rio Grande,¹⁶⁹ the IBWC adopted a Minute in 1946 approving the construction of the largest of these, Falcon Dam.¹⁷⁰ In 1960, the two Governments agreed to proceed with construction of Amistad Dam upstream from Falcon.¹⁷¹ The IBWC

168. See IBWC, *Minute 309: Volumes of Water Saved with the Modernization and Improved Technology Projects for the Irrigation Districts in the Rio Conchos Basin and Measures for their Conveyance to the Rio Grande*, at 1 (July 3, 2003), available at <http://www.ibwc.gov/Files/Minutes/Min309.pdf> (minutes dealing with drought); IBWC, *Minute 308: United States Allocation of Rio Grande Waters During the Last Year of the Current Cycle*, at 1-5 (June 28, 2002), available at <http://www.ibwc.gov/Files/Minutes/Minute308.pdf>; IBWC, *Minute 307: Partial Coverage of Allocation of the Rio Grande Treaty Tributary Water Deficit from Fort Quitman to Falcon Dam*, at 1-3 (March 16, 2001), available at <http://www.ibwc.gov/Files/Minutes/Min307.pdf>; IBWC, *Minute 293: Emergency Cooperative Measures to Supply Municipal Needs of Mexican Communities Located Along the Rio Grande Downstream of Amistad Dam*, at 1-5 (Oct. 4, 1995), available at <http://www.ibwc.gov/Files/Minutes/Min293.pdf>; IBWC, *Minute 234: Waters of the Rio Grande Allotted to the United States from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vegas Arroyo*, at 1-3 (Dec. 2, 1969), available at <http://www.ibwc.gov/Files/Minutes/Min234.pdf>; IBWC, *Minute 201: Regulations for Storage, Conveyance, and Delivery of Waters of the Rio Grande from Ft. Quitman, Texas, to the Gulf of Mexico*, at 1 (Oct. 13, 1954), available at <http://www.ibwc.gov/Files/Minutes/Min201.pdf>.

169. 1944 Water Treaty, *supra* note 3, at 1228-30.

170. IBWC, *Minute 182: Approval of "Joint Report on Engineering Conference on Studies, Investigations and Procedures for the Planning of Works to be Built in Accordance with the Treaty of February 3, 1944"* (Sept. 23, 1946), available at <http://www.ibwc.gov/Files/Minutes/Min182.pdf>; see also IBWC, *Minute 205: Improvement of Generation of Hydroelectric Energy at the Falcon Plant* (May 21, 1956), available at <http://www.ibwc.gov/Files/Minutes/Min205.pdf>; IBWC, *Minute 202: Basis for Joint Operation and Maintenance of the Falcon Dam and Hydroelectric Plant and for Division of Costs Thereof* (Jan. 11, 1955), available at <http://www.ibwc.gov/Files/Minutes/Min202.pdf>; IBWC, *Minute 199: Establishment of Jurisdictional Line in Falcon Reservoir* (Dec. 15, 1953), available at <http://www.ibwc.gov/Files/Minutes/Min199.pdf>; IBWC, *Minute 192: Plans and Procedures for Construction of Falcon Dam and Recommendations for Construction of Falcon Hydroelectric Plants* (Sept. 7, 1949), available at <http://www.ibwc.gov/Files/Minutes/Min192.pdf>; IBWC, *Minute 190: Allocation to the Two Sections of the Commission of Remaining Items of Work Preparatory to Construction of Falcon Dam* (Aug. 13, 1948), available at <http://www.ibwc.gov/Files/Minutes/Min190.pdf>; IBWC, *Minute 187: Determinations as to Site and Required Capacities of the Lowest Major International Storage Dam to be Built on the Rio Grande, in Accordance with the Provisions of Article 5 of the Treaty Concluded February 3, 1944* (Dec. 20, 1947), available at <http://www.ibwc.gov/Files/Minutes/Min187.pdf>.

171. Agreement Concerning the Utilization of Boundary Water: Construction of Amistad Dam on the Rio Grande River, U.S.-Mex., Oct. 24, 1960, 11 U.S.T. 2396; see IBWC, *Minute 292: Works of an Emergency Nature that Should be Undertaken Promptly for Treatment of Sinkholes that have Developed in the Reservoir at Amistad Dam* (Apr. 28, 1995), available at <http://www.ibwc.gov/Files/Minutes/Min292.pdf> (containing the first report of troubling defects in Amistad Dam); IBWC, *Minute 235: Division of Operation and Maintenance Costs of Amistad Dam* (Dec. 3, 1969), available at <http://www.ibwc.gov/Files/Minutes/Min235.pdf> (illustrating additional agreements with respect to Amistad over the decades); IBWC, *Minute 232: Demarcation of a Jurisdictional Line in Amistad Reservoir* (May, 9, 1968), available at

also approved a variety of diversion dams pursuant to the 1944 Water Treaty, including Retamal Diversion Dam on the Rio Grande,¹⁷² Anzalduas Weir and Dam on the Rio Grande,¹⁷³ and Morelos Diversion Dam on the Colorado River.¹⁷⁴ The IBWC has also undertaken to address a problem of salinity in the Lower Rio Grande with construction and maintenance of the Morillo Drain Pumping Plant.¹⁷⁵

<http://www.ibwc.gov/Files/Minutes/Min232.pdf>; IBWC, *Minute 215: Design and Procedures for Construction of Amistad Dam* (Sept. 28, 1963), available at <http://www.ibwc.gov/Files/Minutes/Min215.pdf>; IBWC, *Minute 213: Foundation Drilling and Grouting Program for Amistad Dam* (Apr. 26, 1963), available at <http://www.ibwc.gov/Files/Minutes/Min213.pdf>; IBWC, *Minute 210: Recommendations Regarding Construction of Amistad Dam* (Jan. 12, 1961), available at <http://www.ibwc.gov/Files/Minutes/Min210.pdf>; IBWC, *Minute 207: Consideration of Joint Report of the Principle Engineers on Site, Capacities and Type of Dam for the Second Major International Storage Dam on the Rio Grande* (June 19, 1958), available at <http://www.ibwc.gov/Files/Minutes/Min207.pdf>.

172. IBWC, *Minute 254: Operation and Maintenance of Retamal Diversion Dam* (Sept. 24, 1976), available at http://www.ibwc.gov/Files/Minutes/Minute_254_w_JR.pdf; IBWC, *Minute 238: Improvement of the International Flood Control Works of the Lower Rio Grande* (Sept. 10, 1970), available at http://www.ibwc.gov/Files/Minutes/Minute_238_w_JR.pdf; IBWC, *Minute 186: Approval of the Construction by Mexico of a Temporary Diversion Dam Across the Rio Grande Below Retamal Heading* (May 26, 1947), available at <http://www.ibwc.gov/Files/Minutes/Min186.pdf>.

173. IBWC, *Minute 265: Installation of Stoplogs at Anzalduas Diversion Dam*, at 1 (Dec. 13, 1980), available at <http://www.ibwc.gov/Files/Minutes/Min265.pdf>; IBWC, *Minute 203: Plans and Procedures for Construction of the Anzalduas Diversion Dam*, at 1 (Dec. 23, 1955), available at <http://www.ibwc.gov/Files/Minutes/Min203.pdf>; IBWC, *Minute 198: Temporary Weir Across the Rio Grande at the Anzalduas Dam Site*, at 1 (June 2, 1953), available at <http://www.ibwc.gov/Files/Minutes/Min198.pdf>.

174. IBWC, *Minute 221: Final Liquidation of Costs Allocable to Mexico of Construction of the South Gila Levee and Determination of the Part of its Operation and Maintenance Costs Allocable to that Country*, at 1 (Nov. 29, 1965), available at <http://www.ibwc.gov/Files/Minutes/Min221.pdf>; IBWC, *Minute 211: Manner of Payment of Mexico's Share of Cost of Construction of Group II Colorado River Levees Upstream from Morelos Diversion Dam*, at 1 (May 12, 1961), available at <http://www.ibwc.gov/Files/Minutes/Min211.pdf>; IBWC, *Minute 209: Portion Allowable to Mexico of Costs of Operation and Maintenance of the Group I Levees on the Colorado River Upstream from Morelos Diversion Dam*, at 1 (Nov. 21, 1958), available at <http://www.ibwc.gov/Files/Minutes/Min209.pdf>; IBWC, *Minute 208: Final Liquidation of Costs Corresponding to Mexico for Group I Levee Works Required Upstream from the Morelos Diversion Dam to Protect Lands Within the United States Against Damages from Such Rise in Flood Stages of the Colorado River as Might Result from Construction, Operation and Maintenance of that Structure*, at 1 (Nov. 14, 1958), available at <http://www.ibwc.gov/Files/Minutes/Min208.pdf>; IBWC, *Minute 197: Adoption of Rules for the Operation and Maintenance of the Morelos Diversion Dam on the Colorado River*, at 1 (June 30, 1951), available at <http://www.ibwc.gov/Files/Minutes/Min197.pdf>; IBWC, *Minute 195: Works Required Above the Morelos Diversion Dam to Protect Lands Within the U.S. Against Damages from Such Floods as Might Result from the Construction, Operation and Maintenance of that Structure*, at 1 (May 6, 1950), available at <http://www.ibwc.gov/Files/Minutes/Min195.pdf>; IBWC, *Minute 189: Determinations as to Site and Design Features of the Main Diversion Structure to be Constructed by Mexico on the Colorado River and Work Necessitated Thereby for Protection of United States Lands, Pursuant to the Provisions of Article 12(e) of the 1944 Water Treaty*, at 1 (May 12, 1948), available at <http://www.ibwc.gov/Files/Minutes/Min189.pdf>.

175. IBWC, *Minute 303: Operation and Maintenance of the Jointly-Financed Works for Solution of the Lower Rio Grande Salinity Problem*, at 1-2 (May 15, 2000), available at

Referencing Article 13 of the 1944 Water Treaty, the IBWC undertook clearing of the Colorado River channel downstream from Morelos Dam.¹⁷⁶ Under Article 15, which concerns schedules for delivery of Mexico's share of Colorado River water, the IBWC adopted numerous Minutes adjusting deliveries.¹⁷⁷ Citing Article 16, the IBWC

<http://www.ibwc.gov/Files/Minutes/Min303.pdf>; IBWC, *Minute 282: Rehabilitation of the Saline Waters Disposal System for Solution of the Salinity Problem in the Waters of the Lower Rio Grande*, at 1 (Mar. 26, 1990), available at

<http://www.ibwc.gov/Files/Minutes/Min282.pdf>; IBWC, *Minute 269: Replacement of Pumps at the Morillo Drain Pumping Plant*, at 1 (Nov. 9, 1984), available at

<http://www.ibwc.gov/Files/Minutes/Min269.pdf>; IBWC, *Minute 224: Recommendations Concerning the Lower Rio Grande Salinity Problem*, at 1 (Jan. 16, 1967), available at

<http://www.ibwc.gov/Files/Minutes/Min224.pdf>; IBWC, *Minute 223: Measures for Solution of the Lower Rio Grande Salinity Problem*, at 1-2 (Nov. 30, 1965), available at

<http://www.ibwc.gov/Files/Minutes/Min223.pdf>.

176. IBWC, *Minute 291: Improvements to the Conveying Capacity of the International Boundary Segment of the Colorado River*, at 1-3 (July 16, 1994), available at

<http://www.ibwc.gov/Files/Minutes/Min291.pdf>; IBWC, *Minute 217: Clearing of the Colorado River Channel Downstream from Morelos Dam*, at 1 (Nov. 30, 1964), available at

<http://www.ibwc.gov/Files/Minutes/Min217.pdf>.

177. IBWC, *Minute 314: Extension of the Temporary Emergency Delivery of Colorado River Water for Use in Tijuana, Baja California*, at 1 (Nov. 14, 2008), available at

http://www.ibwc.gov/Files/Minutes/Minute_314.pdf; IBWC, *Minute 310: Emergency Delivery of Colorado River Water for Use in Tijuana, Baja California*, at 1-2 (July 28, 2003), available at <http://www.ibwc.gov/Files/Minutes/Min310.pdf>; IBWC, *Minute 287: Emergency Deliveries of Colorado River Waters for Use in Tijuana, Baja California*, at 1-2 (Oct. 6, 1992), available at <http://www.ibwc.gov/Files/Minutes/Min287.pdf>; IBWC, *Minute 280: Disposal of Equipment Installed at the Expense of Mexico in United States Territory to Enable Emergency deliveries of Colorado River Waters for Use in Tijuana, Baja California*, at 1 (Mar. 6, 1990), available at <http://www.ibwc.gov/Files/Minutes/Min280.pdf>; IBWC, *Minute 267: Extension of the Effect of Minute No. 266 Relating to the Emergency Deliveries of Colorado River Water for Use in Tijuana*, at 1 (Aug. 13, 1982), available at <http://www.ibwc.gov/Files/Minutes/Min267.pdf>; IBWC, *Minute 266: Extension of the Effect of Minute No. 263 Relating to the Emergency Deliveries of Colorado River Water for Use in Tijuana*, at 1 (Aug. 3, 1981), available at <http://www.ibwc.gov/Files/Minutes/Min266.pdf>; IBWC, *Minute 263: Extension of the Effect of Minute No. 260 Relating to the Emergency Deliveries of Colorado River Water for Use in Tijuana*, at 1 (Aug. 6, 1980), available at <http://www.ibwc.gov/Files/Minutes/Min263.pdf>; IBWC, *Minute 260: Extension of the Effect of Minute No. 259 Relating to the Emergency Deliveries of Colorado River Water for Use in Tijuana*, at 1 (Aug. 11, 1979), available at <http://www.ibwc.gov/Files/Minutes/Min260.pdf>; IBWC, *Minute 259: Extension of the Effect of Minute No. 256 Relating to the Emergency Deliveries of Colorado River Water for Use in Tijuana*, at 1 (July 27, 1978), available at <http://www.ibwc.gov/Files/Minutes/Min259.pdf>; IBWC, *Minute 256: Extension of Minutes Nos. 240, 243, 245 and 252 Regarding Emergency Deliveries of Colorado River Waters for Use in Tijuana*, at 1 (Feb. 22, 1977), available at <http://www.ibwc.gov/Files/Minutes/Min256.pdf>; IBWC, *Minute 252: An Amendment to Minutes Nos. 240 and 245, Relating to Emergency Deliveries of Colorado River Waters for Use in Tijuana*, at 1 (Aug. 31, 1976), available at <http://www.ibwc.gov/Files/Minutes/Min252.pdf>; IBWC, *Minute 243: An Amendment to Minute No. 240 Relating to Emergency Deliveries of Colorado River Water for Use in Tijuana*, at 1 (Sept. 25, 1973), available at <http://www.ibwc.gov/Files/Minutes/Min243.pdf>; IBWC, *Minute 240: Emergency Deliveries of Colorado River Waters for Use in Tijuana*, at 1 (June 13, 1972), available at <http://www.ibwc.gov/Files/Minutes/Min240.pdf>; IBWC, *Minute 194: Agreement Relative to the Emergency Use of the All-American Canal for the Delivery of Water for Use in Mexico During the Portion of the Calendar Year 1950 Until Articles 10, 11,*

approved a joint flood control project for the Tijuana River in 1967.¹⁷⁸

Additional Minutes were adopted pursuant to provisions of treaties and conventions subsequent to the 1944 Water Treaty. The IBWC adopted Minutes between 1963 and 1993 to implement the Chamizal Convention.¹⁷⁹ The 1970 Boundary Treaty was implemented through numerous international agreements, such as those relating to execution of the changes in location of the Rio Grande stipulated in the Treaty,¹⁸⁰ “the international plan for the protection of the Presidio-Ojinaga Valley against floods of the Rio Grande”;¹⁸¹ the potential relocation of occupants of lands the United States will transfer to Mexico under the Treaty,¹⁸² the demarcation and

and 15 of the Water of Treaty of 1944 Become Effective, at 1 (Mar. 3, 1950), available at <http://www.ibwc.gov/Files/Minutes/Min194.pdf>; IBWC, *Minute 191: Agreement Relative to the Emergency Use of the All-American Canal for the Delivery of Water for Use in Mexico During the 1949 Irrigation Season*, at 1 (Mar. 8, 1949), available at

<http://www.ibwc.gov/Files/Minutes/Min191.pdf>; IBWC, *Minute 188: Agreement Relative to the Emergency Use of the All-American Canal for the Delivery of Water for Use in Mexico During the 1948 Irrigation Season*, at 1 (Mar. 12, 1948), available at <http://www.ibwc.gov/Files/Minutes/Min188.pdf>; IBWC, *Minute 185: Proposing Agreement Relative to the Emergency use of the All-American Canal for the Delivery of Water for Use in Mexico During the 1947 Irrigation Season*, at 1 (Jan. 25, 1947), available at <http://www.ibwc.gov/Files/Minutes/Min185.pdf>.

178. See IBWC, *Minute 258: Modification of the United States Portion of the Plan for the Channelization of the Tijuana River*, at 1-2 (May 27, 1977), available at

<http://www.ibwc.gov/Files/Minutes/Min258.pdf>; IBWC, *Minute 236: Construction of Works for Channelization of the Tijuana River*, at 1 (July 2, 1970), available at

<http://www.ibwc.gov/Files/Minutes/Min236.pdf>; IBWC, *Minute 225: Channelization of the Tijuana River*, at 1 (June 19, 1967), available at

<http://www.ibwc.gov/Files/Minutes/Min225.pdf>.

179. See Act Approving Minute No. 228 of the International Boundary and Water Commission, U.S.-Mex., Oct. 27, 1967, 18 U.S.T. 2836 (concerning demarcation of new international boundary between the United States and Mexico); see also IBWC, *Minute 290: Replacement of the International Cordova-Bridge of the Americas over the Rio Grande at El Paso, Texas-Ciudad Juárez, Chihuahua, Mexico*, at 1, 3-4 (Sept. 21, 1993), available at <http://www.ibwc.gov/Files/Minutes/Min290.pdf>; IBWC, *Minute 219: Bridges to be Constructed over the New Channel of the Rio Grande Between El Paso and Ciudad Juárez, and Their Corresponding International Inspection Facilities*, at 1 (July 16, 1965), available at <http://www.ibwc.gov/Files/Minutes/Min219.pdf>; IBWC, *Minute 214: Engineering Considerations Relating to Relocation of the Rio Grande at El Paso, Texas, and Ciudad Juárez, Chihuahua*, at 1 (Aug. 28, 1963), available at

<http://www.ibwc.gov/Files/Minutes/Min214.pdf>.

180. IBWC, *Minute 262: Recommendations for Works to Preserve for the Rio Grande its Character as the International Boundary in the Reach from Cajoncitos, Chihuahua to Haciendita, Texas*, at 1-4 (Dec. 26, 1980), available at

<http://www.ibwc.gov/Files/Minutes/Min262.pdf>; IBWC, *Minute 257: Completion of the Relocations of the Rio Grande Stipulated in Article I of the Treaty of November 23, 1970*, at 1-2 (May 18, 1977), available at <http://www.ibwc.gov/Files/Minutes/Min257.pdf>; IBWC, *Minute 246: Recommendations for Execution of the Changes in Location of the Rio Grande Stipulated in Article I of the Boundary Treaty of 1970*, at 1 (Jan. 28, 1975), available at <http://www.ibwc.gov/Files/Minutes/Min246.pdf>; see also Act Approving Minute 257 of the International Boundary and Water Commission, U.S.-Mex., May 26, 1977, 28 U.S.T. 5256 (concerning the relocation of the channel of the Rio Grande).

181. IBWC, *Minute 247: International Plan for the Protection of the Presidio-Ojinaga Valley against Floods of the Rio Grande*, at 1-3 (Feb. 7, 1975), available at

<http://www.ibwc.gov/Files/Minutes/Min247.pdf>.

182. IBWC, *Minute 255: Consideration of Possible Property Rights of the Residents and*

monumentation of the land boundary¹⁸³ and international bridges;¹⁸⁴ the creation of maps,¹⁸⁵ “recommendations for establishing a restricted use zone on lands adjacent to the main channel of the Rio Grande in the vicinity of Brownsville, Texas”;¹⁸⁶ and the ongoing maintenance of

Occupants of the Horcon Tract and of Beaver Island, at 1-2 (Jan. 28, 1977), available at <http://www.ibwc.gov/Files/Minutes/Min255.pdf>; IBWC, *Minute 251: Occupants of the Horcon Tract*, at 1 (Apr. 28, 1976), available at <http://www.ibwc.gov/Files/Minutes/Min251.pdf>.

183. IBWC, *Minute 277: Location, Permanency and Visibility of International Monument No. 123-A*, at 1 (Aug. 29, 1988), available at <http://www.ibwc.gov/Files/Minutes/Min277.pdf>; IBWC, *Minute 272: Installation of Monument 13-R*, at 1 (Oct. 24, 1986), available at <http://www.ibwc.gov/Files/Minutes/Min271.pdf>; IBWC, *Minute 271: Markers Installed on the International Boundary*, at 1 (Sept. 9, 1986), available at <http://www.ibwc.gov/Files/Minutes/Min271.pdf>; IBWC, *Minute 249: Placement of Markers on the Land Boundary*, at 1 (July 14, 1975), available at <http://www.ibwc.gov/Files/Minutes/Min249.pdf>; IBWC, *Minute 244: Maintenance of the International Land Boundary Monuments*, at 1 (Dec. 4, 1973), available at <http://www.ibwc.gov/Files/Minutes/Min244.pdf>; IBWC, *Minute 230: Additional Monuments 244A and 244B on the Land Boundary, Between International Monuments Nos. 244 and 245*, at 1 (May 8, 1968), available at <http://www.ibwc.gov/Files/Minutes/Min230.pdf>; IBWC, *Minute 226: Additional Monuments on the Land Boundary Between International Monuments Numbers 2 and 3*, at 1 (June 23, 1967), available at <http://www.ibwc.gov/Files/Minutes/Min226.pdf>; IBWC, *Minute 180: Reestablishment of the Western Land Boundary at Monument No. 118*, at 1-2 (Jan. 11, 1946), available at <http://www.ibwc.gov/Files/Minutes/Min180.pdf>.

184. IBWC, *Minute 305: Demarcation and Monumentation of the International Boundary on the Bridges over the Rio Grande at Eagle Pass, Texas - Piedras Negras, Coahuila II; Laredo, Texas - Colombia, Nuevo Leon; Laredo, Texas IV- Nuevo Laredo, Tamaulipas III Pharr, Texas - Reynosa, Tamaulipas; Los Indios, Texas - Lucio Blanco, Tamaulipas; and Veterans, Brownsville, Texas - Matamoros, Tamaulipas III*, at 1-2 (Dec. 4, 2000), available at <http://www.ibwc.gov/Files/Minutes/Min305.pdf>; IBWC, *Minute 302: Enhanced Demarcation and Monumentation of the International Boundary at International Boundary River Bridges and Land Boundary Ports of Entry*, at 1 (Dec. 13, 1999), available at <http://www.ibwc.gov/Files/Minutes/Min302.pdf>; IBWC, *Minute 286: Demarcation and Monumentation of the International Boundary on the New International Ysleta/Zaragoza Bridge and Demolition of the Old Bridge*, at 1 (Nov. 29, 1991), available at <http://www.ibwc.gov/Files/Minutes/Min286.pdf>; IBWC, *Minute 275: Demarcation of the International Boundary and Monumentation of the New International Bridges over the Rio Grande between Del Rio, Texas and Cd. Acuna, Coahuila and between Hidalgo, Texas and Reynosa, Tamaulipas*, at 1 (Nov. 4, 1987), available at <http://www.ibwc.gov/Files/Minutes/Min275.pdf>.

185. IBWC, *Minute 315: Adoption of the Delineation of the International Boundary on the 2008 Aerial Photographic Mosaic of the Rio Grande*, at 1-3 (Nov. 5, 2009), available at <http://www.ibwc.gov/Files/Minutes/Min315.pdf>; IBWC, *Minute 278: Delineation of the International Boundary on Aerial Photographic Mosaics of the Rio Grande*, at 1-3 (Mar. 31, 1984), available at <http://www.ibwc.gov/Files/Minutes/Min278.pdf>; IBWC, *Minute 268: Modification to Minute No. 253 "Maps of the International Boundary in the Rio Grande and in the Colorado River"*, at 1-2 (July 26, 1984), available at <http://www.ibwc.gov/Files/Minutes/Min268.pdf>; IBWC, *Minute 253: Maps of the International Boundary in the Rio Grande and in the Colorado River*, at 1-2 (Sept. 23, 1975), available at <http://www.ibwc.gov/Files/Minutes/Min253.pdf>.

186. IBWC, *Minute 285: Recommendations for Establishing a Restricted Use Zone on Lands Adjacent to the Main Channel of the Rio Grande in the Vicinity of Brownsville, Texas/Matamoros, Tamaulipas*, at 1, 3 (Nov. 8, 1991), available at <http://www.ibwc.gov/Files/Minutes/Min285.pdf>.

the Rio Grande as the international boundary.¹⁸⁷

C. MINUTES ADDRESSING GROUNDWATER AND ECOLOGICAL ISSUES

Although the enormous impact of many post-1944 Minutes makes it remarkable that the U.S. and Mexican governments entrusted the IBWC with the authority to short-circuit what would otherwise, no doubt, be elaborate approval processes for those governments, still it must be said that few of the Minutes wandered far from the explicit mandates of the 1944 Water Treaty. Two remarkable exceptions to the foregoing, both concerning the Colorado River, mark occasions when the IBWC appears to have explored the use of the power of the Minute to extend the provisions of the 1944 Water Treaty in an adaptive application to evolving environmental conditions.

The first of these occasions came in 1973 with the adoption of Minute 242 and its ambitious proclamation for “a permanent and definitive solution to the international problem of the salinity of the Colorado River.”¹⁸⁸ Minute 242 contemplates “a comprehensive agreement on groundwater in the border areas,” and provides for mandatory consultation prior to either country further developing the groundwater resources, something addressed nowhere in the 1944 Water Treaty.¹⁸⁹ The second landmark use of the Minute system to suggest an expansion of the 1944 Water Treaty came only after another three decades had passed. In 2000, the IBWC adopted Minute 306, which promised cooperation by the United States and Mexico in the development of studies and recommendations concerning the riparian and estuarine ecology of the lower Colorado River and its associated delta.¹⁹⁰

Unfortunately, neither Minute 242 nor 306 has produced any substantive changes in how the IBWC manages the boundary waters, and an examination of the circumstances surrounding their adoption

187. IBWC, *Minute 313: Maintenance in the Rectified Channel of the Rio Grande*, at 1 (Feb. 5, 2008), available at <http://www.ibwc.gov/Files/Minutes/Min313.pdf>; IBWC, *Minute 262: Recommendations for Works to Preserve for the Rio Grande Its Character as the International Boundary in the Reach from Cajoncitos, Chihuahua to Haciendita, Texas*, at 1-4 (Dec. 26, 1979), available at <http://www.ibwc.gov/Files/Minutes/Min262.pdf>.

188. Agreement Confirming Minute No. 242 of the International Boundary and Water Commission, U.S.-Mex., Aug. 30, 1973, 24 U.S.T. 1968, 1971.

189. IBWC, *Minute 242: Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River*, at 3 (Aug. 30, 1973), available at <http://www.ibwc.gov/Files/Minutes/Min242.pdf>.

190. IBWC, *Minute 306: Conceptual Framework for United States - Mexico Studies for Future Recommendations Concerning the Riparian and Estuarine Ecology of the Limitrophe Section of the Colorado River and its Associated Delta*, at 2 (Dec. 12, 2000), available at <http://www.ibwc.gov/Files/Minutes/Min306.pdf>. The IBWC adopted a third agreement, Minute 289, that called for establishment of a water monitoring program and database to observe surface and groundwater quality in the lower Rio Grande, however, this was not an IBWC initiative, but rather a response to the Integrated Border Environmental Plan that directed the IBWC to take such action in cooperation with EPA and other agencies. *Minute 289: Observation of the Quality of the Waters Along the United States and Mexico Border*, at 2 (Nov. 13, 1992), available at <http://www.ibwc.gov/Files/Minutes/Min289.pdf>.

suggests little reason for optimism. The impetus for Minute 242 arose in the early 1960s, when actions by U.S. irrigators caused a sharp increase in the salinity of Colorado River Water delivered to Mexico, making it unsuitable for agricultural use. Mexico protested strenuously, but the Colorado River Basin States prevailed upon the State Department and the Bureau of Reclamation to block any resolution that would result in loss of U.S. irrigation water to dilute the salinity of the water delivered to Mexico. Mexico's President Echeverria paid a state visit to Washington in 1972, made a compelling address to Congress, and persuaded President Nixon to appoint a special representative to negotiate a solution to the problem.¹⁹¹ The resulting agreement formed the basis for Minute 242, guaranteeing Mexico that the salinity of its water would not exceed that of U.S. irrigators.¹⁹²

The purpose of including the groundwater provision in Minute 242 was to raise the possibility of reaching a subsequent agreement to limit "protective pumping" on both sides of the border, and following the adoption of Minute 242, the State Department gave the USIBWC the green light to seek such a groundwater agreement with Mexico.¹⁹³ The proposal developed by the USIBWC, which heavily favored the United States, would apportion groundwater with protection of existing groundwater uses (a provision favored by Mexico), but permit U.S. recovery of seepage losses from the All-American Canal and other U.S. irrigation works (a provision insisted upon by California and Arizona; Texas apparently opposed any groundwater agreement).¹⁹⁴ An alternative more favorable to Mexico described as "an approach along the lines suggested by academicians in the United States and in Mexico," was summarily eliminated due to opposition from Basin States.¹⁹⁵

191. Letter from U.S. State Dep't, to Joseph Friedkin, USIBWC Commissioner, *The Diplomacy of the International Colorado River Salinity Problem*, at 15, 17 (Dec. 17, 1982) (draft) (on file with the University of Texas at El Paso ("UTEP") Library system).

192. *Id.* at 17-18; *see also, e.g.*, U.S. DEP'T OF STATE, STATE 173820, THE WHITE HOUSE PRESS CONFERENCE OF AMBASSADOR HERBERT BROWNELL, SPECIAL REPRESENTATIVE OF THE PRESIDENT FOR RESOLUTION OF THE SALINITY PROBLEM WITH MEXICO (1973) *available at* <http://aad.archives.gov/aad/createpdf?dt=2472&rid=49800&dl=1345>.

193. Letter from William H. Luers, Deputy Assistant Secretary for International Affairs, U.S. State Dep't, to Joseph Friedkin, USIBWC Commissioner (Sept. 30, 1976) (on file with the UTEP Library system).

194. *See* Memorandum from K. Scott Gudgeon, U.S. State Dep't, to T. Frank Crigler (Nov. 29, 1982) (on file with the UTEP Library system) [hereinafter Gudgeon Memo]; Letter from Joseph F. Friedkin, USIBWC Commissioner, to T. Frank Crigler, U.S. State Dep't (Oct. 15, 1982) (with Draft Preliminary Report on Whether the United States Should Seek an Agreement with Mexico on the Unapportioned Waters Along the International Boundary) (on file with the UTEP Library system); *see also* Unsigned Letter to "Joe" (presumably Joseph Friedkin) (Dec. 8, 1982) (on file with the UTEP Library system).

195. Draft Preliminary Report on Whether United States Should Seek an Agreement with Mexico on the Unapportioned Waters Along the International Boundary (attached to Letter from Joseph F. Friedkin, USIBWC Commissioner, to T. Frank Crigler, U.S. State Dep't (Oct. 15, 1982)) (on file with the UTEP Library system). The documents included in UTEP Library's Friedkin papers do not describe this

The possibility of reaching an agreement to resolve the closely related problems of salinity, groundwater, and Mexican water deliveries was looked at “with pessimism” by the State Department, due to opposition from California and Arizona.¹⁹⁶ Eventually, in 2000, the IBWC adopted Minute 306, which promised cooperation by the United States and Mexico in the development of studies and recommendations concerning the riparian and estuarine ecology of the lower Colorado River and its associated delta.¹⁹⁷ Finally, Congress acted in 2006 to take the groundwater issue out of the hands of the IBWC by designating the Department of the Interior as the lead agency for establishing a program to characterize, map, and model priority transboundary aquifers.¹⁹⁸

The IBWC has recently adopted Minutes that signal a renewed interest in addressing groundwater and related ecological issues, but once again, there is more to this development than is apparent on its face. Minute 316 would permit the temporary use of water conveyance infrastructure in the United States to provide substitute water to sustain the Santa Clara Wetlands during a trial run of the Yuma Desalting Plant (YDP).¹⁹⁹ The YDP would treat surplus water too saline to count as treaty water, and which currently sustains the wetlands.²⁰⁰ Once treated, fresh water would be available for consumption in the United States, but the water would no longer be available for the wetlands.²⁰¹ While Minute 316 depends entirely on the ability and willingness of NGOs to supply 10,000 acre-feet of substitute water during the YDP pilot run, and on Mexico and the United States to supply like amounts, the IBWC still has not agreed that any treaty waters would ever be made available for ecological uses.

Minute 317 establishes a binational “Consultative Council” to continue to explore and make recommendations concerning development of projects and initiatives to promote water conservation, use of water for environmental purposes, and development of new water sources through investment in desalinization facilities.²⁰² The

disfavored alternative any further.

196. Gudgeon Memo, *supra* note 194.

197. IBWC, *Minute 306: Conceptual Framework for United States - Mexico Studies for Future Recommendations Concerning the Riparian and Estuarine Ecology of the Limitrophe Section of the Colorado River and its Associated Delta*, at 2 (Dec. 12, 2000), available at <http://www.ibwc.gov/Files/Minutes/Min306.pdf>.

198. United States-Mexico Transboundary Aquifer Assessment Act, Pub. L. 109-448, 120 Stat. 3328 (2006) (codified at 42 U.S.C. § 1962).

199. IBWC, *Minute 316: Utilization of the Wellton-Mohawk Bypass Drain and Necessary Infrastructure in the United States for the Conveyance of Water by Mexico and Non-Governmental Organizations of Both Countries to the Santa Clara Wetland During the Yuma Desalting Plant Pilot Run* (Apr. 16, 2010), available at http://www.ibwc.gov/Treaties_Minutes/Minutes/Min316.pdf.

200. *Id.*

201. *Id.*

202. IBWC, *Minute 317: Conceptual Framework for U.S. Mexico Discussions on Colorado River Cooperative Actions*, at 3 (June 17, 2010), available at http://www.ibwc.gov/Treaties_Minutes/Minutes/Min317.pdf.

language of Minute 317, however, goes no further than that of Minute 306 which in some ways was even more explicit, with references to “preserving the Colorado River Delta ecology,” “use of water for ecological purposes,” and “equitable distribution of resources.”²⁰³ Even Minute 317’s creation of a binational council appears merely to replicate the “binational technical task force” under Minute 306.²⁰⁴ The IBWC says adoption of Minute 317 is intended to facilitate US-Mexico cooperation related to the Transboundary Aquifer Assessment Act, under the leadership of the Department of the Interior.²⁰⁵

Perhaps suggesting more substantial developments ahead, is the adoption of Minute 318 in December 2010, which delays delivery of water allotted to Mexico as a result of irrigation infrastructure damage caused by the April 2010 earthquake in the Mexicali Valley, Baja California.²⁰⁶ Minute 318 was written in close collaboration with the Bureau of Reclamation, the agency “responsible for managing and administering the waters of the Lower Colorado River on behalf of the U.S. Secretary of the Interior,” and the approval of Minute 318 coincided with a meeting of the Interior Secretary with Mexico’s Secretary of the Environment.²⁰⁷ Interior Secretary Salazar trumpeted completion of Minute 318 during his visit to Mexico, saying it “lays important groundwork for a much-needed comprehensive water agreement with Mexico on how we manage the Colorado River,” as desired by the seven Colorado River Basin States.²⁰⁸ In a prepared statement, Salazar said that in cooperation with the Bureau of Reclamation, “the IBWC plans to commence negotiations of this comprehensive water agreement immediately in January, 2011.”²⁰⁹

203. IBWC, *Minute 306: Conceptual Framework for United States - Mexico Studies for Future Recommendations Concerning the Riparian and Estuarine Ecology of the Limitrophe Section of the Colorado River and its Associated Delta*, at 2 (Dec. 12, 2000), available at <http://www.ibwc.gov/Files/Minutes/Min306.pdf>.

204. *Id.*

205. IBWC, *THE BOUNDARY MARKER 3* (2010), available at http://www.ibwc.gov/Files/BM_Winter_2010.pdf.

206. IBWC, *Minute 318: Adjustment of Delivery Schedules for Water Allotted to Mexico for the Years 2010 Through 2013 as a Result of Infrastructure Damage in Irrigation District 014, Rio Colorado, Caused by the April 2010 Earthquake in the Mexicali Valley, Baja California*, at 2-3 (Dec. 17, 2010), available at

http://www.ibwc.gov/Treaties_Minutes/Minutes.html. Although Minute 318 has been represented as a humanitarian gesture, the agreement to store Mexican water in a depleted Lake Mead also serves the short-term interests of drought-stricken Western states.

207. Press Release, IBWC, Commission Signs Colorado River Agreement in Response to April 2010 Earthquake Damage in the Mexicali Valley, at 2 (Dec. 20, 2010), available at http://www.ibwc.gov/Files/Press_Release_122010.pdf

208. Press Release, U.S. Dep’t of the Interior, Leaders Lay Groundwork for Comprehensive U.S.-Mexico Water Agreement on Colorado River (Dec. 20, 2010), available at <http://www.doi.gov/news/pressreleases/Salazar-Elvira-Announce-Water-Agreement-to-Support-Response-to-Mexicali-Valley-Earthquake.cfm>.

209. *Joint Media Availability with Secretary Elvira on Water Agreement*, U.S. DEP’T OF THE INTERIOR (Dec. 20, 2010), <http://www.doi.gov/news/speeches/Joint-Media-Availability-with-Secretary-Elvira-English-and-Spanish.cfm>; see also, Joan DeLuca, *U.S. - Mexico Water Agreement: The U.S. and Mexico, and the Seven Colorado River Basin [U.S.]*

The Basin States will attempt to dictate the U.S. position on any new water agreement, as they did the 1944 Water Treaty and the ill-fated negotiations surrounding adoption of Minutes 242 and 306.²¹⁰ That the Bureau of Reclamation is now leading the charge for negotiation of a new agreement, through the IBWC, suggests déjà vu all over again. Neither the Basin States nor the Bureau has evinced much interest in equity, ecology, conservation, or diplomacy.²¹¹ If insanity is doing the same thing over and over again, while expecting different results, then the best hope for a sane solution to the ecological crisis at the border is to elevate diplomacy over regional special interests and to limit the Bureau of Reclamation strictly to technical implementation of any new agreements.

IV. STATUTORY IMPLEMENTATION OF THE TREATIES

A. THE USIBWC ENABLING ACT

Legislative authorization of the IBC in its early years consists merely of line items in annual appropriation acts.²¹² On April 29, 1890, Congress passed a Joint Resolution authorizing an investigation of concerning the use of waters of the Rio Grande for irrigation and for the construction of a dam and reservoir near El Paso.²¹³ The duties were not assigned to the IBC, however, because its jurisdiction at that time was limited to boundary matters. Instead, the U.S. Secretary of State and the Mexican Minister at Washington signed a Protocol in 1896, establishing a new International Water Commission (IWC) with U.S. and Mexican sections. The IWC held its first meeting in El Paso that same year and shortly thereafter issued a joint report of its investigation. In 1914, the U.S. Comptroller General signed an opinion that resulted in the dissolution of the U.S. Section of the IWC.²¹⁴

The Act of May 13, 1924, authorized the President to appoint three special commissioners to explore the potential for an agreement with Mexico for the equitable use of the waters of the Lower Rio Grande,

States Are Bringing Resources Together, VOICE OF AM. (Dec. 29, 2010), <http://www.voanews.com/policy/editorials/US-Mexico-Water-Agreement-112654619.html>.

210. The Basin States dominated Congressional hearings on the 1944 Treaty. See generally 91 CONG. REC. 2805-2833 (1945).

211. *Id.*; see also Zellmer, *supra* note 43, at 615-16, n. 127.

212. See S. Rep. No. 81-2095 (1950), reprinted in 1950 U.S.C.C.A.N. 3734, 3735, 1950 WL 1829; see also H.R. Conf. Rep. No. 81-3018 (1950), reprinted in 1950 U.S.C.C.A.N. 3744, 1950 WL 1830.

213. See 51 Cong. Rec. H3977 (1890) (daily ed. Apr. 29, 1890) (not printed in the Statutes at Large); see also IBWC U.S. SECTION, CHRONOLOGICAL OUTLINE OF THE ORGANIZATIONS OF THE VARIOUS INTERNATIONAL BOUNDARY AND/OR WATER COMMISSIONS, UNITED STATES AND MEXICO: WITH AN INDEX TO PERTINENT TREATIES - 1848-1970 33-34 (R. P. Daguerre eds., United States Section of The Commission, 1972), available at University of Texas at El Paso, UTEP Special Collection Reference F781.1594C357f.

214. IBWC U.S. SECTION, *supra* note 213, at 35.

again bypassing the IBC.²¹⁵ The Secretary of State directed that the title of the Commission would be “Commission on the Equitable Use of the Waters of the Lower Rio Grande.”²¹⁶ A Joint Resolution of March 3, 1927, authorized adding the Colorado and Tijuana Rivers to the IWC mandate.²¹⁷ The Secretary of State directed that under its enlarged powers the title of the Commission would be the “International Water Commission.”²¹⁸ Finally, by the Act of June 30, 1932, Congress transferred the powers, duties, and functions of the IWC to the IBC, thereby abolishing the IWC.²¹⁹

Still, the duties assigned to the IBC were of a limited nature, encompassing boundary maintenance matters and the newly delegated exploratory duties with respect to water. This changed dramatically in 1935, with the passage of the U.S. Section’s “Enabling Act”, which amended the 1924 Act and authorized the Secretary of State, acting through the USIBC:

to conduct technical and other investigations relating to the defining, demarcation, fencing, or monumentation of the land and water boundary between the United States and Mexico, to flood control, water resources, conservation, and utilization of water, sanitation and prevention of pollution, channel rectification, stabilization, drainage of transboundary storm waters, and other related matters upon the international boundary between the United States and Mexico; and to construct and maintain fences, monuments and other demarcations of the boundary line between the United States and Mexico, and sewer systems, water systems, and electric light, power and gas systems crossing the international border.²²⁰

Congress authorized the President “to construct, operate, and maintain on the Rio Grande River below Fort Quitman, Texas, any and all works or projects which are recommended to the President as the result of such investigations and by the President are deemed necessary and proper.”²²¹

The 1935 Act authorized the President:

to construct, operate and maintain any project or works which may be provided for in a treaty entered into with Mexico . . . subject to such rules and regulations for continuing supervision by the said American Commissioner or any Federal agency as the President may cause to be promulgated, to turn over the operation and maintenance of such project or works to any Federal agency, or any State, county,

215. Act of May 13, 1924, ch. 153, 43 Stat. 118 (providing for a study regarding the equitable use of water in the lower Rio Grande in cooperation with the United States and Mexico) (codified at 22 U.S.C. § 277 (2011)).

216. *See id.*; IBWC U.S. SECTION, *supra* note 213, at 35.

217. Act of Mar. 3, 1927, ch. 381, 44 Stat. 1403 (codified at 22 U.S.C. § 277 (2011)).

218. IBWC U.S. SECTION, *supra* note 213, at 36.

219. Act of June 30, 1932, ch. 314, § 510, 47 Stat. 417 (codified at 22 U.S.C. § 277a (2011)).

220. Act of Aug. 19, 1935, ch. 561, 49 Stat. 660 (codified at 22 U.S.C. § 277a (2011)).

221. *Id.* § 277a.

municipality, district, or other political subdivision within which such project or works may be in whole or in part situated, upon such terms, conditions, and requirements as the President may deem appropriate.²²²

The 1935 Act also authorized:

the President, or any Federal agency he may designate . . . to enter into agreements with political subdivisions . . . [granting] the United States, gratuitously, lands or easements in lands necessary for the construction, operation, and maintenance . . . of any such project or works, or for the assumption by one or more of any such political subdivisions . . . of the operation and maintenance of such project or works in whole or in part upon the completion thereof.²²³

The Congress further authorized the President “to acquire by purchase, exercise of the power of eminent domain, or by donation, any real or personal property which may be necessary” for such projects or works.²²⁴ A final proviso authorizing the President to withdraw from sale, public entry or disposal of public lands “under the mining laws or any other law relating to the public domain” of the United States was repealed in 1976.²²⁵

Further amendments in 1935 and thereafter generally authorized the Secretary of State, through the USIBC, to dispose of unneeded lands and to issue revocable licenses for use of project lands;²²⁶ authorized and made appropriations for the construction, operation and maintenance of the Rio Grande Canalization Project;²²⁷ and provided for reconstruction or replacement of bridges as necessitated by the Rio Grande Canalization Project.²²⁸ Additional legislation in the 1940s authorized the Secretary, through the USIBWC, to reconstruct the Rio Grande Valley Gravity Canal and Storage Project;²²⁹ authorized the Rio Grande Bank Protection Project;²³⁰ and authorized the construction of hydroelectric generating facilities at Falcon Dam.²³¹

Further amendments in 1996 authorized the Secretary of State, acting through the USIBWC, to make improvements to the Rio Grande Canalization Project to stabilize the Rio Grande in the reach between the Percha Diversion Dam in New Mexico and the American

222. *Id.* § 277b(a)(1)-(2).

223. *Id.* § 277c(a).

224. *Id.* § 277c(b).

225. *See* 22 U.S.C. § 277c(c) (2011).

226. Act of Aug. 27, 1935, ch. 763 (codified at 22 U.S.C. § 277e (2011)).

227. *Id.* § 277b(d).

228. Act of Apr. 22, 1940, ch. 129, 54 Stat. 151.

229. Act of June 28, 1941, ch. 259, § 1, 55 Stat. 338 (codified at 22 U.S.C. § 277f (2011)).

230. Act of Apr. 25, 1945, 59 Stat. 89 (codified at 22 U.S.C. § 277b(b) (2011)).

231. Act of Oct. 5, 1949, ch. 593, 63 Stat. 701.

Diversion Dam in El Paso.²³²

B. THE AMERICAN-MEXICAN TREATY ACT OF 1950

The American-Mexican Treaty Act of 1950²³³ enacted § 277d-1 to 277d-9 of 22 U.S.C. §. 277. The Act authorized the Secretary of State, acting through the USIBWC, “to purchase, or condemn, lands, or interests in lands, for relocation of highways, railroads. . . telephone, or electric transmission lines,” or any other properties deemed necessary for the construction or operation and maintenance of any project; and to convey or exchange Government properties so acquired or improved or to grant easements therein, by instruments executed by the Secretary of State.²³⁴

The USIBWC was further authorized to construct, operate, and maintain all roads, highways, railways, power lines, buildings, and facilities necessary in connection with any such project, and . . . to provide housing, subsistence, and medical and recreational facilities for the officers, agents, and employees of the United States . . . engaged in the construction, operation, and maintenance of any such project.²³⁵

The 1950 Treaty Act also authorized appropriations to be expended for treaty and statutory purposes, including for construction, operation, and maintenance of stream gaging stations; personal services and rent; services of attorneys, appraisers, and others; travel expenses; acquisition of real and personal property; purchase of firearms and ammunition for guard purposes; and other such purposes.²³⁶

The American-Mexican Treaty Act also authorized the USIBWC to acquire, “by purchase or by proceedings in eminent domain,” certain properties owned by the Imperial Irrigation District of California, and to “reconstruct, operate and maintain such properties in connection with the administration of” the 1944 treaty.²³⁷

The Act further authorized the Secretary of State to enter into an agreement with Mexico for the IBWC to operate the Douglas-Agua Prieta sanitation project, subject to agreement by the city of Douglas, Arizona that it contribute an equitable proportion of the costs of such operation and maintenance allocated to the United States.²³⁸ The Act similarly authorized such agreement for the construction, operation, and maintenance of a sanitation project for the cities of Calexico,

232. Act of Oct. 19, 1996, Pub. L. 104-319, § 104, 110 Stat. 3866 (codified at 22 U.S.C. § 277b(d) (2011)).

233. American-Mexican Treaty Act of 1950, ch. 948, 64 Stat. 846.

234. American-Mexican Treaty Act of 1950, 22 U.S.C. § 277d-1(a) (2011).

235. *Id.* § 277d-2.

236. *Id.* § 277d-3.

237. *Id.* § 277d-4.

238. *Id.* § 277d-6.

California, and Mexicali, Mexico, with a similar requirement for equitable financial participation by the city of Calexico.²³⁹

In 1953, Congress authorized a similar agreement for the operation and maintenance of the Nogales sanitation project, located at Nogales, Arizona, with a similar requirement for financial participation by the city of Nogales.²⁴⁰ That same year Congress provided funding for the Anzalduas Diversion Dam,²⁴¹ and the next year provided for the transmission and disposition of electric power from Falcon Dam.²⁴²

In 1960, Congress authorized the Secretary of State, acting through the USIBWC, to join with Mexico to construct, operate, and maintain the Amistad international storage dam on the Rio Grande, above the previously built Falcon Dam.²⁴³ Concurrently, Congress authorized the construction of facilities for generating hydroelectric energy at Amistad Dam.²⁴⁴ Congress provided further that releases of the United States' share of waters from Amistad for domestic, municipal, industrial, and irrigation uses in the United States, shall be made pursuant to order by the appropriate authority of the State of Texas.²⁴⁵ A 1963 law added arrangements for power distribution and use from Amistad.²⁴⁶

In 1964, Congress approved a settlement for flood damage claims resulting from the Falcon Dam construction.²⁴⁷ Additionally, Congress authorized the USIBWC to enter into agreements with local organizations for the maintenance of flood and arroyo sediment control dams to be constructed in the Rio Grande watershed between Caballo Dam and El Paso, Texas, and facilitate and implement the operation and maintenance of the Rio Grande canalization project.²⁴⁸

A 1966 Act of Congress authorized the Secretary of State, acting through the USIBWC, to conclude an agreement with the Government of Mexico for the construction, operation, and maintenance of a drainage canal through Mexican territory for the discharge of waters of El Morillo and other drains into the Gulf of Mexico.²⁴⁹ The law also addressed joint solutions for the salinity problem in the Lower Rio

239. *Id.* § 277d-8.

240. Act of July 27, 1953, ch. 242, § 1, 67 Stat. 195 (codified at 22 U.S.C. § 277d-10 (2011)).

241. Act of Aug. 5, 1953, Pub. L. No. 195, 67 Stat. 370.

242. Act of June 18, 1954, ch. 310, 68 Stat. 255.

243. Act of July 7, 1960, Pub. L. No. 86-605, § 1, 74 Stat. 360 (codified at 22 U.S.C. § 277d-13 (2011)).

244. *Id.* § 277d-14.

245. *Id.* § 277d-15.

246. Act of Dec. 23, 1963, Pub. L. No. 88-137, 77 Stat. 475.

247. Act of Aug. 19, 1964, Pub. L. No. 88-447, 78 Stat. 481.

248. Act of Sept. 18, 1964, Pub. L. No. 88-600, 78 Stat. 956 (codified at 22 U.S.C. § 277d-29 (2011)).

249. Act of Sept. 19, 1966, Pub. L. No. 89-584, § 1, 80 Stat. 808 (codified at 22 U.S.C. § 277d-30 (2011)).

Grande.²⁵⁰

C. THE AMERICAN-MEXICAN CHAMIZAL CONVENTION ACT OF 1964

The American-Mexican Chamizal Convention Act of 1964 enacted § 277d-17 to 277d-25 of Title 22 of the U.S.C.,²⁵¹ which implemented the Chamizal Convention that was signed August 29, 1963. The act authorized the Secretary of State, through the USIBWC, to investigate construction of a new river channel, and “to acquire by donation, purchase, or condemnation, all lands required— for transfer to Mexico as provided in [the Chamizal Convention] . . . for relocation of highways, railroads, electric transmission lines, bridges, or other facilities, [as needed].”²⁵²

The 1964 Act further authorized: 1) the construction of various works, including replacement of the Bridge of the Americas that crosses the Rio Grande between El Paso and Ciudad Juarez, and 2) turning “over the operation and maintenance of any such works to any Federal agency, or any State, [or local government] within which such project or works [is situated].”²⁵³ It also authorized compensation for owners and tenants of lands affected by relocation.²⁵⁴ Later legislation concerning Chamizal established the Chamizal National Memorial,²⁵⁵ and provided for the Chamizal Border Highway.²⁵⁶

D. TIJUANA RIVER FLOOD CONTROL PROJECT

In 1956, Congress expanded the authorization for emergency flood control on the Rio Grande to also include the Colorado and Tijuana Rivers.²⁵⁷ Congress also, authorized taking emergency actions “to protect against health threatening surface and ground water pollution problems along the United States-Mexico boundary.”²⁵⁸

A 1964 law authorized the Secretary of State, acting through the USIBWC, “to conclude with the . . . Government of Mexico,

250. *Id.*

251. American-Mexican Chamizal Convention Act of 1964, Pub. L. No. 88-300, 78 Stat. 184 (codified at .

252. 22 U.S.C. § 277d-17(a-b) (2011).

253. *Id.* § 277d-18(a-b).

254. *Id.* § 277d-19(a).

255. Act of June 30, 1966, Pub. L. No. 89-479, 80 Stat. 232.

256. *See* Act of Nov. 8, 1966, Pub. L. No. 89-795, 80 Stat. 1477.

257. Act of June 20, 1956, ch. 414, § 101, 70 Stat. 302 (codified at 22 U.S.C. § 277d-12 (2011)). A 1990 amendment authorized emergency actions to protect against health threatening sanitation problems by repairing or replacing existing capital infrastructure along the border. *See* Act of Feb 16, 1990, Pub. L. No. 101-246, § 412(a), 104 Stat. 69. A further 1994 amendment replaced the 1990 language by specifying authority to take emergency actions, “consistent with the emergency provisions of the Safe Drinking Water Act, to protect against health threatening surface and ground water pollution problems” along the border. Act of Apr. 30, 1994, Pub. L. No. 103-236, § 423(b), 108 Stat. 457.

258. Act of June 20, 1956, ch. 414, § 101, 70 Stat. 302 (codified at 22 U.S.C. § 277d-12 (2011)).

agreements for emergency flood control measures . . . in the reaches of the lower Colorado River between Imperial Dam and the Gulf of California,” including actions to clear brush and guard against sedimentation of the river channel.²⁵⁹

In 1966, Congress authorized the Secretary of State, acting through the USIBWC, to conclude an agreement with the Mexican Government for “joint construction, operation, and maintenance” of the Tijuana River flood control project.²⁶⁰ A later statute made acquisition of lands for construction of the project contingent upon the City of San Diego providing an appropriate share of funds.²⁶¹

E. THE AMERICAN-MEXICAN BOUNDARY TREATY ACT OF 1972

The American-Mexican Boundary Treaty Act of 1972, which enacted § 277d-34 to 277d-42 of Title 22, implemented the 1970 Boundary Treaty.²⁶² The Act authorized the Secretary of State, acting through the USIBWC, to investigate matters relating to:

“(A) . . . the preservation of the river boundaries between the United States and Mexico; (B) the establishment and delimitation of the maritime boundaries in the Gulf of Mexico and in the Pacific Ocean; (C) water resources; and (D) the sanitation and the prevention of pollution.”²⁶³ The Act also authorized the Secretary of State, acting through the USIBWC, to acquire by donation, purchase, or condemnation, all lands . . . required . . . (A) for transfer to Mexico as provided in the treaty; (B) for construction of . . . new river channels and the adjoining levees in the territory of the United States; (C) to preserve the Rio Grande and the Colorado River as the boundary by preventing the construction of works which may cause deflection or obstruction of the normal flow of the rivers or of their floodflows; and (D) for relocation of any structure or facility . . . necessitated by the project.²⁶⁴

Lastly, the Act authorized the Secretary of State, acting through the USIBWC, “to remove, modify, or repair the damages caused to Mexico by works constructed in the United States.”²⁶⁵

The 1972 Boundary Treaty Act further directed that administration of nearly five hundred “acres of land acquired . . . from Mexico near Hidalgo-Reynosa . . . be assumed by the Department of the Interior,

259. Act of Aug. 10, 1964, Pub. L. No. 88-411, § 1, 78 Stat. 386 (codified at 22 U.S.C. § 277d-26(a-b) (2011)).

260. Oct. 10, 1966, Pub. L. No. 89-640, § 1, 80 Stat. 884 (codified at 22 U.S.C. § 277d-32 (2011)).

261. Sept. 28, 1976, Pub. L. 94-425, 90 Stat. 1333 (codified at 22 U.S.C. § 277d-33 (2011)).

262. American-Mexican Boundary Treaty Act of 1972, Pub. L. 92-549, § 101, 86 Stat. 1161 (codified at 22 U.S.C. §§ 277d-34 to 42 (2011)).

263. 22 U.S.C. § 277d-34(1) (2011).

264. *Id.* § 277d-34(2).

265. *Id.* § 277d-34(3).

United States Fish and Wildlife Service . . . as a part of the national wildlife refuge system."²⁶⁶ The Act further authorized "international flood control works for protection of lands along the international Section of the Rio Grande in the United States and in Mexico in the Presidio-Ojinaga Valley."²⁶⁷ However, the Act prohibited the use of appropriated funds "for flood control works on any land, site, or easement, unless . . . acquired under the treaty for other purposes or by donation."²⁶⁸

F. THE RIO GRANDE POLLUTION CORRECTION ACT OF 1987

The Rio Grande Pollution Correction Act of 1987 enacted § 277g to 277g-3 of Title 22 of the U.S.C.²⁶⁹ This act directed the Secretary of State, through the USIBWC, to conclude agreements with the Government of Mexico:

for the purpose of correcting the international problem of pollution of the Rio Grande caused by discharge of raw and inadequately treated sewage and other wastes into such river from the border cities including but not limited to Ciudad Acuna, Nuevo Laredo, and Reynosa, Mexico, and Del Rio, Laredo, and Hidalgo, Texas²⁷⁰

The Act further authorized the construction of facilities approved by the two Governments.²⁷¹

In the 1990 Amendments, Congress authorized operation of the interceptor system, which was "constructed to intercept sewage flows from Tijuana from selected canyon areas."²⁷² It further authorized operation of the Rio Grande bank protection project; as well as the operation of the Anzalduas diversion dam for irrigation or water supply purposes, which is subject to payment by water users for portions of the dam as allocated by the Secretary of State.²⁷³

Amendments to another statute authorized emergency actions "consistent with the emergency provisions of the Safe Drinking Water Act, to protect against health threatening sanitation problems by repairing or replacing existing capital infrastructure along the border."²⁷⁴

266. *Id.* at § 277d-39.

267. *Id.* at § 277d-41.

268. *Id.* at § 277d-42.

269. Rio Grande Pollution Correction Act of 1987, Pub. L. 100-465, § 1, 102 Stat. 2272 (codified at 22 U.S.C. § 277g to 277g-3 (2011)).

270. 22 U.S.C. § 277g(a) (2011).

271. *Id.* § 277g-1(1-2).

272. *Id.* § 277b(a).

273. *Id.* § 277b(b-c). Another act extended authority for construction of works on the Rio Grande to include drainage of transboundary storm waters. *Id.* § 277a.

274. *Id.* § 277d-12.

G. TIJUANA RIVER VALLEY ESTUARY AND BEACH SEWAGE CLEANUP ACT OF 2000

In the Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000, Congress acted “to authorize the United States to take actions to address comprehensively the treatment of sewage emanating from the Tijuana River area, Mexico, that flows untreated or partially treated into the United States causing significant adverse public health and environmental impacts.”²⁷⁵ The Act directed both the USIBWC and the Administrator of the EPA to take action to ensure the secondary treatment in the United States or Mexico of effluent from the South Bay International Wastewater Treatment Plant (IWTP) and “of additional sewage emanating from the Tijuana River area, Mexico.”²⁷⁶

V. CRITICISM OF THE USIBWC

A. PRAISE GIVES WAY TO CRITICISM

The U.S. Section of the IBWC is headquartered in El Paso, Texas, and is one of few Federal agencies headquartered outside Washington, D.C., which may partially account for its aura of independence, as well as the absence of oversight.²⁷⁷ Its Mexican Government counterpart (La Comisión Internacional de Límites y Agua, or “CILA”) is located across the Rio Grande at Ciudad Juarez, in the Mexican state of Chihuahua.²⁷⁸ The juxtaposition of conditions in the two cities today sadly reflects the continuation of a neocolonial relationship that is not limited to land and water.²⁷⁹

275. Tijuana River Valley Estuary and Beach Sewage Cleanup Act of 2000, Pub. L. 106-457, § 802, 114 Stat. 1977 (codified at 22 U.S.C. § 277d-43 (2011)).

276. 22 U.S.C. § 277d-44(a)(1)(A-B) (2011).

277. *The International Boundary and Water Commission, Its Mission, Organization, and Procedures for Solution of Boundary and Water Problems*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/About_Us/About_Us.html (last visited Mar. 15, 2011). One irony of the State Department’s disavowal of responsibility for the USIBWC is that it leaves the agency without headquarters in Washington, D.C., a requirement applicable to all executive departments, absent statutory waiver. See 4 U.S.C. §§ 71 and 72 (2011).

278. *Id.*

279. Ciudad Juarez is one of the deadliest cities in the world, having experienced 3,000 murders in 2010 alone. See Nick Valencia, *Juarez Counts 3,000th Homicide of 2010*, CNN (Dec. 15, 2010, 6:02 AM), <http://www.cnn.com/2010/WORLD/americas/12/15/mexico.juarez.homicides/index.html>. El Paso, on the other hand, celebrates its claim to be the safest major city in the United States. *El Paso Called the Safest Big City in the U.S.*, ALBUQUERQUE J. (Nov. 23, 2010, 6:30 AM), <http://www.abqjournal.com/abqnews/abqnewseeker-mainmenu-39/25396-630am-el-paso-called-safest-big-city-in-the-us.html>.

Meanwhile, the United States supplies eighty seven percent of the illegal guns used in Mexican murders. See, e.g., VIVIAN S. CHU & WILLIAM J. KROUSE, CONG. RESEARCH SERV., R40733, GUN TRAFFICKING AND THE SOUTHWEST BORDER 1-2 (2009), available at http://assets.opencrs.com/rpts/R40733_20090729.pdf. The United States also pays Mexican crime lords billions of dollars annually in return for a steady flow of illegal drugs. *Id.* at 1; OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG

Notwithstanding its creation in the wake of conquest, and the uneasy alliance between victor and vanquished, the IBWC generally won high praise throughout the twentieth century for its engineering expertise and ability to diplomatically resolve difficult transboundary water issues.²⁸⁰ The IBWC engaged in aggressive technological initiatives designed principally to secure a reliable source of water for development on both sides of the border region, and for building canals, flood control projects, dams and wastewater treatment plants located along the Rio Grande, Colorado and Tijuana Rivers.²⁸¹

Various authors have referred to the IBWC as “one of the most prestigious international resource management agencies in the world,”²⁸² and “the finest example of functional cooperation in transboundary resources management between highly dissimilar countries anywhere on the globe.”²⁸³ Of course, such unabashed admiration for diplomatic accomplishments fails to reflect the reality that, even in the absence of war, conflict and unequal power define binational relations.²⁸⁴

Actually, many such tributes are offered as a preface to criticism, or at least in presentation of competing perceptions of the IBWC. For example, the IBWC has been labeled both “the most venerable binational water management agency in North America,” and “an institutional dinosaur, a stodgy brick and mortar agency, dominated by engineers, intractable, defensive,” with a “reputation as a monopolistic, secretive agency with a penchant for controlling and hoarding vital data on border water dynamics.”²⁸⁵

Such a mixture of praise and criticism is to be expected, for the IBWC’s projects, however meritorious, have always had some

CONTROL STRATEGY DATA SUPPLEMENT 2010, 63 (2010), *available at* www.whitehousedrugpolicy.gov/publications/policy/ndcs10/ndcs10_data_supl/10dat_asupplement.pdf. Of course, the U.S. government itself does not sell the guns and purchase the drugs, however, federal, state, and local laws enable the continuation of the exploitative relationship. CHU & KROUSE, *supra* note 279, at 2-3.

280. *See, e.g.*, OIG, 2005 REPORT, *supra* note 31, at 7 (“USIBWC has a long history of quiet, acknowledged technical competence. For over 100 years, the American and Mexican Commissioners of the IBWC - civil engineers - found appropriate solutions to most of the water and sanitation issues affecting both sides of the border. In other words, the commission worked as the treaties intended. More recently, USIBWC has gone through several years of internal management turmoil.”).

281. *See* INT’L BOUNDARY & WATER COMM’N, U.S. SECTION, STRATEGIC PLAN FY 2008 – FY 2013 3-4, 7-9 (2010), *available at* http://www.ibwc.gov/Files/Strategic_Plan.pdf.

282. *E.g.*, Mumme & Moore, *supra* note 34, at 661.

283. Stephen Mumme, *Innovation and Reform in Transboundary Resource Management: A Critical Look at the International Boundary and Water Commission, United States and Mexico*, 33 NAT. RESOURCES J. 93, 93 (1993).

284. *See generally, e.g.*, Mark Zeitoun & J. A. Allan, *Applying Hegemony and Power Theory to Transboundary Water Analysis*, 10 WATER POLICY (Supplement 2) 3, 5-6 (2008), *available at*

<http://www.iwaponline.com/wp/010S2/wp010S20003.htm> (discussing the implications of power disparities in the management and allocation of transboundary water).

285. Mumme, *Sustainable Development Era*, *supra* note 5, at 117, 122.

detrimental impacts. For example, the Rio Grande Channelization Project, completed by the USIBWC in 1943, destroyed between 12,000 and 20,000 acres of riparian wetlands along the one hundred-mile reach of the Rio Grande from Caballo Dam in New Mexico to the Texas State line.²⁸⁶

Yet the IBWC's reputation is typically redeemed, at least in part, by its technical engineering accomplishments:

Criticism of the IBWC is almost as old as the Commission itself. Over the past sixty years, the Commission, particularly its U.S. Section, has been attacked for numerous grievances. Complaints include U.S. intrusion on national sovereignty, unnecessary duplication of functions of domestic water management agencies, the adoption of an overly technical and politically narrow interpretation of treaty-based responsibilities, use of an ad-hoc approach to dealing with problems and disputes falling within the scope of its official mandate, and failure to respond to local constituencies. By contemporary standards, the IBWC is deficient in various areas, ranging from the adequacy of its mandate to administration and operational procedures. Centered on the task of protecting national treaty water endowments, the IBWC was, and arguably remains, poorly positioned to address contemporary water management concerns or to promote an agenda of sustainable development of border water resources. The Commission, however, is also praised as a model of institutionalized bi-national cooperation. It is the lead agency for transboundary water management and the settlement of bilateral disputes relating to managing shared water resources.²⁸⁷

Ironically, even USIBWC shortcomings, such as its lack of oversight and accountability, insulation from public input, and allegiance to elite interests, are also viewed as assets. Accordingly, its "complete independence in administrative matters," is credited to the agency's "conservatism,"²⁸⁸ and to its need to keep a "low profile with the general public along the border [in order to] effectively cultivate[] the support of the elite political clientele that is crucial to decisionmaking."²⁸⁹

Beginning in the 1970s, rapid growth and development along the 2,000-mile long border coincided with a rising tide of public consciousness about water quality, water shortages, pollution, and sanitation, as well as a growing demand for public participation in government decisions.²⁹⁰ A law review Comment in 1971 suggested

286. See U.S. DEP'T. OF THE INTERIOR, *Chapter 4: Water Development and Management Programs*, in *THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS*, VOL. II (1996) available at <http://www.doi.gov/oepc/wetlands2/v2ch2.html>.

287. Stephen P. Mumme, *Developing Treaty Compatible Watershed Management Reforms for the U.S. - México Border: The Case for Strengthening the International Boundary and Water Commission*, 30 N.C. J. INT'L L. & COM. REG. 929, 930 (2005).

288. Mumme & Moore, *supra* note 34, at 672-73.

289. *Id.* at 675.

290. See Sanchez, *supra* note 6, at 283, 285-86, 288-90; see also U.S. Envtl. Prot. Agency, *What is Border 2012, People Along the Border*, U.S. - MEXICO BORDER 2012 (Oct. 12, 2010), <http://www.epa.gov/Border2012/framework/people.html> (stating that the

that the IBWC was institutionally incapable of addressing complex ecological issues and condemned the IBWC for its narrow technical focus, describing the purportedly diplomatic institution as an "international Army Corps of Engineers."²⁹¹ The authors of a 1979 paper opined that, "[b]ecause of the limited scope of its authority, the IBWC is somewhat inadequate to bring about a definitive resolution of issues in an area where political considerations take precedence over sound water management."²⁹² Such concerns were increasingly expressed or acknowledged throughout the 1980s.²⁹³ One observer listed the IBWC's shortcomings:

[T]he IBWC has attributed minor significance to the Treaty's concern with border sanitation. The IBWC has construed narrowly the Treaty's mandate for "solution of all border sanitation problems." The IBWC has limited its sanitation responsibilities to the development of sewage disposal projects, refusing to address the more complex and hazardous problems of industrial discharges, toxic wastes, groundwater mining and contamination, and air pollution. Apparently, the IBWC wishes to avoid political controversy over its jurisdictional authority.

The IBWC also refuses to use its clearly defined Treaty powers to their fullest extent. The Commission has authority to initiate investigations and to make decisions involving the utilization of the international waters. These decisions, referred to as "Minutes," are binding on the nations unless one of the governments objects within thirty days. These informal decision-making powers give the IBWC tremendous discretion to focus both nations' attention on environmental problems and to make recommendations for their solution. The apolitical Commission, however, has denied itself any role in the fashioning of environmental policy, relying on the uncertain initiative of executive levels of government to bring an issue before the Commission. The IBWC consistently avoids political controversy, preferring to concern itself only with data-gathering, acting as a liaison between the two foreign offices, and completing assigned water projects.²⁹⁴ (citations omitted)

B. PUBLIC PARTICIPATION AND ENVIRONMENTAL CONCERNS

Criticism of the IBWC heated up in the 1990s, as an increasing

border population boom was sparked, in part, "by the maquiladora program, begun in 1965 to provide economic incentives to foreign (mostly U.S.-owned) assembly plants to locate in the border region. The rate of industrial development increased further after the North American Free Trade Agreement . . . removed most barriers to trade . . . among Canada, the United States and Mexico."); *see generally* M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL32934, U.S.-MEXICO ECONOMIC RELATIONS: TRENDS, ISSUES, AND IMPLICATIONS 7 (2011) *available at* <http://www.fas.org/sgp/crs/row/RL32934.pdf>.

291. Johnston, *supra* note 9, at 164.

292. Jamail & Ullery, *supra* note 7, at iv.

293. *See, e.g.*, Mumme, *State Influence*, *supra* note 7, at 625, 633.

294. Sinclair, *supra* note 5, at 113-14.

number of scholars and environmental critics took up the charge. The growing hostility toward the IBWC led one of the leading voices concerning transboundary water management to observe: "For the environmental groups, the Commission could be considered public enemy number one."²⁹⁵

A 1993 scholarly monograph reflected this widespread disillusionment with the IBWC:

The [IBWC] has been questioned by many border scholars and activists who criticize the IBWC for its inability to act as an independent border institution, and for the lack of transparency in its decision-making processes. The IBWC is infamous for being an old-fashioned, engineering driven institution that focuses on large, capital-intensive brick and mortar projects. The IBWC has also been criticized for being too slow and too bureaucratic and for being a nonpublic oriented institution.²⁹⁶

Critics argued that the IBWC is biased towards construction projects, and lacks diplomatic and management skills.²⁹⁷ Scholars partially attribute this problem to Article 2 of the 1944 Water Treaty, which requires that the Commissioners of both the U.S. and Mexican Sections must be licensed engineers.²⁹⁸ The antiquated requirement has ill-served the Commission in modern times, and, at times, both sections have disregarded it.²⁹⁹

Overall, the IBWC was simply seen as not having an interest in environmental projects.

With regard to border environmental infrastructure, the IBWC has completed a number of projects in its over fifty-year history. An examination of the total list of IBWC projects, however, reveals that only a few constitute real environmental infrastructure. If items such as bridges and the various flood control projects are eliminated from the list, then there are not many truly environmental infrastructure projects.³⁰⁰

A Harvard Law Review Comment summarized the USIBWC's environmental default this way: "A lack of [a community of professionals committed to progressive environmental policies] within the [USIBWC], which almost always defers to the judgment of the Army Corps of Engineers, precludes extensive involvement and input by environmental organizations and NGOs."³⁰¹

295. Albert E. Utton, *Protecting the Environment in the U.S.-Mexico Border Region*, 1 U.S.-MEX. L.J. 211, 212 (1993).

296. Spalding, *supra* note 5, at 118.

297. See, e.g., Sanchez, *supra* note 6, at 283, 290, 297.

298. 1944 Water Treaty, *supra* note 3, at art. 2.

299. See *infra* notes 628, 629.

300. Spalding, *supra* note 5, at 120.

301. *Developments in the Law—International Environmental Law*, *supra* note 9, at 1578 n. 143.

Equally toxic to its critics was the IBWC's resistance to public participation. As one author wrote in 1993:

Public participation is perhaps the best evidence of the growing distance between the border community and the IBWC. The reluctance of the Commission to accept public participation in those issues under its jurisdiction for decades is becoming more intolerant to the affected public.

The demands for broader public participation, mistakenly perceived by the Commission as 'antagonistic or 'interference in their affairs,' are no more than the response of those communities to a new reality of the border. The truth is that border problems, particularly water issues, have outgrown the jurisdiction of the Commission. Their solution can no longer depend on the limited technical skill of the IBWC engineers. Rather, they require an integrated and interdisciplinary approach.³⁰²

Comparing public participation policies of the Canada/United States International Joint Commission (IJC) with those of the IBWC, another author noted that the ICJ "is justly renowned for this aspect of its activities . . . in rather stark contrast to the public participation situation of the IBWC."³⁰³ The author noted that the IBWC had "grave shortcomings in the field of public participation . . .":³⁰⁴ "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."³⁰⁵

As one of many observers to occasionally summarize the charges made against the IBWC, a leading supporter of the agency conceded that the charges "certainly have merit, at least by degrees, and deserve to be taken seriously."³⁰⁶ The supporter continued:

302. Sanchez, *supra* note 6, at 283.

303. Hayton, *supra* note 6, at 277-78. The IBWC has frequently been compared unfavorably to the IJC. See, e.g., Richard K. Paisley et al., *Transboundary Water Management: An Institutional Comparison Among Canada, the United States and Mexico*, 9 OCEAN & COASTAL L.J. 177, 189-91 (2004); Keith A. Henry, *The International Joint Commission and the International Boundary and Water Commission*, 33 NAT. RESOURCES J. 305, 306 (1993).

304. Hayton, *supra* note 6, at 279.

305. *Id.* at 278. Indeed, the two are very different types of organizations. Whereas the IBWC comprises a U.S. Section and a Mexican Section, each pursuing its own interests as distinct parts of an international institution, the IJC exists only as an international body, and has no respective national sections. Thus, the IJC is a truly "binational" institution, whereas the IBWC is more properly termed a "bilateral" body. See Lee Botts & Paul Muldoon, *Using the Boundary Waters Treaty for the 21st Century: Revitalizing the Great Lakes Governance Regime*, 54 WAYNE L. REV. 1553, 1559 (2008); see generally, *The Boundary Waters Treaty Centennial Symposium*, 54 WAYNE L. REV. 1417 (2008).

306. Mumme, *Managing Acute Water Scarcity*, *supra* note 5, at 156.

Analysts drawn to administrative concepts like "ecosystem management" or "drainage basin management" have long chafed at the more limited jurisdiction of the Commission, viewing it as a political creation, mired in sovereignty, and mismatched to modern management challenges raised by ecological zones and hydrological cycles. The Commission's mandate, to build and operate joint works and resolve such disputes as may arise related to the treaties under its jurisdiction, is seen as essentially reactive and ad hoc rather than proactive and capable of addressing problems in a systematic, comprehensive, and future-oriented fashion. Finally, the Commission's diplomatic structure is criticized as insular, secretive, and unresponsive to public concerns, factors conceived for the purpose of defending sovereign entitlements rather than forging consensual grassroots solutions to transboundary problems.³⁰⁷

Another critic put it more succinctly: "The IBWC's most commonly cited shortcomings include its limited scope and unclear mandate (narrow focus on water quantity, rather than quality, issues, for example) as well as its 'cumbersome' institutional structure, which hinders prompt responses to environmental problems and obstructs any public participation element."³⁰⁸

C. GROUNDWATER POLLUTION AND DEPLETION

The upsurge in criticism of the IBWC in recent decades has coincided with explosive growth along the border and a growing awareness that a variety of water management issues have reached a point of crisis: groundwater pollution and depletion; water shortages and drought; untreated sewage; salinity in the Colorado River; pervasive pollution of the region's rivers; and deteriorating international relations.

Mexico and the United States share underground aquifer basins connected to the Rio Grande, and the Colorado, Tijuana, Santa Cruz, and New Rivers.³⁰⁹ Although a number of federal laws indirectly protect groundwater, there is no comprehensive federal regulatory scheme.³¹⁰ State laws regarding groundwater ownership and exploitation vary among the U.S. border states, but all vest expansive rights in the owner of the surface to reasonable use of the water.³¹¹ A major criticism of the IBWC is that its scope and jurisdiction exclude consideration of groundwater, water quality, and related environmental, conservation and distribution issues, at least as

307. *Id.* (citations omitted).

308. Land, *supra* note 5, at 108-09 (citing MARY KELLY, *FACING REALITY: THE NEED FOR FUNDAMENTAL CHANGE IN PROTECTING THE ENVIRONMENT ALONG THE U.S./MEXICO BORDER* (1991)).

309. See M. Diane Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexico-United States Border Area*, 24 ST. MARY'S L.J. 639, 680 (1993).

310. See Adrienne Paule, *Underground Water: A Fugitive at the Border*, 13 PACE ENVTL. L. REV. 1129, 1131 (1996).

311. See generally Barber, *supra* note 309, at 667-78.

traditionally construed under the 1944 Water Treaty.³¹²

Groundwater provides a significant source of water used all along the border. The Mexicali-Imperial Aquifer is “a significant source of drinking water” for Mexicali, Mexico, and a “significant source of irrigation water” for farmers in Northern Baja.³¹³ In Far West Texas, the Hueco Bolson and the Mesilla Bolson Aquifers provide approximately half of the municipal water supply for the City of El Paso, with nearly one million residents. The Hueco Bolson Aquifer also serves as the principal source of municipal supply for Ciudad Juarez, a city of 1.5 million residents. Large-scale groundwater withdrawals have caused significant declines in the water table, and water-quality degradation due to lateral brackish water intrusion into the fresh water zones.³¹⁴ In addition to salinity, groundwater contamination is endemic in the border region,³¹⁵ particularly by arsenic that both occur naturally and results from industrial pollution, and by phosphates and nitrogen from agriculture run-off.³¹⁶

Although Texas law permits the Texas Water Commission to regulate groundwater, the agency has been reluctant to do so.³¹⁷ The State requires joint planning in management areas among groundwater conservation districts. According to the Texas Water Code: “Groundwater Conservation Districts . . . are the state’s preferred method of groundwater management”³¹⁸ Among other things, the Water Code requires that, “[n]ot later than September 1, 2010, and every five years thereafter, the districts shall consider groundwater availability models and other data or information for the management area and shall establish desired future conditions for the relevant aquifers within the management area.”³¹⁹ As of October 1, 2009, desired future conditions had not been adopted for any aquifers in the state, and were not expected for several more years.³²⁰

Neither groundwater nor ecological concerns are specifically included in the 1944 Water Treaty’s Article 3 list of IBWC priorities, although there is a catch-all category for “other beneficial uses.”³²¹ While the IBWC took a tentative step toward addressing the omission

312. See, e.g., Mumme, *Advancing Binational Cooperation*, *supra* note 7, at 88-89. See generally Stephen P. Mumme, *The U.S.-Mexican Conflict over Transboundary Groundwaters: Some Institutional and Political Considerations*, 12 CASE W. RES. J. INT’L L. 505, 506-07 (1980); Hall, *supra* note 8, at 907 (“Despite the seemingly inescapable connection between population growth, industrial development, and groundwater demand, the IBWC has managed largely to avoid addressing the issue of transboundary groundwater management throughout its nearly 114 years of combined operation.”).

313. Paul Stanton Kibel, *A Line Drawn in Water: Aquifers Beneath the Mexico-United States Border*, 12 U. DENV. WATER L. REV. 191, 193-94 (2008).

314. FWTWPG 2011 Plan, *supra* note 50, at 1-47 and 1-71.

315. See WESTERHOFF ET AL., *supra* note 50, at 4-5.

316. *Id.*

317. Barber, *supra* note 309, at 676.

318. TEX. WATER CODE ANN. § 36.0015 (2011).

319. TEX. WATER CODE ANN. § 36.108(d) (2011).

320. FWTWPG 2011 Plan, *supra* note 50, at 1-6.

321. 1944 Water Treaty, *supra* note 3, at art. 3.

of groundwater management with the adoption of Minute 242 in 1973, which provides for mandatory consultation on any construction that would affect groundwater, nothing more has been done to extend the jurisdiction of the IBWC concerning groundwater management.³²² One critic observed with alarm in 1993, that

[S]ince 1973 and approval of Minute 242, the IBWC has had general rules for establishing a bilateral regime to conserve, manage, and distribute transboundary groundwaters. Despite the fact that this regime was urgently needed 18 years ago, practically nothing has been done in this respect by the Commission to date. This is viewed as a most desperate situation, and some grave disputes may already be on the horizon as a result of the Commission's passivity.³²³

After another dozen years, nothing had changed, resulting in "a race to the bottom in various localities along the border."³²⁴

Some have long suggested that only a new groundwater treaty will force the IBWC to act.³²⁵ A regional agreement between Mexico and a state or local government that shares the aquifers is both a "reasonable and constitutional alternative for managing groundwater on the border."³²⁶ In any event, even IBWC supporters who once hoped the agency might play a role in negotiating such a treaty have been disappointed.³²⁷

322. See Mumme, *supra* note 8, at 341-42 ("Today the goal of Minute 242 remains unfulfilled. Despite a train of intermittent discussions and localized problems, little progress has been made since 1973. The inevitable result is the current unsustainable yet escalating race amongst parties on both sides of the border to drain these vital resources."); see also Hall, *supra* note 8, at 908 ("The clear anticipation of and call for a 'comprehensive agreement on groundwater in the border areas' found in paragraph 5 of the Minute was never realized, and little progress in developing a formal agreement has been recorded to date, thirty years after the signing of Minute 242.").

323. Szekely, *supra* note 4, at 399.

324. Mumme, *Advancing Binational Cooperation*, *supra* note 7, at 83-84.

325. See Burman & Cornish, *supra* note 13, at 397, 400; Philip Dunlap, Comment, *Border Wars: Analyzing the Dispute over Groundwater Between Texas and Mexico*, 12 L. & BUS. REV. AM. 215, 239-241 (2006); Robert C. Gavrell, *The Elephant Under the Border: An Argument for a New, Comprehensive Treaty for the Transboundary Waters and Aquifers of the United States and Mexico*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 189, 214, 217, 219, 221, 224-27 (2005); Amy Hardberger, *What Lies Beneath: Determining the Necessity of International Groundwater Policy Along the United States—Mexico Border and a Roadmap to an Agreement*, 35 TEX. TECH L. REV. 1211, 1237 (2004); Robert D. Hayton & Albert E. Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty*, 29 NAT. RESOURCES J. 663, 663, 665 (1989); Mumme, *The U.S.-Mexican Conflict over Transboundary Groundwaters*, *supra* note 312, at 506-07; Marilyn C. O'Leary, *The Bellagio Draft Treaty as a Tool for Solving Border Groundwater Issues*, 11 U.S.-MEX. L.J. 57, 58 (2003); Paule, *supra* note 310, at 1133; Ann Berkeley Rodgers & Albert E. Utton, *The Ixtapa Draft Agreement Relating to the Use of Transboundary Groundwaters*, 25 NAT. RESOURCES J. 713, 713, 717, 721 (1985).

326. Jennifer Evans, *Transboundary Groundwater in New Mexico, Texas, and Mexico: State and Local Legal Remedies to a Challenge Between Cities, States, and Nations*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 471, 473 (2006).

327. See, e.g., Stephen P. Mumme, *Advancing Binational Cooperation in Transboundary Aquifer Management on the U.S.-Mexico Border*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 77, 85 (2005) (suggesting it may be unrealistic to expect the IBWC to aggressively promote groundwater management given the lack of support among border state governments,

D. WATER SHORTAGES AND DROUGHT

As for surface water, irrigation uses account for more than eighty percent of the U.S. share of water in the Rio Grande, and more than fifteen percent is consumed for municipal uses; industrial use is negligible, amounting to less than 0.4 percent.³²⁸ With the U.S. border population projected to triple by 2060, municipal use is projected to double.³²⁹ Nearly all water use in the Lower Rio Grande Valley is derived from Amistad and Falcon Reservoirs, the two major international reservoirs that are located on the Rio Grande. “These impoundments provide controlled storage for over 8 million acre-feet of water. . . .”³³⁰ The United States owns 58.6 percent of the useable storage in Falcon Reservoir and 56.2 percent of the total conservation storage capacity in Amistad Reservoir. Mexico owns the balance in each.³³¹

Beginning in the early 1990s, severe drought prevented Mexico from meeting its obligations to deliver water quantities specified by the 1944 Treaty.³³² The flows in the Rio Grande during the 1990s-2000s were “the lowest experienced during the last half century.”³³³ As a result, farmers and ranchers in the Rio Grande Valley of Texas and their congressional representatives became hostile towards Mexico.³³⁴ Texas’s U.S. Senators introduced a rather belligerent demand that “[t]he President of the United States should promptly utilize the full power of his office to bring about compliance with the 1944 Treaty on Water Utilization in order that the full requirement of water be available for United States use during the next full crop season” and “[t]he United States Section of the International Boundary and Water Commission should work to bring about full compliance with the 1944

notwithstanding the resultant “race to the bottom.”)

328. See LRGRWPG 2011 Plan, *supra* note 51, at ES6.

329. LRGRWPG 2011 Plan, *supra* note 51, at 2-11. The U.S. population in the Lower Rio Grande Valley is projected to increase from 1.62 million people at present to 3.94 million by 2060. *Id.* at 2-2. Approximately ninety-seven percent (833,640) of the border population in west Texas reside in El Paso County, one of the fastest growing regions in Texas. FWTWPG 2011 Plan, *supra* note 51, at ES2.

330. LRGRWPG 2011 Plan, *supra* note 51, at 3-7.

331. *Id.*

332. *Id.* at 3-125.

333. *Id.*, at 3-32.

334. See generally, STEPHEN R. VIÑA, CONG. RESEARCH SERV., RS 22085, THE UNITED STATES – MEXICO DISPUTE OVER THE WATERS OF THE LOWER RIO GRANDE RIVER CRS-3 and -6 (2005), available at <http://www.whprp.org/nle/crsreports/05mar/RS22085.pdf>. See also, e.g., Susan Combs, *The Mexico Water Debt*, 67 TEX. B.J. 198, 201 (2004) (the author, a Texas Agriculture Commissioner, charged, “Mexico’s failure to abide by its treaty obligations and address its accumulated debt has caused an estimated \$1 billion economic loss to the Rio Grande Valley.”); Jill Warren, *Mexico’s Compliance with the 1994 Water Treaty Between the United States and Mexico: A Texas Perspective*, 11 U.S.-MEX. L.J. 41, 44-45 (2003) (“Texans and their elected officials are rightfully frustrated by this course of events. The United States and Mexico reach agreements, but Mexico does not fulfill the terms of those agreements. The Texas leadership team is running a full-court press on officials of the United States and Mexico to attempt to force a solution to this devastating problem.”).

Treaty on Water Utilization and not accept any water debt or deficit repayment plan which does not provide for the full repayment of water owed.”³³⁵

The 1944 Water Treaty stipulates rationing rules for periods of “extraordinary drought,” but does not define the term.³³⁶ Amid increasing political tensions on both sides of the border, the IBWC issued several Minutes attempting to balance scheduled amounts due against the fact of water shortages,³³⁷ and although these allowed the IBWC to muddle through the impasse, they ultimately did little to resolve tension between the United States and Mexico over water distribution and binational management.³³⁸ Again, these problems left observers to look for answers beyond both the IBWC and the 1944 Treaty.³³⁹

A 2005 Report to Congress noted: “Many have also stated that the structure and role of the IBWC—a role traditionally rooted in the protection of national sovereign interests—should be reevaluated to reflect the growing need for cooperation and assign a stronger commitment to forming policy on the River’s sustainable development.”³⁴⁰

E. ENDANGERED RIVERS, FLORA AND FAUNA

The IBWC has long been criticized for being so narrowly focused on water quantity that it neglects water quality issues, including environmental mitigation for its own construction projects, and the boundary waters are anything but pristine. The storied Rio Grande (known in Mexico as the Rio Bravo del Norte), which extends 1,900 miles from its headwaters in the Rocky Mountains of Colorado to its

335. 157 CONG. REC.25,658 (2000).

336. 1944 Water Treaty, *supra* note 3, at art. 4; *see also* Mumme, *Revising the 1944 Water Treaty*, *supra* note 16, at 653-54.

337. *See, e.g.*, IBWC Minute 309, *supra* note 168; IBWC Minute 308, *supra* note 168; IBWC Minute 307, *supra* note 168; IBWC Minute 293, *supra* note 168.

338. Texas irrigators invoked Chapter 11 of NAFTA, which allows a foreign investor to challenge host nation actions that are tantamount to nationalization or expropriation; however, Mexico and the State Department obtained a dismissal because NAFTA applies only to host nation investments and all the lost investment was in Texas, not Mexico. *See, e.g.*, Paul Stanton Kibel & Jonathan R. Schutz, *Rio Grande Designs: Texans' NAFTA Water Claim Against Mexico*, 25 BERKELEY J. INT'L L. 228, 229, 265-67 (2007). In 2005, Mexico agreed to a repayment schedule. *See also* Gregory F. Szydowski, *The Commoditization of Water: A Look at Canadian Bulk Water Exports, the Texas Water Dispute, and the Ongoing Battle Under NAFTA for Control of Water Resources*, 18 COLO. J. INT'L ENVTL. L & POLY 665, 679-80 (2007).

339. *See* Ingram, *supra* note 13, at 190-91; Lopez, *supra* note 15, at 500-08; Mumme, *Managing Acute Water Scarcity*, *supra* note 5, at 155-57; Barbara J. Morehouse et al., *The Implications of Sustained Drought for Transboundary Water Management in Nogales, Arizona, and Nogales, Sonora*, 40 NAT. RESOURCES J. 783, 784 (2000); Mumme, *supra* note 16, at 655-58; *See* Craig J. Pritzlaff, *The Tragedy of Another Minute: IBWC Minute 308's Failure to Mend the Rio Grande River*, 9 L. & BUS. REV. AM. 617, 624 (2003).

340. STEPHEN R. VIÑA, CONG. RESEARCH SERV., RS 22085 THE UNITED STATES – MEXICO DISPUTE OVER THE WATERS OF THE LOWER RIO GRANDE RIVER CRS-6 (2005), available at <http://ncseonline.org/nle/crsreports/05mar/RS22085.pdf>.

delta in the Gulf of Mexico, is the fourth longest river in the United States.³⁴¹ The entire Rio Grande/Rio Bravo watershed covers an area approximately 335,000 square miles, with approximately half the watershed in the United States and the other half in Mexico.³⁴² The USIBWC is responsible for monitoring and coordinating efforts to improve the quality of water within the Rio Grande in its 1,254-mile international boundary section, partially pursuant to contract with the state of Texas.³⁴³

The Rio Grande flows freely for 175 miles in Colorado before its nearly 500 mile journey through New Mexico is impeded by Elephant Butte and Caballo dams.³⁴⁴ The river dries up by the time it reaches El Paso/Ciudad Juarez and does not resume significant flows for another 250 miles downstream, at the confluence with the Rio Conchos (with headwaters in Mexico), a stretch deemed the "Forgotten Reach of the Rio Grande."³⁴⁵ Revitalized by the Rio Conchos, the Rio Grande is designated as a Wild and Scenic River for the nearly 200 miles that it winds through Big Bend National Park in Texas.³⁴⁶ The river is once again impounded at Amistad Dam, and then again by Falcon Dam, before it flows into the Gulf of Mexico.³⁴⁷

The Elephant Butte Dam and Reservoir in New Mexico is approximately 125 miles north of El Paso and can store over two million acre-feet of water. Water in the reservoir is stored to meet irrigation demands in [southern New Mexico and the] El Paso and Juarez Valleys and is released in a pattern for power generation. Above El Paso, flow in the River is largely controlled by releases from

341. Jean W. Parcher, et al., *U.S. Geological Survey, A Descriptive Overview Of The Rio Grande-Rio Bravo Watershed*, 1 J. OF TRANSBOUNDARY WATER RESOURCES 159, 159-60 (2010), available at http://wrri.nmsu.edu/publish/journal_of_transboundary/Parcher.pdf; U.S. GEOLOGICAL SURVEY, WATER FACT SHEET, LARGEST RIVERS IN THE UNITED STATES, available at <http://pubs.usgs.gov/of/1987/ofr87-242/pdf/ofr87242.pdf>. Various lengths have been reported for the Rio Grande, all near 1,900 miles, and the river is sometimes reported as the fifth longest in the United States. The St. Lawrence River is similar in length, although half is located in Canada. As discussed in the *Water Fact Sheet*, length calculations are imprecise due to natural variability over time and problems of measurement and definition.

342. USIBWC, TEXAS CLEAN RIVERS PROGRAM, 2010 BASIN HIGHLIGHTS REPORT FOR THE RIO GRANDE BASIN IN TEXAS 2 (2010), available at http://www.ibwc.gov/CRP/documents/BHR2010_final.pdf.

343. *About the Texas Clean River Program*, INT'L BOUNDARY & WATER COMM'N, <http://www.ibwc.gov/CRP/about.htm> (last visited Feb. 24, 2011).

344. For the history and legal developments surrounding operation of dams, see Susan Kelly et al., *History of the Rio Grande Reservoirs in New Mexico: Legislation and Litigation*, 47 NAT. RES. J. 525 (2007).

345. See Parcher, *supra* note 327 at 159-60. See generally U.S. ARMY CORPS OF ENG'RS ALBUQUERQUE DIST., FORGOTTEN REACH OF THE RIO GRANDE, FORT QUITMAN TO PRESIDIO, TEXAS (2008), available at http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/as/200.pdf.

346. Parcher et al., *supra* note 341 at 165.

347. *Id.* at 164-65.

Caballo Reservoir located below Elephant Butte.³⁴⁸

The Bureau of Reclamation manages both Elephant Butte Dam and Caballo Reservoir, controlling all downstream releases.³⁴⁹

From El Paso to Fort Quitman, flow consists of treated municipal wastewater from El Paso, untreated municipal wastewater from Juarez, and irrigation return flow.³⁵⁰ From Presidio downstream to the Amistad Reservoir, “the Rio Grande often lacks sufficient flow to adequately support minimum recreational, environmental, or agricultural needs; and during dry periods, may fall significantly short of supplying such needs.”³⁵¹

The Pecos River is the largest Texas river basin that flows into the Rio Grande.³⁵² Originating in New Mexico, “the Pecos River contributes an average of 11 percent of the annual streamflow into the Rio Grande near Amistad Reservoir. . . . [but] contributes more than 29 percent of the annual salt loading into the reservoir.”³⁵³

American Rivers, a national non-profit organization, has declared the Rio Grande an Endangered River three times since 1993.³⁵⁴ In 2007, the World Wildlife Fund ranked the Rio Grande among the world’s top ten rivers at risk, citing severe threats from water diversions, widespread alteration of the floodplain, dams and pollution.³⁵⁵ “Heavy metals and pesticides have been identified along the course of the Rio Grande. Elevated fecal coliform and nutrient levels occur in the River downstream of border cities, primarily because of untreated wastewater from Mexico.”³⁵⁶

The Colorado River originates in the mountains of Colorado and Wyoming, and flows more than 1000 miles before it reaches the Colorado River Delta, which is located entirely within the borders of Mexico.³⁵⁷ Over the course of the last century, the flows in the Delta have fallen by nearly seventy-five percent,³⁵⁸ and when combined with land use changes, result in a ninety-five percent loss of Delta wetlands

348. FWTWPG 2011 Plan, *supra* note 50, at ES8.

349. *Id.* at 1-75.

350. *Id.* at ES8.

351. *Id.* at 3-10.

352. *Id.* at ES8.

353. *Id.* at 3-19.

354. *America’s Most Endangered Rivers Report: 1986-1995*, AMERICAN RIVERS, available at

<http://www.americanrivers.org/our-work/protecting-rivers/endangered-rivers/background/past-reports.html> (listed in 2003, 1994, and 1993).

355. *WWF’s Top 10 Rivers at Risk, Rio Grande Makes List*, WORLD WILDLIFE FUND (Mar. 19, 2007), available at

<http://www.worldwildlife.org/who/media/press/2007/WWFPresitem925.html>.

356. FWTWPG 2011 Plan, *supra* note 50, at 3-15.

357. Jennifer Pitt et al., *Two Nations, One River: Managing Ecosystem Conservation in the Colorado River Delta*, 40 NAT. RESOURCES J. 819, 822 (2000).

358. *Id.* at 824.

and riparian areas.³⁵⁹ The Delta hosts numerous threatened and endangered species.³⁶⁰ Aside from exploring solutions to the problem of salinity on the Colorado River, the only IBWC actions to even tentatively raise the issue of the disappearing Colorado River ecosystem is Minute 306, adopted in 2000, which authorized a binational investigation of the ecology of the Colorado River Delta, and its restatement in Minute 317, adopted in 2010.³⁶¹

The problem of salinity in the Colorado River means that Colorado River water reaching Mexico is so saline as to render it virtually unusable, and the IBWC has been heavily criticized for the way it has handled the problem.³⁶² IBWC Minutes adopted in 2010 indicate that proposed operation of the Yuma Desalting Plant (YDP) in Yuma, Arizona, would treat agricultural wastewater now delivered to Mexico as surplus.³⁶³ Once treated, the water could be counted as treaty water, and thus increase a like amount of fresh water available for use in the United States. Unfortunately, this would cut off the supply of wastewater that has historically drained into Mexico and now sustains the Santa Clara Wetland, an integral part of the Upper Gulf of California and Colorado River Delta Biosphere Reserve, the highest category of protection that Mexico assigns to a wetland, in addition to being declared a protected wetland under the RAMSAR Wetlands Convention.³⁶⁴ Proposed alternatives such as water leasing and water banking have been proposed to avoid operation of the YDP.³⁶⁵

The Tijuana River watershed spans the U.S.-Mexico international border as it flows from its headwaters between the Laguna and Juarez Mountain Ranges to the Pacific Ocean. The River's main stem runs through a number of major industrial Mexican cities before reaching Tijuana and eventually entering the United States at the San Ysidro International Border Crossing. Rapid urbanization and growth in the San Diego-Tijuana trans-border region in the last fifty years has led to significant changes in regional land use.³⁶⁶

The implementation of the Maquiladora Program to spur border trade in the 1960s led to rapid industrialization and subsequent

359. *Id.*

360. *Id.* at 829-30.

361. See Minute No. 306, *supra* note 190; Minute No. 317, *supra* note 202.

362. See, e.g., Note, Nicole Ries, *supra* note 7, at 523-24 ("the IBWC . . . appears institutionally incapable of negotiating bilateral decision-making when domestic politics mandate incompatible solutions"). See also, Pitt, *supra* note 9.

363. See Minute No. 316 IBWC, *supra* note 199; Minute No. 317, *supra* note 202.

364. See generally Kara Gillon, *Environmental and Other Implications of Operating the Yuma Desalting Plant*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 129, 130, 139-41 (2006). See also Minute No. 316 IBWC, *supra* note 199; Minute No. 317, *supra* note 202.

365. See Gillon, *supra* 364; Tarlock, *supra* note 66, at 389-90. See also U.S. BUREAU OF RECLAMATION, RECLAMATION: MANAGING WATER IN THE WEST (2009), available at http://www.usbr.gov/lc/yuma/environmental_docs/ydp/appa_b_c_d.pdf (including public comments on Draft EA).

366. See *TED Case Studies: Tijuana River Pollution*, AM. UNIV. (2007), available at <http://www.american.edu/TED/TIJUANA.HTM>.

population growth.³⁶⁷ Problems worsened with NAFTA and further rapid population growth and development in the 1980s and 1990s.³⁶⁸ Lack of sewers and insufficient wastewater treatment capacity in Tijuana have contributed to elevated pathogen and nutrient levels in the waters crossing the border.³⁶⁹ Extensive agriculture and industrial operations have also contributed to high concentrations of pesticides, heavy metals, and PCBs.³⁷⁰ Pollution in the Tijuana River is so excessive that many beaches have been closed to swimming, and there have been alarming reports of a rising incidence of infant brain anencephaly near Tijuana and San Diego.³⁷¹

The IBWC's perceived mismanagement of the sewage problem was summarized this way twenty years ago:

Through the years, mounting criticisms of IBWC suggest that it is nonresponsive and perhaps even counterproductive in solving problems. IBWC has demonstrated a history of being uncooperative with other agencies and not being diligent in solving problems for which it was expressly commissioned to address in the 1944 Water Treaty.³⁷²

F. NEW BORDER INSTITUTIONS

Many critics believe the IBWC as an institution has simply been surpassed by the complexity of transboundary water management in the twenty-first century. As one expert observed in 1993,

The apolitical nature and technical expertise of those who are directly responsible for the work of the Commission, and which constituted the keys to its successes, has apparently dwindled or perhaps even vanished. More importantly, there are those concerned with the fact that, even if the Commission maintained the degree of excellence it showed during the past century, the enormity of the new challenges ahead go well beyond its management capacity, as it was not designed to deal with such situations.³⁷³

Many observers have noted that when the IBWC was established by the 1944 Water Treaty it was one of the only federal agencies working for binational cooperation on the U.S.-Mexico border, a situation that no longer exists.³⁷⁴ Over the past few decades many new institutions

367. See John H. Minan, *Recent Developments in Wastewater Management in the Coastal Region at the United States-Mexico Border*, 3 SAN DIEGO INT'L L.J. 51, 56 n.13 (2002).

368. *Id.* at 56-57.

369. *Id.* at 57.

370. See *id.* at 56-58, 61; Peter Smith, *The Watershed Economy: Legal Challenges Facing the Tijuana River*, 11 U. DENV. WATER L. REV. 337, 344 n.57 (2008).

371. Smith, *supra* 370, 337-38.

372. Altomare, *supra* note 12, at 390.

373. Szekely, *supra* note 4, at 399.

374. Bennett & Herzog, *supra* note 4, at 974 ("The truth is that the management of water in the U.S.-Mexico borderland has become a much more complex problem than

have been established on the border to manage binational resources and work for greater cooperation between the two countries, including the Border 2012 Program, Border Environment Cooperation Commission (BECC), North American Development Bank (NADB), Good Neighbor Environmental Board (GNEB), and many others.³⁷⁵

In addition, state governments,³⁷⁶ and increasingly local governments,³⁷⁷ traditionally play a dominant role in water

the creators of the IBWC could ever have imagined.”).

375. See generally, State Department, *supra* note 80 (“The 1983 La Paz Agreement to protect and improve the border environment led to Border 2012, a 10-year . . . environmental program for the U.S.-Mexico border region. The Border 2012 Program is the latest multi-year, bi-national planning effort to be implemented under the La Paz Agreement and succeeds Border XXI, a 5-year program that ended in 2000.” “The 1993 North American Agreement on Environmental Cooperation (NAAEC) created the North American Commission on Environmental Cooperation . . . by the U.S., Mexico, and Canada, to improve enforcement of environmental laws and to address common environmental concerns.” “A November 1993 agreement between the U.S. and Mexico [established] the North American Development Bank (NADBank) and the Border Environment Cooperation Commission (BECC) under the auspices of NAFTA, in order to address border environmental problems. The NADBank uses capital and grant funds contributed by Mexico and the U.S. to help finance border environmental infrastructure projects certified by the BECC. The BECC works with local communities to develop and certify environmental infrastructure projects, such as wastewater treatment plants, drinking water systems, and solid waste disposal facilities.” Each institution originally had its own Board of Directors, but they merged into one entity in 2005). See also, e.g., Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., Aug. 14, 1983, 35 U.S.T. 2916 (the La Paz Agreement stipulates that “[n]othing in this Agreement shall prejudice or otherwise affect the functions entrusted to the International Boundary and Water Commission in accordance with the Water Treaty of 1944”); Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, U.S.-Mex., Nov. 1993, 32 I.L.M. 1545; U.S. GEN. ACCOUNTING OFFICE, *supra* note 62; Eileen Zorc, *The Border 2012 U.S. Mexico Environmental Program: Will a Bottom-Up Approach Work?*, 16 GEO. INT’L ENVTL. L. REV. 533, 536 (2004); Christopher P. Brown & Stephen Mumme, *Applied and Theoretical Aspects of Binational Watershed Councils (Consejos de Cuencas) in the U.S.-Mexico Borderlands*, 40 NAT. RESOURCES J. 895, 912 (2000); David A. Gantz, *The North American Development Bank and the Border Environment Cooperation Commission: A New Approach to Pollution Abatement Along the United States-Mexican Border*, 27 LAW & POL’Y INT’L BUS. 1027 (1996).

376. See Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155, 156 (2002) (“[D]espite the combination of the commerce power and the Supremacy Clause that together allow the national government to propound a meaningful water policy with allocative features, the national government has not done so and is unlikely to do so any time soon.”). See also Colorado River Compact, ch. 42, 45 Stat. 1057, art I, III (1928) (dividing the waters of the Colorado River between the basin states), available at <http://www.usbr.gov/lc/region/g1000/pdfiles/crcompct.pdf>; Rio Grande Compact, ch. 155, 53 Stat. 785 (1938) (providing for the distribution of the U.S. share of the waters of the Rio Grande among Colorado, New Mexico and Texas, above Fort Quitman, Texas); see Jose Ramon Cossio Diaz, *Constitutional Framework for Water Regulation in Mexico*, 35 NAT. RESOURCES J. 489, 490 (1995).

377. See A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, 20 PACE ENVTL. L. REV. 149, 149-50 (2003) (addressing the evolving role of local government in watershed conservation).

management.³⁷⁸ The State of Texas, for example, has created sixteen local bodies to coordinate long-range water supply planning throughout the state. Two of these regional groups cover the entire Rio Grande in Texas. The Rio Grande Regional Water Planning Group (LRGRWPG) covers an eight-county area of south Texas comprising the Lower Rio Grande Valley.³⁷⁹ The other Rio Grande regional planning group is the Far West Texas Water Planning Group (FWTWPG), which comprises seven counties in far west Texas solely within the Rio Grande River Basin.³⁸⁰

G. REFORM OR REPLACE THE IBWC

The IBWC has been given some credit for belated progress in collaborating with other agencies along the border.³⁸¹ Yet the overwhelming sentiment is that the agency should be replaced or radically reformed.³⁸² Some critics believe the IBWC is no longer up to the task of managing the boundary waters, and should be replaced by a modern twenty-first century binational institution, either one like the BECC or an altogether new institution.³⁸³ Others believe the IBWC can be salvaged, but only through radical reforms.

Two leading scholars recommended in 1993 that the governments of Mexico and the United States move toward “meeting the challenge of sustainable development by creating a new institution or changing or reconstituting the present International Boundary and Water Commission to move toward the ecosystem management needs of the boundary region.”³⁸⁴ A similar ambivalence about the IBWC’s potential for reform was expressed in the following manner: “It seems doubtful that regulatory solutions and planning can be avoided if border environmental health is to be protected, and yet the United States Section is unlikely to change,”³⁸⁵ the authors observed, yet

378. The U.S. Supreme Court has fostered a perception of “purposeful and continued deference to state water law by Congress.” *California v. United States*, 438 U.S. 645, 653 (1978). See also *United States v. New Mexico*, 438 U.S. 696, 701 (1978) (stating that Congress has historically almost “invariably deferred” to state water law with regard to the power of federal entities). But see, e.g., Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 243, 312 (2006).

379. See LRGRWPG 2011 Plan, *supra* note 50, at 1-2, 1-5.

380. *Id.* at ES-1.

381. Mumme, *Advancing Binational Cooperation*, *supra* note 7, at 99-101.

382. See, e.g., Gregory, *supra* note 9, at 165 (noting IBWC and the La Paz Agreement Coordinators both “have been strongly criticized for their historic failures in addressing border pollution problems. Consequently, many NGOs argue that these groups should be replaced, restructured, or subordinated to EPA or SEDUE, or in the alternative, a new binational agency should be created.”)

383. See, e.g., Sinclair, *supra* note 5, at 112-15, 122-24, 132, 134, 136 (finding the IBWC “has denied itself any role in the fashioning of environmental policy,” however, the author concludes that the La Paz Environmental Agreement is largely symbolic in nature, offering neither established rules of conduct nor enforcement mechanisms to safeguard shared resources).

384. Dworsky & Utton, *supra* note 12, at 449.

385. See, e.g., Ingram & White, *supra* note 4, at 173.

"[t]he proposal to alter the design and mission of the IBWC, as opposed to establishing entirely new institutions, certainly deserves more debate."³⁸⁶

Others have no such uncertainty, as demonstrated by the Executive Director of the Texas Center for Policy Study in a 1993 publication: "I do not agree that the IBWC should be the agency which is given broader responsibilities for pollution control in the border region. It is an unacceptably closed structure that has little accountability and is responsive only to entrenched interests."³⁸⁷

A 1992 review of several proposals for reform of the IBWC discussed a similar range of views: "The most radical solution is advanced by TCPS [Texas Center for Policy Studies] which recommends 'removal of IBWC's lead jurisdiction on water quality problems in border area rivers and underground water and transfer of that jurisdiction to a new binational agency that is open to public participation and accountable to border area governments.'"³⁸⁸

Other critics have suggested a more moderate path with specific recommendations.

The time has come for the U.S. and Mexico to modernize the Commission. This does not mean renegotiating the 1944 water treaty in any significant respect. In our view, however, effective modernization will require that the countries confront the long-held fiction that controversial water issues can be resolved, out of the public eye, solely through the application of what is traditionally viewed as the commission's technical expertise. As a first step, changes are required to ensure that the commissioners have the full range of stature and skills necessary to address the political and diplomatic aspects of controversial transboundary water management issues. In this regard, the current limitation of an "engineer-commissioner" is no longer useful.

Effective modernization will also require the two federal government elevate the priority of border water issues within their respective foreign relations secretaries; more fully intergrate the U.S. and Mexican sections of the commission; significantly expand the resources available to the commission; and develop clear procedures to avoid the type of crises [i.e. water shortages] confronting us now along the Rio Grande.³⁸⁹

H. POTENTIAL TREATY AMENDMENTS

Some proposals to reform the IBWC insist on the need to amend the 1944 Water Treaty, although it is far from clear that any such

386. *Id.* at 175. See also, Gaines, *supra* note 12, at 446.

387. Kelly, *supra* note 7, at 301-02.

388. Mumme, *New Directions*, *supra* note 5, at 545.

389. KELLY & SZEKELY, *supra* note 11, at 2-3.

amendment is needed to accomplish substantial change in the institution, at least in the U.S. Section. Whereas most critics propose amendments to the Treaty to deal with the issues of drought and groundwater management,³⁹⁰ other proposals are as seemingly mundane as removing the requirement that the Commissioners be engineers, making room for a broader pool of qualified professional managers and water experts.³⁹¹

Others question the wisdom or even the need to amend the 1944 Water Treaty. Any attempt to amend any provision of the Treaty, the argument goes, even something as seemingly innocuous as the engineer-commissioner requirement, will inevitably lead to calls for amendments regarding more substantive provisions regarding water allocation, water quality, groundwater management, and overall institutional reform, pitting entrenched interests against one another in a battle with highly uncertain outcomes.³⁹²

Perhaps surprisingly, however, a recent survey of 172 local Texas government officials that manage water resources in the U.S.-Mexico border region found strong support for amending the 1944 Water Treaty.³⁹³ Two-thirds of respondents agreed that “[t]he 1944 Treaty should be amended to address the allocation of groundwater,” and eighty-one percent of survey respondents agreed that “the Treaty should be amended to define the term extraordinary drought.”³⁹⁴ A majority agreed that “the 1944 Treaty should be amended to include ecological and environmental uses of international waters as a top priority.”³⁹⁵

It seems that support for amending the Treaty may come from other unexpected places, as well, even growing out of concern for United States national security.

The treaty produced an enduring American advantage in terms of maintaining a water status quo with Mexico. Despite paying large dividends for American interests, the treaty now produces considerable tensions between the two countries and contributes towards increased instability in Mexico. This paper shows how the United States used the treaty to protect domestic interests while hindering sustainable development on the Mexican side of the border. In today’s environment this situation is counter-productive

390. See, e.g., Lopez, *supra* note 15, at 496, 498, 508; Mumme, *supra* note 16, at 655; Umoff, *supra* note 16, at 98.

391. See Sanchez, *supra* note 6; see also Schmandt, *supra* note 11, at 152-53 (suggesting a second, non-engineer Commissioner who is responsible for integrated river management).

392. Mumme, *supra* note 5, at 552 (“This, of course, does not mean that a revision to the 1944 Water Treaty, stripping IBWC of its water quality management functions, is inconceivable.”); see also Mumme, *supra* note 283, at 101.

393. OLIVIA N. THOMPSON, BINATIONAL WATER MANAGEMENT: PERSPECTIVES OF LOCAL TEXAS OFFICIALS IN THE U.S.-MEXICO BORDER REGION, at i (2009), available at <http://ecommons.txstate.edu/arp/313>.

394. *Id.* at 65.

395. *Id.* at 66.

for regional security. This paper addresses the consequences of our adherence to the treaty, potential impacts from climate change, poor infrastructure investments in Mexico, population growth, the North American Free Trade Agreement and implications for future policy considerations related to Mexico and its internal stability.³⁹⁶

Yet amendment of the Treaty may be entirely unnecessary, given the authority of the IBWC to interpret its requirements through the adoption of Minutes.³⁹⁷ In this view, the Minute process is seen as an avenue for addressing in detail subjects that are dealt with only in the broadest terms in the 1944 Water Treaty, thus actions such as the adoption of Minute 242 dealing with groundwater and Minute 306 dealing with the Colorado Delta ecosystem permit the IBWC to expand its scope without the need for a Treaty amendment. One scholar observes that the IBWC has hamstrung itself by its slavish adherence to an outdated construction of the 1944 Water Treaty, “an historically entrenched focus on physical borders and the sovereign delimitation of a shared natural resource.”³⁹⁸ This critic urges the IBWC to work on the development of a “twenty-first century Minute” stating a commitment to “modern international principles of watercourse law.”³⁹⁹

VI. NEGLIGENT STATE DEPARTMENT OVERSIGHT

A. STATE WARNS GROSS MISMANAGEMENT IMPERILS BORDER REGION

A 2005 investigation of the USIBWC by the State Department Office of Inspector General revealed a shocking level of mismanagement and resultant threats to the agency’s mission, even though the investigation was narrowly limited to personnel matters and did not even touch upon issues of policy, procedures, or the state of dams, sanitation plants or other infrastructure.⁴⁰⁰ A Report issued as a result of the investigation warned that “[i]nternal management problems have engulfed USIBWC, threatening its essential

396. MARK A. ANSPACH, UNITED STATES ARMY RESERVE, KLEPSUDRA: HOW THE RIO GRANDE TREATY INCREASED INSTABILITY IN MEXICO (2008), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA486548&Location=U2&doc=GetTRDoc.pdf>.

397. Mumme, *supra* note 5, at 555-57.

398. Ingram, *supra* note 13, at 165 (proposing that the 1944 Treaty language can be salvaged and citing the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, Report of the 6th Committee, U.N. Doc. A/RES/51/869 (1997)).

399. *Id.* at 164 (proposing the adoption, as a guide, of the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Report of the 6th Committee, U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/RES/51/869 (1997)).

400. OIG, 2005 REPORT, *supra* note 31, at 23 (“The inspection did not and could not survey levees, measure water depths, or follow up each allegation of neglect [yet] [t]here is disturbing evidence . . . that maintenance of infrastructure is falling behind.”).

responsibilities for flood control and water management in the American Southwest.”⁴⁰¹ The 2005 Report included findings that “management actions have undermined the morale of the agency, led to an alarming departure of key personnel, and raised fundamental questions about the lack of U.S. government oversight of the USIBWC.”⁴⁰²

Among the wide range of problems identified by the 2005 OIG Report was that the Commissioner set his own salary (at a level equivalent to that of an armed forces secretary) and “feels he can fire and hire, set salaries including his own, and generally run his agency without reference to other authority.”⁴⁰³ The Report notes with some consternation that “[a]ppointment by the President of the U.S. Commissioner does not [even] require the advice and consent of the Senate.”⁴⁰⁴ The Report condemns inaction by the USIBWC concerning the health and safety of its employees, describing a Field Office that “lies immediately below the abandoned plant and grounds of a metals smelting and refining company. For over a century, this plant spewed out smoke and slag over the area, leaving toxic waste piles looming over the USIBWC facility.”⁴⁰⁵

The Report notes that “while personal doctors in some cases warned their patients to leave their employment on the site,” and “[t]he city of El Paso evacuated a residential area next to the site some years ago on the grounds that pollution levels were too high for safety,” the “USIBWC does not appear to have been adequately responsive.”⁴⁰⁶

B. STATE DISAVOWS AUTHORITY OR RESPONSIBILITY FOR USIBWC

A follow-up report in 2006, addressing the USIBWC’s pledges of reform, offered little reason for optimism, stating: “The U.S. Section is out of the national limelight, but a major storm and flood could overwhelm the barriers and cause considerable damage. This would usher in bouts of finger pointing between Departments, agencies and jurisdictions concerned.”⁴⁰⁷ The 2006 Report concludes, “The agency is simply too small, too isolated, and too vulnerable to management abuse to continue without the protection and oversight of a major government department.”⁴⁰⁸

By all accounts, the U.S. Department of State has maintained a hands-off policy toward the IBC-IBWC for most of its 120-year existence.

401. *Id.* at 3.

402. *Id.*

403. *Id.* at 11.

404. *Id.* at 13.

405. *Id.* at 29.

406. *Id.*

407. OIG, 2006 REPORT, *supra* note 35, at 4.

408. *Id.*

The agency has an unusual relationship with the Department. While its budget is included within the Department's budget request to Congress, issues of oversight, and who might exercise that oversight in areas apart from foreign policy, have never been adequately defined. Over the years, USIBWC has been largely independent in terms of internal management and operations.⁴⁰⁹

The Department seems to share the view of the USIBWC, which "considers itself an independent federal government agency whose leader is answerable only to the President."⁴¹⁰ Indeed, the Department "has been unwilling or unable to claim full responsibility for the agency despite the fact that most U.S. government agencies and the Congress view the Department as the parent agency and that no other logical choice exists."⁴¹¹

Notwithstanding the apparent exasperation of the OIG with the Department's hands-off policy, the OIG itself questions even its own authority to investigate the USIBWC, stating:

[E]ven the jurisdiction of OIG over the U.S. Section remains subject to dispute. While the Department of State, the Department of Justice, and the White House have supported OIG's oversight, and the current leadership of USIBC has accepted it, there is no clear legislative authority. A future Commissioner could challenge OIG oversight, as did the most recent permanent Commissioner, forcing the same scramble to find "derivative" authorities.⁴¹²

Whereas the OIG has at least drawn official attention to the problems at the USIBWC, it does not claim to have conducted an exhaustive investigation, and it seemingly lets even the Department off the hook for anything beyond foreign policy concerns, stating: "It is not within OIG's or the Department's jurisdiction (or competence or desire) to provide oversight concerning the dams, levees, power plants, sewage treatment plants, and other facilities administered by the joint commission."⁴¹³

The 2006 OIG report explains that "[o]ptions such as integration of the U.S. Section into the Department of the Interior or the U.S. Army Corps of Engineers have been considered in the past and

409. OIG, 2005 REPORT *supra* note 31, at 5-6.

410. *Id.* at 10.

411. OIG, 2006 REPORT, *supra* note 35, at 4.

412. *Id.* at 12. Belated as it was, the State Department is not the only government agency to comment on USIBWC mismanagement over the years. See, e.g., U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL BOUNDARY AND WATER COMMISSION: U.S. OPERATIONS NEED MORE FINANCIAL OVERSIGHT 4-5

(1998), available at <http://www.gao.gov/archive/1998/ns98238.pdf>.

413. OIG, 2006 REPORT, *supra* note 35, at 4. The OIG goes on to claim, with no support in its report and in contradiction to its own 2005 Report, discussed above, as well as contrary to virtually every published report that exists anywhere, as discussed in Part V, "By all accounts, USIBWC's professionals have done well to maintain the organization's infrastructure on a barebones budget." *Id.*

discarded for good reason (such as conflicts with treaty provisions).”⁴¹⁴ Although the OIG Reports do not go into any further detail about these decisions, this is likely a reference to State Department’s successful defeat of recommendations to transfer the U.S. Section’s operational functions to the Bureau of Reclamation, which the Bureau of the Budget made in 1947, the Hoover Commission made in 1949, the Rockefeller Committee (President’s Advisory Committee on Governmental Organization) made in 1953, and as President Eisenhower initially approved in 1953.⁴¹⁵

The 1953 dispute, which appears to have been primarily a power struggle between State and the Interior Department,⁴¹⁶ was belatedly backed up by a State Department legal opinion acknowledging that the U.S. Section “is not sufficiently independent to be classed as an ‘independent agency’ in the sense that term is used in statutes and Executive Orders, yet there is sufficient independence provided for in administrative matters that it cannot be considered as an organizational part of the Department.”⁴¹⁷

Thus, the Department is unwilling to accept responsibility for oversight of the USIBWC, even acknowledges that it is not competent to do so, and goes so far as to claim it has no authority over the agency, yet it fights to defend such allegedly artificial bureaucratic turf. The 2006 OIG Report states that the Department believes it is foreclosed by treaty and statutory language from managing the USIBWC, notwithstanding the contrary language set out in this article that appears to assume State Department oversight.

The Department and other key U.S. government elements have interpreted treaty provisions and other laws and regulations to give them derived authorities over the U.S. Section, but these are not

414. *Id.* Generally, the Department of the Interior’s Bureau of Reclamation manages reservoirs that provide water for irrigation projects and power generation, whereas the Army Corps of Engineers maintains waterways for navigation purposes, undertakes flood control projects, builds and operates hydropower facilities, and operates irrigation and flood control projects. See generally *Bureau of Reclamation: About Us*, BUREAU OF RECLAMATION, <http://www.usbr.gov/main/about/index.html> (last updated Feb. 17, 2011) (stating that the Bureau of Reclamation manages reservoirs for irrigation projects and power generation); *Civil Works Mission*, U.S. ARMY CORPS OF ENGINEERS, <http://www.usace.army.mil/CECW/Pages/index.aspx> (last visited Mar. 22, 2011) (stating that “Civil Works programs include water resource development activities including flood control, navigation, recreation, and infrastructure and environmental stewardship.”).

415. See Mumme & Moore, *supra* note 34, at 678; see also Roger Lee Eldridge, *A Comprehensive Approach to U.S.-Mexico Border Area Water Management*, 4 S.W. REV. MGMT. & ECON. 89, 91 (1985) (stating that in 1947 the Hoover Commission recommended that the “project construction and management function . . . be transferred to the Bureau of Reclamation.”).

416. See Mumme & Moore, *supra* note 34, at 678 (referring to State Department and USIBWC success in resisting “predatory initiatives of other domestic Agencies”); Eldridge, *supra* note 314, at 91 (describing similar reversal of Truman administration proposal).

417. Mumme & Moore, *supra* note 34, at 680.

clearly defined or universally accepted. No one in the Department or elsewhere has taken the lead in resolving the issue.⁴¹⁸

Again without specifying what statutory or treaty provisions are affected, the OIG concludes: "The Department of Justice, the Department of State, and the OIG team all agree that integrating the U.S. Section into the Department of State will require legislation."⁴¹⁹

The OIG Report leaves no doubt about the need for oversight but buys into the notion that this requires legislation, without specifying exactly what statutes need to be amended or what that would accomplish, and at the same time imagining great bureaucratic hurdles by making comparisons to completely non-analogous agencies.

Current USIBWC management prefers a limited relationship rather than full integration into the Department, believing it can benefit from the Department's oversight and protection of its personnel system while enjoying maximum flexibility in its operations. Some Department offices share this view. The OIG inspection team does not believe that measures short of full integration of the agency into the Department will resolve the oversight issue, based on its observations of the experience of recent years in USIBWC history. Attempts to define the meaning of "report to" inevitably lead to the conclusion that legislation would be needed in any event. It is unclear what a memorandum of understanding would provide for and with what legal authority. The agency is simply too small, too isolated, and too vulnerable to management abuse to continue without the protection and oversight of a major government department. The Department was asked in early 2005 to provide its own solution to the oversight problem and could not do so.

The optimal solution is to bring the USIBWC into the Department of State. This would clear away legal ambiguities frustrating rational management and oversight of personnel, administrative, and security operations. This solution would mirror the position of the Mexican Section of the IBWC, which falls under the Mexican Ministry of Foreign Relations. The integration of the U.S. Arms Control and Disarmament Agency and the U.S. Information Agency into the Department indicate that the difficulties attached to integration of the USIBWC are not beyond the Department's ability to overcome. The Department of Justice, the Department of State, and the OIG team all agree that integrating the USIBWC into the Department of State will require legislation.⁴²⁰

Ironically, the State Department's claims of limited authority are inconsistent with even its own actions, which suggest the Department feels it has just as much authority as it chooses to exercise. For example, detailed reports on the USIBWC's implementation of its \$220 million in Recovery Act projects are found not on the agency's

418. OIG, 2006 REPORT, *supra* note 35, at 17.

419. *Id.* at 5.

420. *Id.*

own website but on the Department's.⁴²¹ According to the 2006 OIG Report:

With the growing complexity, sensitivity, and importance of border issues affecting the agency, as well as a history of management problems in recent years, the Department has necessarily exercised oversight of some USIBWC functions beyond the mandated foreign policy aspect. In so doing, the Department's oversight authority for foreign policy and its implied responsibility for budget matters have been interpreted by the Department to justify OIG's assertion of authority over USIBWC, to require the agency to "coordinate" major personnel actions with the Department, and to permit the Bureau of Western Hemisphere Affairs (WHA) to question and influence USIBWC budget levels and priorities.⁴²²

The State Department's relationship to the USIBWC suggests that it wants control without responsibility, especially with the very real possibility of a major disaster. The Department seems much less concerned about the boundary ecosystem, the health and safety of millions of residents on both sides of the border, and the pocketbooks of U.S. taxpayers than it is about the blame game.⁴²³

C. EXEMPT EMPLOYEES PRETEXT

Whatever the bureaucratic motives for its reluctance to manage the USIBWC, the State Department alleges that legislation is needed to give it explicit authority over personnel matters. In a profound misunderstanding of Federal personnel laws, or pretext for abdication of responsibility, the OIG and the State Department both imagine nonexistent obstacles due to the fact that USIBWC employees are in the "excepted service" rather than the "competitive service".⁴²⁴ In both its 2005 and 2006 reports on the USIBWC, the OIG goes on at length about the imagined obstacles to State Department oversight presented by this excepted service status.

USIBWC has been something of an orphan agency, left to its own resources except for guidance on foreign policy issues and some limited financial oversight. It has experienced, professional human resources specialists, but they have not had the freedom to administer

421. See *U.S. Department of State Information Related to the American Recovery and Reinvestment Act of 2009*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/recovery> (last visited Mar. 22, 2011).

422. OIG, 2006 REPORT, *supra* note 34, at 3. This type of informal influence may be worse than nothing, since it gives an isolated mid-level bureaucrat in Washington a surprising degree of control over the USIBWC "priorities."

423. See note 43, *supra*.

424. "The Office of Personnel Management (OPM), following an OPM audit conducted in 2003, directed the USIBWC to convert employees from competitive Civil Service to 'excepted service.' OPM determined that the agency is exempt from the competitive provisions of Title V of the United States Code because its appointment authority is derived from the treaties and conventions establishing the agency." OIG, 2006 REPORT, *supra* note 34, at 14.

procedures in keeping with normal federal practice. The result has been confusion, some abuse, and certainly a severe morale impact. The personnel of USIBWC are in limbo, with questions on all sides as to their status and rights, if any.

....

Given the complex statutory authorities relied on by the USIBWC to carry out its work, it is possible that legislation would be required to permit the Department to take on personnel administration for the U.S. Section. Legal steps needed to transfer personnel authority, and to protect the interests of USIBWC employees, should be reviewed by lawyers at relevant agencies, including the Department of State, Department of Justice, Office of Special Counsel, Office of Personnel Management (OPM), and Office of Government Ethics.⁴²⁵

Ironically, the 2005 OIG Report cites a 1998 OPM report on eighteen exempt agencies, which include the State Department itself, that found “few differences from nonexempt agencies in the exempt agencies’ recruitment, hiring, and promotion practices.”⁴²⁶ It is completely unclear, then, what concerns the State Department has about USIBWC employee rights, “if any.”⁴²⁷

The 2006 OIG Report repeats these nonspecific concerns, noting that because “USIBWC personnel are in an excepted Civil Service,” they are “not subject to all the protections afforded to competitive employees.”⁴²⁸ “If the USIBWC became part of the Department, or if OIG had confirmed statutory authority,” the OIG concludes, “there would be routine oversight, opportunities for appeals of personnel actions, and advice and support available to the agency and the Commissioner.”⁴²⁹

The State Department’s misplaced concerns may be allayed by reference to the relevant statutory authorities and an improved understanding of what it means to be an excepted service employee (although, being an excepted service agency, the State Department surely should be under no misconceptions such as those expressed in the OIG Reports). Title 5 of the U.S. Code defines “employee” as “. . . an individual in the competitive service . . .” or “. . . an individual in the excepted service . . .”⁴³⁰ Excepted service includes “all positions in the executive branch of the Federal Government which are specifically excepted from the competitive service by or pursuant to statute, by the President, or by the Office of Personnel Management, and which are not in the Senior Executive Service.”⁴³¹

425. *Id.*; OIG, 2005 REPORT, *supra* note 30, at 12.

426. OIG, 2005 REPORT, *supra* note 30, at 38-39.

427. *Id.* at 12.

428. OIG, 2006 REPORT, *supra* note 34, at 3.

429. *Id.* at 15.

430. 5 U.S.C. § 7511(a), (c) (2011).

431. *Id.* § 2103(a); 5 C.F.R. § 213.101 (2011).

The Merit Systems Protection Board (MSPB) has explained the difference.

The above definition distinguishes between the “competitive” and the “excepted” service. The executive branch of Government that is governed by Title 5 of the United States Code is composed of the competitive service, the excepted service, and the Senior Executive Service. Most of the executive branch’s civilian positions are part of the competitive civil service. Such positions are filled through competition among applicants under competitive examining procedures administered by OPM. The competitive examining process is characterized by rating and ranking applicants and referring to selecting officials only the top ranked or high-quality applicants. Qualified applicants who have been rated and ranked are placed on a list known as a register. Under the competitive examining process, either the top three candidates under the “Rule of Three,” or all candidates in the highest quality category under the Category Rating procedures, are referred for selection. Positions filled through the competitive examining process are referred to as the competitive service.

On the other hand, there are some positions in the Federal civil service that are excepted from OPM’s competitive examining procedures. In addition, there are positions that would ordinarily be in the competitive service but are in the excepted service while occupied by individuals who are appointed under an excepted appointing authority or programs established by law, the President, or OPM. Individuals appointed through these latter authorities or programs are trainees who can be converted to the competitive service upon successful completion of the program. For excepted service positions, agencies develop and establish their own examining procedures within the guidelines of the merit system principles and veterans’ preference rules. These positions are collectively referred to as the excepted service.⁴³²

The difference between competitive and executive employees, then, is in the hiring procedure, a procedure also used by the State Department. Indeed, although the name “excepted service” implies otherwise, it actually accounts for about half of all federal jobs.⁴³³ Both are still covered by merit system principles, as acknowledged by the OIG. As for having fewer rights, “if any,” excepted service employees are explicitly guaranteed the right to appeal adverse personnel actions respecting: 1) removal, 2) suspension for more than fourteen days, 3)

432. U.S. MERIT SYS. PROT. BD., *NAVIGATING THE PROBATIONARY PERIOD AFTER VAN WERSCH AND MCCORMICK* 6 (2006), available at <http://www.mspb.gov/studies/browsestudies.htm> (follow “Navigating the Probationary Period After Van Wersch and McCormick” hyperlink).

433. See U.S. GENERAL ACCOUNTING OFFICE, *GAO/GGD-97-72, THE EXCEPTED SERVICE: A RESEARCH PROFILE 1* (1997); see also U.S. MERIT SYS. PROT. BD., *REFORMING FEDERAL HIRING: BEYOND FASTER AND CHEAPER* 31 (2006) (looking at the decline in competitive examining).

reduction in grade or pay, or 4) furlough for thirty days or less.⁴³⁴

Indeed, the MSPB had rejected just such a myopic interpretation of employee rights, “if any,” as expressed by the OIG, and did so prior to publication of the 2006 OIG report that repeated the interpretation; this rejection occurred in a case that not coincidentally involved the retaliatory dismissal by the IBWC of its General Counsel.⁴³⁵ The IBWC decision demolished the State Department’s feeble claim that IBWC employees are in some special class with few, “if any,” rights. Mr. Wilcox, the agency’s General Counsel, alleged that he was removed in retaliation for protected whistle blowing. The agency contended Wilcox had no appeal rights, arguing that USIBWC’s hiring authority derives not from Title 5 of the U.S. Code, as is the case with other Federal agencies, but from Article 2 of the 1944 Water Treaty.⁴³⁶ The agency also contended that the USIBWC is not even a federal “agency” as defined by Title 5, but a subdivision of an international organization.⁴³⁷

The MSPB rejected these claims, noting that “the IBWC is deemed an international organization, but that designation does not extend to the U.S. Section as to matters within its exclusive control, supervision, or jurisdiction.”⁴³⁸ The MSPB also ruled the USIBWC is an “executive agency,” which means an Executive department, a Government corporation, or an independent establishment.⁴³⁹

The agency also relied both on 1) a February 2, 1950 letter from the Civil Service Commission’s Chief of the Personnel Classification Division stating that “[T]he IBWC was not subject to the provisions of the Classification Act of 1949”, and 2) a February 12, 2003 letter in which “OPM’s Office of Merit Systems Acting Assistant Director transmitted the findings of a review, and concluded that the IBWC was established by treaties and conventions, and therefore its ‘HRM program’ is not covered by Title 5.”⁴⁴⁰ The MSPB did not rule on those claims, but held that numerous other provisions of Title 5 cover the USIBWC, all of which rely on the same definition of “agency.”⁴⁴¹

D. WISHFUL THINKING

Perhaps surprisingly, the OIG reports have drawn almost no comment from scholars or others, amid the unfortunately insular academic debate about whether to reform or replace the IBWC. In a unique departure from the standard critique, however, a recent article

434. Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461 (guaranteeing such employees the right to appeal a reduction in grade or a removal to the Merit System Protection Board).

435. *Wilcox v. Int’l Boundary Water Comm’n*, 103 M.S.P.R. 73, 77-79 (2006).

436. *Id.* at 75.

437. *Id.* at 76-77.

438. *Id.*

439. *Id.* at 77.

440. *Id.*

441. *Id.*

cites the 2005 OIG report and then focuses on the role of USIBWC leadership, or lack thereof, in the agency's failing performance.⁴⁴² The authors briefly revisit two of the well-worn arguments: first, that the USIBWC is a captive of parochial regional interests that conflict with its twin roles of water management and diplomacy, and second, that increasingly complex environmental issues necessitate accommodation of new constituencies and collaboration with new agencies, requiring technical, diplomatic and professional talents lacking in the politically-oriented leadership of the USIBWC.⁴⁴³ Then, taking note of the OIG reports, they go on to assess the failed leadership of the agency, arguing that in addition to traditional theories of leadership that emphasize leadership traits and skills, heightened politicization associated with a changing operational environment and mission, together with a lack of executive branch oversight, increased the structural risks of executive failure, resulting in "what can only be regarded as a profound administrative failure in the management of the IBWC's U.S. Section."⁴⁴⁴

Rather than offering solutions, however, the article ends on an inexplicably Pollyanna-ish note, seeming to hope against all evidence to the contrary that, "[t]he U.S. Section's new management appears ready to learn from the past and take advantage of new opportunities to strengthen binational water management on the U.S.-Mexican border."⁴⁴⁵ The authors offer no evidence to support their optimism about new leadership at the USIBWC (not even a self-serving interview with the new Commissioner) and, as discussed below, there is none to be found in recent events either.

VII. CURRENT CHAOTIC CONDITION OF THE USIBWC

A. USIBWC EMPLOYEES SAY LEADERSHIP WORST IN NATION

Perhaps nothing is as telling about the current chaotic condition of the USIBWC than the fact that the morale of its employees, long on a downward trajectory, has reached a new low. USIBWC employees have repeatedly rated it among the worst places to work in the entire federal government, with the very worst leadership.⁴⁴⁶ The USIBWC perennially ranks at the very bottom of all small Federal agencies when it comes to employee morale, and dead last when it comes to trust in Agency leadership. Employee satisfaction with the agency and agency leadership has fallen steadily since 2007, the first time the agency participated in a national survey, popularly known as "Best Places to Work" in the Federal Government.⁴⁴⁷

442. Mumme & Little, *supra* note 4, at 253-55.

443. *Id.* at 255-56.

444. *Id.* at 253, 263-66.

445. *Id.* at 267.

446. BESTPLACESTOWORK.ORG, *supra* note 58.

447. *Id.*; see also, David Crowder, *IBWC Ranked Second-Worst Federal Agency by Employees*,

In 2010, the government-wide employee satisfaction score set forth by Best Places to Work⁴⁴⁸ achieved an all-time high average of 65 out of 100, representing a slight increase from 2009.⁴⁴⁸ The best small agency rated an 86.8 and the best large agency an 81.8.⁴⁴⁹ By comparison, the IBWC garnered a score of 48, a drop from 49 in 2009, just edging out the Selective Service System at 47 as the worst place to work in the Federal Government; no large agency ranked below 57.⁴⁵⁰ “The 2010 survey for the fifth time in a row showed the primary driver in the federal space is effective leadership,” according to the Institute for the Study of Public Policy Implementation (ISPP).⁴⁵¹ In 2010, the IBWC came in dead last in this category. IBWC’s Effective Leadership score was 33, down from 37 in 2009.⁴⁵²

The agency made an inadvertent public admission of its chaotic management in a September 15, 2009, contract solicitation for reorganization assistance that stated “the agency is declining significantly in overall indicators of human capital performance,” caused by “numerous reorganizations of the USIBWC headquarters [that] have taken place . . . without the benefit of consistently methodical approaches”⁴⁵³ The agency cancelled the solicitation one month later, without explanation. The irony was not lost on Washington Post columnist Al Kamen who commented with sardonic restraint, “The solicitation was canceled November 16, so maybe things have gotten better on their own.”⁴⁵⁴

The lack of professional management at the U.S. Section is evident in a wide range of alleged misconduct, including rampant workplace hostility and threats of violence, illegal manipulation of payrolls, secret electronic surveillance of employees, and similar wrongdoing.⁴⁵⁵ Unfortunately, due to the State Department’s hands-off policy, and the

EL PASO INC., Sept. 13, 2010,

<http://www.elpasoinc.com/readArticle.aspx?issueid=303&xrec=5649> (documenting the IBWC’s low ranking in the survey).

448. *The Big Picture*,

BESTPLACESTOWORK.ORG, <http://bestplacestowork.org/BPTW/analysis> (last visited Mar. 22, 2011).

449. *Welcome to the 2010 Best Places to Work Rankings*, BESTPLACESTOWORK.ORG, <http://bestplacestowork.org/BPTW/rankings> (last visited Mar. 22, 2011).

450. *Overall Index Scores*,

BESTPLACESTOWORK.ORG, <http://bestplacestowork.org/BPTW/rankings/overall/small> (last visited Mar. 22, 2011).

451. BESTPLACESTOWORK.ORG, *supra* note 448.

452. BESTPLACESTOWORK.ORG, *supra* note 58.

453. *Conduct a Program Assessment*, FEDERAL BUSINESS OPPORTUNITIES (Sept. 15, 2009), <https://www.fbo.gov/?s=opportunity&mode=list&tab=searchresults&> (follow “Conduct a Program Assessment” link) (showing the solicitation for bids to conduct a program assessment, dated September 15, 2009, and cancelled November 16, 2009, including recommendations to reorganize IBWC).

454. Al Kamen, *Do You Have What It Takes to Be a Bailout Cop?*, THE WASHINGTON POST, Dec. 14, 2009,

http://www.washingtonpost.com/wp-dyn/content/article/2009/12/13/AR2009121302525_2.html?sid=ST2009121400400.

455. McCarthy Memo to OIG, *supra* note 48, at 1, 5-7, 9-11.

Office of the Inspector General's doubts about its own jurisdiction, no serious investigation of these charges is likely.

B. MILLIONS WASTED ON DETERIORATED LEVEES

The USIBWC built and maintains over five hundred miles of levees along the Rio Grande that protect more than three million Texas and New Mexico residents.⁴⁵⁶ (Levees in Mexico protect several million Mexican border residents.) A 2001 geo-technical analysis determined that sixty percent of the Rio Grande flood control system was deficient.

⁴⁵⁷

In 2009, the USIBWC received \$220 million in funding under President Obama's Recovery Act stimulus program, virtually the entire amount USIBWC requested for levee repair or replacement.⁴⁵⁸ While the agency was accustomed to an average annual construction budget of approximately \$6 million,⁴⁵⁹ the pressure to quickly spend the

456. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF STATE & THE BROAD. BD. OF GOVERNORS, REPORT AUD/CG-10-12, INDEPENDENT ACCOUNTANTS' REPORT ON AUDIT OF INTERNATIONAL BOUNDARY AND WATER COMMISSION: CONTRACT AWARD AND MANAGEMENT OF FUNDS PROVIDED BY THE AMERICAN RECOVERY AND REINVESTMENT ACT 2 (2010) [hereinafter IBWC AUDIT REPORT], available at <http://oig.state.gov/documents/organization/145260.pdf>.

457. *Id.*

458. *Id.* (stating that the Department of State received \$600 million of Recovery funds, of which \$220 million was designated for the IBWC to use for "the repair and/or rehabilitation of levee segments"); see also State ARRA Plan 2010, *supra* note 46, at 5 (stating that the \$787 billion Recovery Act was signed into law on February 17, 2009, and provided USIBWC with funds for the Rio Grande Flood Control System Project). See generally *American Recovery and Reinvestment Act (ARRA) of 2009*, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF STATE & THE BROAD. BD. OF GOVERNORS, <http://oig.state.gov/arra/index.htm> (last visited Mar. 22, 2011) (presenting an overview of the act).

459. The USIBWC's annual construction budget has remained relatively constant for many years. In the fiscal years 2000, 2001, and 2002, the construction budget was approximately \$6 million. U.S. DEP'T OF STATE, THE BUDGET IN BRIEF - FISCAL YEAR 2002 107 (2002), available at <http://www.state.gov/documents/organization/2155.pdf>. In the fiscal years 2003, 2004, and 2005, the annual construction budgets were \$5.4 million, \$3.5 million, and \$8.5 million, respectively. U.S. DEP'T OF STATE, THE BUDGET IN BRIEF - FISCAL YEAR 2005 BUDGET REQUEST 101 (2005), available at <http://www.state.gov/documents/organization/28790.pdf>. The USIBWC's construction budget was approximately \$5.2 million for the fiscal year 2006. See U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION- FISCAL YEAR 2008 827 (2008), available at <http://www.state.gov/documents/organization/2155.pdf>. In the fiscal year 2007, the construction budget remained at \$5.2 million. For the fiscal year 2008, the agency received a substantial one-time supplement of \$66 million for court-ordered construction of secondary wastewater treatment capability at the South Bay International Wastewater Treatment Plant (SBIWTP) in California, and a dramatic increase of approximately \$20 million in levee construction funds. U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION- FISCAL YEAR 2009 801 (2009), available at <http://www.state.gov/documents/organization/100326.pdf>. The construction budget in the fiscal year 2009 soared to \$263 million, including \$220 million under the Recovery Act, another \$22 million to bring the SBIWTP into compliance with the Clean Water Act and its discharge permit, and an additional \$17 million for levee work. The construction budget was reduced to \$43 million in the fiscal year 2010, including another \$6 million for the SBIWTP and \$21 million for

Recovery Act funds predictably overwhelmed the agency. Flush with funds, the agency tore down newly built levees allegedly so that it could rebuild them with Recovery Act appropriations, wasting millions of dollars as a consequence.⁴⁶⁰ In the process, the USIBWC cancelled earlier construction contracts that were not a part of the Recovery Act, under conditions that pushed several small businesses and contractors to the brink of bankruptcy.⁴⁶¹

The agency was so anxious to spend the Recovery Act windfall that its very first construction contract solicitation listed hundreds of pages of state, rather than federal, contract regulations and building specifications, which it had lifted verbatim from a private architectural firm's designs for a non-federal client, along with the designs themselves.⁴⁶² The agency even agreed to subsidize the border barrier being built by the Department of Homeland Security ("DHS") by combining a levee with a border barrier wall in a single structure and using Recovery funds to pay millions of dollars of the cost of the border barrier in addition to the cost of the levee.⁴⁶³ By doing so, the USIBWC was able to piggyback on DHS's exemption from compliance with a wide range of environmental laws.⁴⁶⁴

In addition to the Recovery Act funds, the USIBWC received another \$37 million in 2009 emergency appropriations to reconstruct fifteen miles of levees at Presidio, Texas, that had been completely

levees. The construction budget request for the fiscal year 2011 is approximately \$27 million, including another \$21 million for levees and \$5 million to begin rehabilitation of Amistad and Falcon Dam.

U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION— FISCAL YEAR 2011 691-94 (2011), available at <http://www.state.gov/documents/organization/136355.pdf>.

460. Crowder. *supra* note 54.

461. *Id.*

462. See *Recovery – Construct Banker Floodway North Levee*, FEDERAL BUSINESS OPPORTUNITIES (July 24, 2009),

<https://www.fbo.gov/?s=opportunity&mode=list&tab=searchresults&> (follow "Recovery – Construct Banker Floodway North Levee" link to original and amended solicitations) (in possession of author); see also McCarthy Memo to OIG, *supra* note 48, at 2.

463. See McCarthy Memo to OIG, *supra* note 48, at 3. Such an agreement would be a violation of the Purpose Act, 31 U.S.C. § 1301 (2011), and the Anti-Deficiency Act, 31 U.S.C. § 1341 (2011). Violations of the Anti-Deficiency Act can carry civil and criminal penalties. See 31 U.S.C. §§ 1349, 1350 (2011).

464. The REAL ID Act of 2005 authorized the Secretary of Homeland Security to "waive all legal requirements . . . necessary to ensure expeditious construction" of the U.S.-Mexico border fence. Pub. L. No. 109-13, Div. B, Title I, § 102(c), 119 Stat. 306 (2005), reprinted in 8 U.S.C. § 1103 note (Improvement of Barriers at Border). Lawsuits challenging the constitutionality of the exemptions law have been unsuccessful. See *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007); *County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045, at *9, *13 (W.D. Tex. Aug. 29, 2008). For more information on border fence construction and the REAL ID Act, see generally CHAD C. HADDAL ET AL., BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER (2009), available at <http://www.fas.org/sgp/crs/homesecc/RL33659.pdf>. For a discussion of constitutional and policy concerns regarding such delegated waiver authority, see generally Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVTL. L. REV. 257 (2010).

destroyed by floods in 2008.⁴⁶⁵ Although geotechnical reports strongly recommended construction on a new alignment, due to unsuitable soils that had contributed to the original failure of the levees, the USIBWC chose to rebuild the levees along the original alignment because it was under pressure to act quickly.⁴⁶⁶ These cosmetic levees give a false appearance of protection and will again be subject to disintegration in a flood of even lesser flow levels, wasting tens of millions of dollars, not including the flood damages that may result.⁴⁶⁷

C. SANITATION PLANTS SPEW TOXIC WASTES

Pursuant to the terms of the 1944 Treaty, through which the United States and Mexico agreed to give preferential attention to the solution of all border sanitation problems, the IBWC operates a small number of international Wastewater Treatment Plants. The South Bay International Wastewater Treatment Plant (SBIWTP), located in San Diego County, California, and adjacent to Tijuana, Mexico, has for years continuously violated effluent limitations under the Clean Water Act, and delays have plagued construction of court-ordered secondary treatment facilities.⁴⁶⁸ The USIBWC recently renewed a five-year, \$35 million contract with Veolia Water North America, which has operated the plant since its inception in 1996.⁴⁶⁹

465. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, H.R. 2638 110th Cong. (2008). *See also*, U.S. DEP'T OF STATE, INTERNATIONAL COMMISSIONS: CONGRESSIONAL BUDGET JUSTIFICATION 743 (2009), <http://www.state.gov/documents/organization/123638.pdf>.

466. *Id.*

467. *See* George Sills, Letter Report: August 2009 Geotechnical Levee Assessment of U.S. IBWC Levees at Presidio, TX, October 28-29, 2008 and January 6-7, 2009, (2009) available at http://peer.org/docs/tx/1_31_11_Presidio_Levee_excerpts.pdf ("it is very critical to move the levee landward as far as practical to achieve improvement of the river flow within this reach"); *see also* U.S. SECTION OF INT'L BOUNDARY & WATER COMM'N, ENVIRONMENTAL IMPACT STATEMENT: FLOOD CONTROL IMPROVEMENTS AND PARTIAL LEVEE RELOCATION, USIBWC PRESIDIO FLOOD CONTROL PROJECT, PRESIDIO, TEXAS, at ES-6, 2-9 (2010), available at http://www.ibwc.gov/Files/Final_EIS_Presidio_FCP_022210.pdf. (rejecting realignment alternative and selecting alternative to rehabilitate the levee system along the current alignment notwithstanding acknowledgement that "preliminary geotechnical studies (ERDC 2008) indicated several structural problems in this area"); McCarthy Memo to OIG, *supra* note 48, at 3.

468. *See e.g.* California v. Duran, No. 01-CV-0270-BTM(JFS), at 1 (S.D. Cal. Dec. 6, 2004), available at

http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/iwtp/docs/ibwc_ord1.pdf. *See also* ERIC TERRILL ET AL., SCRIPPS INST. OF OCEANOGRAPHY, FINAL REPORT: COASTAL OBSERVATIONS AND MONITORING IN SOUTH BAY SAN DIEGO, IBWC/ SURFRIDER CONSENT DECREE 159-60 (2009),

available at http://cordc.ucsd.edu/about/docs/sboo_ibwc/IBWC_Monitoring_SBOO.pdf; IBWC & EPA, RECORD OF DECISION FOR FINAL EIS OF SBIWTP CLEAN WATER ACT COMPLIANCE (2008) (recounting difficulties and controversies encountered in attempting to decide how to comply with consent decree).

469. *International Boundary & Water Commission Renews Veolia Water North America Contract: Agreement to Extend Long-Standing Relationship*, BUSINESSWIRE.COM (Dec. 15, 2010, 11:00AM),

A second plant, in Nogales, Arizona, received 128 citations between January 1995 and January 2000 for violation of water quality standards.⁴⁷⁰ The USIBWC continues to struggle to comply with court orders to clean up the plant's effluent.⁴⁷¹ The IBWC has faced further heavy criticism as well for its crumbling flood control channel in Nogales, Sonora, Mexico, whose disrepair contributed to millions of dollars in damages in 2008.⁴⁷² These and other experiences have led critics to describe the IBWC's role at Ambos Nogales (both Nogales) as a series of failures over a period of more than fifty years.⁴⁷³

D. SKIRTING NEPA

The National Environmental Policy Act (NEPA) requires federal agencies to ensure that environmental considerations are given careful attention and appropriate weight in every recommendation or report on proposals for legislation and for other federal actions significantly affecting the quality of the human environment.⁴⁷⁴ The regulations of the Council of Environmental Quality (CEQ) set forth the procedures for complying with NEPA.⁴⁷⁵ The CEQ Regulations require that each federal agency develop their own regulations to detail how it will

<http://www.businesswire.com/news/home/20101215005203/en/International-Boundary-Water-Commission-Renews-Veolia-Water>.

470. See *Sierra Club v. Whitman*, 268 F.3d 898, 900 (9th Cir. 2001).

471. See *Abbott*, *supra* note 53 (citing elevated levels of toxic metals in effluent from the NIWTP in reports from May 2008 to June 2010, the Arizona Department of Environmental Quality (ADEQ) issued an order requiring IBWC to clean up its effluent and to stop its practice of spreading contaminated sludge on grazing pasture.) "The order also alleges that IBWC knew it had excessive cadmium levels in its biosolids on June 1, 2009, but delayed notifying the state until Aug. 4, 2010. According to its permit under the Clean Water Act, IBWC is supposed to call ADEQ within 24 hours of learning about any exceedance 'which may endanger health or the environment.'" *Id.* See also Mark Shaffer, *Ariz. Dep't of Envtl. Quality, ADEQ Issues Order to IBWC for Cadmium Water Quality Violations and Failure to Properly Manage Sewage Sludge* (Oct. 25, 2010), available at

<http://www.azdeq.gov/function/news/2010/download/102510.pdf> ("The state is telling the responsible federal agency, the IBWC, enough is enough. We need them to step up to the plate and across the border to prevent toxic wastewater and sludge and invest in 21st Century infrastructure," ADEQ Director Benjamin H. Grumbles said").

472. See *Public Employees for Environmental Responsibility*, *supra* note 40. See also Manuel C. Coppola, *Crews Wrap up Sewer Line Repairs*, NOGALES INT'L (Nov. 5, 2010, 11:50 AM),

<http://www.nogalesinternational.com/articles/2010/11/05/news/doc4cd42dbadd052028877752.txt> (reporting that Arizona's two United States Senators had written to President Obama to complain that IBWC "has failed to provide the resources needed for a long-term fix to the problem," which they said is estimated to require \$20 million); Manuel C. Coppola, *IBWC Working with City, Corps to Address Flooding*, NOGALES INT'L (Aug. 13, 2010, 10:26 AM), <http://www.nogalesinternational.com/articles/2010/08/13/news/doc4c655f30285e0835852169.txt> (reporting on flood damages to the IBWC Nogales Wash flood channel and estimates of more than \$60 million in needed repairs).

473. *Ingram & White*, *supra* note 4, at 158-74.

474. 42 U.S.C. § 4321 (2006)

475. 40 C.F.R. §§ 1500-1508 (2010).

comply with NEPA.⁴⁷⁶ Both NEPA and the CEQ regulations emphasize engaging the public in the development and implementation of individual agency NEPA procedures.⁴⁷⁷

The USIBWC adopted its Operational Procedures under NEPA in 1981, with minimal public input from a border population that was just beginning to appreciate the importance of the agency's NEPA compliance.⁴⁷⁸ The USIBWC acknowledged, "[c]omments were received only from the Council on Environmental Quality in response to the Federal Register notice containing the proposed procedures."⁴⁷⁹ The CEQ suggested revision of section 100.3 of the USIBWC's NEPA procedures to provide that the section shall comply with the procedures and CEQ regulations except where compliance would be inconsistent with statutory or treaty requirements.⁴⁸⁰ Indeed, the USIBWC complied with this suggestion, thus exempting the vast majority of its actions from NEPA review:

The operational Procedures apply to all Section programs and activities to the maximum extent possible without impairing its international mission. Domestic requirements must not impair the Section's performance of the United States' international obligations with [sic] are carried out consistent with the treaties and foreign policy of the United States. The Section shall comply with these procedures and the CEQ regulations except where compliance would be inconsistent with statutory or treaty requirements.⁴⁸¹

In addition to the broad exclusion for treaty requirements, the USIBWQC adopted additional "categorical exclusions,"⁴⁸² pursuant to CEQ regulations that permit agencies to exempt from NEPA's procedural requirements actions that do not have significant environmental consequences.⁴⁸³ The USIBWC lists thirteen categorical exclusions, including but not limited to:

Actions specifically required under any treaty or international agreement, or pursuant thereto, to which the United States is a party, or required by the decision of international organizations (including courts), authorities or consultations in which the United States is a

476. *Id.* § 1507.3(a).

477. *See id.* § 1506.6(a) (requiring agencies to make "diligent efforts to involve the public in preparing and implementing their NEPA procedures"); *id.* § 1507.3(a) (providing that an agency's NEPA procedures shall be adopted only after an "opportunity for public review," and that once in effect, the procedures must be made "readily available to the public").

478. USIBWC NEPA Procedures, *supra* note 57, at 44083-44094.

479. *Id.* at 44083.

480. *Id.* at 44083-84.

481. *Id.* at 44084.

482. *Id.* at 44086.

483. 40 C.F.R. § 1508.4 (2011) ("Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations.")

member or participant. . . . Leases of government land for grazing and agricultural purposes. . . . Recreational leases to any city, county, state or federal agency. . . . Leases or licenses regarding buried utilities, including gas, water and sewer pipelines, and telephone cables, irrigation drains, and storm sewers, sanitary sewers discharging treated effluent, telephone and electric power poles and lines, irrigation pumps, drain structures and ditches, fences, roads, highways and bridges, water wells, boat docks and boat launching facilities. . . . Temporary or single-time permit of project facilities.⁴⁸⁴

The breadth of these exclusions is breathtaking. Indeed, it is hard to imagine what projects undertaken by the USIBWC would not come within one or more of the exclusions. This is not to say the USIBWC has not undertaken Environmental Assessments (EA) and Environmental Impact Statements (EIS) for some projects, but it appears to have been done on a voluntary *ad hoc* basis with no public input into the decision whether or not to use a categorical exclusion.⁴⁸⁵ It is unclear whether the public would even know about agency actions when it has invoked a categorical exclusion, because the agency is required to produce only an internal agency memorandum.⁴⁸⁶

Moreover, the USIBWC exclusion of all actions taken pursuant to treaty requirements becomes a self-fulfilling prophecy since the IBWC decides what actions to take under the 1944 Water Treaty.⁴⁸⁷ Further, it misrepresents the language of the Treaty itself, which specifies that actions to be taken by the respective governments are to fully comply with the domestic laws of each section.⁴⁸⁸

The CEQ regulations also require agency procedures to identify "extraordinary circumstances" pursuant to which full NEPA documentation is required even for actions that are normally classified as categorical exclusions.⁴⁸⁹ "Extraordinary circumstances are factors or circumstances in which a normally excluded action may have a significant environmental effect that then requires a further analysis in

484. USIBWC NEPA Procedures, *supra* note 57, at 44086.

485. Even if a proposed action fits within the definition of a categorical exclusion, and does not raise extraordinary circumstances, the CEQ Regulations make clear that an agency can at its discretion decide "to prepare an environmental assessment . . . in order to assist agency planning and decisionmaking." 40 C.F.R. § 1501.3(b) (2011).

486. USIBWC NEPA Procedures, *supra* note 57, at 44087 ("Categorical Exclusions. An environmental memorandum will be prepared which includes a description of the proposed action, and a finding that the action is categorically excluded and no further environmental action is needed to comply with NEPA, executive orders, regulations and other acts. This memorandum shall be referenced in decision documents.")

487. 1944 Water Treaty, *supra* note 3, at 1257.

488. Article 24 of the 1944 Water Treaty provides, in part, "The International Boundary and Water Commission shall have, in addition to the powers and duties otherwise specifically provided in this Treaty, the following powers and duties: . . . (b) To construct the works agreed upon or to supervise their construction and to operate and maintain such works or to supervise their operation and maintenance, in accordance with the respective domestic laws of each country." *Id.* at 1255.

489. 40 C.F.R. § 1508.4 (2011) ("Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.")

an [EA] or an [EIS].”⁴⁹⁰

The USIBWC Procedures include an “an extraordinary circumstance” statement, but provide no criteria for when it would apply.⁴⁹¹ In its entirety, the statement reads: “In an extraordinary circumstance, as determined by the Commissioner, in which a normally excluded action may have a significant environmental effect, an environmental assessment will be prepared.”⁴⁹² This barebones language does not identify what factors or circumstances might constitute extraordinary circumstances and essentially leaves the determination to the unfettered discretion of the Commissioner.⁴⁹³

Reference to CEQ Guidance on “Establishing, Applying and Revising Categorical Exclusions under the NEPA,” suggests numerous shortcomings in the USIBWC’s use of categorical exclusions and extraordinary circumstances.⁴⁹⁴ The CEQ Guidance emphasizes that “categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review.”⁴⁹⁵ The CEQ Guidance states that categorical exclusions “should clearly define the eligible category of actions, as well as any physical temporal or environmental factors that would constrain its use.”⁴⁹⁶

Citing examples of extraordinary circumstances identified by an agency, such as impact on protected species or habitat, the CEQ Guidance states “agency NEPA implementing procedures should clearly describe the manner in which an agency applies extraordinary circumstances and the circumstances under which additional analysis in an EA or an EIS is warranted.”⁴⁹⁷ Further, “if extensive extraordinary circumstances are needed to limit a proposed categorical exclusion, the agency should also consider whether the categorical exclusion itself is appropriate.”⁴⁹⁸ The USIBWC statement of extraordinary circumstances is completely inadequate, both as promulgated and as applied. The Ninth Circuit has required documentation to demonstrate that a Federal agency has considered the environmental impact of extraordinary circumstances.⁴⁹⁹ The CEQ regulations direct Federal agencies to “continue to review their

490. Memorandum from Nancy H. Sutley on Establishing, Applying and Revising Categorical Exclusions under the National Environmental Policy Act 2 (Nov. 23, 2010) [hereinafter CEQ Guidance], available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/NEPA%20Categorical%20Exclusion%20Guidance%2023-11-2010.pdf>.

491. USIBWC NEPA Procedures, *supra* note 57, at 44086.

492. *Id.*

493. *Id.*

494. CEQ Guidance, *supra* note 490, at 2-3.

495. *Id.* at 2.

496. *Id.* at 5.

497. *Id.* at 6.

498. *Id.*

499. *California v. Norton*, 311 F. 3d 1162, 1175-78 (9th Cir. 2002); *see also*, Kevin H. Moriarty, Note, *Circumventing The National Environmental Policy Act: Agency Abuse Of The Categorical Exclusion*, 79 N.Y.U. L. Rev. 2312, 2329-30, 2333 (2004) (analyzing “extraordinary circumstances” language).

policies and procedures and in consultation with [CEQ] to revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA].”⁵⁰⁰ The CEQ Guidance states: “Where an agency’s categorical exclusions have not been regularly reviewed, they should be reviewed by the agency as soon as possible.”⁵⁰¹ The CEQ recommends a “seven-year cycle” for review of agency categorical exclusions, to ensure they are appropriate “in light of evolving or changing conditions that might present new or different environmental impacts or risks.”⁵⁰² The USIBWC categorical exclusions, inadequate as they are, have not been reviewed in 30 years.

E. CATERING TO SPECIAL INTERESTS

In recent years the USIBWC has established advisory groups in an attempt to counter criticisms that it is secretive and resistant to public input. The USIBWC established five regional “Citizen Forums” between 1999 and 2005, each comprising a membership appointed by the U.S. Commissioner, “to facilitate the exchange of information between the USIBWC and members of the public about Commission activities.”⁵⁰³ In addition, the USIBWC’s “Clean Rivers Program” has established separate “Basin Advisory Committees.”⁵⁰⁴ It appears that the USIBWC establishment of these advisory committees is in direct violation of the Federal Advisory Committee Act (FACA),⁵⁰⁵ which has stringent requirements for establishment of such groups.

Enactment of FACA in 1972 was prompted by the belief of many citizens and Members of Congress that a proliferation of advisory committees was duplicative, inefficient, and lacked adequate control or oversight. Additionally, there was strong public sentiment that such committees failed to sufficiently represent the public interest by allowing special interests special access to sway policy-makers.⁵⁰⁶

Through FACA, Congress sought to sharply limit the increasing number of advisory committees and to open their activities to public scrutiny.⁵⁰⁷ FACA requires continuing congressional review of each advisory committee to ensure that it fulfills its defined purpose, that its membership is “fairly balanced in terms of the points of view represented and the functions to be performed,”⁵⁰⁸ and that the

500. 40 C.F.R. § 1507.3(a) (2011).

501. CEQ Guidance, *supra* note 4900, at 15.

502. *Id.* at 16.

503. *San Diego Citizens Forums*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Citizens_Forums/CF_SBIWTP.html (last visited Mar. 8, 2011).

504. *See Basin Advisory Committees*, INT’L BOUNDARY & WATER COMM’N, <http://www.ibwc.gov/crp/participation.htm> (last visited Mar. 22, 2011).

505. 5 U.S.C. app. § 5 (2006).

506. *See* WENDY R. GINSBERG, CONG. RESEARCH SERV., R40520, FEDERAL ADVISORY COMMITTEES: AN OVERVIEW 2 (2009), available at <http://www.fas.org/sgp/crs/misc/R40520.pdf>.

507. 5 U.S.C. app. § 2 (2006).

508. *Id.* § 5(b)(2).

committee will “not be inappropriately influenced by the appointing authority or by any special interest.”⁵⁰⁹

Congress charged the General Services Administration (GSA) with administering FACA, granting it authority to develop and apply guidelines and controls to improve the performance of advisory committees.⁵¹⁰ All advisory committees that are subject to FACA must file a charter every two years with the GSA.⁵¹¹ FACA-governed entities are defined specifically within the act, to include:

any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as “committee”), which is –

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.⁵¹²

There is no reason to doubt that the advisory committees created by the USIBWC are covered by the FACA, yet there is no record of the USIBWC having complied with the requirements for establishing such advisory groups under the FACA.⁵¹³ Additionally, a large part of the intent and purpose of the FACA, to ensure that special interests are not given special access to sway public policy, is frustrated by the make-up of the USIBWC’s committees. Although the full membership information is not posted on the USIBWC’s website, a review of press releases in the last couple of years reveals the committees are stacked with representatives of local irrigation districts.⁵¹⁴ Thus, even if the

509. *Id.* § 5(b)(3).

510. *Id.* § 7.

511. *Id.* § 14(a)(B)(2) (2006).

512. *Id.*, § 3(2).

513. See *Database Search*, FEDERAL INTERAGENCY DATABASES ONLINE, <http://fido.gov/facadatabase/databasesearch.asp> (last visited Mar. 22, 2011).

514. See, e.g., Press Release, USIBWC, USIBWC Appoints Colorado River Citizens Forum Board Members; Public Meeting Set For September 1 In Yuma, Arizona (Aug. 20, 2009), available at http://www.ibwc.gov/Files/PressRelease_082009.pdf.

USIBWC successfully completed the procedural steps required to create such committees, they would be unlikely to satisfy FACA's requirement that membership be "fairly balanced in terms of the points of view represented."⁵¹⁵

A Justice Department opinion states that "Congress did not intend the Federal Advisory Committee Act . . . to apply to such a body created jointly by the United States and another nation," such as the U.S.-Japan Consultative Group on Economic relations.⁵¹⁶ However, the USIBWC advisory committees do not advise the IBWC, an international body, they advise the U.S. Section, a federal agency. Thus, the USIBWC has used the FACA, much like NEPA, to give the appearance of public participation while actually skirting the law and shutting the public out.

F. NEGLECTED DAMS POSE CATASTROPHIC THREATS

The most alarming fact about the current state of the USIBWC and its failing infrastructure, however, concerns the unsafe condition of two major storage dams on the Rio Grande, and the agency's efforts to hide from the public breathtaking information about the imminent threat of a major catastrophe.⁵¹⁷ The Federal Emergency Management Agency (FEMA) in 2009 rated three massive storage dams operated by the IBWC in its highest hazard classification, another dam as a "significant" hazard, and three dams as presenting a "low" hazard.⁵¹⁸

Indeed, the USIBWC itself had previously recognized that that

515. 5 U.S.C. app. § 5(b)(2) (2006).

516. Memorandum from Larry A. Hammond, Assistant Attorney General, Office of Legal Counsel, to the President 3 U.S. Op. Off. Legal Counsel 321, 322 (1979).

517. See, e.g., Public Employees for Environmental Responsibility, *supra* note 39 ("Two international storage dams operated by USIBWC have been rated unsafe. Millions of residents on both sides of the border are at high risk of inundation by floods due to the disrepair."). See also, Emma Perez-Trevino, *Inspections Indicate Weakness in Some Dams*, BROWNSVILLE HERALD, July 14, 2010, <http://www.brownsvilleherald.com/articles/dams-114378-indicate-inspections.html>; Emma Perez-Trevino, *State Keeping Eye on Dams and Levees*, BROWNSVILLE HERALD, July 19, 2010, <http://www.brownsvilleherald.com/articles/texas-114531-division-commission.html>; Emma Perez-Trevino, *Former IBWC Counsel Alleges Abuses Affecting Safety*, BROWNSVILLE HERALD, August 7, 2010, <http://www.brownsvilleherald.com/articles/water-115220-grande-dams.html> (documenting concerns with the IBWC).

518. FEMA, P-759, DAM SAFETY IN THE UNITED STATES (2009), available at <http://www.fema.gov/library/viewRecord.do?id=3677> (follow download link); Federal law imposes duties on both the Army Corps of Engineers and FEMA with respect to dam safety. The law requires the Corps of Engineers to "carry out a national program of inspection of dams for the purpose of protecting human life and property." 33 U.S.C. § 467(a) (2006). Excluded from the program, however, are dams under the jurisdiction of the IBWC, unless the IBWC requests the Corps to inspect its dams. *Id.* FEMA is responsible for coordination of dam safety, including an Interagency Committee on Dam Safety, which ironically, includes IBWC representation. *Id.* § 467(e). FEMA has adopted Federal Guidelines for Dam Safety to establish a basic structure for agencies' dam safety programs. *Federal Guidelines for Dam Safety*, FEMA, (last modified Aug. 11, 2010), <http://www.fema.gov/plan/prevent/damfailure/fema333.shtm>.

none of the IBWC dams located on the Rio Grande are considered “Safe”. Using criteria developed by the United States Army Corps of Engineers, the IBWC itself assigned safety ratings to its dams on a scale that ranges from Class I to Class V, with Class V being “Safe.”⁵¹⁹ Ratings assigned to the two massive IBWC storage dams on the Rio Grande are especially alarming, as they are deemed to be in “urgent” and “high priority” need of repair.⁵²⁰

Amistad Dam, dedicated in 1969, is the largest of the storage dams and reservoirs built on the international reach of the Rio Grande.⁵²¹ Amistad Storage Dam was rated Class II, “Urgent (Potentially Unsafe).”⁵²² The actual report on which the conclusions are based is referenced on the IBWC website.⁵²³ But, the USIBWC refused to release an updated report in response to a FOIA request from Public Employees for Environmental Responsibility (PEER).⁵²⁴

Although not acknowledged on the IBWC website, the rating assigned to Amistad means “failure could begin during normal operations or be initiated as the consequence of an event. The likelihood of failure from one of these occurrences, prior to remediation, is too high to assure public safety.” The operator of a Class II dam is supposed to “[i]mplement interim risk reduction measures, including operational restrictions, . . . [c]onduct heightened monitoring and evaluation . . . [and] [g]ive very high priority for investigations to support justification for remediation.”⁵²⁵

Falcon Dam, built between 1950 and 1954, “is the lowermost major

519. See *Safety of Dams*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Mission_Operations/SoD.html (last visited Mar. 22, 2011). There are five Dam Safety Action Classes. They are as follows: I – Urgent and Compelling (Unsafe); II – Urgent (Unsafe or Potentially Unsafe); III – High Priority (Conditionally Unsafe); IV – Priority (Marginally Safe); V – Normal (Safe), *id.*

520. *Amistad Dam*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Mission_Operations/SoD_Amistad.html [hereinafter *Amistad Dam*] (last visited Mar. 22, 2011); *Falcon Dam*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Mission_Operations/SoD_Falcon.html [hereinafter *Falcon Dam*] (last visited Mar. 22, 2011).

521. *Amistad Project Office*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Organization/Operations/Field_Offices/amistad.html (last visited Mar. 22, 2011). See generally INT’L BOUNDARY & WATER COMM’N, STRATEGIC PLAN FY 2008- FY 2013 (2010), http://www.ibwc.gov/Files/Strategic_Plan.pdf [hereinafter IBWC STRATEGIC PLAN].

522. See *Amistad Dam*, *supra* note 520.

523. *Amistad Project Office*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Organization/Operations/Field_Offices/amistad.html (follow the link “Joint Report of the Technical Advisors of the IBWC regarding the Geotechnical, Electrical, Mechanical and Structural Safety of Amistad Dam”) (last visited Apr. 18, 2011).

524. See Jared Taylor, *Environmental Group Sues IBWC over Withheld Info*, MONITOR, Feb., 1, 2011, 7:08 PM, <http://www.themonitor.com/news/environmental-46750-group-ibwc.html>.

525. See, e.g., TIMOTHY M. O’LEARY, U.S. ARMY CORPS OF ENG’RS, USING PFMA WITH IRRM PLANS: POTENTIAL FAILURE MODE ANALYSIS WORKSHOP, at Q-5 (2007), <http://www.usbr.gov/ssle/damsafety/Risk/pfma/TabQ-UsingPFMAwithIRRMPlans.pdf>.

multipurpose international dam and reservoir on the Rio Grande.”⁵²⁶ The United States Army Corp of Engineers rated the Falcon Storage Dam as Class III, “High Priority=(Conditionally Unsafe).”⁵²⁷ For a Class III dam, such as Falcon, the “probability of failure is moderate to high.” Corrective action calls for the agency to “[i]mplement interim risk reduction measures, including operational restrictions... [c]onduct heightened monitoring and evaluation... [and] [p]rioritize for investigations to support justification for remediation.”⁵²⁸

Yet, in the 2010 hurricane and monsoon season, the IBWC maintained historically high dam levels and made unprecedented dam releases, nonchalantly proclaiming that the IBWC was operating the dams normally.⁵²⁹ According to the Corps, only for dams in Class V, the “Safe” dams, should the operator “[c]ontinue routine dam safety activities, normal operation, and maintenance.”⁵³⁰ “Heightened monitoring and evaluation” and “very high priority for investigations”, as translated by the IBWC, meant that a “risk analysis study on Amistad Dam” was supposed to be completed sometime in 2010!⁵³¹ IBWC’s website notes that it planned to “initiate preliminary investigations and evaluation of Falcon Dam in FY2009.”⁵³² The agency acknowledges that it prepared a November 2009 updated report on the condition of Amistad,⁵³³ but refused to make that public.⁵³⁴

G. SECRECY AND COVER-UP

More shocking, however, was the agency’s decision to hide from the public the inundation maps that would show the extent of the catastrophe that would ensue should one of the IBWC dams fail. The IBWC website does not even acknowledge the existence of “Emergency Action Plans” (EAPs) and inundation maps, although they are considered essential to reduce potential property damage and loss of lives in areas that dam failure would affect. A complete EAP includes a map of the potential inundation area, procedures and

526. *Falcon Dam & Power Plant*, INT’L BOUNDARY & WATER COMM’N, http://www.ibwc.gov/Organization/Operations/Field_Offices/Falcon.html (last visited Apr. 18, 2011); IBWC STRATEGIC PLAN, *supra* note 521, at 7.

527. INT’L BOUNDARY & WATER COMM’N, *supra* note 5266; INT’L BOUNDARY & WATER COMM’N JOINT REPORT OF THE TECHNICAL ADVISORS OF THE INTERNATIONAL BOUNDARY AND WATER COMMISSION REGARDING THE GEOTECHNICAL, ELECTRICAL, MECHANICAL AND STRUCTURAL SAFETY OF FALCON DAM 5, *available at* http://www.ibwc.gov/Files/SOD_Report_Falcon.pdf (last visited Apr. 18, 2011).

528. O’LEARY, *supra* note 525, at Q-5.

529. See, e.g., Perez-Trevino, *Inspections Indicate Weakness in Some Dams*, *supra* note 517; Perez-Trevino *State keeping Eye on Dams and Levees*, *supra* note 517; Perez-Trevino, *Former IBWC Counsel Alleges Abuses Affecting Safety*, *supra* note 517.

530. O’LEARY, *supra* note 525, at Q-5.

531. *Id.*; Perez-Trevino, *supra* note 59.

532. *Falcon Dam*, *supra* note 520.

533. *Amistad Dam*, *supra* note 520; Perez-Trevino, *supra* note 59.

534. Taylor, *supra* note 524.

information for warning downstream emergency management authorities, and other crucial information.⁵³⁵

Although the IBWC denied a FOIA request for its EAP and maps, claiming they do not exist,⁵³⁶ the agency apparently has told another story to FEMA. FEMA has reported that “the USIBWC has an EAP for each of its large storage dams (Amistad and Falcon), as well as for Anzalduas and Retamal International Diversion Dams.”⁵³⁷

The IBWC has been aware of the sinkholes that threaten the integrity of Amistad Dam since 1990, and they have gotten worse, now numbering approximately thirty and varying in size and severity.⁵³⁸ Besides the sinkholes, a “depression” area has also been noticed on the upstream embankment and water seepage has been noticed downstream from the dam.⁵³⁹ If the Amistad Dam were to fail, nearly 5 million acre-feet of water would be released.⁵⁴⁰ Falcon Dam also has a history of foundation seepage and there are serious questions about the stability of the entire Falcon Dam, which inspectors noted is in need of further evaluation.⁵⁴¹ “Both Amistad Dam and Falcon Dam were built before 1972 when the National Dam Inspection Act was passed and before . . . guidelines for dam safety were developed.”⁵⁴²

On appeal of the FOIA denial, the USIBWC belatedly acknowledged the existence of various documents related to the ultra-hazardous condition of the Amistad and Falcon Dams, but once again the U.S. Section refused to produce the requested information.⁵⁴³ This time, instead of denying the existence of the documents, including an admitted seventy-seven inundation maps, the USIBWC claimed the documents are exempt from disclosure under the FOIA because they are mere drafts subject to the deliberative process exemption under the FOIA.⁵⁴⁴ Additionally, IBWC withheld the documents pursuant to a claim that “disclosure of such information could facilitate illegal acts against critical infrastructure.”⁵⁴⁵

The claim that the documents are drafts subject to the deliberative process exemption is troubling, both since “maps are simply factual

535. *About EAPs*, DAMSAFETYACTION.ORG, <http://www.damsafetyaction.org/TX/about-eaps/what-eap.php> (last visited Mar. 22, 2011).

536. Taylor, *supra* note 524.

537. FEMA, *Dam Safety in the United States*, *supra* note 518, at 32.

538. Perez-Trevino, *Deficiencies*, *supra* note 59.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. See Letter from Steve Fitten, Chief FOIA Officer, USIBWC, to Public Employees for Environmental Responsibility (Nov. 29, 2010) (on file with author); Complaint at 1, 2, Pub. Emp. for Env'tl. Responsibility v. U.S. Int'l Boundary & Water Comm'n, No. 1:11CV00261 (Jan. 31, 2011), 2011 WL 466053, available http://peer.org/docs/tx/1_31_11_USIBWC_dam_safety_FOIA_Complaint.pdf at

544. Complaint, *supra* note 543, at 2.

545. Letter from Steve Fitten, *supra* note 543; Complaint, *supra* note 543, at 8.

representations and not subject to policy deliberation, [and] also because the documents have been in perpetual draft form decades after they were first required, precisely to avoid public disclosure."⁵⁴⁶ Moreover, the claim of deliberative process suggests the EAPs have not been shared with state and local officials, which is either a preposterous claim or an admission of a truly counterproductive obsession with secrecy.⁵⁴⁷

Even more troubling is the USIBWC claim that emergency action plans and inundation maps may be withheld from the public on the basis that "disclosure of such information could facilitate illegal acts against critical infrastructure."⁵⁴⁸ By this logic, communities throughout the nation may be denied the very information mandated for their safety planning.⁵⁴⁹ In reality, it is plain that the USIBWC is

546. Complaint, *supra* note 543, at 2. The Amistad EAP "itself suggests this, at p. 27 ('Emergency Action Plans should be considered 'Living Documents,' This means that: (1) They will never be complete, (2) They should be reviewed not less than annually.')." *Id.* at 2 n.1. See also *EPA v. Mink*, 410 U.S. 73, 91 (1973) (discussing the Freedom of Information Act and the scope of the deliberative process privilege).

547. The exemption protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2011).

548. Complaint, *supra* note 543, at 20. The USA Patriot Act of 2001 defines "critical infrastructure" as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. § 5195c(e) (2011). The Homeland Security Act of 2002 includes a provision that operate as a new "Exemption 3 statute" under the FOIA for "critical infrastructure" information that is obtained by the Department of Homeland Security (DHS). 6 U.S.C. § 133(a)(1)(A) (2011). The Exemption 3 statute provides new protection under the FOIA for information pertaining to the nation's critical infrastructure that is voluntarily submitted to DHS. The Act contains an extensive definition of the term "critical infrastructure information." This exemption would not apply to USIBWC, and USIBWC has not claimed Exemption 3. Courts have been asked to protect different types of information related to homeland security under 5 U.S.C. § 552(b)(2) (2011), but the information must relate solely to the internal personnel rules and practices of an agency. Not only that, but even when the exemption is sought, the agency must sufficiently articulate the potential harm from disclosure. Agencies' "conclusory . . . boilerplate" assertions are insufficient to support non-disclosure of even intra-agency practices. See, e.g., *El Badrawi v. Dep't Homeland Security*, 583 F. Supp. 2d 285, 312 (D. Conn. 2008).

549. There is some precedent for withholding inundation maps under FOIA due to claimed threat of terrorist attack. In *Milner v. Department of Navy*, 562 U.S. ___, 131 S. Ct. 1259 (2011), the Supreme Court of United States held that FOIA exemption 2, 5 U. S. C. §552(b)(2), could not be used by the Department of the Navy to deny a FOIA request for data and maps used to help store explosives at a naval base in Washington State. Thus, when assessing records whose disclosure would risk circumvention of the law, as by terrorists, the government must assert interference with a law enforcement function, under exemption 7, §552(b)(7), as in the only reported case to uphold an agency's refusal to release inundation maps. A Federal District Court in Utah declined to order the Bureau of Reclamation to release inundation maps for the areas below Hoover Dam and Glen Canyon Dam, when the Bureau claimed that it was acting in a statutory law enforcement capacity. *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1320, 1322 (D. Utah 2003); see also Cara Muroff, *Terrorists and Tennis Courts: How Legal Interpretations of the Freedom of Information Act and New Laws Enacted to Prevent Terrorist Attacks Will Shape the Public's Ability to Access Critical*

covering behind bogus claims of privilege to hide its own gross incompetence, thereby putting millions of border residents at even greater peril by virtue of denying them information deemed essential to their safety.

The annual USIBWC budget requests in recent years indicate the agency has considered dam safety anything but a “high priority” in the twenty years it has known about the poor condition of the dams. There appears to be a dawning awareness of the need to address urgent safety issues at the two major international storage dams on the Rio Grande, but those tentative efforts appear to be mainly still in the investigatory stages.⁵⁵⁰ The agency’s response to the

FOIA appeal also revealed that it did not even have an EAP of any kind for Falcon Dam prior to

February 17, 2009.⁵⁵¹ Similarly, the agency suggests the EAP still has no inundations maps.⁵⁵²

VIII. EXECUTIVE AUTHORITY AND THE USIBWC

A. DOCTRINE OF SELF-EXECUTING TREATIES

The Supremacy Clause states that, like the Constitution and federal statutes, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;”⁵⁵³ In the leading case of *Foster v. Nielson*,⁵⁵⁴ decided in

Infrastructure Information, 16 U. FLA. J.L. & PUB. POL’Y 149, 166-68(2005). The IBWC has made no law enforcement claim, which in any event would not explain its initial deception regarding the existence of the maps. Significantly, the Army Corps of Engineers, like most of the 100,000 dam operators in the U.S., make their EAPs and inundation maps widely available, often on the internet. The Corps maintains the National Inventory of Dams at <http://nid.usace.army.mil>. The Corps has posted online all of the inundation maps for Wolf Creek Dam in Kentucky, for example, which impounds Lake Cumberland, the largest reservoir east of the Mississippi River and ninth largest in the U.S. See *Wolf Creek Inundation Maps*, ARMY CORPS OF ENGINEERS http://www.lrn.usace.army.mil/WolfCreek/maps_online.htm (Apr. 19, 2011); see also, Austin Peay State University GIS Center, *Wolf Creek Dam*, AP GIS CENTER, <http://gisweb.apsu.edu/WolfCreek.html> (last visited May 24, 2010). FEMA is similarly unequivocal about the need for communities to have access to EAPs and inundation maps for their own emergency preparedness planning. See, e.g., FEMA, CREDIT FOR DAM SAFETY, at 2 (2006),

available

<http://www.fema.gov/library/viewRecord.do?fromSearch=fromsearch&id=4612>. at

State laws often require public access to dam safety information as well. See, e.g., CAL. GOV’T CODE § 8589.5(b) (West 2010); WASH. ADMIN. CODE § 173-175-520 (West 2009).

550. See, e.g., STATE DEP’T BUDGET 2011, *supra* note, at 692-96.

551. See Redacted FOIA copy of the Falcon EAP, C-10, Revisions and Updates made to EAP, describing February 17, 2009 version as the “original” EAP (on file with author).

552. See Redacted FOIA copy of the Falcon EAP, G-1, Desirable Additions to this Manual includes “inundation maps” (on file with author).

553. U.S. CONST. art. VI, cl. 2.

554. See *Foster v. Nielson*, 27 U.S. 253 (1829), *rev’d on other grounds*, *United States v. Percheman*, 32 U.S. 51 (1833).

1829, the Supreme Court explained that notwithstanding the language of the Supremacy Clause, not all treaties are immediately the law of the land upon their ratification:

But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.⁵⁵⁵

The Supreme Court recently revisited the distinction in the case of *Medellín v. Texas*,⁵⁵⁶ wherein the Court noted the longstanding distinction between a self-executing treaty, which upon entry into force “automatically constitute[s] binding federal law enforceable in United States courts,” and a non-self-executing treaty, which does not.⁵⁵⁷ In determining whether a treaty provision is self-executing, the Court has focused on the intent of the U.S. treaty-makers as evidenced by the treaty’s text.⁵⁵⁸ The Court has also considered the negotiation and drafting history, as well as the post-ratification understanding of signatory nations, including the views of the Executive Branch.⁵⁵⁹

Nothing in the Court’s *Medellín* decision suggests that the president is not still constitutionally bound to comply with a non-self-executing treaty. The lack of implementing legislation (and thus justiciability) would seem to have no effect on the president’s constitutional duty to “take Care that the Laws be faithfully executed.”⁵⁶⁰ Indeed, *Medellín* makes clear that the president may take non-judicial actions to enforce a non-self-executing treaty, even if the president is precluded from “unilaterally making the treaty binding on domestic courts.”⁵⁶¹ For example, the Court suggests, the president might set aside state law to implement a non-self-executing treaty.⁵⁶² Obviously, then, the President may and must require compliance with a non-self-executing treaty within the executive branch, and to that end should employ any available constitutional or statutory authorities.⁵⁶³

Under *Medellín*, the 1944 Water Treaty is shown to be non-self-

555. *Id.* at 314.

556. *Medellín v. Texas*, 552 U.S. 491 (2008).

557. *Id.* at 504. Due to the unique facts of the case, and the court’s somewhat inscrutable opinion, scholars disagree as to how far the Court may have tilted away from a presumption of self-execution of international agreements entered into by the United States, and the power of the president to implement such agreements without an act of Congress. See generally, David J. Bederman, *Medellín’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529 (2008).

558. *Medellín*, 552 U.S. at 506 n.3, 518-19.

559. *Id.* at 507, 513.

560. U.S. CONST. art. II, § 3.

561. *Medellín*, 552 U.S. at 530.

562. *Id.* at 523 n.13.

563. See, e.g., Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 549-50 (2008).

executing. Applying the first part of the analysis, examination of the text, the Protocol to the Treaty specifies that it is “an integral part of the Treaty,” and:

(a) [t]hat no commitment for works to be built by the United States in whole or in part at its expense, or for expenditures by the United States, other than those specifically provided for in the treaty, shall be made by the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, or any other officer or employee of the United States, without prior approval of the Congress of the United States

....

(b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States Section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise.⁵⁶⁴

Indeed, Congress has enacted a comprehensive statutory scheme to implement the 1944 Water Treaty and the other boundary and water treaties.⁵⁶⁵ The Senate Report that accompanies the American-Mexican Treaty Act of 1950 states that the legislation was needed to authorize the USIBWC to engage in activities including construction of storage dams on the Rio Grande, and other activities consistent with and required by 1944 Water Treaty, which heretofore had been authorized only on a yearly basis by appropriation acts.⁵⁶⁶ Moreover, the Report makes clear that “[t]he treaty of 1944 and enabling legislation (principally the Act of August 19, 1935, 49 Stat. 660) authorize the United States Section of the Boundary Commission to carry on most of the activities necessary in connection with its operations.”⁵⁶⁷ The Report is accompanied by letters from the State

564. 1944 Water Treaty, *supra* note 3, at Protocol (a), (b).

565. See 22 U.S.C. § 277 (2011).

566. S. Rep. No. 81-2095 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3734, 3735, 1950 WL 1829.

567. *Id.* As described above, the exact same 1935 law cited in the legislative history as giving the USIBWC most of its powers explicitly authorizes the President to designate the USIBWC, or any other federal agency, to perform those functions, and it

Department, which drafted the bill.⁵⁶⁸ The detailed provisions of these statutes also evidence the post-ratification understanding of the United States that such legislation was essential to implementation of the treaties.

Again, it is important to stress that the non-self-executing nature of the Treaty merely precludes judicial enforcement, except for those provisions that have been implemented through legislation. The executive branch is nevertheless bound by all of the Treaty's provisions, including for example those concerning allocation of boundary waters between the United States and Mexico.

B. EXECUTIVE AUTHORITY OVER ADMINISTRATIVE AGENCIES

The State Department has fabricated a variety of excuses for abandoning its responsibilities for oversight of the USIBWC. Chief among these is the implication that the agency is subject not to control by the executive branch, but solely by Congress. The fuzzy claim is promoted by the Department's oft-repeated insistence that the USIBWC cannot be reined in by the executive branch absent congressional approval. Even academic scholars have propagated the myth of congressional control that the State Department instigated. A recent article claims that "the U.S. IBWC was structured, in effect, as a congressional agency, an agency that under normal circumstances was meant to operate with a considerable degree of congressional oversight."⁵⁶⁹ Yet, when it ratified the 1944 Treaty, the Senate did not make the position of Commissioner subject to its advice and consent.⁵⁷⁰ The abdication of this right—indeed this constitutional obligation—hardly suggests a heightened congressional interest in overseeing the agency.⁵⁷¹

In contrast to the "congressional agency" theory, the IBWC "considers itself an independent federal government agency whose

specifies that the Secretary of State, acting through the USIBWC, is so authorized.

568. *Id.*

569. Mumme & Little, *supra* note 5.

570. 1944 Water Treaty, *supra* note 3, at Protocol ¶ (b).

571. Under the U. S. Constitution Appointments Clause, the president may appoint two classes of officers: principal officers and inferior officers. The former are appointed subject to the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. In *Edmond v. United States*, the Court explained that, at a minimum, to be an inferior officer one must be subordinate: "Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond v. United States*, 520 U.S. 651, 662 (1997). If "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," one has a superior. *Id.* at 663. The Congress has no authority to vest the appointment of "principal" officers in the President alone. The Supreme Court has recognized that "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Id.* at 659 (citing *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)). The requirement for "Advice and Consent of the Senate" serves both to curb Executive abuses of the appointment power, and "to promote a judicious choice of [persons] for filling the offices of the union." *Id.* (citations omitted).

leader is answerable only to the President.”⁵⁷² This view presumably is shared by the State Department,⁵⁷³ yet there is no statutory or other support for the claim. Independent agencies are distinguished from other executive agencies by their structural and functional characteristics, or by statutory designation; whereas most executive agencies have a single head, independent agencies are normally led by a multi-member commission or board, and there are usually statutory limitations on presidential influence.⁵⁷⁴

The State Department likens the USIBWC to genuinely independent agencies that have since been statutorily reassigned to the State Department,⁵⁷⁵ but the comparisons are inapt.⁵⁷⁶ In 1961, the Arms Control and Disarmament Act established the U.S. Arms Control and Disarmament Agency (ACDA) as an independent agency.⁵⁷⁷ In 1999, “ACDA was abolished and two new Department bureaus, Arms Control (BAC) and Nonproliferation (BN), were created. Subsequently in 2000, due to congressional concerns regarding effective verification of and compliance with arms agreements, part of the [BAC] became a separate Bureau of Verification and Compliance [BVC].”⁵⁷⁸

The United States Information Agency (USIA) “was created in 1953 as an independent foreign affairs agency within the executive branch of the U.S. government”⁵⁷⁹ In 1977, the State Department’s educational exchange programs and USIA were combined as the United States International Communication Agency (USICA).⁵⁸⁰ In 1982, President Reagan restored the agency’s name to the USIA.⁵⁸¹ “Pursuant to the Foreign Affairs Reform and Restructuring Act of 1998, USIA was abolished on October 1, 1999, and its functions were merged into the State Department.”⁵⁸²

In contrast to these agencies, the USIBWC has always been under the sole jurisdiction of the State Department, notwithstanding the

572. OIG 2005 REPORT, *supra* note 31, at 10.

573. *See id.* at 5, 6, 12; *see also* OIG, 2006 REPORT, *supra* note 36, at 5.

574. *See, e.g.*, RICHARD PIERCE JR., ET AL., ADMINISTRATIVE LAW AND PROCESS, § 4.4.1b at 95-96 (4th ed. 2004).

575. OIG, 2006 REPORT, *supra* note 36, at 5 (comparing the USIBWC to the U.S. Arms Control and Disarmament Agency (“ACDA”) and the United States Information Agency (USIA)).

576. *See generally* Foreign Affairs Agencies Consolidation Act of 1998, 22 U.S.C. § 6501 (2011); KENNON H. NAKAMURA & MATTHEW C. WEED, CONG. RESEARCH SERV., R40989, U.S. PUBLIC DIPLOMACY: BACKGROUND AND CURRENT ISSUES 15-16 (2009), available at <http://www.fas.org/sgp/crs/row/R40989.pdf>.

577. Arms Control and Disarmament Act, Pub. L. No. 87-297, 75 Stat. 631 (1961).

578. OFFICE OF INSPECTOR GEN., DEP’T OF STATE, REPORT NO. ISP-I-05-51: REPORT OF INSPECTION, THE BUREAU OF VERIFICATION AND COMPLIANCE 4 (2004).

579. OFFICE OF INSPECTOR GEN., DEP’T OF STATE, OIG REPORT NO. ISP-I-05-54: SUMMARY REPORT; PUB. DIPLOMACY AT THE DEP’T OF STATE 22 (2005).

580. *Id.*

581. *Id.* at 23

582. *Id.*; *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.

State Department's reticence to exercise that jurisdiction. As such, the USIBWC was never an independent agency reporting to Congress rather than to the executive branch, and Congress has, therefore, never tried to insulate the USIBWC from State Department control.⁵⁸³ In addition, a dramatic contrast may be made with the International Boundary Commission, United States– Canada, which does not even have a U.S. or Canadian Section, but exists only as an international body, not a Federal agency, independent or otherwise.⁵⁸⁴

Those who embrace the State Department's hands-off policy also claim to find support in Treaty language that purportedly delegates unfettered authority to the USIBWC. "The foundation of the [US] Section's authority is the 1944 Water Treaty,"⁵⁸⁵ according to one scholarly tribute to the U.S. Section's autonomy, which also describes the 1944 Water Treaty as "the basic organic act of the modern Commission."⁵⁸⁶ The authors say the U.S. Section was endowed with

exclusive operational authority over the construction of mandated international works, independent control over its payroll, procurement, and retention of consultants, and other discretionary authority that might be justified in the discharge of its functions. These authorizations were not made 'through the Secretary of State,' but were conferred directly on the United States Commissioner, who has the statutory status as 'head of agency.'⁵⁸⁷

Failure to read the statutes that implement the treaty language results in concluding the exact opposite of what Congress intended, and in fact legislated. The statutory scheme enacted by Congress is susceptible to no interpretation other than that Congress intended to empower the Secretary of State to carry out the various statutory duties, and to do so presumptively, but not conclusively, through the USIBWC.⁵⁸⁸ The statute reinforces this intent with commonly used phrases such as "the construction of any project or works undertaken

583. See *The Official White House List of Independent Agencies and Government Corporations Created by Congress*, USA.GOV, <http://www.usa.gov/Agencies/Federal/Independent.shtml> (last visited Mar. 22, 2011) (showing that IBWC is not listed as an "Independent establishment").

584. See David C. Weiss, *The International Boundary Commission, Treaty Interpretation, and the President's Removal Power*, 41 LOY. U. CHI. L.J. 39, 48 (2010).

585. Mumme & Moore, *supra* note 34, at 669.

586. *Id.* (whereas the treaty might be viewed as the organic act of the IBWC, only in the broadest sense of the term, it certainly is not the organic act for the U.S. Section, an essential distinction); See Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457 (2002).

587. Mumme & Moore, *supra* note 34, at 673. To be fair to the authors, they presumably were misled by a 1954 State Department Memo that they cite as authority for this mistaken claim. *Id.* at n.47.

588. See generally YULE KIM, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>. "A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes." *Id.* at CRS-2.

or administered by the Secretary of State through the International Boundary and Water Commission,"⁵⁸⁹ and "in connection with projects, in whole or in part, constructed or administered by the Secretary of State through the said American Commissioner."⁵⁹⁰

More specifically, the statutes frequently reference the fact that all USIBWC appropriations are made through the State Department.⁵⁹¹ Of course many of the statutes reflect the non-remarkable fact that the State Department is charged with negotiating agreements with Mexico, sometimes "acting through" the USIBWC,⁵⁹² but often acting directly, even where the agreements implement projects previously designated and agreed to by treaty.⁵⁹³ Moreover, some statutory language goes so far as to direct the Secretary of State, again without reference to the USIBWC, to negotiate a new Minute.⁵⁹⁴

Ultimately, however, most of the statutes direct the Secretary of State, "acting through" the USIBWC, to take a variety of actions, not merely to negotiate or approve agreements, but to conduct investigations and construct water systems and other works along the border.⁵⁹⁵ Some of these statutes impose such implementation duties directly on the Secretary of State, not acting through the USIBWC.⁵⁹⁶ Others explicitly give the Secretary the discretion to act "through such officers as he may designate."⁵⁹⁷ Obviously, to the extent that the Secretary delegates such statutory duties to the USIBWC, the Secretary cannot escape responsibility to see that they are properly performed. Notably, Congress also recognized the jurisdiction of the State Department OIG to investigate the USIBWC, specifically calling on the OIG to monitor and report on the SBIWTP.⁵⁹⁸

The State Department's own Basic Authorities Act makes clear that the State Department may not simply treat one of its agencies as "independent."⁵⁹⁹ The law provides that "the Secretary shall have and exercise any authority vested by law in any office or official of the Department of State."⁶⁰⁰ Additionally, "a reference in any other provision of law to an official or office of the Department of State . . .

589. 22 U.S.C. § 277e (2011).

590. *Id.* "Statutes should be construed 'so as to avoid rendering superfluous' any statutory language." KIM, *supra* note 588, at CRS-12.

591. *See, e.g.*, 22 U.S.C. §§ 277d-3, d-5, d-7, d-9 (2011).

592. *See, e.g.*, §§ 277d-13, d-14, d-26, d-30, d-32.

593. *See*, §§ 277d-6, d-8, d-26, d-41, 277g(a).

594. § 277d-45(a). This resulted in Minute No. 311. *See* IBWC Minute 311, *supra* note 157.

595. *See, e.g.*, 22 U.S.C. §§ 277a, 277d-1, d-17, d-34, 277e (2011).

596. *Id.* §§ 277e, 277f, 277g-2.

597. *Id.* §§ 277, 277e. This explicit authority to act "through such officers as he may designate" reflects similar statutory authority given to the President, to construct, operate; and maintain treaty projects through "any Federal agency" the President may designate. *Id.* §§ 277b(a), 277c.

598. *Id.* § 277d-44.

599. State Department Basic Authorities Act of 1956, Pub. L. No. 84-885, 70 Stat. 890 (codified as amended at 22 U.S.C. §§ 2651a, 2669 *et seq.*).

600. 22 U.S.C. § 2651a(a)(3)(A) (2011).

shall be deemed to be a reference to the Secretary of State or the Department of State, as may be appropriate.”⁶⁰¹ In 1991, Congress designated the U.S. State Department as the lead agency for coordination of international water resource policies.⁶⁰² Ironically, the Department’s annual reports to Congress under the Senator Paul Simon: Water for the Poor Act, listing U.S. Federal Agencies Working on International Water-Related Activities, include no mention of the IBWC.⁶⁰³

The refusal of the State Department to fulfill its own statutory authority over the IBWC flies in the face of not only the expectations of Congress, the public, and the White House (as acknowledged by State OIG),⁶⁰⁴ but also contradicts settled constitutional doctrines concerning executive authority over both treaty matters and administrative agencies. Recent scholarship and a broad spectrum of political consensus strongly supports the constitutional right and duty of the executive branch to assert control over federal agencies, especially where there is a clear statutory delegation, and most of all, over a non-independent agency such as USIBWC.⁶⁰⁵

One need not embrace the “unitary executive” theory espoused by those who contend the president has exclusive control of executive agencies to agree that the executive branch has not just the right but an obligation to reign in and direct a renegade agency—particularly one whose head he alone appoints and removes—and subject it to administrative discipline. Indeed, President Obama’s second appointee to the Supreme Court, former Harvard Dean and Solicitor General Elena Kagan, persuasively articulated the constitutional basis for presidential control of such administrative agencies in a landmark law review article published ten years ago, in which she distinguished the more radical doctrine the Regan and Bush administrations espoused.⁶⁰⁶

Kagan does not embrace the “unitarian” view that “the

601. *Id.* at § 2651a(d).

602. *Id.* at § 2686a(a) (providing that the “Secretary of State shall designate a Special Coordinator” for water policy Negotiations and water resource policy).

603. The Water for the Poor Act makes access to safe water and sanitation for developing countries a specific policy objective of U.S. foreign assistance programs. 22 U.S.C. § 2152h (2011); see *Water for the Poor Act of 2005*, U.S. DEP’T STATE., at T.4.1 (June 1, 2006), <http://www.state.gov/g/oes/rls/rpts/67447.htm>; see also, e.g., Senator Paul Simon, U.S. DEP’T STATE., WATER FOR THE POOR ACT: REPORT TO CONGRESS JUNE 2010 ⁷² (2010) ^{available} at <http://www.state.gov/documents/organization/146141.pdf> (describing efforts of EPA “to reduce water contamination along the US-Mexico border”).

604. OIG, 2006 REPORT, *supra* note 35, at 4.

605. See, e.g., Farina, *supra* note 29, at 358-59 (noting how the unitary executive “has attained mainstream constitutional status and won adherents across the political spectrum”); Kagan, *supra* note 29, at 2251; Strauss, *supra* note 29, at 713-15.

606. See generally Kagan, *supra* note 29. For an objective analysis of Kagan’s views, see generally TODD B. TATELMAN, CONG. RESEARCH SERV., R41272, SUPREME COURT NOMINEE ELENA KAGAN: PRESIDENTIAL AUTHORITY AND THE SEPARATION OF POWERS (2010), [available at http://www.fas.org/sgp/crs/misc/R41272.pdf](http://www.fas.org/sgp/crs/misc/R41272.pdf).

Constitution provides the President with plenary authority over administration, so that Congress can no more interfere with the President's directive authority than with his removal power."⁶⁰⁷ Rather, Kagan argues that "statutory delegation to an executive agency official - although not to an independent agency head - usually should be read as allowing the President to assert directive authority."⁶⁰⁸ By "independent" agencies, Kagan means those agencies created by Congress, "whose heads the President may not remove at will."⁶⁰⁹

The traditional understanding has been that when an agency possesses delegated authority under a statute, agency heads—not the president—must be the ultimate deciders of policy made under authority of that statute.⁶¹⁰ Yet under this theory, a president, as the head of the executive branch, may lawfully try to influence agencies' actions, and can even remove the head of an agency who does not follow the president's wishes.⁶¹¹ Proponents of the fully unitary executive doctrine, on the other hand, take the extreme view that the Constitution gives presidents the power to control their subordinates – including the so-called independent agencies, whose heads the president may not remove at will.⁶¹²

Kagan describes the need for executive leadership to revitalize especially moribund agencies, stating that "bureaucracy also has inherent vices (even pathologies), foremost among which are inertia

607. Kagan, *supra* note 29, at 2251; see Calabresi & Prakash, *supra* note 29, at 599.

608. Kagan, *supra* note 29, at 2251.

609. *Id.* at 2247.

610. See, e.g., Strauss, *supra* note 29, at 698, 703.

611. See *Id.* at 715-16, 735-36, 751 (finding a presidential role uncontroversial where "presidential authority readily fit the 'oversight' mold and/or may have been explicitly conferred by Congress."). Even where Congress has designated an agency "an independent agency of the executive branch", the Department of Justice Office of Legal Counsel has concluded "[a]ll that should be inferred from the status of an 'independent agency' is that the entity is not located within another department or agency." Memorandum from Deputy Assistant Attorney Gen. Richard L. Shiffrin on Removal of Holdover Officials Serving on the Fed. Hous. Bd. and the R.R. Ret. Bd. to the Counsel to the President 5 (Aug. 1, 1997) available at <http://www.justice.gov/olc/removal.htm>.

612. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4* (2008) [hereinafter Calabresi & Yoo]. This position has been the subject of much criticism that it seeks to encroach on the constitutional powers of the congress. See e.g., Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 313, 318-19, 323 (2010). Whereas the debate is beyond the scope of this article, it should be noted that the Unitary Executive theory draws its name from a passage in *The Federalist* No. 70, in which Alexander Hamilton defended the need for a vigorous, energetic, and therefore unified executive; that the theory has long been debated among scholars whose references are exclusively to the Constitution's textual grant of executive powers to the president; but that this traditional theory has little in common with the truly radical proposition promoted during the Administration of George W. Bush that the president has vast "inherent" powers that do not appear in the Constitution or federal law and that are not subject to any power of Congress to limit their exercise. Robert D. Sloane, *The Scope of the Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 343-45 (2008).

and torpor.”⁶¹³ She notes that even traditional proponents of agency independence have long acknowledged that “governmental agencies inevitably develop ‘arteriosclerosis,’” a “rigidity cycle” or “ossification syndrome” where “Bureaus ‘become[] . . . gigantic machine[s] that slowly and inflexibly grind[] along in the direction in which . . . initially aimed,’ incapable of acting speedily or making necessary innovations;” all seemingly apt descriptions of the USIBWC.⁶¹⁴ The President has the constitutional responsibility to ensure that the “Laws be faithfully executed.”⁶¹⁵ The State Department and the USIBWC must not be permitted to continue their flagrant defiance of the laws.

C. EXECUTIVE AUTHORITY OVER TREATY AFFAIRS

It is well established that the President, by virtue of various constitutional powers, controls the “vast share of responsibility for the conduct of our foreign relations.”⁶¹⁶ It has even been argued that the president has “unilateral freedom to interpret and reinterpret treaties,”⁶¹⁷ notwithstanding their domestic law effect.⁶¹⁸ At a minimum, scholars agree that the president has authority to interpret treaties that are not “self-executing,” and thus do not have the force of federal law absent statutory implementation.⁶¹⁹

Those who celebrate the purported autonomy of the USIBWC, eschewing any consideration of the governing statutes, rely on the 1944 Water Treaty to support their thesis. Ironically, the Treaty itself does no such thing, but rather explicitly recognizes the right of each country to construct treaty works through any public or private agency in accordance with domestic laws.⁶²⁰ Indeed, the State Department and the U.S. Section went to elaborate lengths at the Senate hearings on the Treaty to assure apprehensive Senators that the USIBWC could never become the renegade agency it is today. The “American Commissioner” testified, in regard to such concerns, that the role of the U.S. Section was merely as a coordinator of communications with Mexico, not a border jurisdictional goliath:

The discharge of various functions imposed by provisions of the

613. Kagan, *supra* note 29, at 2263.

614. *Id.* at 2264 (citations omitted).

615. U.S. CONST. art. II, § 3.

616. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); U.S. CONST. art. II, § 2, cl. 1 (giving the president “Commander in Chief” authority); U.S. CONST. art. II, § 2, cl. 2 (granting the President power to make treaties and appoint ambassadors); U.S. CONST. art. II, § 2, cl. 3 (providing for the presidential authority to receive ambassadors).

617. Yoo, *supra* note 28, at 868.

618. *See id.* at 853, 862-63, 867.

619. *See, e.g.,* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1888, 1900-01, 1942-43 (2005) (distinguishing presidential power concerning treaties that are not “self-executing” from the authority that the federal courts have to interpret “self-executing” treaties).

620. 1944 Water Treaty, *supra* note 3, art. 20.

treaty can in fact be handled by other Federal agencies, but all dealings between the two countries concerning boundary and international water matters are funneled through the Commission, subject always to the control, on matters of policy, of the respective foreign relations departments.

....

The purpose of article 2, and other articles of the treaty hereafter to be noted bearing on the functions and jurisdiction of the International Boundary and Water Commission, is to provide a central agency through which all such matters can be cleared and which would also serve to coordinate the activities of other agencies which might be engaged in the discharge of functions relating to boundary matters.⁶²¹

The Commissioner's testimony was echoed repeatedly by Government witnesses eager to assure the lawmakers of the limited jurisdiction of the USIBWC.⁶²²

The effect of this provision [Article 20] is to vest in the respective sections of the Commission the responsibility for the construction of the works required by the terms of the treaty. The actual construction may be carried on by any competent public or private agency. The sole purpose of the provision is to vest the responsibility for carrying out the provisions of the treaty in one central agency, to which either country may look for compliance with the treaty terms. Here, again, internal arrangements are not sought to be controlled.⁶²³

....

The jurisdiction of the United States section, as distinguished from that of the Commission, over the administration of treaty functions, is very limited. The American section is the representative of the United States in performing the treaty obligations of the United States to Mexico and also in seeing that Mexico's obligations to the United States are carried out. The underlying idea is that all treaty functions should be centralized in an international agency, and that the functions to be performed by interior agencies, to the extent that they bear upon the performance of international functions, should be correlated and carried out in cooperation with the respective national section.⁶²⁴

621. *Hearings on the 1944 Water Treaty*, *supra* note 98, pt. 1, at 162-63 (statement of L.M. Lawson, American Comm'r, IBWC).

622. *See id.*, pt. 5, at 1801, 1809-11 (Digest of Testimony of Witnesses for the Dep't of State and United States Section, IBWC).

623. *Id.* at 1811.

624. *Id.* at 1814.

....

[The United States section] acts . . . as a clearing house through which matters involving treaty rights, obligations and functions are cleared, without in any way encroaching upon the jurisdiction of any interior agency – Federal, State, or local.⁶²⁵

Thus, the president is empowered not only by the Constitution and by statute, but also by the 1944 Water Treaty itself to assert executive authority, and specifically to reassign technical duties away from the USIBWC and State Department. Freed from technical engineering responsibilities, the USIBWC should also be unchained from the debilitating treaty requirement that engineers dominate its leadership. The 1944 Water Treaty designates five officials for each section: an “Engineer-Commissioner,” two principal engineers, a legal adviser, and a secretary.⁶²⁶ An earlier treaty had required the appointment of a “practical astronomer,” an anachronistic requirement that, unlike that of the “principal engineers” and “Engineer-Commissioner,” has been dropped.⁶²⁷ Indeed, Mexico unilaterally departed from this requirement in 2009 when it appointed a new commissioner who is not an engineer.⁶²⁸ The United States had earlier departed from at least the spirit of the requirement in 2004, when President George W. Bush appointed Arturo Duran, a chemical engineer rather than a civil engineer, but with similarly nonexistent management abilities.⁶²⁹ The IBWC should, by Minute, eliminate this designation of leadership, so that each section may be free to employ a variety of appropriate professionals. Perhaps USIBWC employees will finally be freed from incompetent and abusive management, and the agency may begin to focus on active diplomacy and adaptive treaty interpretation, to pursue new policy initiatives, with maximum public participation, in areas such as water conservation, water quality, groundwater protection, and environmental restoration.

D. SEPARATING DIPLOMATIC DUTIES FROM TECHNICAL RESPONSIBILITY FOR TREATY WORKS

It has been established that the President has the constitutional, statutory, and treaty-endowed power to assign technical responsibility for treaty works to an agency other than USIBWC or the State Department. The USIBWC has proven that it cannot capably perform

625. *Id.* at 1816.

626. 1944 Water Treaty, *supra* note 3, art. 2. In recent years, the normal in-house permanent personnel of the USIBWC number nearly 300. STATE DEP’T BUDGET 2011, *supra* note, at 683.

627. Convention of 1882, *supra* note 82, art. II.

628. See Press Release, Int’l Boundary and Water Comm’n, U.S. Section, The Boundary Marker, Mex. Names a New Comm’r (2009), *available at* http://www.ibwc.gov/Files/BM_Spring_2009.pdf.

629. See OIG, 2005 REPORT, *supra* note 31, at 7.

both diplomatic and technical duties, and the State Department is admittedly unwilling and unable to oversee the latter. It is yet to be seen whether the USIBWC, under the close supervision of the State Department, as proposed herein, can effectively perform the former. Meanwhile, technical duties should immediately be transferred elsewhere.

Undoubtedly, there is a continuing important role for the Border 2012 Program, Border Environment Cooperation Commission (BECC), North American Development Bank (NADB), Good Neighbor Environmental Board (GNEB), and similar binational institutions.⁶³⁰ Since its inception in 1995, BECC has certified a total of 175 environmental infrastructure projects—eighty-two in the United States and ninety-three in Mexico—related to water, sewage, and municipal waste.⁶³¹ The projects are estimated to cost a total of \$3.92 billion to construct and will benefit an estimated 13.8 million border residents.⁶³² BECC works in cooperation with the North American Development Bank (NADB), which administers the Border Environment Infrastructure Fund (BEIF), consisting of grant resources provided by EPA for water and wastewater infrastructure projects.⁶³³ Since its inception in April 1997, a total of \$560 million in BEIF grants were approved and contracted to support ninety-two water and wastewater projects in the United States and Mexico.⁶³⁴ NADB also provides direct financing in the form of loans for the construction of BECC-certified environmental projects.⁶³⁵ To date, NADB has loaned an estimated \$569.8 million for fifty-six environmental infrastructure projects, and another \$438.6 million for forty-four loans in Mexico through the multipurpose financial institution COFIDAN.⁶³⁶ Such groups might play a larger diplomatic role in addition to their existing duties, however, they are not the type of organizations that could be expected to assume the USIBWC's technical duties.

The Bureau of Reclamation and the Army Corps of Engineers are two agencies that are possible successors to the USIBWC, at least with regard to responsibility for treaty-based construction, operation, maintenance, and environmental restoration projects. Unfortunately, neither would be a panacea for what ails the USIBWC. The Bureau of Reclamation's organic act, the Reclamation Act of 1902, gave it broad authority to build and operate large-scale projects to irrigate the arid

630. For an interesting discussion of the unique new participatory opportunities opened for Mexican farmers by BECC and similar groups, see generally Margaret Wilder, *Border Farmers, Water Contamination, and the NAAEC Environmental Side Accord to NAFTA*, 40 NAT. RESOURCES J. 873 (2000).

631. BORDER ENVTL. COOPERATION COMM'N, N. AM. DEV. BANK, QUARTERLY STATUS REPORT 17 (2010), available at http://www.nadbank.org/pdfs/status_eng.pdf.

632. *Id.*

633. *Id.* at 1, 4.

634. *Id.* at 20.

635. *Id.* at 1.

636. *Id.* at 20.

West.⁶³⁷ Additional legislation includes statutes of general applicability⁶³⁸ and project-specific laws.⁶³⁹ The Department of the Interior, within which the Bureau of Reclamation is located, has a horrible record of supervising its sub-agencies, as demonstrated by mismanagement debacles of the Bureau of Indian Affairs⁶⁴⁰ and the Minerals Management Service.⁶⁴¹ Moreover, the Bureau of Reclamation itself has a very poor reputation with environmentalists, notwithstanding its engineering expertise and historic accomplishments.⁶⁴²

The Army Corps of Engineers has a similarly mixed reputation, lauded for its engineering expertise and condemned for its reckless environmental destruction.⁶⁴³ The Corps lacks an organic statute to limit its discretion,⁶⁴⁴ but was given broad authority to prevent obstructions to navigation under the Rivers and Harbors Act of 1899; ⁶⁴⁵ wide discretion for flood control projects under a series of Flood Control Acts adopted between 1928 and 1965;⁶⁴⁶ and project-specific

637. *See generally* The Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. § 390b (2011)).

638. *See, e.g.*, The Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1263 (codified as amended at 43 U.S.C. §§ 390aa to 390zz-1 (2011)).

639. *See, e.g.*, Boulder Canyon Project Act, 43 U.S.C. § 617 (a)-(v) (2011) (ratified the Colorado River Compact and authorized construction of Hoover Dam).

640. *See* Robert J. McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 5-6 (2004) (recounting long history of gross mismanagement of Indian affairs); *see also* News Release, U.S. Dep't of Interior, Secretary Salazar, Attorney General Holder Announce Settlement of Cobell Lawsuit on Indian Trust Management (Dec. 8, 2009), *available at*

http://www.doi.gov/ost/cobell/FINAL_12-08-09_Cobell_release_as_revised_12-7PM_FINAL.pdf (discussing United State's mismanagement of Indian trust accounts).

641. Following years of congressional investigations and scathing reviews by the DOI Inspector General, the last straw for the Minerals Management Service was its culpability in the British Petroleum Oil Spill in the Gulf of Mexico in 2010. *See, e.g.*, *Minerals Management Service Oversight Hearing: House Committee on Natural Resources, Subcommittee on Natural Resources*, 111th Cong. (2010) (statement of Mary L. Kendall, Acting Inspector General, Department of the Interior) *available at* <http://www.doi.ig.gov/reports/congressional-testimony>; Secretarial Order No. 3302 (June 18, 2010), *available at*

<http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=35872> 9 (renaming the Minerals Management Service as the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE)).

642. *See generally*, MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 222-99 (1986) (detailing the relationship between Floyd Dominy and David Brower during the era large dam construction).

643. *See* Tarlock, *supra* note 65, at 1285-86; Klein, *supra* note 65, at 679-82 (discussing both the Corps technical ability to build dams and their propensity for inefficient expenditures of public monies).

644. Zellmer, *supra* note 43, at 602.

645. *See* 33 U.S.C. § 403 (2011).

646. *See e.g.*, Flood Control Act of 1928, Pub. L. No. 70-391, ch. 569, § 1, 45 Stat. 534 (codified at 33 U.S.C. § 702a (2011)); Flood Control Act of 1936, Pub. L. No. 74-738, ch. 688, § 1, 49 Stat. 1570 (codified at 33 U.S.C. § 701a (2011)); Flood Control Act of 1944, Pub. L. No. 78-534, ch. 665, § 1, 58 Stat. 887 (codified at 33 U.S.C. § 701-1 (2011)); Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (codified at 42 U.S.C. § 1962d-5 (2011) & 33 U.S.C. § 2220 (2011)).

appropriations for specified navigational enhancements, dams, levees, and other engineering structures in various Water Resources Development Acts.⁶⁴⁷

Notwithstanding its own record of environmental destruction and wasteful spending, the Corps may offer a better prospect for reform than the Bureau of Reclamation. According to one leading scholar: “[T]he Corps is often portrayed by environmentalists as a lawless agency, but in fact, it is a model ‘rule of law’ agency compared to sister management agencies, such as the Bureau of Reclamation.”⁶⁴⁸ Moreover, the Corps has admitted its errors,⁶⁴⁹ and seems ready to “reinvent itself as a restoration agency.”⁶⁵⁰

Nevertheless, recent developments would suggest that the Bureau of Reclamation is the front-runner to succeed the USIBWC. The agency’s close relationship with the seven Basin states, its dominant role in management of the Colorado River, its designation as lead agency in legislation such as the Transboundary Aquifer Assessment Act, and its guiding hand in promised negotiations of a new comprehensive water agreement with Mexico all signal, not so much that it might serve as an appendage to the USIBWC, but that the USIBWC might become the diplomatic arm of the Bureau. Given the Bureau’s notorious lack of diplomacy, it would be wise to separate responsibility for technical matters from diplomatic ones, as proposed herein, before it is too late.

E. ADAPTIVE TREATY INTERPRETATION

The most urgent policy imperative is that the U.S. Section and State Department aggressively pursue new initiatives, with maximum public participation, in areas such as water conservation, water quality, groundwater protection, and environmental restoration. The USIBWC should immediately, with full public participation, review and revise its defective NEPA procedures, to narrow and justify categorical exclusions, and to specify the criteria for extraordinary circumstances to override those exclusions. Similarly, the agency should either eliminate its advisory committees or else comply with procedural and substantive requirements, including those for legislative authorization

647. See, e.g., Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (codified at 33 U.S.C. § 2201 *et seq.* (2011)); Water Resources Development Act of 1990, Pub. L. No. 101-640, 104 Stat. 4604 (codified at 33 U.S.C. § 2201 (2011)); Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572 (codified at 33 U.S.C. § 2201 (2011)).

648. Tarlock, *supra* note 65, at 1291.

649. See U.S. ARMY CORPS OF ENG’RS, USACE 2012: ALIGNING THE U.S. ARMY CORPS OF ENGINEERS FOR SUCCESS IN THE 21ST CENTURY i, ii (2003), available at http://aapa.files.cms-plus.com/PDFs/USACE_2012Final_ExSum.pdf.

650. Tarlock, *supra* note 65, at 1325. Additionally, unlike the Bureau, the Corps also has general authority to modify water project facilities and operations for environmental benefits. Reed D. Benson, *New Adventures of the Old Bureau: Modern-Day Reclamation Statutes and Congress’s Unfinished Environmental Business*, 48 HARV. J. ON LEGIS. 137, 176 (2011).

and for “balance.”

As for transboundary environmental impacts, such as those caused by operation of the Yuma Desalting Plant, they are generally unregulated by U.S. law.⁶⁵¹ Nevertheless, the United States is a party to many international agreements that recognize the responsibility of each nation to consider the transboundary environmental effects of governmental actions.⁶⁵² These include, e.g., the United Nations Convention on Environmental Impact Assessment in a Transboundary Context,⁶⁵³ the North American Agreement on Environmental Cooperation,⁶⁵⁴ the United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes,⁶⁵⁵ and the Convention on the Law of the Non-navigational Uses of International Watercourses.⁶⁵⁶ Transboundary environmental impacts on the US- Mexico border have generally been viewed as subject to regulation by the IBWC.⁶⁵⁷ Article 25 of the 1944 Water Treaty contemplates or at least permits application of these new international understandings to evolving conditions.⁶⁵⁸ It may well be too late to ward off the worst ecological effects of a century of neglectful development of the boundary rivers, especially in light of potentially apocalyptic climate change,⁶⁵⁹ but a continuing failure to try to reverse

651. See, e.g., Jonathan Remy Nash, *The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws*, 50 VA. J. INT'L L. 997, 1012 (2010) (“[T]o the extent that U.S. courts have recognized extraterritorial applications of NEPA, such applications have occurred exclusively in settings governed as a global commons where no other single sovereign asserts exclusive jurisdiction.”) (citations omitted).

652. See generally Thomas E. Digan, Comment, *NEPA and the Presumption Against Extraterritorial Application: The Foreign Policy Exclusion*, 11 J. CONTEMP. HEALTH L. & POL'Y 165 (1994); Erika L. Preiss, Student Article, *The International Obligation to Conduct an Environmental Impact Assessment: The ICJ Case Concerning the Gabčíkovo-Nagymaros Project*, 7 N.Y.U. ENVTL. L.J. 307 (1999); Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. ENVTL. L.J. 169, 171 (2003).

653. United Nations Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800.

654. North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Sept. 14, 1993, 32 I.L.M. 1480.

655. United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312.

656. United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700.

657. See, e.g., U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL ASSESSMENT: YUMA DESALTING PLANT PILOT RUN 7-8 (2009), available at http://www.usbr.gov/lc/yuma/environmental_docs/ydp/finlea.pdf.

658. 1944 Water Treaty, *supra* note 3, art. 24-25.

659. “Warming of the climate system is unequivocal” JANE A. LEGGETT, RL 34266, CONG. RESEARCH SERV., CLIMATE CHANGE: SCIENCE HIGHLIGHTS 19 (2009) (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 2 (2007)), available at <http://www.fas.org/sgp/crs/misc/RL34266.pdf>. The IBWC has at least acknowledged the problem of climate change, although has not begun to address it outside the context of drought. See Paul Stanton Kibel, *Climate Adaptation Policy at the Continental Level: Natural Resources in North America and Europe*, 27 PACE ENVTL. L. REV. 473, 479 (2010).

this trend is not an option.⁶⁶⁰

IX. CONCLUSION

There has never been a greater opportunity for radical reform of the USIBWC due to a confluence of unhappy events that include a crescendo of criticism; disappearing water supplies and related ecological crises; an unprecedented level of expenditures by the USIBWC; continuing rapid turnover in its ineffective leadership, the lowest employee morale of any federal agency; and a still rising tide of scandal, including recent revelations about failing dams and other vital infrastructure that now pose catastrophic threats to millions of border residents, the region's ecosystem and its economy.

The executive branch urgently needs to exercise its constitutional, statutory, and treaty authorities in order to salvage a dedicated forum for transboundary diplomacy. The State Department's shameful incompetence and neglect necessitate narrowing its mandate to diplomatic duties only, along with those of the USIBWC. As other institutions take over responsibility for carrying out treaty projects, the need is greater than ever for the State Department and the USIBWC to rise above decades of disrepute and dishonor, to finally focus on adaptive treaty interpretation and sustainable management of boundary waters.

660. Imprisoned by Mussolini in Fascist Italy in 1926, the Italian philosopher Antonio Gramsci famously wrote, "pessimism of the intellect and optimism of the will." ANTONIO GRAMSCI, *The Modern Prince*, in SELECTIONS FROM THE PRISON NOTEBOOKS 175 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971); see also Michael Ekers & Alex Loftus, *The Power of Water: Developing Dialogues Between Foucault and Gramsci*, 26 ENV'T & PLANNING D: SOC'Y & SPACE 698 (2007), available at <http://www.gg.rhul.ac.uk/loftus/Ekers%20and%20Loftus%202008.pdf>.

