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Subnational Governance and the International Joint Commission: Local Management of United States and Canadian Boundary Waters

The Canada–United States boundary is responsible for some important differences in relationships between the people that live in the watersheds that cross it. A host of factors are involved in changes of those relationships. Some are reflected in the evolution of the institutions that have been created to manage those waters and that boundary. In particular, for this assignment on the overall management of natural resources, the International Joint Commission (IJC) and the subnational governments that come in many types and sizes are the institutions of greatest importance.

The trend has been toward broadening the attention of the IJC almost as fast as environmental and natural resource issues have been addressed nationally and have thus been recognized as perhaps needing the attention of an international boundary agency. The result has been a more fluid sense of border, widening out to reflect the nature of the problems being addressed. To manage disputes over water levels and diversions less than a watershed view could be made to serve. But a watershed is a good first cut for the geographic definition of a major ecosystem. Obviously, for acid rain any watershed may be too small. Policy debaters are rarely content today to leave out the larger social and economic context—the ecosystem then includes the whole culture. Thus, what is the border?

The role of the IJC has been that of a kind of residual claimant on the issues, a place for the federal governments to turn after a conflict has been reduced to a technical issue or where the IJC's study role can serve as a step toward achieving that political result. Both governments are distracted by other concerns when dealing with environmental issues, not the least by rapid changes in the relationships between national and subnational governments. New interests have emerged as both nations have better understood the causes and alternatives for pollution and toxic waste management, flooding and land use controls, drought and conser-

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vation, sport fishing and habitat restoration. These interests seek more effective expression in public policy and programs nationally, subnationally and, since the border is there, internationally as well. Can the IJC develop broader powers and a wider political role? How do potential relationships with subnational governance processes fit into the prospect of a wider ecosystem management role?

Border states and provinces and other governance entities and their constituents have become more active in resource and environmental issues and have tried to influence the actions of their respective federal governments. The federal governments and those who lobby them have also seen the IJC as a way to influence their member governments and their local government cohorts, but this may be less obvious. The IJC has not always been able to live up to these expectations. More often than not, new international relationships and patterns of interaction have emerged outside the framework of the Commission in response to boundary definitions and issues that the IJC has not as yet been able to fully address. This paper will explore this fluidity of an international border drawing upon issues such as diversions, responses to lake level changes, toxic waste disposal, and groundwater protection.

The states, provinces, local governments, and concerned nongovernmental organizations, in what has been called para-diplomacy, may evolve into a significant client group for the IJC, providing the political support to reinvigorate the expansion of its role. The IJC has the potential to be similar in character to the more active river basin commissions, such as for the Delaware, Colorado, or the Tennessee rivers. Evaluation of such prospects should be done with a realistic notion of the potential for such institutions in decentralized democratic federations with relatively strong commitments to free market ideology. In particular, policy fads and foci of the larger border partner tend to limit the progress of border institutional evolution.

A part of this realism should be an understanding of the competition for attention and support from other outlets for public entrepreneurship. These other outlets would range from the other boundary related organizations, such as the Great Lakes Commission or the Great Lakes Fisheries Commission, to the totally active federal agencies, such as the United States Army Corps of Engineers or Environment Canada, not to mention bilateral cooperation at the state and provincial level, and the local government level.

To fill this tall order this paper will suggest tentative generalizations about some roles subnational governments have played, how they have been involved in Commission decisions, blocked or facilitated them, enjoyed access, been frustrated in meeting local objectives, and were able to use the process to complement other relations with their federal governments.

Initially, the difference in United States state/federal and Canadian provincial/federal relationships will be explored. There is some evidence to suggest that these differences, largely cultural and constitutional, are narrowing and may not be as important as sometimes is assumed. For example, these constitutional issues may be less significant than for the issues important to the region to be supported by the United States Congress, where lack of response may do far more to block progress.

Then the character of local governance will be explored, including some of the differences between each nation. It will be argued that for many of the environmental and natural resource issues facing boundary waters, the development of improved governance and management capacity at the local level may be a key to future progress. Alternatives for the evolution of the IJC will be addressed by including this local capacity-building aspect. Providing the extra energy needed to achieve intergovernmental cooperation at the local levels plus a means to inform local leadership of the elements of these issues should be the target.

FEDERALISM

In constitutional terms, the federal governments are in different positions relative to their subnational governments in their authority to manage natural resources. In political terms, the differences are not as great and may be diminishing. In the division of powers, the Canadian federal government must recognize the primacy of the provinces—it's their water. Environment Canada does not set standards for water quality—that is a provincial function. Under the terms of the 1972 and 1978 Great Lakes Water Quality Agreements and related documents, the Canadian national government must look to Ontario and the other provinces to directly implement the terms of the Agreement.

Structured provincial/national negotiations and resulting agreements are an instrument for such coordination in addition to special legislative authorities. With the careful guidance of the superbureaucrats (Treasury Board, Prime Minister's Office, etc.), but with growing initiative and control from their provincial counterparts, the intergovernmental consultation process is carried on with respect to every phase of Canadian governance. For water issues, this would seem to be something like combining the old United States Water Resources Council with the National Governors' Association. In 1975 there were almost 800 of these federal/provincial meetings; over 150 that could have dealt with some aspect of boundary water problems.¹ Under the Canadian Water Act of 1985, such federal/provincial agreements are to be negotiated where there is signifi-

1. Advisory Commission on Intergovernmental Relations (ACIR), *Studies in Comparative Federalism* (1981).

cant national interest. Presumably the negotiation of an agreement with the United States enhances the argument for what is of national interest, but up to a few years ago no agreements had been negotiated under this authority.² However, to carry out the provisions of the Water Quality Agreement, the Province of Ontario and the Canadian federal government do have an agreement that establishes compatible commitments and responsibilities apparently under other authority.

More to the point for the future may perhaps be the movement toward reform reflected in the Canadian Water Policy Statement of 1987, which was stimulated by the Pearse Inquiry into Federal Water Policy.³ This reform is to press for "realistic" pricing of water services, scientific leadership, policy integration between levels of government and agencies, to reform laws, and change public attitudes. This suggests more activism on the part of the federal government than the constitutional restrictions would imply. Perhaps the aggressive stance of the 1970s for a stronger water quality role, successfully resisted by the provinces, will return with a water quantity focus.⁴

The United States Constitution as interpreted by the courts gives more apparent authority to its federal government. The United States Environmental Protection Agency can set standards, reclaim delegated enforcement power, and be assigned a variety of direct roles. But, in fact, most of its programming is channeled through the states. Negotiations with the states to achieve any treaty obligations are very much a part of the game and could be included in the negotiated annual agreements over funding and programs under the various Congressional policy mandates. Unlike some other federal agencies, including other water management agencies, EPA does not maintain state or local offices. When such offices are clearly needed, an alternative to programming through the states has been to share programming with agencies that do have them, such as the Corps of Engineers (wetland protection) or the Soil Conservation Service (nonpoint sources). In previous attempts to provide more comprehensive river basin integration between agencies water quality has usually stood apart from the water quantity oriented planning and development activities.

On the quantity side, water rights and water law have always been primarily a state responsibility. Federal water development projects

2. A. Roman & D. Ferris, *Regulation of Groundwater Contamination in Canada*, 65 Chi.-Kent L. Rev. 424 (1989).

3. L. Shabman, *Comparing Canadian and United States Water Policy for Economic Development in Agricultural and Rural Restructuring: Comparisons of the United States, Canada, and Europe* (1990); T. McMillan, *Water Resource Planning in Canada*, 45 J. Soil & Water Conservation 614 (1990).

4. D. LeMarquand, *Preconditions to Cooperation in Canada-United States Boundary Waters*, 26 Nat. Res. J. 230 (1986).

have always been an extension of local political support into the Congress, usually frustrating executive branch attempts to apply control. The always considerable ability of the states to veto or to lobby for particular projects has been increasing, ironically just as the Congressional delegations have found many other ways of meeting constituent needs, thus reducing interest in water development projects. Expanding state staffs have allowed this influence to grow at the federal agency planning level, and river basin commissions, usually dominated by these state staffs, can be an extension of this process. Environmental concerns have increased conflict (e.g., no omnibus bills from 1974 to 1986), reshaped the agenda (e.g., cost sharing rose, habitat restoration legitimized), and added possibilities for more comprehensive coordination between quantity and quality management.

There is an increasing realization that achieving many federal objectives in resource management is linked to influencing local land use decisions. A current example is groundwater protection, but the history of erosion control illustrates the same idea. The greater freedom of action by the states in that policy realm—a function of their relationship to local governments—makes state/federal partnership approaches even more germane.

Perhaps more to the point are some other differences on the two sides of the border. In the United States, interests that are to be accommodated in a policy reform are expected to be represented, particularly to the Congress, by organizations outside of the formal governmental structure. These groups may have long-standing client relationships with particular agencies and have been far more influential than their counterparts in Canada, although this is changing. Professionals within the Canadian civil service are expected to represent the interests to be taken into account, but they are being more effectively lobbied than in the past.⁵ Shabman attributes the difference to the way in which the Canadian courts have limited standing in resource issues to those directly involved, to a civil service tradition that limits politicization to only the highest levels, and to a greater cultural acceptance of the legitimacy and authority of formal government institutions. To a greater extent in Canada, power is conferred by an attitude of "that is the way it works" rather than an expectation of interest group politics and pluralism.⁶

The systems are of different sizes and the relationships between federal partners are changing in different ways at the same time. While United States policy has seen a federal devolution to the states under the guise of deficit pressures, the Canadian relationships have gone through restructuring as a result of the difference between the energy rich prov-

5. ACIR, *supra* note 1, at 34.

6. Shabman, *supra* note 3, at 3.

inces and the rest. Always a country of strong regional interests and thus regional parties, the ability of the Liberal Party of Trudeau to attract support west of Ontario dried up over oil pricing policies that left western producers facing half the world price while revenue sharing formulae were changed to their disadvantage to reflect increases in oil and gas revenue. These equalization formulae are a major factor in provincial finance and have led to what the Advisory Council on Intergovernmental Relations (ACIR) called in 1981 "... remarkably small differences in public services."⁷ These payments have increased faster than the overall GNP in recent years. This system, plus funding of health services and postsecondary education, seems to reflect the results of more dependence on the type of rationality experts and professional bureaucrats can apply to a problem when given more scope. It is not clear that similar differences in traditions infuse the water policy arena in the two countries.

Some other realities of political power further set the stage for the relationships of the subnational governments to the management of the border. Any one issue along the border is of less salience in Washington than in Ottawa. On the other hand, it may be of greater salience in Minneapolis/St. Paul or Madison than in Toronto. LeMarquand makes the point that, from the Canadian point of view, the western rivers flowing into the United States are potential sites for economic development, the border a corridor for development.⁸ From the United States side, the rivers are seen as wilderness areas, the last remaining accessible frontier.

On the Great Lakes the positions differ, but with similar results. The United States makes the lion's share of the use of the waters and has over two-thirds of the Basin population, with a corresponding share of the toxic releases and nonpoint pollution. But while the basin has a third of the Canadian population, it has only one-seventh of the United States voters (and more to the point, only a similar share of the lobbyists), but on water issues it has less a tradition of unified action than most other parts of the nation. In many relevant issues the region is politically disadvantaged (part of the rust belt) to other parts of the country (the sun belt). For example, the shift away from federal funding for pollution control has made worse a situation that already disadvantaged the areas whose sewers were long ago built to the wrong specifications. Costs to achieve increased removal of a pound of oxygen demand have always been higher in the older cities, as much as four times higher than a few years ago.

In the last few years, a regional voice on environmental matters has been developing for the Great Lakes. The Council of Great Lakes Governors with the support of Ontario and Quebec adopted the Great Lakes Charter in 1985. Spurred on by rumors of covetous interest in their water

7. ACIR, *supra* note 1, at 42.

8. LeMarquand, *supra* note 4, at 225.

by arid regions of the country, they have agreed to keep each other informed about water withdrawals (1988). They also agreed to take concerted action on toxics (1986) and added a \$100 million endowment for protection efforts (1988).⁹ The linkages with Ontario and Quebec on diversions and acid rain have been direct and vigorous if informal.

Nonetheless, LeMarquand concludes

Canada is dependent on American domestic politics to solve issues of reciprocal damage. Where American groups allied to Canadian interests lack political force in Washington, as they do for issues like acid rain, the Canadian government can do little . . . international agreements will only be as progressive as domestic American policy.¹⁰

It is a little hard to judge just how this is working out. Certainly many wish progress were faster on many issues of regional concern— toxic discharges and remediation, nutrient enrichment of the lakes, air deposition of pollutants, and in the long run, the consumptive use of water. But how does the impact on Canadians of a lagging rate of change on these issues in the United States compare to the effect of Canada's own rate of policy development and institutional capacity? Perhaps Canadian attitudes toward the legitimacy of government allows their approach to water quality management and stream standards to work better than when it was relied upon in the United States. Perhaps greater official sensitivity to outside interest groups and their greater bargaining power in the United States made it necessary in 1972 for the United States to move away from control by objectives based on overall ambient standards toward discharge standards based on available technology.¹¹ But these differences allow Canadians Roman and Ferris to conclude

The United States regulatory regimes, although somewhat imperfect, are far ahead of the situation in Canada. Ontario, one of Canada's most advanced provinces from the standpoint of environmental protection, has a long way to go to catch up to the standard of regulation of groundwater enjoyed in the United States . . . most other provinces are not even up to the Ontario standards.¹²

9. G. Francis, *Binational Cooperation for Great Lakes Water Quality: A Framework for the Groundwater Connection*, 65 Chic.-Kent L. Rev. 369 (1989).

10. LeMarquand, *supra* note 4, at 227-28.

11. J. Carroll, *Water Resources Management As an Issue in Environmental Diplomacy*, 26 Nat. Res. J. 217 (1986).

12. Roman & Ferris, *supra* note 2, at 551.

Perhaps the Canadian federal government has or will find the IJC a useful instrument to prod its provinces.

In any case when the Boundary Waters Treaty can be invoked it applies the principle of equal and similar rights for each side. Equal use of the assimilative capacity and thus a reduction of the United States use has been harder to achieve than equal use for power production. Also under the Treaty, equal access to each other's courts is maintained. This, plus the interlocking language, dominant culture, and pervasive organizational and commercial linkages, gives hope to the notion that participatory access could and should be increased.¹³ Practice by a growing number of environmental and other organizations and vigorous lobbying on occasion by Canadian federal and provincial governments in the United States capitals has set the precedent.¹⁴

SUBNATIONAL GOVERNMENTS AND THE IJC

From the above, it should come as no surprise that subnational governments play important roles in the functions of the IJC. Boards for lake level control and for water or air quality surveillance are routinely composed of a mixture of federal and subnational government professional staff. In a small, informal sampling of annual reports, of 35 cases where individual affiliations were listed, 19 were with federal agencies and 16 were with subnational governments, even a few municipalities. This balancing reflects the logic of the tasks—subnational governments on both sides of the border share the locus of the expertise and responsibility and to a large extent effectively represent the social interests that must be balanced. In the great majority of the cases, the role of the boards is to give technical expertise to an issue whose value aspects are stable and have been settled to the point that they can be delegated to such groups to be bargained out on a technical level.

It would be a mistake to infer that these boards are not under stress from shifting social expectations, or that they do not come under attack by dissidents. The point is that they probably are not much different in that regard than the agencies whose hats the members wear when they are not on duty with the board. The boards are extensions across the border of their domestic duties.

In the individual references, such as that for lake level control in 1986 and the 1977 reference on Great Lakes diversions and consumptive uses, the logic of the task may suggest different makeup of the groups assigned. The project management teams may reflect the fact that the issues are not stabilized politically and that values need to be addressed

13. A. Scott, *The Canadian-American Problem of Acid Rain*, 26 Nat. Res. J. 344 (1986).

14. LeMarquand, *supra* note 4, at 222.

and conflicts resolved. With the growth of state and provincial capability to address policy development in the water realm, a shift has taken place in the likely role of subnational governments in such deliberations.

Note that in January 1985, the reports on Great Lakes diversions were issued, one by the IJC to the national governments,¹⁵ and one by a task force to the governors and premiers of the states and provinces.¹⁶ The similar timing was not accidental. The significant action that came out of these intertwined deliberations was taken by the governors and premiers, who agreed to collect and share data on consumptive use. This put the information closest to the governments that would have the most to do with preventing unreasonable use and diversions even if the instrument for such a conflict were the proposed project of an agency of one of the national governments. Water supply politics in both countries today is more the concern of subnational than national governments. Given that there were no legitimate proposals to actually take Great Lakes water out of the basin, their action was probably more effective in warning others to look elsewhere than anything the national governments could have done.

Nonetheless, the 1985 Governors Task Force took the opportunity to make some points about national responsiveness to their region's concerns. Like the 1989 GAO report, they point out that there is no system to track responsibility for implementing or rejecting IJC recommendations.¹⁷ In addition to greater federal responsiveness to IJC recommendations they want rules of procedure changes and authority to allow the IJC to initiate studies. The combination would give the region a stronger voice in national water affairs. But the strongest language was largely directed not toward diversion issues but toward water quality, and clarifying the need for a vigorous and collective role for the states to the United States federal government in the renegotiation of the Water Quality Agreement in 1986. Similar expressions of discontent were surely being made in the annual negotiations for water quality program agreements between each state and the United States EPA. This was a time when the Reagan Administration had orchestrated a drastic retrenchment of United States EPA, including some amazing misreading of the public support for environmental protection. Environmental groups had seen major growth in membership as a result of the public reaction. Indeed, the IJC had its role cut back in the Carter Administration and then, at the advent of the Reagan period, it languished without full appointments until 1982 and had been largely ignored by both governments up to the 1985 report.

15. Int'l Joint Comm'n, *Great Lakes Diversions and Consumptive Uses: A Report to the Governments of the United States and Canada Under the 1977 Reference* (1985).

16. Great Lakes Governors Task Force, *Water Diversions and Great Lakes Institutions* (1985).

17. General Accounting Office, *Need to Reassess U.S. Participation in the International Joint Commission* (1989).

The history of the 1986 lake levels reference makes the same point: the subnational governments did not wish to be left out when the issues primarily concerned them. The study team for the initial reports was led and largely staffed by federal agencies, especially the United States Army Corps of Engineers (IJC Project Management Team). This made sense as there was still a hope by some of the concerned parties, who had pressed for the relief, that structural measures such as dams, channels, and dikes might be found feasible even though they had not been in previous responses to high water problems. They did not get that result, but at least they had a study done by the professionals most likely to find such measures feasible. Now it was time to respond to those who saw the alternatives differently.

The progress report may or may not have put the case for structural measures to rest, but it did rekindle the policy fires under nonstructural alternatives: if you can't keep the water off the people, maybe you can move the people away from the water. At the very least, you can establish an authoritative source of information about the system, its management, and the options local people have to solve their problems due to water level changes. Nonstructural measures of this kind are most likely to be implemented by subnational governments, particularly local governments, if at all. Thus, it makes sense for the study team for the second phase to be made up of more state and provincial actors. This was the recommendation of the scoping workshop called by the IJC for the second phase and was the eventual result. A recommendation for a system information clearinghouse probably operated by the IJC can be expected.

Another recommendation of the IJC scoping workshop was that feasibility demonstration projects be planned and evaluated in cooperation with municipalities that face the range of typical shoreline problems due to lake level changes. If local governments do not develop a sense of ownership for such solutions they aren't likely to happen. Neither federal government has had much success in developing such programs. Thus, some experimentation and institutional innovation is needed to find political stability. Such an approach would have put the phase II study in the business of local government capacity-building.

LOCAL GOVERNANCE AND THE IJC

Groundwater protection from toxic contamination is a further example of a management problem that will need to be solved in a partnership approach that involves local governments as well as states, provinces, and the federal agencies.¹⁸ As a recent Chicago-Kent Law Review

18. E. Witt, *The Tedious Chore of Preparing for Chemical Disaster Is in the Lap of Local Governments, in Governing the States and Localities* (1988).

issue demonstrates, both countries are experimenting to find more effective policy and program combinations. Toxics, which in the Great Lakes are making sportfish cleaning stations potential toxic waste clean-up sites, are posing many difficulties. Much of this chemical loading appears in contaminated groundwater. Can the work of the IJC under the Water Quality Agreements facilitate the prevention task as it has helped high-light remediation? Note that the governors and premiers have again taken some independent initiative on the topic. It bodes well for future support for further innovations and for developing cooperation to extend equal protection of the law across the border. But, if local governments develop a large role in management of the risk of contamination, facilitating their border relations also will be needed. If so, what models will work?

Facilitating local government cooperation is not a new question for the IJC. The negotiation of a toxics control agreement between Ontario and New York is directly relevant. The Niagara River has provided an opportunity for cooperation at every level, as have the St. Mary's and Detroit rivers. Contact, communication, and cooperation on everything from oil spills to the Seaway have been a feature of the St. Lawrence River. But future opportunities may put an even greater premium on local government participation. LeMarquand suggests that the major future issues facing the border will be reciprocal in nature; that is, they will involve benefits and costs on both sides of the border.¹⁹ He lists nutrients, toxics, air deposition, and consumptive use. If he is right, these are all issues in which local governments have a major stake in either the result or the approach to control.

Developing new capacity for local governments will be a challenge that should be made a bit easier by understanding some of the characteristics of local governments beyond the fact that they tend to dominate the implementation of land use controls. In both countries, local governments derive their formal powers from the state/provincial governments.²⁰ The form thus varies greatly from state to state and province to province. Some of the differences are striking.

In Canada, a strong local/provincial partnership approach to providing public services appears to operate, but this is city-directed, or more to the point, urban-region-directed.²¹ The role of the county as rural administrator and regional government as found in many United States states appears to be absent. Urban consolidation concepts have been taken seriously. About the time Woodrow Wilson penned his classic 1895 text about fragmentation, lines of authority, and overlapping jurisdiction,

19. LeMarquand, *supra* note 4, at 225.

20. T. Johnson & G. McDowell, *Differences in Power and Responsibility between Canadian and American Local Governments: A Rural Economic Development Perspective*, in *Agricultural and Rural Restructuring: Comparisons of the United States, Canada and Europe* (1990).

21. *Id.* at 23.

Canadian local governments were being depoliticized, reducing one set of linkages to national parties. Regional governments are being superimposed on the clusters of urbanization by provincial legislatures as halfway steps toward municipal integration. The roots for this go back to changes made in the 1930s and stress infrastructure, schools, and safety services. The intergovernmental constitutive process, such a striking feature of federal/provincial relations, is largely absent at the provincial/local level.

Canadian provinces cannot delegate as cleanly as can their United States counterparts. They remain responsible and exercise more detailed veto powers and supervision even in areas they have delegated. And less has been delegated to local governments outside cities. Provinces are fond of setting up boards and commissions instead of delegating functions to local governments, particularly outside of cities. This includes public health, conservation, and community planning.

In addition, local revenue bases are more restricted, cutting independence further. The property tax is highly developed. But, as in the United States, the shift in responsibility toward local governments has not been matched by a corresponding increase in access to revenue sources. A tax base equalization system similar to the national system operates at the provincial level in seven of the provinces. Over half of local revenues are from provincial appropriations, but they appear to be allocated less in response to conceptually driven formulae than is true at the federal level. A significant proportion of those funds is made available with little or no specifications on how they will be spent.

In contrast, delegation of functions by states to local governments has been greater, and increasing, as the United States federal government has gone through a process of devolution. The last several decades have seen an explosion in the development of revenue sources, particularly the use of fees. While fiscal stress is also a common feature of current local governments, there is considerable scope locally to try to make a difference and the potential shift to more state financing and control, as happened in California or Massachusetts after their tax revolts.

In many states, United States local governments have a strong tradition of home rule, and they are accustomed to operating in an arena with many other entities competing for the hearts and minds of their constituents. From New York to Illinois there is the potential for the citizen to turn to at least four levels of government for redress or service: town, county, state, or federal, with many combinations and interconnections. Even in states that have the legal assumption that local governments can only do those functions specifically authorized by state governments (the Dillon Rule) there is a presumption of considerable independence as to how those functions will be performed.

Access to the legislature at the more inclusive levels of governments, and the expectation of influence on how that body will evolve pol-

icy, is expected on the part of the various types and sizes of local governments. Counties, cities, and towns have similar representative organizations at state and federal levels, reflecting less a "chain of command" structure. Indeed, public districts for irrigation, sewer, and flood control, public and private water suppliers, port authorities, coastal zone management agencies, and many other groups connected with the public management of water resources are also likely to have their own representatives at the several capitals.

Johnson and McDowell pose some speculations that appear to have some significance for dealing with management problems.²² They have, for example, a different view of rural and of community that may need to be recognized by boundary water managers. The sense of place in the United States, they argue, is for a territory, a county, or a valley. In Canada the sense of identity, and thus sense of responsibility, may have more linkage to a point, a town, or city. Economic development between communities is seen as more competitive in the United States, and with more local responsibility taken for stimulating that development compared to the two more inclusive levels of government. Provincial governments are more likely than states to think and act in terms of communities and subregions. Nongovernmental organizations have emerged to carry out in rural areas many of the tasks that governments would perform in the United States. They create incentives for individual action and facilitate community decisionmaking, roles more often expected of local governments in the United States. Spatial flexibility in problem representation is seen as easier to come by in Canada, and economic development easier in the United States, as a result of these differences.

THE CASE OF GROUNDWATER PROTECTION

It would seem that these differences might show themselves in some of the innovations needed to increase the intensity of ecosystem management of the boundary waters of the two nations. Watershed management is an illustrative case. Groundwater quality management should be shifting from a reactive to a proactive mode. Once contaminated it is so expensive to reclaim that the general position is that policy evolution should emphasize prevention. This is consistent with the multiple-barriers philosophy in public health doctrine.

Groundwater is more idiosyncratic in its behavior than surface water, and thus its management requires more detailed knowledge of the local landscape. Prevention also requires more attention to the type of face-to-face management in which local public entities should have an

22. Johnson & McDowell, *supra* note 20 at 8.

advantage. But, as the history of land use controls suggests, the capacity for that kind of management varies greatly from jurisdiction to jurisdiction. The use of toxics that have the potential for significant damage at very low concentrations is ubiquitous, but the mix varies greatly over the landscape depending upon the mix of land uses. Thus, in addition to great variability in the distribution of vulnerability of contamination over the landscape there is great variability in the distribution of hazards and the capacity of institutions for that management. The surface watershed is often a good approximation of the physical unit for management. Local governments can usually be grouped and/or subdivided into such units.

Watershed management units have been sought in both countries for many years with some success.²³ For example, the Milwaukee River is organized as a regional water quality utility. In Ontario, conservation authorities on watershed lines were first formed in 1946 and now number 38. They are reported to be "completely locally driven." They are funded by provincial project grants, taxes for capital improvements, and operating assessment against municipalities. These are held up as a model for more United States watersheds to follow. The Ohio Conservation Districts are the closest examples in the border states. And the IJC's program of Areas of Concern (AOC) are seen as a mechanism for encouraging such management entities. Are these straws in the wind?

The IJC could be asked to impact the evolution of watershed management in several ways. The setting where the border divides a watershed is somewhat different than the case where the watershed is wholly contained in the respective country. Both could be targeted. The IJC board mechanism is already employed to deal with air pollution, water flows, and water quality in a number of such regions. Examples include the Detroit and St. Clair rivers, the Souris, the Red, the Rainy, the St. Croix, the Skagit, and many more all along the border. With the increase in the activity and capability of the states and provinces to represent their water interests, these models should be expanded in their application. A question can be raised as to the cumbersomeness of working through foreign affairs channels for each case separately and completely. A reference that gave the IJC continuing authority to facilitate cooperation at a less formal level until the basis for a formal agreement was well worked out could increase the effectiveness of the process. Encouraging like management capability on each side of the border could be stimulated by involving the respective state and province in this incubation process. The nature of water conflicts is such that the crisis needed to put a more formal organization—a separate board—in place will likely come along. The advantage will be that a

23. The Center for the Great Lakes reports that at one of its recent conferences a number of examples were discussed. Center for the Great Lakes, *Areas of Concern: Watershed Agencies Could Hold the Key for AOCs*, 7 Great Lakes Rep. 6 (1990).

more comprehensive base for such a result will have been put in place and thus the terms of reference for the board should more nearly match the complexities of the problem.

In case of the watersheds more removed from the border but still obviously a part of the larger ecosystem, a strategy more directly involving the capacity of the state or province to stimulate such changes is needed. The AOC/RAP approach of the IJC under the Water Quality Agreement is a model for the approach that might be taken here. This essentially uses a process employed by the United States federal water quality managers before their authority was expanded in 1972.²⁴ Conferences were used to bring parties together who had not yet complied with the objectives of the program to discuss their plans for doing so. Coercion levels were modest, information levels and an educational impact were more significant in the extent to which progress was made. It matched the level of support and expectations of the publics that were concerned about water quality.

Important to either setting would be the development of information about those examples of intergovernmental cooperation that might improve the results in these watersheds. Thus, the IJC and the states and provinces involved should cooperate, not only in the educational processes suggested, but also in a process that identifies these examples and makes available those officials and community leaders that make them work. Examples would be the use of districts to make the linkage between voluntary programs and regulatory approaches now often seen as adversarial rather than complementary.²⁵

It is one thing to have a copy of an ordinance or an annual report or a case study from a community like yours that has dealt with a problem like yours. It is of even more use to have a visit or two or ten with someone who faced the political process and the institutional constraints that you face. United States EPA has such a "peer to peer" program in place and it could easily be applied along the border by an IJC reference team.

RECOMMENDATIONS

The focus for water management issues in both countries is on the provinces in Canada and the states in the United States. With the growth of a larger federal role in Canada since the Pearse Commission and with the shrinking of the United States federal role since the Carter presidency, but especially under Reagan and the many stimuli to expand the always

24. Pub. L. No. 92-500 (1972).

25. J. Davidson, *Commentary: Using Special Water Districts to Control Nonpoint Sources of Water Pollution*, 65 Chi.-Kent L. Rev. 503 (1989).

important state role, the balance of the partnership on both sides has become more alike than different. The essential role of impacting United States policy evolution to in turn release institutional development for management of the boundary waters highlights the importance of local involvement in issue development. Organized local interests, often effectively represented by local governments, at the very least offer an access route to the congressional delegations. State agency representatives to IJC activities have found, as they have with traditional river basin commissions, that this can be an effective means of building multi-state coalitions. With the roles that the IJC plays, especially in developing the political side of the fact finding process, it is in a position to give the local capacity-building aspects more recognition in its activities and in time to expand a clientele that can effectively support its evolution into new roles.

Among many sources of uncertainty is the future growth of the role of the Great Lakes Commission—a state compact group—and the Council of Great Lakes Governors. They may compete successfully for the same support base leaving the IJC with growth of a judicial role, while those organizations take on more of the political representation role, including the important task of working out accommodations with the Canadian interests. Such a result might be more viable, if messy.

1. Expand the application of the Remedial Action Plan (RAP) model. The citizens of the two nations, thanks to the treaty that established the IJC, already have access to each others' courts to obtain redress for damages inflicted on the ecosystem, such as with toxics. But, just as the litigation route has proven to be of limited effectiveness from a national perspective, it has been even less impressive internationally. It has been argued that political participation is also needed, and that has included direct lobbying by Canadian agencies and organizations.²⁶ The designation of AOCs and facilitation of RAPs brings this process to the local level. The AOC/RAP process has the potential to be an effective local capacity-building approach, particularly when it is linked to watershed management as a way to encourage intergovernmental cooperation at the local level.

The AOC/RAP process can be applied to many other concerns than toxic waste sites, the predominant use of the process to date under the Water Quality Agreement, and with variation, it could become a standard feature of the IJC approach to references and other activities. In addition to intergovernmental cooperation as a tool to increase capacity, local leadership development and patterns of improved local access and program support can be encouraged with or without a watershed emphasis.

26. Scott, *supra* note 13.

Such an approach can be used to raise questions, such as Scott's suggestion to explore compensation, or the use of alternative dispute resolution concepts, with or without public debate needed to reshape values and policy expectations, or pricing policies to encourage more responsible management.

Examples for an expanded AOC/RAP approach include habitat restoration, urbanization management, rural development through water supply protection and development, waterfront revitalization, public wellhead protection, nonpoint pollution control, and many others. The choice should be responsive to emerging needs identified by the states and provinces, and targets of opportunity that bring to the attention of legislators the opportunities for program development. In particular, the incubation of issues should be facilitated so that more thoughtful and comprehensive responses can be implemented when a sense of crisis opens policy windows.²⁷ Indeed, policy windows may be opened by such efforts with a lower level of crisis if they create more effective regional coalitions.

2. Facilitate more cross border state/provincial and local government interactions. There are hundreds of examples of cooperation and accommodation between adjoining governments that have gone to the point of formal agreements at the state/provincial level.²⁸ If our experience cataloging such cooperation at local municipal level in New York is any guide, there are probably even more at the local governmental level along the border that have not been so formalized. These are more likely where there is the opportunity for communication to identify common interests. The conventional wisdom of a multiplicity of competing jurisdictions blocking the solution of multiple jurisdictional problems is only partly right. Boundary lines make for divisions of interest representation and call for either extra leadership or other political resources. But these can be supplemented by more inclusive levels of government. Since different problems call for different geographic "federations" of local representation, greater fragmentation at the local level could become more efficient overall than consolidation. Even watersheds come in different scales.

Can the fact finding and judicial roles of the IJC be broadened to include the role of creating problem-solving organizations? Again, under the AOC/RAP concept thesis seems workable. But even in the absence of

27. D. Allee & L. Dworsky, *Breaking the Incrementalist Trap: Achieving Unified Management of the Great Lakes Ecosystem*, in *Symposium on International and Transboundary Water Resources Issues* (J. Fitzgibbon et al. eds., 1990).

28. A. Utton, *A Book Review of J. Owen Saunders, Managing Natural Resources in a Federal State*, 3 *Transboundary Res. Rep.* 6 (1989).

agreement to expand that function, it would seem that under the reference study process it should be possible to inventory such cross boundary cooperation and develop a typology useful to those seeking such accommodations. But future references to the IJC are needed for that route to be followed. State/provincial and local interests working through their federal contacts should consider this as a way to generate needed studies.

Local governments in particular are accustomed to seeking out governments like themselves that have faced a particular problem from whom they can learn what they need to solve their own difficulty. This "peer to peer" approach as part of the process of exploring and testing out alternative solutions should give the reports of the IJC to their respective governments more program development punch. Federal and state agencies who make up reference study teams should be willing to assist as it builds prospects for their programs.

3. Create an independent IJC ecosystem review board with only fact finding powers. Milbrath argues that one of the functions of disputes is to provide a learning experience and that this role can be institutionalized through a board of experts who would review proposed actions before they were taken. Under the Water Quality Agreement, such a board seems possible. Under the recent trend of governments to cut back the staffing and referrals to the IJC, it seems unlikely.

This Ecosystem Review Board would join the Water Quality Board and the Great Lakes Science Advisory Board. Its only power would be to cause a short delay in proposed projects of regional significance, and then provide a new source of estimation about system wide and cross boundary consequences of a proposed action. The IJC does this now, but only on references of the national governments—in other words, late in the dispute resolution process. The point would be to identify under what conditions others (states, provinces, or municipalities, or even nongovernmental organizations) might trigger this result earlier in a likely conflict.

This role for an IJC board might serve as a way to provide more formal access to nationals of the other country in proceedings such as environmental impact statement reviews and the like. As Sadler has pointed out, such an early referral of a potential border conflict to the IJC would be consistent with the scoping process for environmental impact statements under the United States National Environmental Policy Act and its counterpart in Canada, the Environmental Assessment and Review Process.²⁹ Subnational governments play an active role in these national policy stimulating systems and have similar processes for actions not covered under the national programs. It would seem that they should be able to represent the interests of their constituents in a similar way

29. B. Sadler, *The International Joint Commission: Past and Future*, 4 *Transboundary Res. Rep.* 1 (1990).

when the border is involved in the problem. It is both inefficient and unfair to have less.

Such a board would need a standing system for garnering expertise. The members of the board could be individuals whose positions give them the background to review submissions. A staff able to support the process would have to be considered and a proactive research program would not be amiss and could complement the other IJC functions.

Adding the charge and capability to implement alternative dispute resolution techniques is a possibility.³⁰ These efforts to find "win/win" solutions for all sides of a conflict are attractive for situations that are stable in terms of political value systems—the situation where most IJC boards work well. But where no board exists, or there is one but it and its national institutional counterparts are under regular attack by interests not well accommodated by the policy process, then the public debate is needed. This suggests that other boards might be equipped with alternative dispute resolution training and support staff, but it not be provided for an IJC board whose task is to provide a more rational basis for debate.

4. An Ecosystem Review Board with subnational input and an improved national response system. An alternative would be to have an Ecosystem Review Board that reported only to the national governments, as with current references. Again, the point would be to provide different access to the triggering of such reviews. Staff teams composed of state, provincial, and local officials could use the occasion to work out differences while they provided information and analysis on questions that could be answered from available information.

As noted in a recent United States General Accounting Office report, the national governments do not have a working system to report out what actions are taken when the IJC makes a recommendation. The involvement of an entity like the United States Water Resources Council could solve that problem. That is, it could be resolved with an interagency committee. Formal notification of congressional committees could be helpful in any follow-up.

30. D. Sewell & A. Utton, *Getting to Yes in United States-Canadian Water Disputes*, 26 Nat. Res. J. 201 (1986).