



May 29, 2006

Mr. Henry J. Vaux, Jr.
Chair, Rosenberg Advisory Committee
Professor of Resources Economics, Emeritus
Rosenberg International Forum on Water Policy
UC Division of Agriculture and Natural Resources
324 Giannini Hall
Berkeley, CA 94720

Dear Mr. Vaux:

Further to your letter of January 19, 2006, I am pleased to enclose a copy of the paper that Commissioner Blaney will be delivering at this year's Rosenberg Forum to provide an overview and brief history of the IJC.

Yours sincerely,

Murray Clamen
Secretary
Canadian Section

Enclosure

cc Commissioner Blaney
Chair Schornack
Ms Elizabeth Bourget, Secretary, U.S. Section/IJC

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AN OVERVIEW OF THE IJC

Jack P. Blaney*

I am very pleased to be attending this prestigious forum on *Managing Upland Watersheds in an Era of Global Change*. The forum provides an excellent opportunity to exchange views on matters of increasing importance to all of us.

As a Commissioner appointed to the International Joint Commission of Canada and the United States, I am particularly pleased to have been asked to provide an overview of the Commission as an introduction to the fourth case study on *Lessons in the Successful Management of International Waters*. My colleague Dennis Schornack will then offer an analysis of the Commission's achievements, and the factors that have led to its successes.

It is particularly fitting to be focussing on the IJC at a forum in Banff, not only because we are relatively close to the Canada – United States border, but because we are very close to the site of one of the disputes that led to the negotiation of the *Boundary Waters Treaty*, which in turn created the International Joint Commission.

*I want to recognize the substantial contributions of Michael Vechsler to this paper.

Although Canada and the United States are water-rich countries, this is not the case in the border region of Alberta, Saskatchewan and Montana. At the beginning of the twentieth century, there was a very real threat of hostilities between settlers in Canada and the United States over use of the St Mary and Milk Rivers for irrigation. These rivers rise in the foothills of the Rocky Mountains in Montana and flow across the international border into Canada. The Milk River then re-enters the United States where it joins the Missouri and Mississippi Rivers and eventually flows into the Gulf of Mexico. The St Mary River, on the other hand, joins the Saskatchewan River system which flows into Hudson Bay,

Despite a shortage of water and strong competing claims in both countries, Canada and the United States were able to agree on provisions in the Boundary Waters Treaty of 1909 to settle their differences peacefully over the use of the St Mary and Milk Rivers (and over the use of the Niagara River between Lake Erie and Lake Ontario). These were the only two specific issues dealt with in the treaty. However, the St Mary and Milk Rivers have remained a source of controversy to this day.

The real importance of the Boundary Waters Treaty is that it created a comprehensive, rules-based regime with an effective dispute avoidance and

settlement mechanism that has worked to prevent and resolve transboundary water disputes between Canada and the United States for almost 100 years. This regime has effectively dispelled the old adage that is often referred to in western North America that “whiskey is for drinking; but water is for fighting”. Instead, transboundary water disputes between Canada and the United States have been dealt with peacefully and, for the most part, amicably by pursuing the common good of both countries. (The treaty has also been used to deal with air issues, starting in 1928 when the Trail Smelter investigation was referred to the International Joint Commission.)

The basic purpose of the Boundary Waters Treaty is to avoid or resolve disputes between Canada and the United States over waters that run along or across the international boundary. The preamble to the treaty reads:

“The United States of America and His Majesty the King ... being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such

questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends”

Much of the treaty negotiation on the Canadian side was carried out, not by the then U.K. ambassador James (later Lord) Bryce, but by a Canadian lawyer based in London, Ontario – George Gibbons. On the U.S. side, Chandler Anderson helped Secretary of State Elihu Root develop treaty texts.

In essence, the two countries wanted to settle two outstanding problems and to put in place mechanisms that would resolve future disputes.

The treaty also created a unique international institution – a dispute avoidance and dispute settlement mechanism applied by the International Joint Commission of Canada and United States (or the “IJC”) – to help the two national governments achieve the treaty’s objectives.

The Boundary Waters Treaty is worded and applied, and the Commission operates, on the basis of absolute equality between the two countries. This may be considered remarkable given the disparity in the size of their populations and economies – the United States being 10 times the size of Canada in both its population and its economy.

The Commission has six members – three appointed by the United States and three by Canada. All Commissioners have equal authority and power. The Commission's Rules of Procedure (Rule 2) require that two Chairs – one for the Canadian Section and one for the U.S. Section – be appointed by the Commissioners of each section. However, in practice, the governments have selected who will serve as chairs.

The U.S. Commissioners are appointed at the highest level in the U.S. Federal government, that is by the President with the concurrence of the Senate. Their Canadian counterparts likewise are appointed by the highest level in the Canadian federal government, the Governor in Council (the Cabinet).

The treaty allows decisions by a majority of Commissioners, and the Commission's rules require that at least four Commissioners concur in any decision so as to ensure that all decisions have the support of at least one Commissioner from each country. In fact, in current practice, the Commissioners usually reach decisions by consensus.

The Commission has dealt with almost 100 matters since its inception in 1911. Over that time, it has divided formally along national lines on only two occasions. And both occasions involved the arid western region.

Unlike many other international organizations, Commissioners do not formally represent their countries. Instead, on appointment, each Commissioner signs a declaration, based on Article XII of the treaty which states:

"Each Commissioner ... shall, ... make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this treaty".

The everyday application of this declaration is that Commissioners feel obliged to act in the best interests of both countries.

As already mentioned, the Boundary Waters Treaty created a comprehensive rules-based regime for dealing with transboundary water issues between Canada and the United States.

Article I sets out rights to navigation of the ships and citizens of the two countries. Article II deals with jurisdiction and control over the use and diversion of waters which subsequently flow across the boundary or into boundary waters. Articles III and IV set out requirements for binational approval – either by the governments or the IJC – (1) for certain projects in boundary waters that would affect levels or flows in the other country, and (2) for certain projects in transboundary rivers or in waters flowing from boundary waters that would raise levels across the boundary in the upstream country. In cases where the IJC is asked to provide approval, the Commission must follow certain principles that have been agreed to by Canada and the United States as set out in Article VIII. These include that each country shall have equal and similar rights in the use of boundary waters on its own side of the border; that an order of precedence shall be observed among municipal, navigation, power, and irrigation uses; and that where obstructions in one country will raise the natural level in the other country the IJC “shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by

it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.”

Article IV of the treaty also contains one of the most fundamental and far-reaching principles that governs water relations between Canada and the United States. In a clear, straight forward, and unqualified sentence the two countries agree that boundary waters and waters flowing across the boundary must not be polluted in either country to the injury of health or property in the other country. The environmental consequences of this declaration are remarkably prescient, and it took international law some time to catch up with the intent and purpose of this article.

The International Joint Commission is the key mechanism established by the treaty to avoid and resolve disputes between the two countries over water and other transboundary environmental issues.

The treaty gives the Commission a number of responsibilities. First, it must respond to “references” – formal requests from the two national governments to look into a specific matter or problem along the border and to make findings and recommendations for action by the two governments to resolve the problem.

(Although these references have usually been related to transboundary water and air issues, they can, in fact, be directed to any matter or problem along the border. In one instance, the Commission was asked to look at social and economic issues concerning Point Roberts, a small community which is part of Washington State, but which can be reached only by land by going through British Columbia.)

Reports on references are not regarded as decisions, and do not have the status or character of arbitral awards. However IJC reports are also released to the public at the same time as they are submitted to the two governments, and the force of public opinion can often be brought to bear in support of the Commission's recommendations. Also, by custom, the direction to the IJC to undertake a reference comes from both governments in the same terms, and at the same time. There is therefore an implied obligation on both governments to provide the Commission with the resources that it needs to carry out the reference, and to deal with the Commission's report in a responsive way. A high percentage of IJC recommendations have been acted upon by the two governments.

In addition to being asked to address specific problems, the Commission also receives long-term, permanent references from the two governments. These include

requests to assist and oversee the way in which the governments carry out certain other international agreements between themselves. This is done in the Great Lakes Water Quality Agreement and in the International Air Quality Agreement. I will speak further about these permanent references in a few minutes.

The treaty does provide, in Article X, for the governments to refer matters to the Commission for a binding arbitral award. Such references, however, require the concurrence of the U.S. Senate and the Canadian Governor General in Council. No references under Article X have ever been given to the Commission.

As mentioned earlier, the Commission makes decisions on applications for approval to build certain structures in boundary waters, in waters flowing from boundary waters, and in transboundary rivers. Such applications for structures are submitted to the Commission through the government of the country in whose territory the project will be built. That government makes an initial determination whether binational approval is required under the treaty, and, if so, whether the IJC will be asked to approve the project or whether the project should be approved by a special agreement between the two governments. The apportionment of water under these IJC control orders (Orders of Approval) has obvious economic, environmental,

and social impacts. In these cases, the Commission can decide to allow the application, to deny it, or to allow it with conditions – the latter is usually what has happened. If an Order of Approval with conditions is made, the IJC then sets up an international control body (Board of Control) to oversee its implementation.

As a matter of practice, and consistent with the spirit of the treaty, the Commission requires that all its boards and other advisory bodies be made up of an equal number of members from Canada and the United States. Further, these members serve the Commission in their personal and professional capacities and not as representatives of their governments, employers or other institutions. Most members are drawn from various levels of government or from universities. There are obvious benefits to be gained from having officials from both countries work out solutions to binational issues in the impartial atmosphere of an IJC board. The Commission, in turn, makes recommendations to governments, and, if the governments decide to act on them, the governments may call on the same officials to implement those recommendations. The boards play a vital role in joint fact-finding which serves as the basis for building consensus at all levels.

The IJC has 15 such control bodies along the entire US-Canada boundary. They govern the operation of dams on the Columbia, Okanogan, and Kootenay Rivers in Washington State and British Columbia, and on the St Croix and St. John Rivers in New Brunswick and Maine. They are also responsible for overseeing the operation of structures on the St. Marys River at Sault Ste. Marie that control the outflows from Lake Superior into Lakes Michigan, Huron and Erie, and the operation of works in the international section of the St. Lawrence River – near Cornwall and Massena – that control the outflows from Lake Ontario. (The IJC also has a control board that oversees flows in the Niagara River, but it does so under a reference under Article IX, rather than pursuant to an Order of Approval under Articles III and VIII.)

In a few cases the governments have concluded special agreements like the 1950 Niagara River Diversion Treaty and the 1964 Columbia River Treaty which, in effect, establish special regimes for those rivers that supersede the general provisions of the Boundary Waters Treaty. Even in these cases, however, the governments have often turned to the IJC for advice in developing and implementing these special agreements.

There is no appeal from the Commission's decisions on Orders of Approval. However, the IJC may review and amend its own Orders, either on its own initiative or in response to an outside request. In 1997, the Commission informed the governments that because many of its Orders of Approval have been in place for a very long time the IJC intends to review all its Orders systematically as circumstances permit.

A special IJC study board has just completed a five-year examination of the Lake Ontario and the St. Lawrence River system to see whether the Commission's existing control order should be modified to take into account factors, such as the environment and recreational boating, that were either not considered or have changed since the Commission's Order of Approval was last amended in 1956. When the Commission receives the study board's report, it will consult governments and seek comments from interested members of the public before deciding whether to amend its existing Order of Approval. (Under Article XII of the Boundary Waters Treaty, the Commission is required to give all parties interested in a matter before it a "convenient opportunity to be heard", and the Commission must adopt rules of procedure that are "in accordance with justice and equity", as that phrase is understood in the two countries.)

The IJC is now just beginning a review of its control order at Sault Ste. Marie for the Upper Great Lakes – Lakes Superior, Michigan, Huron, and Erie.

The waters of the Great Lakes are one of the world's most precious natural assets. The quality of these waters is critical to the Great Lakes ecosystem and to the nearly 40 million people on both sides of the border who rely on it for drinking water, food, work, and recreation.

In 1972, the Great Lakes Water Quality Agreement was signed by Canada and the United States in response to the growing concerns of the millions of people living around the lakes about the lakes' deterioration and, more specifically, in response to IJC reports about their poor condition.

The 1972 agreement was replaced six years later by the current 1978 Great Lakes Water Quality Agreement in which the two governments committed themselves: *“to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem”*.

The Great Lakes Water Quality Agreement requires the IJC to assist the two governments in implementing the agreement. This includes making a major report at least every two years to the governments and to the public assessing progress and providing advice and recommendations on how to achieve the agreement's objectives. Special reports on particular issues related to water quality may be issued at any time.

Significant progress has been made in restoring the lakes since the first Great Lakes Water Quality Agreement was signed in 1972. However, serious problems remain, and new threats continue to emerge, such as new chemicals and pharmaceuticals, invasive species, and the effects of intensive agriculture and ongoing urbanization.

The Agreement provides that every six years – after every third biennial report from the Commission – the two national governments must carry out a review of the agreement. The Commission's last biennial report, issued in September, 2004, triggered the need for a new review by the governments, which is now underway. At the request of the governments, the Commission has held an extensive round of public meetings in the Great Lakes Basin to obtain the views of the public, and it has

passed these views on to the governments. The Commission is also in the process of preparing its own advice to governments.

The Commission has focused in recent years on the highly contentious issue of bulk removals of water from the Great Lakes Basin. In 1998, the IJC was called upon in a reference to report on whether the waters of the Great Lakes could sustain bulk diversions of water to locations beyond their basin, particularly to the United States.

This reference followed an application to Ontario by the Nova Corporation in 1998 to export water by tanker from the Ontario side of Lake Superior. Although the Ontario license for this export was later rescinded, the Nova application caused a great deal of public concern about other possible bulk water removals from the lakes.

The IJC issued an interim report in 1999 and a final report in 2000 which was entitled "The Protection of the Waters of the Great Lakes". The IJC found that the Great Lakes are not a renewable resource and do not offer a vast reservoir for an increasingly thirsty world. The report noted that although the Great Lakes contain

about 20% of the fresh water on the earth's surface, only 1% of this water is renewed each year from snowmelt and rain. If all interests in the Basin are considered, there is never a “surplus” of water in the Great Lakes system. The Commission concluded in its 2000 report that existing international trade law obligations do not prevent Canada and the United States from taking measures to protect their water resources and preserve the integrity of the Great Lakes Basin ecosystem. The Commission also concluded that removals of water from the basin reduce the resilience of the system and its capacity to cope with unpredictable stresses, such as climate change. The Commission therefore recommended that governments take a number of specific measures to ensure that removals of water from the basin and consumptive uses in the basin will not endanger the integrity of the Great Lakes Basin ecosystem. The Commission confirmed these recommendations in a follow-up report in 2004.

The U.S. Congress had earlier passed the Water Resources Development Act of 1986 which said that no diversion is allowed from the lakes if the governor of any Great Lakes state objects, even if the project does not involve their state.

In 1999, Ontario enacted a water taking and transfer regulation, which generally prohibits transfers out of Ontario's part of the Great Lakes and the St. Lawrence

basin. Quebec also generally prohibits transfers of water outside that province. In December 2002, the Canadian government proclaimed amendments to the International Boundary Waters Treaty Act (Bill C-6) and issued International Boundary Waters Regulations which prohibit new bulk removals from Canadian boundary waters, including the Great Lakes-St. Lawrence Basin.

On June 18, 2001, the eight U.S. Great Lakes states and the Canadian provinces of Ontario and Quebec concluded Annex 2001 to the 1985 Great Lakes Charter, a non-binding, good-faith arrangement among the Great Lakes states and provinces designed to protect the lakes. After lengthy negotiations, the Great Lakes governors and premiers signed agreements on December 13, 2005 to implement the Annex and, with limited exceptions, to ban new diversions outside the Great Lakes-St. Lawrence River Basin. This water resources agreement among the Great Lakes states and Ontario and Quebec will again be a non-binding, good-faith arrangement (because the states and provinces do not have the authority to conclude international treaties between themselves). However, the water resources compact among the U.S. Great Lakes states alone will be binding under U.S. law. These agreements must still be implemented through state and provincial legislation, and the compact must also be approved by the U.S. Congress.

Although not expressly stated in the Boundary Waters Treaty, it has been recognized for some time that the Commission's inherent responsibility for preventing and resolving transboundary disputes requires it to alert governments to situations along the border which have the potential for transboundary conflict so that early action can be taken to avoid or resolve such conflict. This can be one of the Commission's most valuable roles.

The duty to alert is explicit with respect to transboundary air issues. In 1966, the governments gave the IJC a reference which requested the Commission "to take note of air pollution problems in boundary areas ... which may come to its attention from any source. If at any time the Commission considers it appropriate to do so, the Commission is invited to draw such problems to the attention of both Governments."

The Commission has also been given a number of other ongoing references that require it to look at air issues. These include a 1975 reference on the state of air quality in the Detroit-Windsor and Port Huron-Sarnia areas; a reference in the 1978 Great Lakes Water Quality Agreement with respect to reducing atmospheric deposition of toxic substances to the Great Lakes Basin Ecosystem (Annex 15); and

a reference in the 1991 Air Quality Agreement to invite public comments on progress reports and provide the governments with a synthesis of the public's views.

The Commission has come to clearly recognize that local people, given appropriate assistance, are best positioned to resolve local transboundary issues. The Commission also believes that effective trust-building and problem-solving capabilities at the local watershed level will substantially prevent, reduce, and perhaps eliminate the need to directly involve the two national governments or the IJC in a full formal reference to resolve specific international watershed issues. In the Commission's view, creating such local solution-building capabilities will represent a significant investment in the management of the precious water resources that Canada and the United States share.

With these ideas in mind, the Commission reported to the governments in June, 2005, in *A Discussion Paper on the International Watersheds Initiative*, that the IJC's first priority under this initiative is to strengthen the watershed capabilities of its boards in the St. Croix, Rainy, and Red River watersheds. The Commission expects that these watershed initiatives will be successful and that others will follow.

In conclusion I would like to summarize what I have said by quoting from the Commission's Mission Statement which captures succinctly the Commission's responsibilities. It says,

“The International Joint Commission prevents and resolves disputes between the United States of America and Canada under the 1909 Boundary Waters Treaty and pursues the common good of both countries as an independent and objective adviser to the two governments.

“In particular, the Commission rules upon applications for approval of projects affecting boundary or transboundary waters and may regulate the operation of these projects; it assists the two countries in the protection of the transboundary environment, including the implementation of the Great Lakes Water Quality Agreement and the improvement of transboundary air quality; and it alerts the governments to emerging issues along the boundary that may give rise to bilateral disputes.”

In the words of one close observer: “An uncommonly good treaty.”