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THE TRAGEDY OF ANOTHER MINUTE: IBWC MINUTE 308'S FAILURE TO MEND THE RIO GRANDE RIVER

Craig J. Pritzlaff*

*"Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all."*¹

I. INTRODUCTION

THE summer of 2002 marked another dry season for residents on both sides of the Rio Grande River. Ten Texas communities along the border with Mexico were under mandatory restrictions on water use, and two other cities encouraged voluntary restrictions all in an effort to conserve a scant resource.² According to the Palmer Drought Severity Index, nine Texas counties bordering the Rio Grande River were experiencing severe to extreme drought conditions.³ Absent an influx of tropical disturbances, the U.S. Climate Prediction Center expected the droughts in these areas to continue in the months ahead.⁴

The prognosis was especially bleak for the lower Rio Grande River Valley, which is home to extensive agricultural operations.⁵ The valley was in the midst of a "severe drought," and the soil conditions for crops had been described as "excessively dry."⁶ Also, the international reservoirs along the Rio Grande River, Falcon Reservoir, and Amistad Reservoir all reached record lows in the summer of 2002. For example, Falcon

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1. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

2. TEXAS COMM'N ON ENVTL. QUALITY, PUBLIC WATER SUPPLIES EFFECTED BY DROUGHT, available at <http://www.tceq.state.tx.us> (last visited Feb. 22, 2003).

3. TEXAS WATER DEV. BD., PALMER DROUGHT SEVERITY INDEX BY TEXAS CLIMATIC DIVISIONS, available at <http://www.texaswaterinfo.net> (last visited Feb. 22, 2003).

4. CLIMATE PREDICTION CENTER, U.S. SEASONAL DROUGHT OUTLOOK THROUGH NOVEMBER 2002, available at <http://www.cpc.ncep.noaa.gov> (last updated Aug. 29, 2002).

5. DROUGHT PREPAREDNESS COUNCIL, STATEWIDE DROUGHT SITUATION REPORT 2 (Aug. 1, 2002), available at <http://www.txwin.net/dpc> (last visited Feb. 22, 2003) [hereinafter SITUATION REPORT].

6. *Id.*

Reservoir's capacity plunged below 10 percent.⁷ On the Mexican side of the border, the situation remained bleak. Mexican reservoirs along tributaries of the Rio Grande River (known as Rio Bravo in Mexico) float at quarter capacities or less.⁸ The lack of storage capacity limited irrigation efforts and crippled the region's agricultural economy. Accordingly, the drought of the summer of 2002 was expected to cost Texas tens of millions of dollars in agricultural losses, which resulted in the designation of three counties as eligible for disaster relief.⁹

Exacerbating the effects of the near-decade long drought, the populations on both sides of the border have steadily increased.¹⁰ If the growth continues along the Texas side of the border, the population is expected to double to over five million people by 2030.¹¹ Meanwhile, on the Mexican side of the border it could double to over four million by 2020.¹² Poor sanitation, wasteful irrigation practices, and an unnecessarily complex political management system are contributing to the region's water woes.¹³

The problems caused by the prolonged water shortage reached a head in the summer of 2002, resulting in a strain in relations between the United States and Mexico.¹⁴ Texas farmers and politicians remained especially angry over Mexico's continued failure to adhere to its international obligations to share the waters of the Rio Grande River.¹⁵ Since 1992 Mexico has accumulated an aqua-debt of approximately 1.4 million acre-feet of water with the United States.¹⁶ Texas farmers desperately needed this water to maintain their crops, and Mexico was simply unable to provide the indebted water because of the dry conditions.¹⁷

In 1968 Garrett Hardin wrote an article describing the tragedy of the

7. *Id.*; see also TEXAS WATER DEV. BD., TEXAS DROUGHT CONDITIONS SUMMARY, available at <http://www.twdb.state.tx.us> (last visited Feb. 22, 2003).
8. Mary Kelly and Karen Chapman, *Sharing the Waters* 1 (May 17, 2002), available at <http://www.americaspolicy.org> (last visited Feb. 22, 2003) [hereinafter *Sharing*].
9. SITUATION REPORT, *supra* note 5, at 6; Blair Fannin, *Drought Returns to Texas Agriculture* (June 12, 2002), available at <http://agnews.tamu.edu/dailynews> (last visited Feb. 22, 2003).
10. TEXAS COMM'N ON ENVTL. QUALITY, BORDER ISSUES, available at <http://www.tceq.state.tx.us> (last visited Sept. 13, 2002).
11. *Id.*
12. *Id.*
13. William A. Nitze, *Meeting the Water Needs of the Border Region*, 8 POLICY PAPERS ON THE AMERICAS 1 (Apr. 2002), available at <http://www.csis.org/Americas> (last visited Feb. 22, 2003).
14. See e.g., Steve Taylor, *Lucio Trying to Set Meeting Between Fox and Farmers*, MCALEN MONITOR, July 23, 2002, available at <http://www.rioweb.org> (last visited Feb. 22, 2003) (stating how Mexico's President cancelled trips to Texas due to the water crisis).
15. See Ramona Nye, *Texas Tackles Water Dispute*, available at <http://www.agr.state.tx.us> (last visited Feb. 22, 2003) (discussing how Texas politicians express dismay over crisis and farmers stage protests); see also Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mex., T.S. No. 994 [hereinafter 1944 Water Treaty].
16. See *Sharing*, *supra* note 8, at 1.
17. See generally *id.* at 1-2.

commons.¹⁸ Essentially, when humans are provided with a free resource shared by all, with little or no incentives against overuse, then the resource will be absolutely consumed to the detriment of everyone.¹⁹ The Rio Grande River is a paradigm simulating this tragedy.

Absent any real incentives to adopt sustainable agriculture, Mexican farmers in the state of Chihuahua²⁰ switched their crops to higher profit, more water intensive strains than had been previously used in recent years.²¹ With surface water levels in the area plunging, Mexican farmers started mining groundwater resources in order to sustain crop irrigation.²² Many of those groundwater aquifers connected to the waters that feed the Rio Grande River and resulted in a contribution to the surface water problems of the region.²³

Among the hodgepodge of agencies, commissions, and groups authorized to help administer the Rio Grande River, the most important is the International Boundary and Water Commission (IBWC).²⁴ Though limited in its power, the IBWC is authorized to manage and administer the waters of the Rio Grande River, and is in the best position to ensure continued vitality of the border region's water.²⁵ Regrettably, the IBWC failed in the recent crisis because it passed on an opportunity to proactively enforce Mexico's payment of its water debt to the United States.²⁶ The IBWC's latest corrective minute is just another temporary stopgap measure that fails to stem the worsening water woes of the Rio Grande River.²⁷

II. LEGAL BACKGROUND

The Rio Grande River border waters have long been a source of dispute between Mexico and the United States.²⁸ In the 1890s the United States obstructed the flow of the upper Rio Grande River to such an extent that the residents of Ciudad Juarez were essentially left with a dry

18. See Hardin, *supra* note 1.

19. *Id.*

20. Chihuahua is home of the Rio Conchos, one of the main tributaries of the southern Rio Grande.

21. C. PARR ROSSON ET AL., TEXAS A&M UNIVERSITY, A PRELIMINARY ASSESSMENT OF CROP PRODUCTION AND ESTIMATED IRRIGATION WATER USE FOR CHIHUAHUA, MEXICO (May 2, 2002), available at <http://www.cnas.tamu.edu/publications> (last visited Feb. 22, 2003).

22. *Id.* at 4.

23. See *id.* at 8.

24. See 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, 110 (1986).

25. *Id.* at 111.

26. INT'L BOUNDARY WATER COMM'N, MINUTE NO. 308 UNITED STATES ALLOCATION OF RIO GRANDE WATERS DURING THE LAST YEAR OF THE CURRENT CYCLE (June 28, 2002), available at <http://www.ibwc.state.gov> (last visited Feb. 22, 2003) [hereinafter MINUTE 308].

27. *Id.*

28. See STEPHEN C. McCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 77 (2001).

streambed.²⁹ Following its isolationist policies of the time, the United States bucked international trends, and the U.S. Attorney General proclaimed that the United States could use water flowing within its territory without any obligation to downstream residents of Mexico.³⁰ In 1906 the United States partially backed down from the harsh extremes of this doctrine by agreeing to equitably distribute the waters of the Rio Grande River for purposes of irrigation.³¹

Toward the middle of the twentieth century, the United States was embroiled in World War II, signaling an end to its isolationist policies.³² As a result of this new political stance, the United States renewed relations with Mexico over the water problems plaguing their borders.³³ In 1944 the United States forever put to rest what was known as the Harmon Doctrine and subsequently enacted the 1944 Water Treaty with Mexico to quantify each nation's rights to the Rio Grande River waters.³⁴ Article 3 of the 1944 Water Treaty sets forth a series of water use preferences and stresses the importance of solving border sanitation problems. Article 4 quantifies the amounts of Rio Grande River water allocated to each nation from tributaries and jointly managed international reservoirs (constructed under the terms of Article 5). Further, Mexico must send the United States no less than 350,000 acre-feet of water from its tributaries annually.³⁵ The treaty uses five-year average cycles in water flow, and any deficiencies due to "extraordinary drought or serious accident to the hydraulic systems on the measured Mexican tributaries" are to be made up in the subsequent five-year cycle.³⁶

The 1944 Water Treaty also renamed the previous commission in charge of administering the border waters from the International Boundary Commission to the IBWC.³⁷ As such, the IBWC is vested with authority to interpret the treaty and to regulate and administer the treaty's terms. The IBWC's mission "is to apply the rights and obligations" that Mexico and the United States assumed under the 1944 Water Treaty and other subsequently related agreements "in a way that benefits the social and economic welfare of the peoples on the two sides of the boundary and improves relations between the two countries."³⁸ The IBWC implements its interpretative and regulatory authority through the use of Minutes.³⁹ Once approved by each nation, the Minutes take "the form of a

29. *See id.* at 78.

30. *See id.* at 88 (also known as the Harmon Doctrine).

31. *See id.* at 102; *see* Distribution of Waters of the Rio Grande, May 21, 1906, U.S.-Mex., T.S. No. 455.

32. *See* Sinclair, *supra* note 24, at 110.

33. *See generally id.*

34. *See* 1944 Water Treaty, *supra* note 15.

35. *Id.* at art. 4(B)(d).

36. *Id.*

37. *Id.* at art. 1.

38. International Boundary and Water Commission, *The IBWC, Its Mission, Organization and Procedures for Solution of Boundary and Water Problems*, available at <http://www.ibwc.state.gov> (last visited Feb. 22, 2003) [hereinafter *Mission*].

39. *See* 1944 Water Treaty, *supra* note 15, at art. 25.

legislative enactment."⁴⁰ Although in recent years a variety of other organizations assumed various oversight and financial functions, the IBWC remains the principle authority for oversight of the Rio Grande River waters.⁴¹

III. MINUTE 308

Since 1992 Mexico has not adhered to its duties under article 4 of the 1944 Water Treaty and thus far has accumulated a significant water debt with the United States.⁴² In an attempt to solve this crisis, the IBWC drafted Minute 308, which calls for immediate and long-term solutions to the water dispute.⁴³

In an effort to alleviate the immediate problems plaguing South Texas farmers, Minute 308 includes Mexico's agreement to transfer 90,000 acre-feet of water to the United States by October 26, 2002.⁴⁴ This amount, however, is discounted by 28,845 acre-feet for evaporation and other natural losses incurred during the transfer.⁴⁵ Additionally, if Mexico is unable to meet the delivery due to continued drought, the difference will be credited.⁴⁶ Essentially, Mexico must do the best it can, and if it is unable to meet the goal, Mexico will still receive credit as if it had been met. This is hardly the type of enforcement needed to prevent Hardin's tragedy of the commons. Even if Mexico delivers the full allotment or more, the water will arrive at the end of the growing season, offering little solace to the plagued Lower Valley farmers.⁴⁷ Also, 90,000 acre-feet of water are a long way from addressing the 1.4 million acre-feet of cumulative debt Mexico owes the United States. Contrary to the communiqué issued by Mexico and the United States lauding the achievements of Minute 308, the measure does not address "immediate needs" and makes little headway in alleviating Mexico's overall water debt to the United States.⁴⁸

The remainder of Minute 308 addresses long-term planning, and financial and data management needs. Paragraph B includes recognition by the IBWC of Mexico's commitment to modernize its irrigation systems to achieve greater "efficiency in water use in the border cities."⁴⁹ Furthermore, the IBWC recognizes Mexico's financial commitment to the project

40. *See Mission, supra* note 38.

41. *See generally* 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, 164-65 (1999).

42. *See Sharing, supra* note 8, at 1.

43. MINUTE 308, *supra* note 26.

44. *Id.* at ¶ A(a).

45. *Id.* at ¶ A(a)(3).

46. *Id.* at ¶ A(a)(4).

47. *See Taylor, supra* note 14.

48. Press Release, U.S. Department of State, Joint Communiqué of the United States and Mexico Concerning the Water Problem in the Rio Grande (June 29, 2002), available at <http://www.state.gov> (last visited Feb. 22, 2003) [hereinafter Press Release].

49. MINUTE 308, *supra* note 26, at ¶ B.

and even proposes that Mexico “could” spend additional peso amounts on irrigation projects to achieve an even greater conservation yield.⁵⁰ The Minute, however, merely takes note of governmental support to commit the funds. The IBWC fails to (1) outline specific details of the Mexican plans, (2) recommend specific areas to spend the money, and (3) commit Mexico to specific timeframes for completion of the modernization plans (outside of a broad four-year window of spending). Without specific objectives for regulators in Mexico to achieve, any time and the money allocated could be squandered in the regulator’s search for direction. Finally, if the irrigation projects alluded to by the IBWC would result in a greater conservative yield, then Paragraph B should have used a more directive “shall” instead of “could” in the Minute’s language.

Paragraphs E and F of Minute 308 observe the support of both nations to reform the institutions charged with financing border community water projects. This item is merely recognition of prior agreements between the two governments made in early 2002.⁵¹ It should reinforce those agreements and encourage swift actions to free up funds for use. Additionally, the IBWC assumed a proactive stance by declaring that the commission would monitor the conservation projects and report the measures needed to ensure that waters salvaged from the projects reach the Rio Grande River.⁵²

Minute 308’s paragraphs B and G recognize the need for both governments to share scientific and hydrologic information, as well as data related to sustainable management of the Rio Grande River basin. Paragraph G appears to acknowledge the need for one agency (the IBWC) to serve as a forum for the collection and exchange of the vast array of scientific data collected for development of sustainable management practices. Additionally, Paragraph G, Points 1 and 3 strengthen the IBWC’s management role in the Rio Grande River basin and appear to set it as the central forum for the collection of information from outside agencies and groups related to sustainable management and drought management planning. Yet, in Paragraph D, the Minute only recognizes that both governments have committed to sharing hydrologic data and fails to expressly require the governments to share or even indicate appropriate means to share the data. Reading the paragraphs together, however, it would seem logical that the IBWC will be the forum through which information exchange will flow because hydrologic data is critical to drought management and sustainable management planning. Additionally, Paragraph G, Point 3 indicates that the IBWC will create an International Advisory Council that will coordinate the exchange of data between the two countries.

Unfortunately, the creation of this data forum is subject to financial

50. *Id.* at ¶ C.

51. See Press Release, *supra* note 48.

52. MINUTE 308, *supra* note 26, at ¶ F.

and personnel commitments from the United States and Mexico.⁵³ That is where the Minute potentially fails. Exact monetary commitments are not etched out, and the IBWC neglects to establish a specific date for creation of the data exchange council. Additionally, it remains unclear whether the IBWC will now serve as a central data clearinghouse to coordinate, collect, and analyze the information, or if the IBWC will merely serve as a conduit through which information will flow.

One of the biggest problems perpetuating the Rio Grande Rivers water woes is the lack of coordination among the various groups that study the Rio Grande River, which results in duplicate efforts.⁵⁴ If the IBWC served as a central data clearinghouse, then it could more easily identify data gaps and duplication. The IBWC could then direct the focus of the studies to fill the gaps and help coordinate groups to prevent data duplication. Minute 308 falls short in outlining these issues and leaves the problem for another day or crisis.

Finally, Paragraph G, Point 2 takes note of the need for a "bi-national summit of experts and water users from each country" to develop a bi-national sustainable management plan.⁵⁵ The paragraph also notes that the United States and Mexico will consider the summit's recommendations. Although studies and summits are laudable, the problems plaguing the Rio Grande River have been ongoing for over a century.⁵⁶ The time for half-measures is over. Given the public attention to the current crisis, the IBWC should have capitalized on the situation and outlined a sustainable management plan for Mexico and the United States to consider.

The IBWC's goal is to ensure vitality of a shared resource. The sharing of current scientific data is an integral step to achieving that goal within the spirit of the 1944 Water Treaty and sustainable development in general.⁵⁷ In drafting Minute 308, however, the IBWC lost a golden opportunity in the midst of a political crisis, to take proactive action to permanently solve the water problems of the Rio Grande River. The IBWC merely writes empty words and puts off immediate action in favor of perpetual planning and reorganization.

IV. CONCLUSION

In 1968 Hardin warned of a tragedy of the commons.⁵⁸ In 2002 his words have begun to ring true as the IBWC is perpetuating a tragedy of the commons in the Rio Grande River. The Rio Grande River has not reached the Gulf of Mexico in any meaningful way in years and a large sandbar has even formed at its mouth to the Gulf of Mexico.⁵⁹ Mexican

53. *Id.* at ¶ G(3).

54. *See* Nitze, *supra* note 13, at 14; *see also* Mumme, *supra* note 41, at 162.

55. MINUTE 308, *supra* note 26, at ¶ G.

56. *See* McCaffrey, *supra* note 28, at 77.

57. *See* Mission, *supra* note 38.

58. *See* Hardin, *supra* note 1.

59. *See* Sharing, *supra* note 8, at 1; *See also* INT'L BOUNDARY AND WATER COMM'N, RIO GRANDE DISCHARGE PROFILE, available at <http://www.ibwc.state.gov> (last vis-

farmers have recently realized that they can freely abuse the diminishing water supply without any real consequences.⁶⁰ Already, Mexico has accumulated approximately 1.4 million acre-feet of water debt to the United States.⁶¹ They are adopting unsustainable agricultural practices in favor of short-term economic gains. Regrettably, this short-term gain could ultimately result in long-term disaster.⁶²

Management of a shared, finite resource requires strong proactive leadership with enforcement power. The IBWC's failure to satisfactorily resolve a politically sensitive crisis highlights the inadequacies of the existing legal framework that controls the Rio Grande River. In 2002 the situation reached the executive branches of both countries and interfered with negotiation on other key issues in the wake of the terrorist attacks on September 11th.⁶³ Prolonged continuance of unsustainable practices in the region, combined with poor management and enforcement of existing legal agreements will only worsen Mexico's water debt and perpetuate future political disputes.

The IBWC can prevent this by strongly adhering to the spirit of the 1944 Water Treaty as well as its stated mission. Currently, the IBWC is not acting "in a way that benefits the social and economic welfare" of the border populations.⁶⁴ The 1944 Water Treaty vested the IBWC with an opportunity to respond to changing conditions through its ad-hoc system of Minutes.⁶⁵ Minute 308 was on the right track, but fell short in several key areas. First, the IBWC did not adequately address Mexico's default of the 1944 Water Treaty terms. Minute 308's response to Mexico's water debt was to force them to payback a mere 6 percent of its debt. After discounting losses due to evaporation and infiltration, only about 4.5 percent will reach South Texas farmers.⁶⁶ The IBWC's refusal to proactively enforce the 1944 Water Treaty renders it nearly meaningless. If the terms of the 1944 Water Treaty are not equitable, then they should be renegotiated. Until then its terms should be strictly enforced by the agency charged to do so.

Second, the IBWC failed to provide specific direction about how Mexico should spend the money it committed to capital improvements.⁶⁷ The Minute merely recognizes Mexico's commitment to spend the funds, and it only suggests broad areas where the funds could be spent. Although the commitment of money is laudable, after the default of the 1944 Water Treaty it seems that Mexico should receive specific directions on how to

ited Feb. 22, 2003) (discharge at Brownsville is zero; Note also the IBWC is planning to dredge the sandbar and has a pending permit application with the United States Army Corps of Engineers to do so).

60. See ROSSON ET AL., *supra* note 21, at 2.

61. See *Sharing*, *supra* note 8, at 1.

62. See generally ROSSON ET AL., *supra* note 21.

63. See Taylor, *supra* note 14.

64. See *Mission*, *supra* note 38.

65. See Sinclair, *supra* note 24, at 115.

66. See MINUTE 308, *supra* note 26, at ¶ A.

67. *Id.* at ¶¶ B, C.

alleviate its water debt. By ensuring the committed funds are spent on specifically designated projects that will improve the efficiency and collection of Mexico's water use, future growth of Mexico's water debt might be mitigated. For example, funds could be allocated to immediate solutions such as offering farmers incentives to plant drought tolerant crops instead of irrigation intensive cash crops.

Third, Minute 308 did not adequately delineate how the IBWC will serve as a central forum for information exchange and consolidation.⁶⁸ From water level data to environmental quality data, the IBWC must serve as a central data clearinghouse for all information related to water management of the Rio Grande.⁶⁹ Instead of recognizing that Mexico and the United States will commit funding and personnel to aid the IBWC in this effort, the Minute should have been more specific and instead imitated Paragraph C, which specifically designated the funds Mexico planned to dedicate toward capital conservation projects. Additionally, the Minute should have included the exact date the new Interagency Advisory Council would be formed along with its specific goals and role.

Finally, the IBWC remains content to focus its efforts toward continued study and perpetual planning.⁷⁰ The problems of the prolonged drought are known and solutions abound.⁷¹ The IBWC is in the ideal position to take the lead role in mandating the construction and maintenance of conservation projects. In fact, Minute 308's Paragraph F appears to recognize this position by establishing the IBWC as a watchdog over newly implemented conservation works. The IBWC should also direct the creation of new projects. Such projects could include directing funding for creation of new agricultural irrigation methods, continued construction of comprehensive urban centralized wastewater systems, and adoption of non-point source discharge management controls in rural and urban areas to help preserve water quality.⁷² The IBWC could enforce the timetables for completion of the projects by withholding water allotments from each nation.

The IBWC had a golden opportunity and political spotlight to come up with concrete enforceable language to solve the ongoing problems. Instead, they opted for small stopgap measures and overly broad language with no enforceable milestones or financial incentives for Mexico to proactively mitigate its water debt. By calling for the drafting of more plans and negotiations, precious time is lost from solving the on-going problem. Although diplomacy sometimes necessitates the use of broad language, when millions of people's lives, livelihood, and pleasure is dependent on a finite resource like the Rio Grande River, hard-line mea-

68. *Id.* at ¶¶ D, G(1), G(3).

69. *See generally* Mumme, *supra* note 41, at 163.

70. *See* MINUTE 308, *supra* note 26, at ¶ G.

71. *See generally* Nitze, *supra* note 13.

72. *See* 1944 Water Treaty, *supra* note 15, at art. 3 (water uses must "give preferential attention to the solution of all border sanitation problems").

tures, management, and strong language are needed to ensure the resource's vitality. The waters of the Rio Grande River are a dwindling resource, and the more time spent planning for solutions only means more water will drain out of the bathtub without return.

Articles

