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State Government Officials' Role in U.S./Mexico Transboundary Resource Issues**

INTRODUCTION

The traditional view of foreign policymaking, where representatives of the federal government, particularly the President and the Department of State, are the actors that shape policy is becoming supplanted by a view that recognizes the significant role state governments and other domestic actors play in the foreign policy process. One of the traditional distinctions made between foreign policy and domestic policy issue areas is the undifferentiated or symmetrical internal impact of foreign policies. According to Rosenau:

. . . whatever the differences among the members (of a governmental system) they would seem minimal compared with the distinctions that set them apart from the members of other systems that comprise the environment. Fellow system members thus come to be viewed as a "we" who are constantly endangered by a "them."¹

Contrary to this view of foreign policy, not all foreign policy issues have an undifferentiated internal impact. There is a growing body of literature on the domestic sources of foreign policy which acknowledges that various domestic actors help shape certain foreign policy decisions. Zimmerman has theorized that where the domestic impact of a foreign policy is not symmetrical, as in the case of much economic and trade policy, domestic political institutions such as Congress and interest groups will get involved.² In the cases where foreign policy impacts are concentrated in particular geographic areas, the political arenas representing those areas, that is state and local governments, have increasingly participated in the foreign policymaking process much like they participate on what are more typically recognized as domestic policy issues.

While it is now recognized that domestic interests influence foreign policy, little systematic research has been done which analyzes and com-

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1. James Rosenau, "Foreign Policy as an Issue Area," *Domestic Sources of Foreign Policy*, 24 at 24 (1967).

2. William Zimmerman, *Issue Area and Foreign-Policy Process: A Research Note in Search of a General Theory*, 67 *Am. Pol. Sci. Rev.* 1204 (1973).

pare their contribution to policymaking on various types of issues. The increased participation of state governments in international relations has been studied by several scholars. They have primarily focused, however, on state involvement in transboundary organizations³ or on the activities of state governors or economic development agencies in pursuance of increased international economic opportunities.⁴ Such analysis concentrates on why states have become increasingly involved in these issues and through which forums state actors are engaging in relations with foreign nations, with little attention being paid to particular policy issues or policymaking processes. Duchacek and Soldatos have presented theoretical studies on the general trend of increased participation by subnational actors (state and provincial governments) in national foreign policymaking.⁵ Neither scholar, however, discusses this phenomenon in terms of specific policy issues. Mumme has examined state and local influence on specific transboundary water and air pollution issues, conducting very useful but narrow case studies.⁶

This paper proposes to move a step further in the analysis of state roles in foreign policy by examining the broader picture of policymaking concerning U.S./Mexico transboundary resource issues and what roles states have to play in the policymaking process. Transboundary resource issues present an ideal forum for studying the involvement of state actors in the foreign policymaking process. Observers of natural resources issues on the U.S./Mexican border have been warning for some time that the seriousness of problems concerning such issues is escalating.⁷ Institutional and political capacity to deal successfully with these problems has not kept pace. The consequences of growing problems outpacing mechanisms for solutions is especially important to states because a disproportionate share of the negative consequences falls upon residents of border states. For this reason, state public officials often have a stronger incentive to

3. See, for instance, Robert Chattan, *The Conduct of Foreign Relations by State Government Along the Mexican Border*, United States, Department of State, Foreign Service Institute, Executive Seminar in National and International Affairs, 1982-83; William Schmitt, *Border Governors Conference—A State Level Foreign Policy Mechanism*, United States, Department of State, Foreign Service Institute, Executive Seminar in National and International Affairs, 1982-83.

4. John Kline, *The International Economic Interests of U.S. States*, 14 *Publius* 81 (Fall 1984); John Kincaid, *The American Governors in International Affairs*, 14 *Publius* 95 (Fall 1984).

5. Ivo Duchacek, *International Dimension of Subnational Self-Government*, 14 *Publius* 5 (Fall 1984); Panayotis Soldatos, *Towards an Explanatory Framework for the Study of the Federated States as Foreign Policy Actors*. Paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C., Aug. 28-31, 1986.

6. Stephen Mumme, *State Influence in Foreign Policy Making: Water Related Environmental Disputes Along the United States-Mexico Border*, 38 *The Western Political Quarterly* 620 (Dec. 1985); Stephen Mumme, *State and Local Influence in Transboundary Environmental Policy Making Along the U.S.-Mexico Border: The Case of Air Quality Management*. Paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C., Aug. 28-31, 1986.

7. See, e.g., Albert Utton, *Overview*, 22 *Nat. Res. J.* 735 (1982).

become actively involved in problem solving than do federal officials. As several transboundary resource case studies illustrate, state officials do indeed attempt to influence federal policies that strongly affect state interests.

In order to analyze the role state actors play in the policy process concerning transboundary resource issues, this paper first looks at the nature of these issues, the incentives for and factors influencing the negotiation of binational settlements, and the roles of state decisionmakers in that negotiation process. Next, the paper takes a closer look at the domestic U.S. policymaking process concerning transboundary resource issues and examines state government officials' roles at the different stages of the process from initial agenda setting to implementation. Specific examples from case studies are cited and shortcomings of the existing decision processes are summarized. Finally, the paper suggests the direction for improved future transboundary resource decisionmaking.

NATURE OF U.S./MEXICO TRANSBOUNDARY RESOURCE ISSUES

The U.S. citizens along the nearly 2000 mile-long border between the United States and Mexico experience an adjacency effect that is different from and more intense than that experienced by other U.S. citizens. This adjacency presents a factor which makes our foreign policy relations with Mexico different from those with any other nation except perhaps Canada.

Adjacency with Mexico has resulted in many commonalities between the two nations, including people, history and language. Almost ten million Mexican-Americans are in the United States, most concentrated in five Southwestern states. Since 1950, the Hispanic population of the United States has increased by 256 percent, compared to just under 50 percent for the total U.S. population. In addition, the number of undocumented workers now living in this country is estimated to be between three and one half and six million.⁸ Further, adjacency to Mexico evidences itself in a number of policy areas affecting states: crime control, public health, education, and economic development are obvious. Yet, because natural and environmental resources are physical systems which are ignorant of international boundaries, adjacency is especially relevant to resource allocation and environmental protection. Moreover, these physical systems are increasingly subjected to stresses, the adverse impacts of which affect both the United States and Mexico.

Much has been written about air, water, oceans and migratory wildlife being common pool resources in which it is difficult to establish property rights and restrict the impact of use to users. The common characteristics

8. Roberto Villarreal, *Hispanic Leadership and the Immigration Issue* (1985).

of these natural resources are not salient as long as the resource is abundant. For instance, until recently it has not been important how much groundwater lies beneath the border region and how it is to be allocated. However, startlingly rapid population growth has created water demands that outstrip supplies. Rather than signaling conservation, the scarcity or degradation of common pool resources actually operates to produce perverse management incentives. In the case of transboundary groundwaters, neither the United States nor Mexico has security or assurance that it will get a fair share of good quality water, and so mining of groundwater is rampant. It is estimated that only five percent of the water overdrafted each year from the Hueco Bolson underlying El Paso/Ciudad Juarez is being recharged. There is a strong economic incentive to exploit the resource as quickly as possible—to “race each other to the bottom of the aquifer.”⁹

Scarcity and resource degradation are common along the border, and groundwater is only the latest in a series of resources to show the symptoms. The U.S./Mexico border runs mainly through a fragile desert ecosystem with a limited biological carrying capacity. Yet the population in this area has burgeoned, and increases show no signs of abating. On the U.S. side, the Sunbelt continues to attract people, mostly to urbanized areas. Population on the Mexico side is growing even more rapidly, and a three percent per year increase in the work force is predicted to continue at least until the year 2000.¹⁰ The groundwater overdraft already noted is but one indication of the full appropriation of surface water on the two major international rivers, the Rio Grande and the Colorado. Increasing demands on surface water have also had an adverse effect upon water quality and have resulted in higher levels of salinity. Pesticide contamination is common. Exploding cities have outstripped wastewater treatment capacity in Mexico, and sewerage contaminates north-flowing rivers such as the Santa Cruz and the New River, and other surface flows.¹¹ Beaches in San Diego are periodically closed by ocean disposal of Tijuana's wastes. Air quality in a number of twin cities along the border is degraded. A major threat to air quality is sulphur oxides coming from copper smelters located on both sides of the border.

CONDITIONS FOR AGREEMENT

The classic solution to common resource problems is to alter the perverse incentives to overexploit, often by governmental regulations which

9. Niles Hansen, *Economic Growth Patterns in the Texas Border Lands*, 22 *Nat. Res. J.* 805, 819 (1982), as quoted in Ann Berkley Rodgers and Albert Utton, *The Ixtapa Draft Agreement Relating to the Use of Transboundary Groundwater*, 25 *Nat. Res. J.* 713 (1985).

10. Utton, *Overview*, 22 *Nat. Res. J.* 736 (cited in note 7).

11. Milton Jamail & Scott Ullery, *International Water Use and Relations Along the Sonoran Desert Borderlands* (1979).

control behavior damaging to the shared resource. In Hardin's words, there must be "mutual coercion, mutually agreed upon."¹² Unfortunately, the necessary agreements have proven difficult to forge. Resource exploiters and polluters have a strong incentive to oppose regulation, while the public, which will receive general as well as diffuse benefits, may not be well informed of the stakes or strongly motivated to press for governmental controls.

Agreements become enormously more difficult to achieve when they must be forged in several distinct arenas. To regulate transboundary resources, separate accords must be reached within each nation, including whatever separate decisionmaking forums may be involved, and between nations. The likelihood of attaining the necessary mutual agreement depends upon the following factors, each of which appears problematic when applied to U.S./Mexico transboundary resource issues.

Stakes in Coming to an Agreement must be Roughly Equal

Negotiated agreements are more likely to occur when each party perceives that its interests are better served by some agreement rather than no agreement. There are many cases of transboundary resource conflicts where the status quo favors one side and that side shows little interest in negotiating. As the upstream nation on the Colorado River, the United States was slow to respond to Mexican claims to supplies or complaints about salinity. Mexico has likewise been slow to clean up sewerage from Nogales, Tijuana, and other cities when it flows into the United States.

Important differences in stakes may exist even when the impact of the problem appears similar, such as air pollution which flows both ways across the border. Concern about environmental quality varies from one society to another and is influenced by the stage of economic development. It may be that only after certain levels of well-being are attained do people feel they can afford concern with long-term health and aesthetics. Fairly stringent environmental laws have existed and been applied in the United States only since the 1970s. Mexican environmental laws are newer and, although they appear strict, have many loopholes. The Mexican environmental agency, SEDUE, is not strong and has had difficulties imposing air and water quality regulations. Even if environmental protection ranked higher as an issue in Mexico it seems doubtful that the border would be a priority region, considering the acute pollution problems in Mexico City.¹³ For that matter, the border region has not received priority treatment in the United States either.¹⁴

12. Garrett Hardin, *Tragedy of the Commons*, 162 *Sci.* 1243 (1968).

13. Larry Rother, In "Makesicko City," *New Smog Fear*, *New York Times*, Jan. 16, 1988, at 4, col. 1.

14. Richard Fagen, *The Politics of United States-Mexico Relationship*, in Clark Reynolds and Carlos Tello, *U.S.-Mexico Relations: Economic and Social Aspects* (1983).

Even when the states are roughly equal, motivations need not be the same in both countries. Participants will buy into agreements for associated rewards that may be remote from what appears to be at issue. General foreign policy or particular international strategic concerns may take precedence. For example, Mexico places a much higher priority upon its relations with the United States than does the United States with Mexico. For the U.S., relations with Mexico are a minor consideration in international affairs. Mexico is too weak a neighbor to create the sort of crisis that pushes relations with it to the top of the U.S. foreign relations agenda.¹⁵

It is not always obvious what motivates nations in negotiations. For instance, Mexico may be accommodating in installing controls on its new copper smelters, even though pollution flows mainly toward the United States, because it wishes U.S. support in economic development loans. More subtly, it has a strong stake in upholding international law, which can serve as a potential defense against the feared United States. For example, the Arbitral Tribunal's finding in the *Trail Smelter* case that the nation in which pollution originates is responsible for abatement would seem to place the burden upon the Mexicans.¹⁶ In deference to this point of international law, Mexico has agreed to a costly acid plant at its new smelter. Fear of reprisal may also create a stake. Mexico's economic vulnerability in relation to the United States frequently forces it to bargain from a position of weakness.

Inherent defects exist in negotiated settlements where some stakes are remotely associated with the substantive transboundary resource issue or are based on fear and weakness. Decisions made on the basis of larger foreign policy concerns may carry a lack of commitment and settle poorly with border residents. Issues joined in agreements may become separated or international power relations may change so that agreements are no longer supported or observed. For instance, when Mexico's booming oil industry in the 1978-1981 period gave the country a new source of leverage vis-a-vis the United States, the Mexican government attempted to modify the terms of certain bilateral relationships including those concerning trade and immigration.¹⁷ The signing of a border environmental quality agreement by Reagan and de la Madrid (the 1983 La Paz agreement) is an example of decisions being made on the basis of other foreign policy concerns. Some analysts point out that in the face of extensive

15. For a discussion of the unequal relations between the U.S. and Mexico and consequences, see, Roberto Sanchez, *Acuerdos Binacionales en la Solucion de Problemas Ambientales Transfronterizos*. Paper presented at a Mexican/U.S. Conference on Smelter Emissions, Tucson, Arizona, Feb. 7, 1986.

16. *Trail Smelter case (U.S. v. Can.)*, III U.N. Rep., 1905 (1941).

17. George Grayson, *The United States and Mexico: Patterns of Influence* (1984).

disagreements over other issues such as Nicaragua, Cuba, tuna fishing, migration, and oil prices, both leaders felt the need to agree on something.¹⁸ The long-term effectiveness of this agreement is thus made questionable.

Negotiators must have the Ability to Perform as Promised in Agreements

While it may be possible to extract promises, agreements cannot be considered real unless they are followed by performance. Ability to perform is, of course, relative to how much is promised. Even so, the considerable differences between U.S. and Mexican world positions, economies and political systems raise potential performance issues. While Mexico is a Third World leader, it is by no means a great power comparable to the United States. Not only is the Mexican economy small, but it is currently in a severe crisis which limits the possible actions available to its government. While the highly centralized national government in Mexico is constrained by the country's economic weakness, the U.S. government is also constrained by its decentralized mode of domestic policymaking which gives strong roles to state and local governments.

The implications for performance of very different political systems are too complex for extended discussion here. However, differences in the degree of centralization present some real variation in the extent to which commitments are unfettered. Within their respective systems, Mexico City has much more authority than does Washington, D.C. to dictate natural resource policies to state and local governments. The allocation of water rights, for instance, is centralized in Mexico while a strong prerogative of state governments in the United States. Even in the areas of water and air pollution where the federal Environmental Protection Agency has considerable influence, state and local governments in the United States play an important role in implementation. Moreover, the role of state and local government is increasing.

THE ROLE OF U.S. STATES IN MEXICO-U.S. RELATIONS

State officials' involvement in international relations with Mexico are well-established and growing. Over the years, each of the border states has established standing organizational mechanisms to address border issues, including the Good Neighbor Commission of Texas, the New Mexico State Border Commission, the Arizona-Mexico Commission, and

18. Alan Weisman, *A Matter of Jurisdiction*, 254 *Atlantic Monthly* 20 (1984).

the Commission of the Californias.¹⁹ For the first four years of the 1980s, governors of the four U.S. and six Mexican border states met annually. Six standing committees operated throughout the year, one of which focused on the environment. An outgrowth of the Southwest Border Regional Commission, meetings of the governors and committee activities lapsed when funding for this federally supported activity was withdrawn.

Assessments of these organizational mechanisms vary. The greatest achievement seems to have been in establishing a network of communications among U.S. and Mexican border governors and creating an atmosphere of cooperation. As might be expected, the greatest contributions toward communications links were built at informal sessions.²⁰

Despite the formal demise of the governors conference, individual governors and their staffs continue to show strong interest in Mexico-U.S. relations. Hispanics represent an important segment of the voting constituency for Western governors, and border problems regularly press their way upon governors' agendas. Former governors Toney Anaya of New Mexico and Bruce Babbitt of Arizona, for instance, gave testimony in June 1986 to a U.S. Senate Committee headed by Senator Jesse Helms. The governors took issue with statements made by federal officials casting the Mexican government and political system in a bad light. Bruce Babbitt has long argued that Mexico deserves a higher place on the U.S. national agenda, calling Mexico, rather than Nicaragua or El Salvador, the real issue of the Western Hemisphere.²¹ In this case, Babbitt's long-term interests were obviously consistent with the large proportion of Mexican-Americans among his Arizona constituents and the growing importance of the Mexican-American vote nationally.²²

STATE CONTRIBUTION TO TRANSBOUNDARY RESOURCE POLICY

A misconception of the foreign policymaking process underlies the tendency to underemphasize state official and other domestic influences upon international relations. Policy is mistakenly viewed as a unitary decision made in the arena with formal authority, usually the Presidency and/or the State Department. Yet policy evolves from a process which has stages prior to formal legitimation. In addition, policies may or may

19. See, e.g., Chattan, *The Conduct of Foreign Relations by State Government Along the Mexican Border* (cited in note 3); Schmitt, *Border Governors Conference—A State Level Foreign Policy Mechanism* (cited in note 3).

20. *Id.*

21. Keith Rosenblum, *Mexico Should Be Made a Higher U.S. Priority, Babbitt Tells Forum*, *Arizona Daily Star*, June 21, 1985, at 11B, cols. 1 & 2.

22. Daniel Levy & Gabriel Székely, *Mexico: Paradoxes of Stability and Change* (2nd ed. 1987).

not be implemented, and when they are it is often in a form very different from that which was originally decided. To evaluate the contribution of state officials to transboundary resource policy, it is necessary to look at roles at each stage of the policymaking process: agenda setting, policy formulation, policy legitimation, and policy implementation.

By focusing on a sample of important transboundary issues it is possible to trace and assess state officials' contributions. Water allocation has been a continuing issue, with controversy occurring before and after the signing of the 1944 treaty dividing the waters on the Colorado and Rio Grande. The treaty represented a trade, with Texas receiving more Rio Grande Water in exchange for the Colorado River Basin states (Arizona, California, Colorado, Nevada and Utah) giving up twice the amount of Colorado River water to the Mexicans than they had wanted. This agreement has never been fully satisfactory to these basin states and they have continued to object to the settlement which they believe is overly generous to Mexico. The treaty also established the International Boundary and Water Commission (IBWC), and gave it, operating through separate U.S. and Mexican sections, day-to-day management authority of the Colorado River and the Rio Grande.²³

Water quality has also been a continuing transboundary resource problem. While it may have been implied, water quality was not mentioned in the 1944 treaty. Extensive agriculture in the Mexicali Valley is dependent upon Colorado River water. Increased water use in the United States concentrated salt loadings and the drainage water from the Welton-Mohawk Project in Arizona contributed quite salty supplies to downstream users. Mexico claimed crop losses and that the 1944 treaty was being violated. After extended negotiations and two interim agreements, an accord was reached in August 1983. Under Minute 242 of the IBWC the United States agreed to deliver water at a salinity level pegged to the average salinity at Imperial Dam.²⁴ Thus, Mexico was assured of receiving water not much more salty than that used by Imperial Valley farmers in California.

Sewerage and mine tailings also threaten water quality in the border region. Examples include overflow and seepage from the Cananea tailings ponds into the San Pedro River which crosses the border into Arizona. Tijuana sewerage reaches San Diego both through the Tia Juana and New Rivers and ocean currents. Similar problems in Nogales, Sonora were handled by an international treatment plant located in the United States and negotiated through the IBWC in 1971. Population increases in No-

23. Stephen Mumme, *Engineering Diplomacy: The Evolving Role of the International Boundary and Water Commission in U.S.-Mexico Water Management*, *I J. Borderlands Studies* 75 (1986).

24. *Id.* at 79.

gales, Sonora, however, have outstripped capacities making sewerage still an issue.

One transboundary resource issue area where there has been success in reaching bilateral agreement involves air pollution caused by copper smelters in what is referred to as the "smelter triangle." The location of three large copper smelters in close proximity to the Arizona-Sonora border raised health threats, especially to asthmatics, and fear of acid rain. Until February 1986, when the Nacozari plant opened in Mexico, the Phelps Dodge plant in Douglas, Arizona was responsible for most of the pollution. Because the plant was old, owners claimed they could not afford controls and until July 9, 1986 operated on variances received from the EPA. With the opening of the Nacozari facility and the planned enlargement of the smelter at Cananea to two and one half times its original size, the air pollution originating in Mexico within 50 miles of the U.S. border could potentially far surpass that emitted at Douglas.²⁵ In order to address the air pollution problem they shared, on January 14, 1987, the United States and Mexican governments signed the 4th Annex to the 1983 La Paz Agreement. This Annex places limits on sulfur dioxide emissions at all present and future smelters in the border region. Mexico agreed to have pollution control devices operational at the Nacozari plant by June 1988 and to limit emissions at Cananea when its operations are expanded. The U.S. government likewise agreed to curb emissions being generated on its side of the border, which was published by the closure of the aged Phelps Dodge smelter at Douglas on January 15, 1987.²⁶

CONTROLLING THE AGENDA

State governmental officials have played a significant role in determining agendas at the federal level. The likelihood that transboundary pollution problems will simply not be put on the agenda for solution is great because shared perceptions of stakes in a solution on both sides of the border are relatively rare. Consequently, the states have the most impact in blocking issues, but state officials have also participated successfully in getting some issues on the agenda.

The Colorado River Basin states took the position that no obligation to allocate water to Mexico existed and blocked successful negotiations on the issue until 1941. The Colorado River Compact of 1922, negotiated among the states, skirted the Mexican issue by a vague reference to the possibility of a treaty with Mexico at some future date, and Mexico was

25. Stephen Mumme, *The Cananea Copper Controversy: Lesson for Environmental Diplomacy*, 38 *Inter-American Econ. Aff.* 3 (Summer 1984).

26. Dinah Wisenbery, *Mexico, U.S.: Sign Pact on Border Air Pollution*, *Arizona Daily Star*, Jan. 30, 1987, at 3B, cols. 4 & 5.

simply assigned any surplus water that was above and beyond that claimed by the states. While the federal government may have had strong reasons for wanting a water accord in 1944, the agenda became unblocked mainly because of divisions among Western states. As mentioned above, Texas gained from the swap that gave it more Rio Grande water in exchange for Mexico receiving more Colorado River water. Satisfying Texas' interests proved important in gaining treaty ratification because the chairman of the Senate Foreign Relations Committee was Senator Tom Connolly of Texas.²⁷

Colorado Basin states were similarly successful for a long time in blocking consideration of Mexican complaints of excessively saline deliveries on the Colorado. The position of the Basin states was that Mexico had expressly agreed to accept return flows as part of its allotment and that the Mexican treaty contained no provision for the quality of water. In 1964, when the Johnson administration was concerned about its Alliance for Progress and the Mexican President, Lopez Mateos, argued that the salinity issue was an important diplomatic problem confronting the two nations, the issue took on national and not just regional importance and was taken up "over the heads" of the states.

Agenda placement presents more challenges to states than does agenda blocking. In order for problems that states want to be considered at the national level to be taken up, states must overcome the low priority given to U.S./Mexican relations by the national government, as well as whatever reluctance may exist on the part of the Mexican government. In particular, it is more difficult to get an issue on the agenda at the Presidential level where meetings are infrequent and agendas are crowded than at lower levels such as the IBWC.

State officials have been active in drawing attention to border pollution problems. While much of the publicity is generated by journalists, environmentalists, and city and county officials, state health, environment, and parks and recreation officials have also helped to gain attention. For example, the Arizona Department of Health Services and Arizona Game and Fish Department officials were prominent in prodding the IBWC to protect Arizona from Mexican mine tailing pollution on the San Pedro River.²⁸ State officials from California and Arizona joined conservation groups, Congressional delegations, and local officials in expressing outrage over a number of instances of border water pollution in 1979 and successfully called on President Carter to include the topic in discussions with President Lopez Portillo in 1979.²⁹ Similar demands undoubtedly

27. Philip Fradkin, *A River No More: The Colorado River and the West* (1984).

28. Jamail & Ullery, *International Water Use* (cited in note 11).

29. *Id.*

undergirded the environmental discussions of Reagan and de la Madrid in La Paz in 1983, which led to the signing of the Border Environmental Cooperation Agreement of 1983 (known as the La Paz Agreement). In this case, Arizona's governor and Congressional delegation, who were concerned primarily with the smelter air pollution in the smelter triangle, formed a coalition with a California delegation seeking resolution of the San Diego-Tijuana sewerage pollution problem. Together with other state and Congressional officials concerned with acid rain, this coalition of state actors succeeded in placing border environmental issues as a set on the La Paz summit agenda.³⁰

POLICY FORMULATION

Influence over the substance of policy depends upon establishing close links to those actually making or legitimating the decision and exercising expertise over subject matter. The broad outlines of policy set out at the Presidential level, such as the La Paz agreement, are largely established by the Department of State and reflect its diplomatic concern and expertise. In that case, the two executives agreed to seek solutions to border environmental problems within a comprehensive framework, designating national coordinators from each country, with mandates to work toward solutions to border pollution problems.³¹ After the broad outlines of policy are established, then state officials are in a position to influence the form of specific policy.

The position of the Colorado River Basin states had a considerable impact upon U.S. policy toward the salinity problem. From the beginning, the Basin states contended that the Mexican water treaty was a national obligation, and Congressman Morris Udall (D., Ariz.) managed to get language to that effect inserted into legislation.³² Raised during the Kennedy Administration and only briefly settled by Minute 218, the issue was successfully raised again by the Mexicans in the waning days of the Nixon Administration. A Committee of Fourteen, made up of state water officials and first established to advise concerning the Mexican water treaty, was reactivated to deal with the salinity issue. Herbert Brownell, appointed S.A. by President Nixon, met often with the members of this committee in formulating the salinity policy in Minute 242. Brownell pledged that nothing in the agreement would in any way hamper the

30. Mumme, *State and Local Influence in Transboundary Environmental Policy Making Along the U.S.-Mexico Border*, at 8 (cited in note 6).

31. Stephen Mumme, *Recent Advances in U.S.-Mexico Border Environmental Diplomacy: Implications for Settling the Smelter Triangle Dispute*. Paper presented to the U.S.-Mexico Conference on Border Smelter Emissions, Tucson, Ariz., Feb. 7, 1986.

32. Helen Ingram, *Patterns of Politics in Water Resources Policy: The Case of the Colorado River Bill* (1961).

orderly development of the Basin states because the solution of a desalting plant was based on federal dollars, not on the states giving up water. Wesley Steiner, Arizona State Engineer and Chairman of the Committee of Fourteen, credited unity among the states as the reason for their victory.³³

Border states consistently exert a great deal of leverage over policies formulated by the IBWC. According to Stephen Mumme, the principle authority on the IBWC:

Services to border states provide the Section with natural allies in defense of its institutional interests and functions and a reliable base of support independent of the Department of State. The U.S. Section has over the years nurtured this border state constituency at the level of state governments and Congressional delegations, developing an interdependent relationship of mutual benefit to the states and to the agency. This relationship . . . provides the states with substantial leverage over U.S. boundary and water policy.³⁴

POLICY LEGITIMATION

Because sovereignty is indivisible in the international arena, states are not ordinarily represented in formal decisionmaking processes concerning foreign policy issues. States have some voice on national legislative issues through their Congressional delegations, particularly if those delegations are unified in their position. However, when international agreements are being negotiated, states have little opportunity for input. Federal officials are named as coordinators of the bi-national task forces and working groups, and committees set up by agreements provide for state membership only by allowing the participation of "others."³⁵ Lack of formal representation can be frustrating to local and state officials who feel closest to the problem.³⁶

POLICY IMPLEMENTATION

State government officials have both enormous advantages and grave disadvantages in terms of influencing policy implementation. In the U.S., national policies such as the Clean Air and Water Acts are implemented through the federal system, and states would have considerable power

33. Fradkin, *A River No More* (cited in note 27).

34. Stephen Mumme, *Regional Power in National Diplomacy: The Case of the U.S. Section of the International Boundary and Water Commission*, 14 *Publius* 115(1984).

35. There are instances where state representation is official. A Smelter Triangle Task Force was set up pursuant to the La Paz agreement to forge a working agreement. Charles Anders of the Arizona Department of Health Services has membership along with EPA on the task force.

36. Joseph Nalven, *A Cooperation Paradox and an "Airy Tale Along the Border,"* 9 *New Scholar* 171 (1984).

over what, when, and how policies are implemented. In the same way, a state has power when international agreements depend upon state actions in implementation. However, when implementation depends upon the action of either the federal government or Mexican officials, state officials lack control and must use whatever resources they have to persuade.

States have exerted a great deal of influence over the EPA in the cleanup actions it has taken pursuant to national legislation and international agreements. States were able to fend off an EPA requirement of a salinity standard applied at state boundaries. In its place, states won a basin-wide approach and salinity standards were measured at only three points in the lower basin.³⁷

State success in affecting federal agency implementation of national laws and international agreements depends partly on their leverage in specific situations. In the case of the Douglas smelter controversy, state leverage has come from its authority to grant operating permits each year. In February 1985, Governor Bruce Babbitt came out strongly against renewal of the Douglas smelter's operating license.³⁸ In August, however, the Governor backed off this stand and opted for a "conditional" permit through December 31, 1985 and also gave support to a temporary waiver, a Nonferrous Smelting Order (NSO), from the EPA contingent on a demonstration that the facility did not pollute Mexican air by nocturnal emissions. The EPA postponed a determination on the waiver for months.³⁹ Finally, in July 1986, the state prodded the EPA into action by another about-face. The Arizona Department of Health Services pressured the EPA to act more quickly in disallowing the Douglas plant to delay compliance with the Clean Air Act. Director Lloyd Novick sent a letter to Region 9 EPA Administrator Judith Ayres requesting that the state be included in negotiations with Phelps Dodge and threatening not to issue a state operating permit unless a three-party agreement could be reached.⁴⁰ On July 9, 1986, EPA denied the NSO to Phelps Dodge and the state followed suit by denying an operating permit.

Conflicting concerns caused Arizona state officials to waffle and later to take a strong stand. On the one hand, state law does not give the state Department of Health Services broad authority, and a showing of clear and eminent danger is necessary to shut down a plant.⁴¹ In addition, the

37. Miller Taylor, Gary Weatherford, & John Thorson, *The Salty Colorado* (1985).

38. Jill Blonden, *Babbitt Asks E.P.A. to Deny Douglas Smelter Permit*, July 23, 1985, at cols. 1 & 2.

39. Mumme, *Recent Advances in U.S.-Mexico Border Environmental Diplomacy* (cited in note 31).

40. Statement of Lee Lockie, Arizona Department of Health Services. U.S.-Mexico Conference on Border Smelter Emissions, Tucson, Ariz., Feb. 7, 1986.

41. Letter from Lloyd Novick, Director, Department of Health Services to Ms. Judith Ayres, Regional Administrator, U.S. Environmental Protection Agency, June 20, 1986.

copper industry is a powerful interest in Arizona, especially in the state legislature. On the other hand, new research has provided mounting evidence of damage to asthmatics in the Douglas area, and a very effective lobbying campaign was waged by Richard Kamp who heads an organization called the Border Ecology Project. Further, state officials may have wished to avoid an awkward situation with Mexico. To get the Mexicans to agree to emissions limits on its smelters, it was imperative that the Douglas plant be brought into conformity with clean air standards. As the *Arizona Daily Star* editorialized:

It is more than a little hypocritical to ask the Mexican Government to impose pollution restrictions on smelters south of the border if EPA allows Phelps Dodge to pollute to the last possible moment. The U.S. has an agreement with Mexico designed to limit the border area pollution that will result when Mexico fires up a large smelter in Nacozari. That agreement is not ideal. It will not hurt to maintain a good negotiating position for the future.⁴²

The Douglas plant was initially closed down from July 9 to July 29, when it was allowed to operate again under the terms of a consent decree agreed to by Phelps Dodge, the state of Arizona and the EPA. Under the terms of the decree, the smelter was to cease operations on January 15, 1987 and to meet interim emissions levels or face a \$100,000 fine for each violation.⁴³ In the final analysis, it was Arizona state officials who put on the pressure to force the closure of the Douglas smelter one year earlier than originally anticipated. It could have continued to operate on variances to the Clean Air Act until January 1988.

States have difficulty affecting implementation when federal actions and resources are controlling. Both the need to tighten budgets and the conservative prescription to push solutions to problems back onto state and local levels are relevant. Settlement of the San Diego-Tijuana sewerage problem has been frustrated by the reluctance of the Reagan Administration and the Office of Management and Budget to allocate funds to an international project which may require further financial commitments. Moreover, the Administration believes that the Mexicans should pay for the cleanup of pollution they generate and that the federal budget should not be used to bail out a local and state problem. In contrast, San Diego residents feel that they are bearing the brunt of an international problem without much help.⁴⁴ Negotiations are continuing on mechanisms to re-

42. It's About Time: Keep PD's Douglas Plant Closed for Good, *Arizona Daily Star*, July 13, 1986, at 2E.

43. Dinah Wisenbery, Mexico, U.S.: Sign Pact on Border Air Pollution, *Arizona Daily Star*, Jan. 30, 1987, at 3B, cols. 4 & 5.

44. Weisman, A Matter of Jurisdiction (cited in note 18).

solve the transboundary sewage problem emanating from Mexico. While limited progress has been made in reaching formal agreement on the issue with the signing of the First Annex to the La Paz Agreement that addresses the Tijuana River pollution problem, many aspects of the issue remain unaddressed. Who will bear the financial burden of any future agreements remains unresolved.

States have the least leverage on implementation when action is required in Mexico. The different priorities and limited resources of Mexico frequently lead it to do less and to act at a slower pace in addressing pollution problems flowing north across the border than the border residents would like. The high degree of centralized administration in Mexico makes state-to-state or city-to-city solutions to problems difficult. The San Diego-Tijuana sewerage problem escalated when Tijuana refused San Diego's offer of equipment to repair a break in the sewer line. The mayor of Tijuana explained that in Mexico such international arrangements were the domain of the federal government.⁴⁵

International diplomacy can also sidetrack implementation. Plans were proceeding to build an international sewerage facility in the United States to treat Tijuana wastes when the United States reacted in a draconian fashion to the murder in Mexico of a U.S. drug control agent. U.S. retaliatory pressures cooled Mexican official attitudes toward joint ventures. Mexicans proposed to construct two plants on their side of the border, one of which would have quite negative consequences to natural areas in the U.S. To protect against possible breakdowns of Mexican facilities, San Diego plans to construct catch basins to collect spills and sewerage lines to deliver Mexican waste back across the border. Negotiations over funding continue.⁴⁶

Implementing agreements where joint action with Mexico is required is facilitated where institutions such as the International Boundary Waters Commission with United States and Mexican sections are involved. The IBWC successfully worked out the construction, financing and proposed enlargement of an international sewerage plant serving Nogales on both sides of the border. Because the land slopes north, it makes hydrologic sense to locate the plant on the U.S. side.⁴⁷ An attempt at a similar arrangement for San Diego-Tijuana fell through, however, as discussed above. The IBWC's efforts were upstaged by a diplomatic crisis, and Mexico withdrew its support of a joint resolution.

45. *Id.*

46. United States Information Agency, *TEXT*, newsletter from Embassy of the United States of America, Apartado Postal No. 88, Bis Mexico DF.

47. Jamail & Ullery, *International Water Use* (cited in note 11).

DISCONTINUITIES IN THE TRANSBOUNDARY RESOURCE POLICY PROCESS

The review of state experience in influencing transboundary policy at the various stages of the policy process on a number of different issues clearly demonstrates that states are indeed important actors. The fact that states have a significant role, however, does not make the process satisfactory even from a state's point of view. The policy process on transboundary resources has tended to be ad hoc and particular, with shifting patterns of influence from one issue to another and from one stage of policymaking to the next. The interest and concern of state residents who suffer the consequences of border environmental and resource problems are not dependably and consistently well-expressed.

The resistance of the national foreign policy agenda to matters dealing with Mexico has costly consequences. While it is possible for border states to keep issues dealing with Mexico off the agenda because a bias already exists to ignore Mexico, it may be difficult to get federal government attention and help for solving transboundary problems which are damaging to state residents. There is a general lack of ongoing institutionalized interest. The IBWC represents a significant and welcome exception. In the areas of its limited jurisdiction, it has operated steadily to address problems.

When transboundary issues are put on the national policy agenda, the underlying impetus may be diplomatic and strategic concerns loosely coupled with natural resource concerns. Also, the federal executive branch may have bureaucratic stakes in such issues as drugs, illegal immigration or corruption which confound their approach to transboundary resource problems. Under these circumstances, it is all too easy to formulate policies which are not really responsive to resource problems but which serve to give the appropriate diplomatic, strategic or bureaucratic message. Formulation of policy unresponsive to problems is less likely when pursued by an institutionalized agency like the IBWC with substantive expertise in water resources. Furthermore, policymaking on transboundary issues is plagued by the inability to link resources to agreements. It is possible to strike a general accord such as the La Paz agreement to lessen border pollution, yet the U.S. federal government is reluctant to undertake new obligations and the Mexicans lack financial resources.

Examining specific cases of transboundary resource policy teaches one overarching lesson. Problems are systematically and predictably occurring but there is not yet a systematic, institutionalized policymaking framework with which to respond. Stephen Mumme, a leading observer of policymaking on the border, has concluded that neither the United States nor

Mexico have yet committed to a comprehensive approach to settling environmental disputes, tending to resist any concession of sovereignty or sacrifice of political feasibility.⁴⁸ The greatest degree of institutionalization has come in water matters through the operation of the IBWC, although the reach of this organization to matters of protecting water quality and regulating groundwater is as yet tentative. For example, Minute 261, which in 1979 extended the application of the 1944 water treaty in the case of "border sanitation problems," is designed as a mechanism for giving this class of issues greater priority on the bi-national agenda, yet amounts to a statement of intention to seek specified agreements to problems rather than constituting a comprehensive framework for problem resolution.⁴⁹

The 1983 La Paz agreement does little more. The agreement includes language which commits both the United States and Mexico to a "comprehensive framework" for addressing bi-national environmental problems.⁵⁰ However, it actually provides only a framework for discussion and consultation across a range of environmental issues and in no way provides a concrete basis for the resolution of specific problems, leaving them to case-by-case negotiation. Eventually, the accumulation of experience in specific cases may permit the setting of priorities, standards, liabilities and a uniform mechanism for administration and enforcement.⁵¹ Without question, it is necessary to move toward means of solving problems that are as persistent and predictable as the problems.

CONCLUSION

Transboundary resource problems are issues which present an exception to the notion of a unitary federal executive branch making foreign policy. Transboundary resource policy has an asymmetrical effect upon different geographic regions. The adjacency effect upon residents of border states is such that the state officials who represent this geographic area contiguous to Mexico have a strong incentive for involvement in policy.

In order to arrive at a negotiated policy on transboundary matters, both sides must have roughly equal stakes in the issue and have resources sufficient to implement agreements. Achieving such mutuality is extremely difficult on common pool resource matters where the interests of resource users and polluters tend to be different from the larger communal

48. Mumme, *Engineering Diplomacy at 75* (cited in note 23).

49. Mumme, *Recent Advances in U.S.-Mexico Border Environmental Diplomacy* (cited in note 31).

50. Mumme, *Engineering Diplomacy at 75* (cited in note 23).

51. Mumme, *Recent Advances in U.S.-Mexico Border Environmental Diplomacy* (cited in note 31).

interest. Negotiating settlements between such diverse nations as the U.S. and Mexico compounds negotiation problems. When stakes and resources for dealing with transboundary resource problems are examined, it is clear that state officials must be closely associated with negotiations.

Formal bi-national governors' conferences and commissions are useful for promoting communication among the border region officials, but are not the major avenue through which state officials become involved in policymaking on transboundary resource issues. When the process of decision making on a sample of natural resource issues is examined, it is clear that state officials have a role in agenda setting, policy formulation, policy legitimation and policy implementation, with their role being particularly prominent in the first and last stages.

Even though state officials are important participants in transboundary resource policymaking, state interests are not served if the policymaking process is fundamentally flawed. A review of policymaking on a series of natural resource issues reveals that the process tends to be ad hoc and particularistic and unduly sensitive to the vagaries of international diplomacy. Events such as the murder of a drug control agent or comments by political figures may upset policymaking on natural resource issues. Further, the physical reality of stressed natural systems in the border region means that problems of scarcity and damage to environmental quality are bound to continue to arise. A more comprehensive and institutionalized means of dealing with problems is necessary, although this will mean a sacrifice of autonomy. It may also mean that U.S. border residents whose standard of living is below the rest of the nation will need to bear the largest share of the burden of managing and protecting transboundary resources.