

## **Comments on the International St. Mary – Milk Rivers Administrative Measures Task Force, Report to the International Joint Commission, April 2006**

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I offer these comments as a legal academic with an interest in the implementation of transboundary water agreements. I am most familiar with the Columbia River Treaty but I have spent some time over the last year or so looking at the Milk\St. Mary.

My overall assessment is that the Task Force has done a good job of exactly what it was asked to do, namely “to examine and report ... on measures for improvements to existing administrative procedures ... to ensure more beneficial use and optimal receipt by each country of its apportioned waters [including] examining ... administrative procedures, such as accounting procedures, surpluses and deficits, accounting periods.” I think that the report is an important first step but I also suspect that the process involved in developing this report has helped to create an environment in which it is possible to pursue win-win solutions to the central problem of facilitating each party in taking maximum advantage of its entitlement.

In my own reading I divide the report and its recommendations into two categories. First, there is the discussion and recommendations at pp. 28 – 33 dealing with natural flow. My conclusion here is that there is broad agreement amongst all the key players that we can and should do a better job of determining natural flow and accounting for withdrawals etc; the only caveat being that there is no point in getting this perfect if the last (expensive) increment is not likely to change the accounts. There seems to be consensus that this is a useful way forward and I offer no further comment.

The second part of the report dealing with balancing periods and the treatment of surpluses and deficits offers a useful discussion and exploration of the issues but does not offer concrete recommendations. It is evident that there is far less consensus on these issues and far less consensus as to how to proceed. Most of my comments relate to this second part of the report.

These comments proceed as follows. Part I offers a rather abstract analysis of the different levels of “ordering” that seem to apply to the apportionment rules for the Milk and St. Mary. Part II discusses a whole series of issues (Rolph and Lee Creeks, apportionment periods, balancing periods and treatment of surpluses and deficits) which the 1921 Order arguably failed to address (at least explicitly). Part III offers some brief comments on issues that I had hoped that the Task Force might spend more time and effort on.

### **Part I: Different levels of ordering in relation to the apportionment**

#### **1.1 A hierarchy of norms**

In reflecting upon just what it was that the Task Force was being asked to do and what it was not being asked to do I think that it is useful to have in mind the range of norms that apply to the apportionment of the Milk and St Mary. I see these norms in the form of a hierarchy which looks something like this:

1. Article VI of the BWT
2. The 1921 Order
3. The administrative measures needed to implement the 1921 order (e.g. how we go about doing natural flow calculations), and
4. Optimizing agreements such as the Letter of Intent and similar (but less formal) arrangements on the Eastern Tributaries that create win-win solutions and which, in effect, modify (at least *pro tem*) the outcome that would otherwise arise from the strict application of the 1921 Order.

I offer this (perhaps simplistic) analysis for several reasons. First, I think it helps clarify what we are talking about, and when. Second, it allows us to think about where the Task Force report fits and helps us think about the respective roles of the different players, the IJC, the accredited officers, users etc. Third, it emphasizes that there really is a hierarchy and that different processes apply to changing different parts of the hierarchy. Fourth, while there is a hierarchy we should also recognize that these four levels are interlinked. It is perhaps particularly important to emphasise that it will be difficult if not impossible for the players to engage in the bargaining required for level four agreements in the absence of clear rules in relation to 1, 2 and 3.

In my view the way ahead requires that we recognize that we are principally talking about options in relation to levels 3 and 4 of this ordering. We need to accept levels 1 and 2 as givens, at least for what they decide.

## **2.2 Why should levels 1 and 2 be treated as givens?**

Levels 1 and 2 should be treated as givens because level 1 creates the entitlements of the two parties and level 2 affords an authoritative interpretation of those entitlements. Certainty in transboundary relations and the need for certainty to build and operate storage infrastructure requires that we don't revisit the question of the entitlement under Article VI. Nobody seriously suggests that we re-visit the various entitlements created by the Columbia River Treaty (except in accordance with the procedure stipulated for terminating that treaty) which led to the construction of four significant dams even though BC's downstream power benefits perhaps turns out to be worth more than had been anticipated in 1961. It would similarly frustrate legitimate investment-backed expectations if we revisited the basic set of entitlements recognized or created by Article VI. The US at one time questioned the capacity of the IJC to provide a binding interpretation of Article VI but seems long ago to have given up on that position.<sup>1</sup>

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<sup>1</sup> This was the US position at the St. Paul hearings and Secretary Lansing maintained that position in diplomatic correspondence in 1917 before apparently modifying that position in 1919.

But there is a caveat here and it's this, levels 1 and 2 should only be treated as "givens" for what they have actually decided. There are at least a couple of instances where the 1921 Order seems not to have explicitly addressed a matter although a practice may have developed since then (at level 3) which does address the issue.<sup>2</sup> One such issue that may fall into this category is that of Rolph and Lee Creeks which takes us from these introductory remarks to matters of more substance.

## **Part II.**

### **2.1 Lee and Rolph Creeks**

The 1921 order does not address the apportionment of these two streams but, as a matter of practice, Canada receives essentially the entire benefit of these two streams since there is no significant upstream use. The failure of the 1921 Order to deal explicitly with this issue suggests that there might be a case for going back to the IJC and having the IJC rule on the question of how Article VI applies to Rolph and Lee Creeks if the parties are unable to agree on this question.

That said there are at least two or three possible constructions open to the IJC. First, there is what we might call the precedent approach. Using this approach the IJC might apply the same approach to Rolph and Lee Creeks as it applies to the eastern tributaries (i.e. the waters are to be shared, but the need to share only needs to be addressed if and when the upstream state is in a position to interfere with the entitlements of the downstream state). Until then the waters are not formally apportioned and the downstream state receives whatever waters pass down to it. Second, the IJC might apply a pooling approach. On this approach the IJC might require that Rolph and Lee Creeks somehow be pooled with the St. Mary for the purposes of determining Canada's entitlement (i.e. "deliveries" to Canada through these creeks might serve to reduce what the US would otherwise required to deliver on the mainstem of the St. Mary. Third, the IJC might reach the same result as it did under the first construction but by applying the "surplus" approach to these waters. On this basis the IJC would treat the "deliveries" through Rolph and Lee Creeks as US surplus deliveries (since the US cannot put them to beneficial use) and, as we know (and deal with in greater detail below), the upstream state does not get credit for surplus deliveries.

In sum, while one or more of the parties might be persuaded of the wisdom of approaching the IJC on this matter there are at least two reasons for thinking that the IJC might well simply confirm the status quo. Certainly the status quo seems to treat the waters of Lee and Rolph Creek in a manner that is consistent with other waters subject to apportionment. It might be useful to have this matter settled before the parties and the

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<sup>2</sup> As part of the negotiating context for Article VI we might recall that it was originally contemplated that the Milk and St. Mary issue would be dealt with by way of a separate treaty. Consequently, when the decision was made to deal with it as part of the BWT some of the detail that had previously been discussed dropped off the table. For example, Secretary Root's 1907 14 point proposal provided for daily apportionment and stipulated that surplus deliveries would not attract a credit.

Task Force devote more time and energy to pursuing the matters identified in Appendix K.

## **2.2 Apportionment periods, balancing periods, surpluses and deficits**

The report recognizes that there is a set of interrelated questions that are central to the ability of the upstream state to take advantage of its entitlement. These questions are: (1) the period for determining the entitlement, (2) the balancing period within which a party must meet its obligations or be in a surplus or deficit position, (3) the treatment of deficits, and (4) the treatment of surpluses. While these are best analysed separately it perhaps bears emphasizing that both a long balancing period and a system of credit for surpluses each offer the upstream state similar benefits in terms of a larger discretionary power with respect to the timing of downstream releases.

As between the two it will likely be more fruitful to explore the concept of credits for surpluses rather than extending the balancing period. It will likely prove easier to develop a system for checks and balances (to protect the interest of the downstream state) in a credit-for-surpluses system than it will if the parties were to use a longer balancing period. A longer balancing period more clearly vests the discretion over releases with the upstream state.

### **2.2.1 The period for determining the entitlement**

The 1921 Order addresses the period for determining the entitlement of each of the parties in an authoritative way. This is because paragraph V of the 1921 Order requires daily measurements and requires that the entitlement is to be fixed in accordance with those daily measurements. Thus the period for *determining* the entitlement is “daily”. It is perhaps important to recognize that all of the key players seem to accept this proposition (indeed it is implicit if not explicit in all of the submissions) and it is of course a central point. Without agreement on this there can be no discussion of surpluses and deficits.

### **2.2.2 The balancing period**

The length of the balancing period is an important question because it goes directly to the scope of discretion available to the upstream state and therefore to the certainty (especially in relation to timing) of the entitlement of the downstream state.

Does the 1921 Order address the balancing period? I think it is pretty clear that it does not do so expressly, but does it do so implicitly? I think that there is a fairly strong argument that the Order implicitly addresses the balancing issue insofar as the natural presumption is that if you measure daily in order to apportion daily then you must balance daily (unless at least the text says otherwise). But since it was perhaps not possible to balance daily in 1921 the Accredited Officers agreed to adopt bi-monthly balancing periods. Thus the scenario that currently prevails is that we have an agreement at level 3 that sets the balancing period.

What are the implications of this? I think the implications are two-fold. First, if the parties asked for an interpretation of the balancing period the IJC would be most likely to adopt a balancing period that tracked the determination period. Second, if the IJC so-ruled it would of course be open to the parties, by agreement, to adopt another such period but one would expect them to do so only if the new period offered each some benefit over the default position of a daily balancing period. Such an agreement would effectively be a level 4 agreement.

The Task Force report contains an inconclusive discussion of the possibility of adopting a different balancing period. Most of that discussion deals with the possibility of lengthening the balancing period rather than shortening it and concludes (at least with respect to the St. Mary) that lengthening the balancing period would only make a material difference if the balancing period were lengthened, either to the entire irrigation season or an annual period.

The purpose of my comment is to suggest that if the parties cannot agree to retain the current bi-monthly period and seek instead to refer this to the IJC, the strict text of Article VI is more likely to push the IJC to adopting a shorter, daily balancing period rather than the current bi-monthly balancing period which the Accredited Officers arguably adopted out of convenience and because of technical limitations. It would not likely be longer and I think it inconceivable that the IJC would rule that the balancing period would be an annual or even a seasonal balancing period.

I say this because one of the implications of a balancing period of that length (seasonal or annual – and indeed, why stop there) is that it accords the upstream state *carte blanche* as to when it makes deliveries. That is an unreasonable interpretation of the 1921 Order and of the treaty and an interpretation that is inconsistent with the idea of differing entitlements depending upon the state of flow (i.e. above or below 666 cfs). Under an annual or seasonal balancing scheme a daily deficit delivery of the upstream state wouldn't matter so long as it was in balance by the end of the season\year.

In sum, the question of a balancing period is best explored not as a question of entitlement but as a question of optimizing procedures so as to create a benefit for both parties. The premise here is that any departure from the status quo or (more stringently) a daily balancing period should only be adopted if it creates a win-win for both parties.

### **2.2.3 The treatment of deficits**

It is useful to distinguish between the treatment of deficits and surpluses. While the 1921 Order does not refer to deficits directly it must do by necessary implication. This is because the Order only makes sense if we think about it in terms of the duties that it imposes on the upstream state. The upstream state has a duty to make available the downstream state's entitlement. Failure to do so is a breach of the terms of the Order (and of the treaty) for which the upstream state incurs international responsibility.

It is true that the Order does not say what happens in the event of a deficit delivery but general international law would impose a duty on the upstream state to make the downstream state whole by effecting delivery of the deficit as soon as possible thereafter. In that sense the practice of the Accredited Officers in requiring that deficits be made up during the next balancing period is simply giving practical effect to this general obligation in international law.

In sum, any variation of the duty to rectify deficits in the next period is best addressed (as it has been in the Letter of Intent) as an optimizing agreement where there is a win-win opportunity.

### **2.3.4 The treatment of surpluses**

As to surpluses, the 1921 Order really is truly silent on this matter and there is a good reason for that silence. Since the Order is really designed to impose obligations on the upstream state it doesn't have to say anything about surpluses since the upstream state has no obligations in relation to surpluses. But could this silence mean that the Order and indeed the treaty could bear an interpretation that allowed the upstream state to insist that it get credit for surplus deliveries? I think that the answer is clearly "no" for a couple of reasons. First, it seems inconceivable that had the parties intended to allow credit for surpluses that they would not have addressed the issue. Second, allowing credit for a surplus has serious implications for the downstream state both when the surplus is delivered or created and when it is captured or credited.

The implication for the downstream state *at the time the surplus is delivered* is that if the upstream state is to get credit for it then the downstream state had better have in place adequate storage or other facilities to make beneficial use of it. Again, had this been the intention of the parties one would have expected that the issue of credit would have been dealt with explicitly. It goes without saying that had the parties had in mind some middle position such as credit only for those surplus deliveries that the downstream state, in its opinion, might be able to make use of (i.e. the sort of test that the Task Force develops at page 41), then there is even more reason to think that the IJC would have addressed this in the order.

The implication for the downstream state *at the time when the credit is actually captured* is that the downstream state must accept a lesser delivery than it would otherwise be entitled to and that the upstream state has a discretion as to when to inflict that change of entitlement on the downstream state. Again, if this had really been the intention of the parties or the IJC is it not reasonable to think that the parties would have addressed the matter? And equally so if a more moderate rule were adopted (such as that the credit could only be claimed at a certain rate or time or with the consent of the downstream state.<sup>3</sup>)

In sum, the 1921 Order does not explicitly address the treatment of surpluses but there is good reason to think that if the parties asked the IJC for an interpretation of its order there

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<sup>3</sup> Note here that the Letter of Intent establishes rules of this nature.

could be only one possible interpretation of the text: no credit to the upstream state for surplus deliveries. So, once again, if credit is to be given for surplus deliveries credit should only be given as part of an arrangement that offers both parties a benefit over what they receive under the current administration of the 1921 Order. There is no *right* to credits.

#### **2.2.4 Instream flows**

It seems pretty clear that the Task Force deals with instream flows not because of the intrinsic importance of instream flows but simply as a way of reassuring the downstream state that the upstream state will not have an open-ended discretion were the parties to adopt a longer duration balancing period or to adopt a scheme of credits for surplus deliveries (see in particular the last sentence of the opening paragraph dealing with this issue on page 40).

I have four comments on this issue.

First, the treaty and the 1921 Order say nothing directly about maintaining minimum flows for the purposes of the aquatic ecosystem. That said, the reading offered above (in s.2.2.1 dealing with the period for determining the entitlement and section 2.2.2 dealing with the balancing period) implicitly requires instream flows. I argued above that the 1921 Order requires daily apportionment and, in the absence of an agreement to the contrary, must be taken to require daily balancing. If there is daily balancing there should be significant minimum flows on the St. Mary at the boundary since at low flow (i.e. below 666 cfs) the US has a duty to pass three quarters of the flow.

Second, the IJC itself lacks the jurisdiction to impose an instream flow requirement that deviates from the above. If the parties want to they can of course agree to do so as part of an optimizing agreement or as some sort of Protocol to the treaty.<sup>4</sup>

Third, there is another way to deal with instream flows and that is for each jurisdiction to apply its domestic procedures, such as the *Endangered Species Act* or the WCO process in Alberta. Such requirements would be consistent with the international obligations of both states unless those requirements purported to reduce obligations that that state might have under the treaty. While one can imagine situations of conflict (e.g. it has been argued that the operation of Libby for sturgeon flows breaches US obligations under the CRT) in other situations (such as the St. Mary) it is less obvious that a domestic minimum flow obligation of the upstream state that will contradict a treaty obligation to pass 75% or 50% of natural flow.

Fourth, and perhaps most importantly in terms of moving ahead, if I am correct in thinking that the Task Force really only considers the minimum flow issue as a way of reassuring the downstream states that its interests will not be jeopardized in the context of: (a) longer balancing or (b) credit for surpluses, it would make more sense to deal with this issue head on. Thus, rather than asking whether the Montana methodology for

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<sup>4</sup> See, for example, the Protocol to the original BWT dealing with the other St. Mary River.

determining a minimum flow is appropriate it would make more sense to ask the following type of question: “under what set of conditions is it possible for the downstream state to consider a system of credit for upstream surplus flows”?

If the parties are really serious about addressing the instream flow issue as an important issue in its own right and at an international rather than a national level then the starting point might well be daily balancing.

### 2.3 The way ahead

As I stated at the outset, the Task Force’s discussion is very tentative (and appropriately so) in relation to the issues of balancing periods, surpluses and deficits. So how might we proceed from here? I have suggested above that the better interpretation of Article VI and the 1921 Order is that the upstream state has no right\entitlement to: (1) a longer balancing period, (2) a longer grace period for discharging deficits, or (3) credit for surplus deliveries. Consequently, I have suggested that if any of these questions is to be pursued by the parties they should be pursued in the context of a win-win agreement – each party must be better off than it would be applying existing norms or the norms required by the 1921 Order as authoritatively interpreted by the IJC.

But this may beg another question. What is the duty on each party to explore these win\win solutions? In my view there is a strong argument that each party has a duty to participate in good faith in exploring these mutually beneficial possibilities if asked to do so by the other party. I think that this duty arises from three sources: (1) the general duty of good faith performance of treaties (Article 26 of the Vienna Convention), (2) the general doctrine of abuse of rights, and (3) the language of “more beneficial use to each” which we find in Article VI of the BWT (albeit as a direction to the IJC) and the equivalent but not identical paragraph VIII (b) of the 1921 Order

I am not suggesting here that the downstream state has a duty to accept any variation of the 1921 Order. I am merely suggesting that each state has a duty to consider alternative operations that offer win\win possibilities. In sum, it may well be at the end of the day that the downstream state might reasonably conclude that there are no benefits to be gained by recognizing a system of credits for surplus deliveries. Alternatively, the upstream state might conclude that the operating constraints that the downstream state insists upon to protect its position means that there are no real benefits to be gained from pursuing a system of credits (especially when applied to *all* the relevant water bodies). But none of that is inconsistent with the idea that there is a duty on both parties to explore reasonable proposals for optimizing operations.<sup>5</sup>

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<sup>5</sup> There is an analogy here to Article XII and XIII of the Columbia River Treaty (the Libby and Kootenay diversion provisions). Paragraphs (5) and (6) contain the reciprocal provision in each case to the effect that “If a variation in the operation of the storage is considered by Canada [the United States] to be of advantage to it the United States of America [Canada] shall, upon request, consult with Canada [the United States]. If the United States [Canada] determines that the variation would not be to its disadvantage it shall vary the operation accordingly.” In my view the subjective nature of this provision makes it little more than an operationalization of the duty of good faith discussed above.

### **2.3.1 Who should do what?**

One of my reflections on the hierarchy of norms referred to above is that different people get involved in the discourse at different levels. At level one we can expect heavy federal involvement and specifically involvement from the Department of State and DFAIT. At level two the principal actor will be the IJC (also located in Washington and Ottawa). Level three brings us to federal, state and provincial officials, principally engineers, who have more local knowledge of how to implement the arrangements. Level four is likely to involve some of the same people as level three but may also involve actual users of the water (e.g. irrigation districts and municipalities) and indeed these are precisely the people one would expect to have the knowledge basis and experience to imagine different win-win futures. This is surely what we should aim for.

## **Part 3**

### **3.1 What would I have liked to have seen more of?**

I understand that Montana's concerns to this point have focused on the St. Mary and I further understand that, given limited resources and time, the task force elected to focus on the St Mary and Milk mainstems. I also acknowledge that the Task Force has shown itself to be appropriately sensitive to the need for consistency (see e.g. pp. 28 and 51) (i.e. that principles that may be adopted with respect to balancing periods and surpluses etc should work for all the water bodies subject to Article VI of the treaty). That said, I think that it would have been useful for the Task Force to have documented some of the win\win solutions that the parties have adopted on the eastern tributaries.

For example, it is my understanding that a practice has arisen in which Canada is permitted (and indeed encouraged) to under-deliver during the spring melt on the eastern tributaries. This practice allows Canadian upstream storage to fill but this is of considerable benefit to downstream US interests. The practice offers downstream interests flood control benefits as well as the promise of larger deliveries later in the irrigation season when these tributaries might otherwise be dry under natural flow conditions and when these waters will prove far more beneficial than earlier in the season. It would be useful for all concerned (in this basin and other Prairie basins) if the Task Force could do a more complete job of documenting these and other optimizing agreements (both current and historical) on each of the St. Mary, the Milk and the Eastern Tributaries. At present, the only real example of a win\win agreement that the Task Force offers is the arrangement recorded in the Letter of Intent which is largely portrayed as a way of allowing Canadian irrigators and the Town of Milk River to take water that they would otherwise not be able to divert. In fact of course the arrangement, especially as modified in 2001, also affords the US an increased opportunity to take delivery of a larger portion of its St. Mary entitlement.