

Guidance in Seeking Approval for Uses, Obstructions, or Diversions of Waters Under the Boundary Waters Treaty of 1909



INTERNATIONAL JOINT COMMISSION



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This guide provides information on the process for seeking approval for uses, obstructions, or diversions of boundary waters pursuant to the Boundary Waters Treaty. The content contained herein may not necessarily reflect the views of the Governments of Canada and the United States and is not intended to be a substitute for legal advice.

INTRODUCTION

Many rivers and lakes flow along or across the border between Canada and the United States. The International Joint Commission (IJC) was established in 1909 by the **Boundary Waters Treaty** (Treaty) to help prevent and resolve disputes that may arise in these shared waters. For over a century the Treaty has allowed Canada and the United States to manage shared boundary waters responsibly, protecting them for the benefit of today's citizens and safeguarding them for future generations.

The IJC acts as a quasi-judicial body by deciding whether certain types of projects, such as dams, diversions or bridges, can be built or undertaken in rivers or lakes that flow along or across the international boundary. The Treaty distinguishes between projects built in boundary waters, waters flowing from boundary waters, and waters flowing across the boundary. In very general terms, unless there is a special agreement between the United States and Canada, new uses, obstructions or diversions of boundary waters cannot take place without the prior approval of the IJC if the proposed project will affect the natural level or flow of those waters on the other side of the boundary. Similarly, in the absence of a special agreement between the governments, new obstructions or protective works cannot be constructed or maintained in waters flowing from boundary waters or downstream from the boundary in rivers that flow across the boundary without the prior approval of the Commission, if the obstruction will raise the natural level of waters on the other side.

The IJC considers interests in both countries in accordance with the Treaty and may require that certain conditions in project design or operation be met to protect interests on either side of the boundary. If the IJC approves a project in response to an application, it issues an 'Order of Approval.' In cases where the operation of the project must meet certain conditions, such as flow requirements through a dam, the IJC appoints a board to monitor compliance with the Order of Approval on an ongoing basis.

This document provides guidance on the process for seeking approval for projects or activities pursuant to the Treaty. The guide is organized in two sections. The first section describes the application process in the IJC's [Rules of Procedure](#) and what an application should include. The second section provides an overview of the Commission's review process in accordance with Treaty requirements. A short glossary and flowchart illustrating the application and review process are also included.

SECTION I – ORDERS OF APPROVAL APPLICATION REQUIREMENTS AND IJC RULES OF PROCEDURE

The IJC has established Rules of Procedure for the conduct of its affairs in accordance with the Treaty. Part II of these rules sets out the procedures to be followed with respect to applications for Orders of Approval.

Who can make an application for an Order of Approval?

Either federal government may transmit an application directly to the IJC. Any person who wishes to use, divert, or obstruct boundary or transboundary waters must submit an application to the government within whose territorial jurisdiction the use, diversion, or obstruction is contemplated. This requirement in effect allows the governments to determine initially whether a particular project falls within those provisions of the Treaty requiring approval by the IJC. This guidance also applies to existing structures that may not be compliant with the Boundary Waters Treaty. An application for review may be brought forward for such structures.

Persons who consider that their proposed project requires or could require the approval of the IJC should provide the United States Transboundary Affairs Division of the Department of Foreign Affairs and International Trade Canada (DFAIT), or the Office of Canadian Affairs, Bureau of Western Hemisphere Affairs, U.S. State Department, with as much information as possible about the proposed project and request advice from DFAIT or State Department about whether the project would require Commission approval. Applications for project approval shall be prepared for the Commission and forwarded to governments with a request that the application also be transmitted to the Commission. (See IJC Rule of Procedure 12(2) in the glossary below.)

When is an Order of Approval needed?

In very general terms, the Treaty gives the IJC jurisdiction to consider and either approve or disapprove applications for certain uses of boundary waters, waters flowing from boundary waters, and waters flowing across the boundary that affect the natural level of waters on the other side. IJC approval is additional to, and does not replace, any domestic authorizations in the country where the proposal is located. For example, applicants should be aware of any requirements under Canada's International Boundary Waters Treaty Act and applicable U.S. laws and regulations.

In reaching a decision about whether IJC approval is required for a particular project, DFAIT and State Department may need to consider the nature and effects of the proposed project as well as the governments' obligations under the Treaty. Consultations may be needed with other government departments and agencies to assess potential impacts. Because the Treaty creates international obligations between Canada and the United States, the governments of the two countries may also find it necessary to consult each other, or third parties.

In considering whether IJC approval is required, governments may have to address the question of the cumulative effect of small projects, which in and of themselves may not require approval, as well as situations where effects are theoretical but not measurable. The cumulative effects question was drawn to the governments' attention in the 1985 IJC report on "Great Lakes Diversions and Consumptive Uses".

The Commission cannot require the governments to submit applications and is not responsible for ensuring that the Canadian and U.S. governments perform their obligations under the Treaty. It is up to each government to ensure that IJC approval is obtained for works and undertakings within their respective jurisdictions that require such approval. The IJC may bring projects to the attention of governments that the IJC becomes aware of and that could call for its approval.

Questions about whether an application is needed for a particular project should be directed to the federal government(s) where the proposed project will be located. Contact information is provided in the next section below.

How should an application be submitted?

Applications must be sent to either the Department of Foreign Affairs and International Trade in Canada, or the Department of State in the United States, depending on where the project will take place. The application should also include a request that the submission be transmitted to the IJC.

The mailing addresses for delivery to the governments are:

Foreign Affairs and International Trade Canada
US Transboundary Affairs Division (GGB)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2

U.S. Department of State
Office for U.S.-Canadian Border Affairs
WHA/CAN Room 3917
2201 C Street, NW
Washington, DC 20520

What should an application include?

An application should set forth as fully as necessary the facts upon which the application is based and the nature of the Order of Approval sought, as described in the IJC Rules of Procedure 12(1). The application should consist of the project details and relevant supporting information that will help to determine the extent of the impacts the proposed project will have on the water levels or flows along or across boundary waters. Depending on the nature of the project, additional supporting materials may be requested.

The following will generally be required in an application:

- The geographical location of the proposed project
- A summary of the nature and purpose of the project, clearly indicating how the proposed project will affect the water levels or flows along or across boundary waters
- A brief description of the type of work the project proposes to carry out
- The physical impacts the project is likely to have on boundary waters, supported with data and technical information such as hydrological and hydraulic analyses and modeling
- The construction method that will be used and how the construction will affect the levels or flows of boundary waters (whether temporary or permanent)

Two duplicate originals and an electronic copy of the application and of any supplemental information is required to be delivered to the IJC. Where the use, obstruction or diversion of waters for which the Commission's approval is sought has been authorized by or on behalf of the U.S. or Canadian government or by or on behalf of a state or province or other competent authority, two copies of such authorization and of any plans approved shall accompany the application when it is presented to the Commission. (See IJC Rules of Procedure 13 and 14).

What happens when an application is transmitted to the IJC?

When an application for an Order of Approval is transmitted to the IJC by the governments, the IJC proceeds with notifying the public and usually assembles a study board or directs one of its existing groups to investigate and advise on the matters related to the application. The study board is composed of an equal number of experts from both countries. The IJC relies on the expertise of the study board (or existing group) to provide informed technical analysis of an application and usually requests that it recommend if a project should proceed and how the structure should be operated.

How does the Commission involve the public?

The IJC has a long tradition of public engagement and anyone interested in the subject matter of an application, whether in favor of or opposed to it, is entitled to be heard. When the IJC receives an application, it holds hearings inviting public participation to assist it in determining the merits of the application. During these hearings, any interested government or person (including the applicant) is given a chance to present oral and documentary evidence and arguments on the proposed project before the IJC. Presentations can be made in person or through a lawyer.

Additionally, any interested government or person (other than the applicant) may present a statement in response to an application. This response shall include the facts and arguments bearing on the subject matter of the application and support or oppose the application, either in whole or in part. The applicant may then present a statement in reply addressing the allegations and arguments contained in the statements in response.

How are interests balanced?

The IJC is empowered to make its approval of an application conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed. The IJC may also require that suitable and adequate provision be made for the protection and indemnity against injury of any interests on either side of the boundary. With respect to uses and diversions, the exercise of this authority is discretionary. With respect to cases where the water level is likely to be raised on the other side of the boundary as a result of proposed obstructions in boundary waters, or in waters flowing from or across the boundary, the exercise of the authority is mandatory. If, after taking account of all relevant considerations, the IJC decides to approve a project, it usually does so in terms and conditions aimed at protecting other interests affected by the proposal.

How are decisions made by the Commission?

The Commission is composed of six Commissioners, three from the United States, appointed by the President with Senate approval; and three from Canada, appointed by the Governor in Council on the advice of the Prime Minister. When deciding on applications, the Commissioners must act impartially rather than represent the views of their respective governments. Under the IJC's Rules of Procedure, a

decision by the IJC can only be made with the concurrence of at least four Commissioners, so as to ensure the participation of at least one Commissioner from each country. Differences can and have occurred on rare occasions. If the Commission is equally divided, separate reports shall be made by the Commissioners on each side to their own government. In most cases consensus is sought and almost always received.

While there is no provision for an appeal of an IJC Order of Approval, the Commission can amend its Orders. In Canada the IJC has immunity from legal process as provided by the International Joint Commission Immunity Order, (C.R.C., c. 1315) issued under the Foreign Missions and International Organizations Act enabling provisions. In the United States, immunity is provided for in the International Organizations Immunities Act (22 USC Section 288, et seq.) and Executive Order 9972.

Does the public have access to documents relating to an application?

Records of the Commission, such as applications, public notices, press releases, statements in response, statements in reply, records of hearing (including exhibits filed), briefs and formal statements submitted at hearings or at other times shall be available for public information at the permanent offices of the IJC in accordance with its Rules of Procedure. Many documents are available on the IJC website at <http://www.ijc.org>.

SECTION II– IJC REVIEW OF APPLICATIONS TREATY REQUIREMENTS

Once an application is received, the IJC has to interpret relevant provisions of the Boundary Waters Treaty to determine whether it has jurisdiction over a particular matter, and if so, to determine the rules the Commission is to follow in handling the case. Articles III, IV and VIII describe the authority of the IJC to decide whether certain works or activities can be built or undertaken in rivers or lakes that flow along or across the international boundary. Below are selected provisions of the Boundary Waters Treaty of 1909:

Article III

“It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are

wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.”

Under Article III the two governments will not authorize any new use, obstruction or diversion in boundary waters that affects the natural level or flow of boundary waters on the other side of the boundary without the approval of the Commission unless a special agreement has been reached between the United States and Canada. The term “boundary waters” is defined for the purposes of the Treaty to mean waters from main shore to main shore of the lakes and rivers and connecting waterways along which the international boundary passes. Article III does not limit or interfere with the existing rights of the governments to undertake and carry on works in boundary waters, or with the ordinary use of waters for domestic and sanitary purposes. Cases under Article III affecting boundary waters have been presented to the Commission on the St. Croix River, St. Lawrence River, Rainy River, St. Marys River, St. Clair River, Niagara River and on the Lake of the Woods.

Article IV

“The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved.”

Article IV of the Treaty refers to the authority of the Commission to approve dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary. The lower St. John River is an example of a river that flows from boundary waters, and rivers like the Red, Souris, Kootenay and the Columbia are rivers that flow across the boundary within the meaning of Article IV. Waters flowing from or across the boundary are outside the Treaty definition of “boundary waters” but any construction or maintenance of remedial or protective works, dams, or other obstructions in these waters, whether they flow from or across the boundary, must be approved by the Commission according to the terms of Article IV, whenever the proposed works would “raise the natural level of waters on the other side of the boundary” – unless Canada and the United States have otherwise provided by special agreement between them.

Article VIII

“This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Article III or IV of this Treaty the approval shall be governed by the following rules of principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

- 1. Uses for domestic and sanitary purposes;*
- 2. Uses for navigation, including the service of canals for the purposes of navigation;*
- 3. Uses for power and for irrigation purposes.*

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division cannot be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of all interests on the other side of the line which may be injured thereby.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters flowing there from or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement."

Article VIII sets forth the rules or principles for the IJC to follow in considering cases. Some of these rules or principles provide considerable room for the IJC to use its judgment to reach decisions that achieve the overall purpose of the Treaty, which is to resolve issues along the boundary. The Treaty was intended by the governments to serve for the long term and its provisions are consequentially broad and flexible to address development proposals as they evolve over time.

Article VIII provides that the two countries have equal and similar rights in the use of boundary waters on their own side of the line. Article VIII also sets out an order of precedence of uses; the Commission may not approve a use that tends materially to conflict or restrain any use that is given preference over it in the order of precedence. In cases involving the elevation of the natural level of waters on either

side of the line as a result of projects on the other side in boundary waters, or in waters flowing from boundary waters or in waters downstream of the boundary in transboundary rivers, the Commission shall require, as a condition of its approval, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line that may be injured thereby. It is important to note that this provision does not require that there be no adverse impact or no net loss for any interest. This provision leaves room for the Commission to apply its own judgment in determining what provisions may be necessary for protection and indemnity. Different considerations in different cases may result in different applications of this provision in orders issued for approval of projects.

What does the IJC do after an Order of Approval is issued?

The Order of Approval often calls for the appointment of a Board of Control, composed of an equal number of Canadian and United States members, to assist with the oversight and implementation of the Order. Other conditions in the Order may establish monitoring mechanisms to help inform the IJC about how its Order of Approval is being implemented, to alert it to new or changed circumstances, and to assess the impact of the project and its operation on various interests, including the environment.

What is the process for amending IJC Orders of Approval?

The Commission's powers under Articles III, IV and VIII of the Boundary Waters Treaty give it a continuing obligation of oversight and review of its orders to assure that the Commission's actions are in conformity with the Treaty in light of all relevant circumstances. The Commission retains continuing jurisdiction over the subject matter of an application so that it can, at its own initiative or the initiative of others, amend the Order as appropriate. Rule 12(3) of the IJC Rules of Procedure states that any government or person entitled to request the issuance of further orders may present to the Commission a request setting forth the facts upon which it is based and the nature of the further order desired. The provisions of Article VIII that the Commission is bound to observe in the exercise of its jurisdiction over Article III or IV matters apply to both the original consideration of matters and to the continuing jurisdiction of the Commission in any particular matter. If the Commission initiates a process of amendment, it would proceed consistent with the provisions of the Treaty and its Rules of Procedure, with adequate opportunities afforded for public review and comment.

GLOSSARY AND RELEVANT RULES OF PROCEDURE

Application: A request for approval of the 'use, obstruction or diversion' of waters under the Boundary Waters Treaty. An application is presented to the Commission by one or both governments and normally sets forth the facts upon which the application is based and the nature of the Order of Approval desired.

Boundary waters: As defined in the preliminary Article of the 1909 Treaty, those waters 'from main shore to main shore' of rivers, lakes, and other waterways along which the international boundary passes. Not included in this definition are rivers flowing across the boundary or rivers flowing from boundary waters that are included under Article IV of the Treaty.

Boundary Waters Treaty: The Treaty between Great Britain (on behalf of Canada) and the United States of America, signed 11 January, 1909.

Government: The Government of Canada or the United States of America.

Special agreement: An inter-governmental arrangement – generally an exchange of notes or other arrangement – between the Government of Canada and the Government of the United States that operates to negate the need for a Commission Order of Approval under Articles III and IV of the Boundary Waters Treaty. The term special agreement is defined in Article XIII of the Treaty to include not only direct agreements between the two governments but also any mutual arrangement between Canada and the United States expressed by concurrent or reciprocal legislation on the part of the U.S. Congress and the Parliament of Canada.

Order of Approval: The formal document of approval by the Commission for works or activities built or undertaken in rivers or lakes that flow along or across the international boundary under Articles III and IV of the Boundary Waters Treaty. Under Article VIII, the IJC has the authority to decide on applications, and require “suitable and adequate provision” be made for the protection and indemnity against injury of interests on either side of the boundary.

Relevant Rules of Procedure: 12(1) Where one or the other of the Governments on its own initiative seeks the approval of the Commission for the use, obstruction or diversion of waters with respect to which under Articles III or IV of the Treaty the approval of the Commission is required, it shall present to the Commission an application setting forth as fully as may be necessary for the information of the Commission the facts upon which the application is based and the nature of the order of approval desired.

12(2) Where a person seeks the approval of the Commission for the use, obstruction or diversion of waters with respect to which under Articles III or IV of the Treaty the approval of the Commission is required, that person shall prepare an application to the Commission and forward it to the Government within whose jurisdiction such use, obstruction or diversion is to be made, with the request that the said application be transmitted to the Commission. If such Government transmits the application to the Commission with a request that it take appropriate action thereon, the same shall be filed by the Commission in the same manner as an application presented in accordance with paragraph (1) of this rule. Transmittal of the application to the Commission shall not be construed as authorization by the government of the use, obstruction or diversion proposed by the applicant. All applications by persons shall conform, as to their contents, to the requirements of paragraph (1) of this rule.

12(3) Where the Commission has issued an Order approving a particular use, obstruction or diversion, the Commission retains continuing jurisdiction over the subject matter of an application and reserves the right to make further orders relating thereto. Any Government or person entitled to request the issuance of such further order may present to the Commission a request, setting forth the facts upon which it is based and the nature of the further order desired. On receipt of the request, the Commission shall proceed in accordance with the terms of the Order. In each case the secretaries shall notify both Governments and invite their comments before the request is complied with.

13(1) Subject to paragraph (3) of this rule, two duplicate originals of the application and an electronic copy of the application and of any supplemental application, statement in response, supplemental statement in response, statement in reply and supplemental statement in reply shall be delivered to either secretary. On receipt of such documents, the secretary shall forthwith send one duplicate original and an electronic copy to the other secretary.

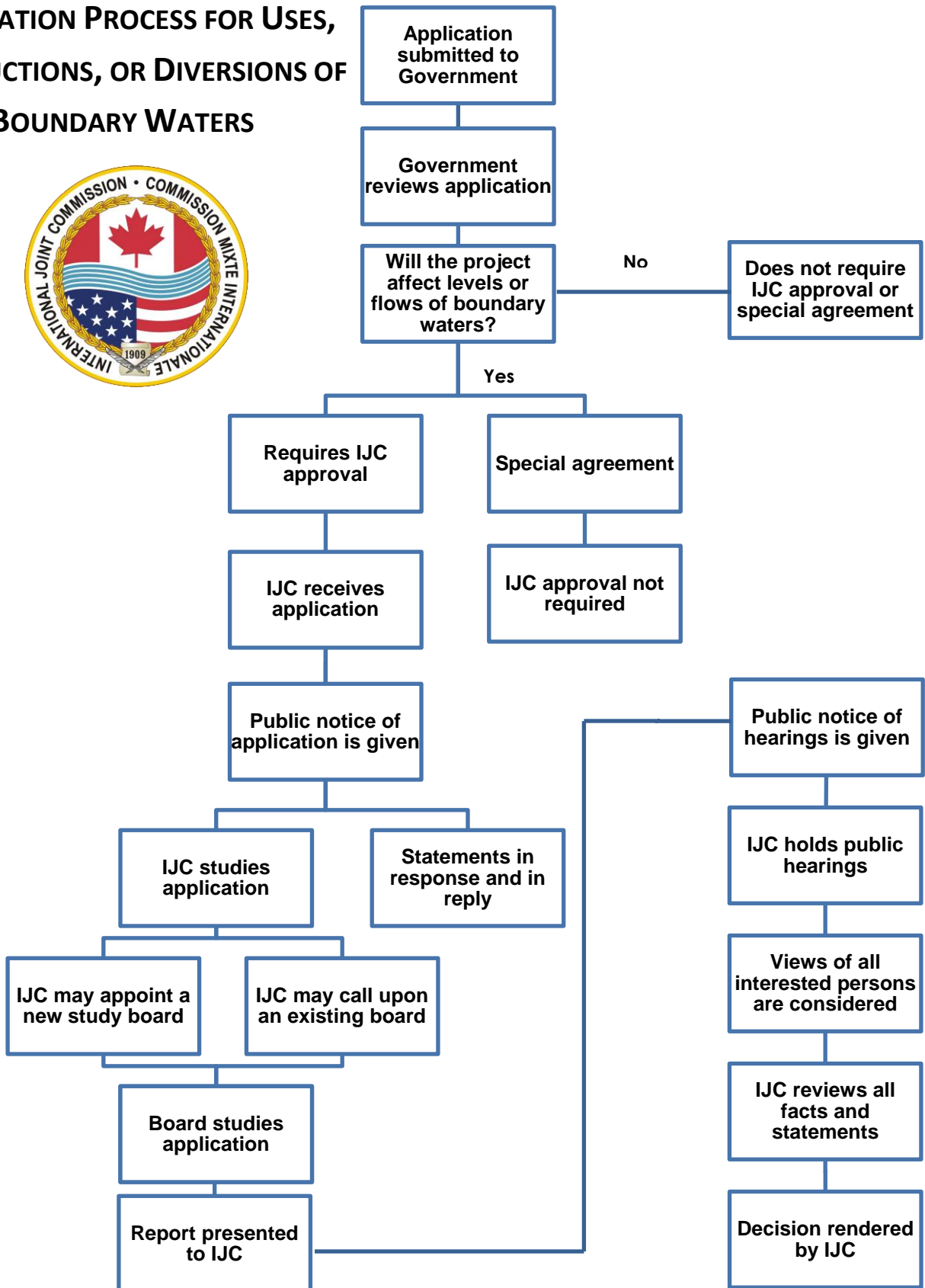
13(2) Subject to paragraph (3) of this rule, two copies and an electronic copy where practical of such drawings, profiles, plans of survey, maps and specifications as may be necessary to illustrate clearly the matter of the application shall be delivered to either secretary and the secretary shall send one copy and an electronic copy forthwith to the other secretary.

13(3) Notwithstanding paragraphs (1) and (2) of this rule, such additional copies of the documents mentioned therein as may be requested by the Commission shall be provided forthwith.

14(1) Where the use, obstruction or diversion of waters for which the Commission's approval is sought has been authorized by or on behalf of a Government or by or on behalf of a State or Province or other competent authority, two copies of such authorization and of any plans approved incidental thereto shall accompany the application when it is presented to the Commission in accordance with Rule 12.

14(2) Where such a use, obstruction or diversion of waters is authorized by or on behalf of a Government or by or on behalf of a State or Province or other competent authority after an application has been presented to the commission in accordance with Rule 12, the applicant shall deliver forthwith to the Commission two copies of such authorization and of any plans approved incidental thereto.

APPLICATION PROCESS FOR USES, OBSTRUCTIONS, OR DIVERSIONS OF BOUNDARY WATERS



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Over a century of cooperation in protecting our
shared waters