

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

Nigel Bankes, Professor of Law, The University of Calgary, July 2006, ndbankes@ucalgary.ca.

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.¹

¹ 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.² 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

² 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.³)

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

³ 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.⁴

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

⁴ 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.⁵

⁵ 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.



JUL 10 2006

ALBERTA
MINISTER OF ENVIRONMENT

Office of the Minister
M.L.A. Fort McMurray – Wood Buffalo

AR 21899

June 30, 2006

Mr. Ross Herrington, P. Eng
Senior Water Policy Advisor
Environmental Conservation Branch
Environment Canada

Mr. Daniel Jewell, P.E.
Area Manager
Montana Area Office
U.S. Bureau of Reclamation

Regina, Saskatchewan

Billings, Montana

Dear Messrs. Herrington and Jewell:

In regards to the International St. Mary and Milk River Administrative Measures Task Force Report, Alberta wishes to express sincere appreciation to the Task Force for its dedication and extensive review of issues relating to sharing the waters of the St. Mary and Milk River. It is Alberta's belief the Task Force has fostered a spirit of cooperation and mutual understanding of issues, concerns, and challenges in both countries, and their report offers a solid foundation both countries can build on as they continue to work together to find solutions that are of mutual benefit.

Alberta appreciated the opportunity to address the Task Force at their meetings in May 2006, and for the opportunity to provide the enclosed written submission entitled, *Alberta's Comments on the International St. Mary-Milk Rivers Administrative Measures Task Force Report*.

Alberta has positive relationships with Montana, and we intend to build on these to foster sound, creative water management solutions that are of mutual benefit. The economic and operational importance of certainty and stability to the apportionment and administration of water in the St. Mary and Milk Rivers cannot be overstated, and the 1921 Order should form the framework of any future cooperative arrangements.

Confidence in the stability and certainty of entitlements is necessary for Montana, Alberta, and Saskatchewan to commit to capital investments that are the key to efficient and beneficial water use.

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Edmonton, Alberta, Canada
Fort McMurray, Alberta, Canada

Mr. Ross Herrington
Mr. Daniel Jewell
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Alberta urges the Task Force and International Joint Commission to provide this stability and certainty required to move forward by confirming that the 1921 Order will form the framework of any collaborative future discussions on improving the operations of the St. Mary and Milk Rivers.

Best personal regards,



Guy Boutilier
Minister

Enclosure

cc: Honourable Ralph Klein
Premier

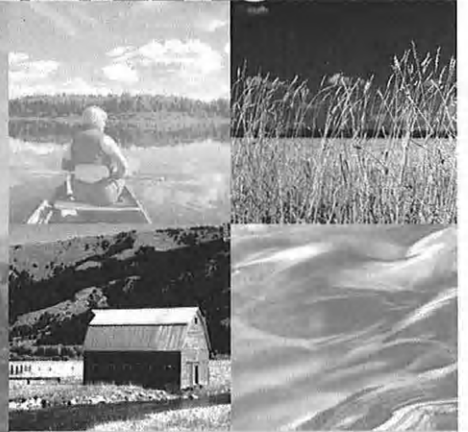
Honourable Gary G. Mar, Q.C.
Minister of International and Intergovernmental Relations

Honourable David Coutts
Minister of Sustainable Resource Development

Honourable Doug Horner
Minister of Agriculture, Food and Rural Development

Lenonard Mitzel
MLA, Cypress-Medicine Hat Constituency

ALBERTA'S COMMENTS



ON THE INTERNATIONAL
ST. MARY-MILK RIVERS
ADMINISTRATIVE MEASURES
TASK FORCE REPORT

Alberta

Front Cover Photo:
Milk River Valley

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EXECUTIVE SUMMARY

In 2003, the Governor of Montana requested the International Joint Commission (IJC) review the 1921 Order to determine whether or not it is meeting the intent of the 1909 Boundary Waters Treaty.

In December 2004, the IJC established the International St. Mary - Milk Rivers Administrative Measures Task Force (Task Force) to: "*... examine and report ...on measures for improvements to existing administrative procedures of the St. Mary and Milk Rivers apportionment to ensure more beneficial use and optimal receipt by each country of its apportioned waters*" – **within the terms of the 1921 Order.**

The Task Force released its report in April 2006. The following is a summary of Alberta's comments on the Task Force's report.

The 1909 Boundary Water Treaty is fair and reasonable. For the past 85 years, the 1921 Order, and its application by the Accredited Officers of the IJC, have formed the basis for capital investment in water management infrastructure required to store, convey and deliver water to farms, industry and power generation on both sides of the border.

It is Alberta's perspective the intent of the 1921 Order as laid out by Montana's member on the Task Force is fundamentally incorrect and inconsistent with the fair and balanced terms and conditions agreed to in 1909. Balancing water purely on a seasonal or annual basis will not accomplish timely delivery, rather, it will lead to a reduction in the rights of the downstream jurisdiction since it could receive most of its entitlements in the form of unusable winter and flood flows. Montana's interpretation fails to consider the realities and necessities of delivering water to consumptive uses such as livestock, irrigated crops, municipalities and industry in a timely and efficient manner.

The economic and operational importance of certainty and stability to the apportionment and administration of water in the St. Mary and Milk Rivers cannot be overstated. The Task Force report upsets the confidence of the landowners, investors and the Province since it did not specifically state the 1921 Order should form the framework of any future cooperative arrangements. Confidence in the stability and certainty of entitlements is necessary for the state and both provinces to commit to capital investments that are the key to efficient and beneficial water use.

The treaty was based on each country being able to take and make beneficial use of their respective share of available water, and the failure of one country to fully utilize its entitlements should not add to or diminish the rights of the other country. Further, Canada's infrastructure was designed to capture Canada's entitlements and to support the anticipated development during two consecutive drought years; with due consideration to the historical apportionment of water under the Treaty and the Accredited Officers' application of the 1921 Order for the past 85 years.

As such, while Alberta is prepared to continue to investigate potential modifications to the balancing period and surplus/deficit accounting, any such modifications must be based on the concept of mutual benefits. Where storage is provided for the direct or indirect benefit of the other country, due consideration should be given to the cost of building and maintaining the infrastructure.

Alberta supports the implementation of the following Task Force recommendations:

- Monitoring and reporting improvements, to ensure reliability, credibility and transparency in the computation and reporting of natural flows and entitlements.
- The use of formal agreements, such as the Letter of Intent, to implement potential improvements that are of mutual benefit, while maintaining the integrity of the 1921 Order
- The need to conduct more detailed evaluations for a broader range of alternatives to assess potential implications to both the upstream and downstream country *before* implementing changes
- Exploring novel and innovative approaches in sustainable water resource and environmental management to optimize beneficial use in both countries, provided it is within the context of the 1921 Order.

The request by Montana to open the 1921 Order seems to have been left on the table, without a conclusive response from either the Task Force or the International Joint Commission. Alberta would prefer a firm statement that the 1921 Order will form the framework of any collaborative future discussions on improving the operations of the St. Mary and Milk Rivers.

Alberta expresses its sincere appreciation to the Task Force for its dedication and extensive review of issues relating to sharing the waters of the St. Mary and Milk Rivers. The Task Force fostered a spirit of cooperation and mutual understanding of issues, concerns and challenges in both countries and that their report offers a solid foundation both countries can build on as they continue to work together to find solutions that are of mutual benefit.

Solutions can best be achieved by creating a bi-national working group made up of local stakeholders, communities and industry, with access to government and other experts. This working group could examine the net benefits to both upstream and downstream jurisdictions on each of these rivers using alternative administrative arrangements and infrastructure development.

1.0: BACKGROUND

In 1909, Canada and the United States signed the Boundary Waters Treaty to provide the principles and mechanism for preventing and resolving disputes concerning water quantity and quality along the border. The Treaty also established an International Joint Commission (IJC), to help resolve disputes. Article VI of the Treaty outlines how waters of the St. Mary and Milk Rivers are to be shared between Canada and the United States.

Following the signing of the Treaty, the two countries could not agree on the exact meaning of several terms in Article VI regarding how the St. Mary and Milk Rivers were to be measured and apportioned. Because the two countries could not agree, the IJC held hearings across Canada and the U.S. from 1915 to 1921 to gather recommendations and suggestions on how to measure and apportion these waters. Each year during this period the IJC issued a provisional order outlining how the waters of these rivers were to be shared during the coming year. The last provisional order was issued in March 1921.

On October 4, 1921, following many hours of hearings across Canada and the U.S., and a detailed reconstruction of the intent of the Treaty, the IJC issued an Order which clarified the Terms of the Treaty by establishing a set of rules under which the measurement and apportionment of water from the St. Mary and Milk Rivers would be made by Accredited Officers, one from each country. For the past 85 years the October 4, 1921 Order, commonly referred to as the "1921 Order of the IJC", has been used by the Accredited Officers appointed by each country to share the waters of the St. Mary and the Milk River.

In 2003, the Governor of Montana requested the IJC review the 1921 Order to determine whether or not it is meeting the intent of the Treaty. Montana contended that:

- i. The 1921 Order did not provide for equal apportionment;*
- ii. Circumstances are different today than they were in 1921; and*
- iii. There are problems with the administrative procedures that implements the Order.*

In July 2004, the IJC conducted a series of public meetings within the St. Mary River and Milk River basins, to gather information on issues surrounding the sharing of the Milk and St. Mary Rivers between Canada and the United States. In December 2004, the IJC established the International St. Mary - Milk Rivers Administrative Measures Task Force (Task Force) to: "... examine and report ...on measures for improvements to existing administrative procedures of the St. Mary and Milk Rivers apportionment to ensure more beneficial use and optimal receipt by each country of its apportioned waters" – **within the terms of the 1921 Order.**

The Task Force released its report in April 2006 and requested that comments on the report be submitted by June 30, 2006.

Alberta wishes to express its sincere appreciation to the Task Force for its dedication and extensive review of issues relating to sharing the waters of the St. Mary and Milk Rivers. It is Alberta's belief that the Task Force has fostered a spirit of cooperation and mutual understanding of issues, concerns and challenges in both countries and that the Task Force report offers a solid foundation both countries can build on as they continue to work together to find solutions that are of mutual benefit.

This document provides Alberta's comments respecting the Task Force report. The comments, which include Alberta's perspective on Task Force recommendations and clarification on certain technical discussions, are offered in the spirit of cooperation and to enhance our common understanding of issues and concerns as we explore potential opportunities that are of mutual benefit.

2.0: COMMENTS ON EXISTING ADMINISTRATIVE MEASURES

2.1: IJC Order of 1921

As indicated on page 12 of the Task Force report, “in 1899 the Alberta Irrigation Company applied for and received the right to divert the entire low flow and up to 2,000 cubic feet per second (cfs) of the high flow of the St. Mary River to irrigate up to 500,000 acres. By 1900, Canada had completed a 115-mile (185 kilometer) diversion canal with a capacity of 500 cfs, which conveyed St. Mary River water from a point near the crossing of the international boundary to present day Magrath.” In 1902 the Northwest Irrigation Co. applied for and received the right to divert 500 cfs from the Milk River during low water and 1,500 cfs during high water stages. In comparison, in 1908 the United States had allocated 450 cfs for irrigation of which 359 cfs were allocated directly from the Milk River.¹

In negotiations leading up to the treaty, Canada, in recognition of these vested interests and as compensation for the U.S. using the Canadian portion of the Milk River to convey U.S. St. Mary River diversions across Alberta, requested substantially more than half of the combined flow of the St. Mary and Milk Rivers. The U.S., whose territory was the source of most of the flow, requested that the flow be shared equally, with the U.S. receiving a greater portion of its equal share from the Milk River.

While the 1909 Boundary Waters Treaty and its reconstruction, the 1921 Order, result in Canada and the U.S. being entitled to about 55 and 45 percent, respectively², of the combined flow of the St. Mary River, Milk River and Eastern Tributaries, it represents a negotiated agreement that both parties considered to be fair and reasonable at the time.

However, the Treaty and Order are fair and reasonable not only because the two parties were able to agree on a set of terms, but also because of the balance it achieved in meeting the interests of the two countries. These being:

- i. *Granting the U.S. a prior appropriation on the Milk River and Canada a prior appropriation on the St. Mary River during the irrigation season to ensure the ongoing viability of vested interests in each of the two countries*
- ii. *Limiting the prior appropriation to each country to a maximum of 75 percent of the flow so as to ensure both countries always had some access to the flow within each of the two streams; and*
- iii. *Ensuring each country is entitled to an equal share of all flows above the prior appropriations and during the winter months.*

¹ “Hearing and Argument in the Matter of the Measurement and Apportionment of the Water of the St. Mary and Milk River and Their Tributaries – St. Paul Minn., May 24-28, 1915”, International Joint Commission

² “International St. Mary – Milk River Administrative Procedures Task Force Report”, April 2006

2.2: Fundamental Differences Between Alberta and Montana

During the May 1917 hearings in Detroit, Michigan; and the May 1920 hearings in Ottawa, Ontario; Montana's eminent Senator and Lawyer, the Honorable Thomas R Walsh, successfully argued that:

- i. While a "*vast amount of matter has come in ... the very matter before us [the commission] is to direct the question to the proper construction of this treaty.*"
- ii. That drafts of the treaty can and should be used in the construction; "*... to get at what the authorities were thinking about, what they had in their minds [in the wording of the Treaty]*"; and
- iii. That although not specifically mentioned in the treaty, the drafts indicated that apportionment was to be carried out at the international Boundary rather than at the mouth as was being argued by Canada.

It is noted that the same drafts referenced by the Honorable Thomas R. Walsh in his arguments list two other principles that were to be used in the sharing of the waters of these streams. These are:

- i. "*... that the water available for irrigation from these two river systems shall be apportioned from day to day...*", and
- ii. that "*...the failure of either country to fully utilize the right hereby agreed upon ...of the available water during the period specified in item 1 shall not be regarded as adding to or diminishing the rights of the other country.*"

For the past 85 years, the Accredited Officers have administered the 1921 Order using the above noted two principles to ensure that the agreed to balance between the right to prior appropriations, the right to access some water from each stream at all times,

and the right to an equal share of all flows above the prior allocations are maintained. For the past 85 years the 1921 Order and its application by the Accredited Officers, based on the above principles, has formed the basis for capital investment in water management infrastructure required to store, convey and deliver water to farms, industry and power generation.

It is Alberta's perspective that the intent of the 1921 Order as laid out by Montana's member on the Task Force is fundamentally incorrect and inconsistent with the fair and balanced terms and conditions agreed to in 1909. Alberta believes that Montana's interpretation would result in uncertainty as to the quantity and timing of the delivery of the downstream country's entitlements. It is Alberta's perspective that this interpretation is fundamentally incorrect for the following reasons:

- It is inconsistent with the principle of prior appropriation used in both Alberta and Montana, in that it would permit Canada on the Milk River and the U.S. on the St. Mary River to deprive the other country of its prior appropriations.
- It is inconsistent with the term in the Treaty that limits prior appropriations to a maximum of 75 per cent of the flow to ensure each country always receives a share of the flow, since it would permit the upstream country to take all or none of the water at its discretion.
- It is inconsistent with the Treaty's principle of maximizing beneficial use by each country of its allocated share, because it implies the upstream country (Canada on the Milk River and Eastern Tributaries and the U.S. on the St. Mary River) can take all of the flow for most of the year and deliver the downstream jurisdiction's entitlements in the form of unusable winter flows and flood flows.

Montana's interpretation fails to consider the realities and necessities of delivering water to consumptive uses such as livestock, irrigated crops, municipalities and industry in a timely and efficient manner. Balancing water purely on a seasonal or annual basis will not accomplish timely delivery. Annual balancing would require the downstream jurisdiction (Montana on the Milk River and Eastern Tributaries and Alberta on the St. Mary River) to build additional infrastructure at the International Boundary to capture and store surplus flows in order for water to be delivered continuously, while the upstream country could take all of the most desirable water with little or no infrastructure, thereby diminishing the right of the downstream jurisdiction.

2.3: Historical Apportionment

One of the reasons Montana states that there are problems with the administrative procedures is that Canada on average receives more water than its entitlements. While the Task Force tries to examine this issue, it is felt that the limited assessment provided in the report does not indicate "whether or not the apportionment, as defined by the 1921 Order, was being met" and that it is potentially misleading. In view of these limitations, the following discussion on "Historical Utilization" is offered for consideration by the Task Force and the International Joint Commission.

2.3.1: Historical Utilization by Canada and the U.S. of St. Mary River Entitlements

Figure 1, summarizes the percent of U.S. St. Mary River entitlements that the United States Bureau of Reclamation has diverted during the period of 1950 to 2001.

Figure 1

Annual U.S. St. Mary River Diversions as a Percent of Entitlement

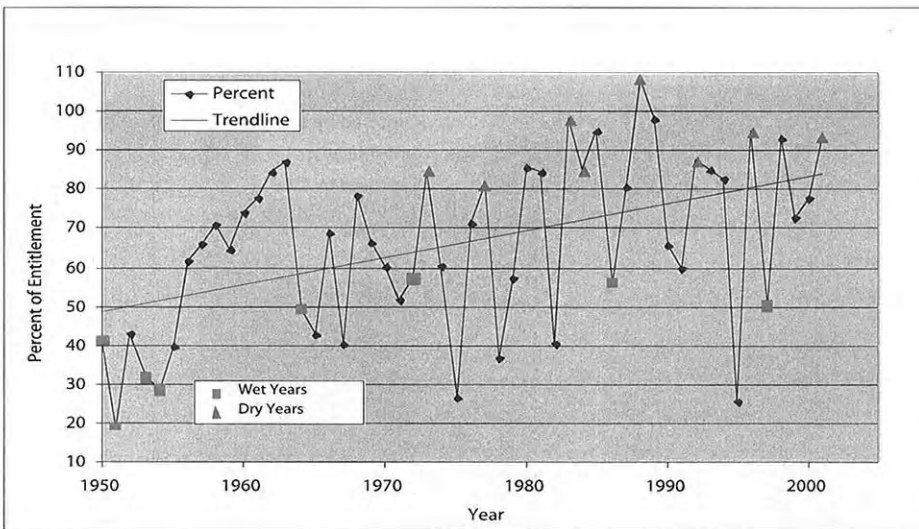


Figure 1 shows that the U.S. diversions have averaged approximately 62% during the 1950 to 2001 period, as per the task force report. However, during the most recent 10-year period U.S. diversions have averaged approximately 76% of their entitlements, while in the 1950-60 period they averaged 49%. Figure 1 also shows that during the eight driest years, the U.S. on average diverted 92% of its entitlements, while during the eight wettest years it only averaged 42%. As such, figure 1 this indicates the following.

- i. The 1950 to 2004 average is not representative of current conditions.
- ii. Since a substantial improvement in U.S. diversions was achieved over this time period without any modifications in the administrative procedures and with the U.S. St. Mary Canal significantly below its design capacity, the focus should be on improving U.S. operations and infrastructure rather than modifying the administrative procedures.

- iii. Since the U.S. has diverted about 92% of entitlements during dry years versus 42% in wet years, most of the surplus flow being delivered to Canada is likely in the form of flood flows, which neither country is able to utilize. As a result, modifications in the administrative procedures may provide little if any improvement in the U.S. ability to take a greater share of its St. Mary River entitlements.

In view of the above results, a second assessment was carried to determine the percentage of the flow of the St. Mary River Canada is actually able to utilize and what percentage may be in the form of winter or flood flows that neither country can capture and put to beneficial use without the development of additional infrastructure.

Figure 2 summarizes the 1980 to 2004 flows for the St. Mary River at the International Boundary in terms of the percent utilized (diverted) by the U. S., the percentage utilized (diverted or stored) by Canada, and the percentage that was spilled or released from the Canadian St. Mary Reservoir that could not be beneficially used by either country.

Figure 2

Percent of St. Mary River Flow Utilized by Canada versus Percent Utilized by U.S. versus Spills/Releases³

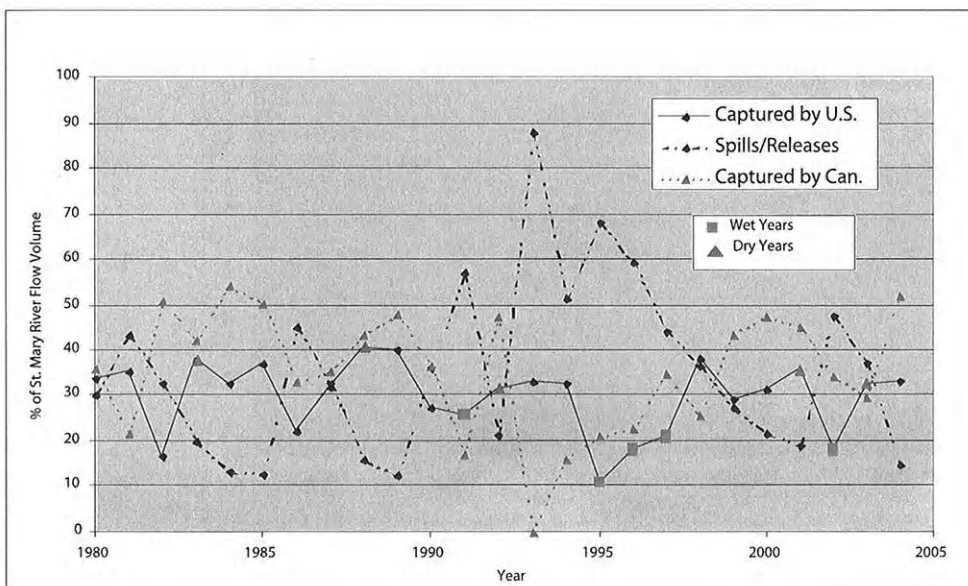


Figure 2 shows that during the 1980 to 2004 period, the U.S. utilized approximately 29.9% of the total flow of the St. Mary River at the International boundary (about 71% of its entitlements), while Canada utilized 35.5% of the total flow (about 59.9% of its entitlement). The remaining 35.5% were either spilled or released to meet in stream flow requirements. While the analysis cannot be used to indicate whether or not apportionment was being met, the analysis clearly illustrates the following.

- i. Most of the surplus waters being delivered to Canada are in the form of winter and flood flows which neither country is able to utilize. As a result, the focus should be on the development of infrastructure that may permit both countries to utilize a greater percent of their entitlement rather than a review of the 1921 Order or the administrative procedures.
- ii. Since Alberta is able to take and utilize only 59.9% of Canada's St. Mary River entitlements compared to Montana taking 71% of U.S. entitlements, Montana's contention that Canada is receiving a greater percentage of the flow because "*there are problems with the administrative procedures that implements the Order*" is unfounded.

In view of the above results, it is Alberta's perspective that energies should be directed towards working cooperatively to ensure both countries are able to utilize a greater share of their respective entitlements, rather than introducing uncertainties through the questioning of the 1921 Order and the administrative procedures.

2.4: Letters of Intent

It is Alberta's view that the 1909 Boundary Water Treaty is fair and reasonable and that, for the past 85 years, the 1921 Order and its application by the Accredited Officers of the IJC have provided the stability and security of supplies required for long term planning and investment in both countries.

Alberta agrees with the Task Force report that formal agreements, such as the Letter of Intent which has been used successfully in the past, provide a viable option for implementing potential improvements that are of mutual benefit to both countries, while maintaining the integrity of the 1921 Order.

³ U.S. utilization is based on U.S. diversions, Canadian utilization is estimated based on flows for the St. Mary River at the International Boundary minus spills and releases from the St. Mary reservoir. Spills and releases from the St. Mary Reservoir are available from Alberta Environment, Water Management Division

3.0: COMMENTS ON OPTIONS FOR IMPROVING ADMINISTRATIVE MEASURES

3.1: Natural Flow Calculations

The implementation of recommendations on monitoring and reporting improvements is strongly supported by Alberta to ensure reliability, credibility and transparency in the computation and reporting of natural flows and each country's entitlements.

To implement these recommendations, Alberta is working with the Eastern Tributaries Technical Working Group and the Milk River Technical Working Group, which include representation from Montana, Saskatchewan, Water Survey of Canada, the U.S Bureau of Reclamation, and the U.S. Geological Survey; to revise the computational procedures.

As indicated in the Task Force report, Alberta has also initiated a process to collect actual water use information from water users on the Milk River for inclusion in the natural flow computations. Alberta is also investigating the feasibility of real-time monitoring and reporting of water use within Alberta.

3.2: Balancing Periods, Surpluses and Deficits

Over the past 85 years the Accredited Officers of the IJC have apportioned the waters of the St. Mary and Milk River on a daily basis. Recognizing the impracticality of measuring the flow, and setting gate openings for diversion and storage on a daily basis, the Accredited Officers developed a working arrangement in which minor daily deviations in the taking or delivery of daily entitlements were permitted and were to be balanced by the end of the 15/16-day balancing period. Similarly, to ensure that *the failure of either country to fully utilize their right to the water granted under the Treaty did not add to or diminish the rights of the other country*, the Accredited Officers developed an accounting procedure in which residual surplus deliveries accumulated during the 15/16 day period are forfeited, while residual deficits are to be made up during the following balancing period.

The balancing period and surplus/deficit modifications being considered in the Task Force report represent a significant departure from these principles that have been applied for the past 85 years. The modifications being considered would permit significant departures in the daily delivery of the downstream jurisdiction entitlements, as well as the carryover of surpluses or deficits for an extended period of time. It is therefore imperative that detailed evaluations of the potential implications to both the upstream and downstream jurisdiction are carried out prior to the implementation of any potential modifications.

Should an arrangement be found that is beneficial to both countries, it should be implemented through a Letter of Intent or similar instrument, within the context of the 1921 Order, to ensure the modification does not *add to or diminish the rights of either country*.

It is noted that the modeling and analysis conducted by the Task Force to assess the potential benefits of changes in the balancing period and surplus/deficit accounting focused solely on examining the additional water which could potentially be withdrawn by the upstream jurisdiction (Montana on the St. Mary River and Alberta on the Milk River) **without** consideration to:

- i. The potential implications to the downstream country (Montana on the Milk River and Eastern Tributaries and Alberta on the St. Mary River) of receiving a greater proportion of its entitlement in the form of unusable winter and flood flows;
- ii. The beneficial use that may be derived from potential additional diversions; and
- iii. Minimum flow requirements as described in Alberta's Water Conservation Objectives.

It is further noted that the assessment of potential additional U.S. diversion from the St. Mary River under longer balancing periods and alternative surplus/deficit accounting assumed:

- i. That the U.S. would receive full credit for, and could draw against, all unused U.S. entitlements flowing across the International Boundary into Canada; and
- ii. That if adequate flow was available, the U.S. St Mary Canal would continue to divert at maximum capacity without any consideration to limiting flow conditions (such as floods) in the St. Mary or Milk River or to the storage conditions (full and spilling) in Fresno Reservoir.

As such, the results identified in the Task Force report represent very optimistic projections of potential additional diversions with no consideration to the potential benefits or disbenefits that would accrue to either country. Furthermore, the surplus/deficit accounting procedures being considered are effectively implementing a system whereby the downstream country is capturing and storing flows for the benefit of the upstream country with no discussion regarding compensation for the infrastructure investment or future operation and maintenance costs.

It is Alberta's perspective that the treaty was based on each country being able to take and make beneficial use of their respective share of available water. It is also Alberta's perspective that the infrastructure in Canada was designed to capture Canada's entitlements and to be able to support the anticipated development during two consecutive drought years. The Canadian infrastructure was developed with due consideration to the historical apportionment of water created by the Treaty and the Accredited Officers' application, for the past 85 years, of the 1921 Order. As such, while Alberta is prepared to continue to investigate any modifications to the balancing period and surplus/deficit accounting, any such modifications must be based on the concept of mutual benefits.

The Task Force report conducted a limited examination of potential benefits to the upstream country (Canada on the Milk River and the United States on the St. Mary River) of alternative apportionment arrangements. While it is Alberta's perspective that modifications to the administrative procedures are not necessary, if such modifications are considered Alberta believes that before implementing changes in the balancing period or the surplus/deficit accounting procedures, a more detailed evaluation is required to assess a broader range of alternatives and potential implications to both the upstream and downstream jurisdictions.

3.3: Other Potential Options

Water is a finite resource. The limit of water has been reached in a number of watersheds in Alberta and is being approached in others. Consequently, the Government of Alberta has created and implemented a provincial water strategy called *Water for Life: Alberta's Strategy for Sustainability*.

Water For Life, which outlines actions to be taken by all Albertans and sectors of the provincial economy towards ensuring sustainability, centers on three areas of focus; Knowledge and Research, Partnerships, and Water Conservation.

Within the above context, Alberta is supportive of exploring novel and innovative approaches in sustainable water resource and environmental management that optimize the beneficial use in both countries of their agreed to share, provided it is within the context of the 1921 Order.

4.0: STABILITY AND CERTAINTY ARE REQUIRED FOR LONG TERM PLANNING AND DEVELOPMENT

The economic and operational importance of certainty and stability to the apportionment and administration of water in the St. Mary and Milk Rivers cannot be overstated. The Task Force report upsets the confidence of the landowners, investors and the Province since it did not specifically state the 1921 Order should form the framework of any future cooperative arrangements. Confidence in the stability and certainty of entitlements is necessary for Montana, Alberta and Saskatchewan to commit to capital investments, which are the key to efficient and beneficial water use.

The request by Montana to open the 1921 Order seems to have been left on the table without a conclusive response from either the Task Force or the International Joint Commission. Alberta would prefer a firm statement that the 1921 Order will form the framework of any collaborative future discussions on improving the operations of the St. Mary and Milk Rivers.



CONTACT INFORMATION

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Edmonton, AB

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KAINAIWA

JUL 10 2006

Chief and Council

Standoff, Alberta

June 29, 2006

**INTERNATIONAL ST. MARY and
MILK RIVERS ADMINISTRATIVE
MEASURES TASK FORCE**
Environmental Conservation Branch
Environment Canada
Room 300, 2365 Albert Street
Regina SK

Attention: Ross Herrington

**INTERNATIONAL ST. MARY and
MILK RIVERS ADMINISTRATIVE
MEASURES TASK FORCE**
U.S. Bureau of Reclamation
2900 - 4th Avenue North, Suite 501
PO Box 30137
Billings, MT 59107-0137

Attention: Daniel Jewell, P.E. ✓

Dear Sirs:

Re: IJC Task Force Report to International Joint Commission, April 2006

As you know, the Blood Tribe has a substantial interest in the waters that are subject to the 1909 Boundary Waters Treaty. We have now reviewed the April 2006 IJC Task Force Report and can offer some preliminary observations.

First, we are enclosing a copy of a document entitled "Blood Tribe / Kainai Submissions to the International Joint Commission and the St. Mary - Milk Rivers Administrative Measures Task Force". This material was initially submitted to the IJC in substantially the same format in July, 2004. Intended to be an expression of the Blood Tribe's position with respect to water usage and rights, the paper has particular relevance to the IJC's consideration of the sharing of the water resources in the St. Mary River and its basin and tributaries.

The importance of that water to the Blood Tribe can hardly be understated - the St. Mary River makes up about 88 miles or 140 kilometres of the Blood Reserve's eastern boundary. As noted, water is essential to both the traditional and contemporary existence of the Blood Tribe. Equally important, the Blood Tribe has retained Treaty and Aboriginal rights to the waters and rivers in its traditional territory.

Against that backdrop, we offer a second important message. Any adjustments to policy or practice with respect to water management or allocation contemplated by the IJC or its Task Force require prior consultation with the Blood Tribe and, where appropriate, accommodation of the interests of the Blood Tribe.

In that respect, we recognize and appreciate the observer status granted to the Blood Tribe (and three other First Nations) during the Task Force hearing process. Going forward, however, that past observer status on its own will not meet the consultative duties owed by the IJC to the Blood Tribe.

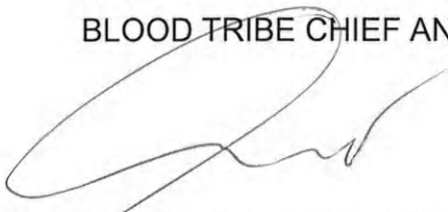
As a way of underlining that, we note the following:

- The April 2006 IJC Task Force Report anticipates that “formal public consultation” on the report “will be initiated jointly by the Task Force and the IJC sometime in Spring 2006”;
- The Task Force Report also notes, unlike some other transborder watersheds, the lack of a formal IJC watershed board for the St. Mary - Milk Rivers, perhaps presaging the prospect of the creation of such a board; and,
- The Alberta submission on the IJC Task Force Report speaks of the potential creation of a “bi-national working group made up of local stakeholders, communities and industry...”.

In light of the foregoing, any future steps aimed at structuring the administration of or actually managing these water resources by the IJC will necessitate direct consultation with the Blood Tribe. We look forward to that with what we expect is a mutual understanding that the Blood Tribe’s rights and interests in this critical resource will be fully protected through whatever future measures might be implemented by the IJC.

Yours truly,

BLOOD TRIBE CHIEF AND COUNCIL



Chief Charles Weasel Head

cc: Minister of Indian and Northern Affairs Canada - Jim Prentice
Minister of Environment, Government of Alberta - The Honourable Guy Boutilier
Minister of the Environment, Government of Canada - The Honourable Rona Ambrose
Councillor Kirby Many Fingers, Chairperson Tribal Government Committee - Blood Tribe

BLOOD TRIBE/KAINAI
SUBMISSION TO
THE INTERNATIONAL JOINT COMMISSION
AND THE
ST. MARY - MILK RIVERS
ADMINISTRATIVE MEASURES TASK FORCE

SUBMITTED JUNE 29, 2006

HISTORY

The Blood Tribe is a member of the Blackfoot Confederacy and shares the same territory, culture and kinships with the other Blackfoot speaking Tribes of that Confederacy, the North Peigan and Siksika in southern Alberta and the South Peigan in Montana, USA. The Confederacy has and continues to function as a political, economic and social alliance. Social and religious kinships extended throughout the four Tribes and continue to the present.

Traditional Blackfoot territory encompassed significant parts of what are now Montana, Alberta and Saskatchewan, and was bounded by the Yellowstone River in the State of Montana to the south, the North Saskatchewan River to the north, the Rockies to the West and the Sand Hills in Saskatchewan to the east (the "Traditional Territory").

In addition to hunting and other forms of resource and land use which existed in the Traditional Territory, trade was common among the four Tribes and with other First Nations further to the south, or what is now the United States. Treaty making was also common and was a mechanism used to forge new relationships including those of trade, peace and friendship. The Blood Tribe has at various times traded with such First Nations as the Gros Ventre, the Assinboine, the Cree, the Kootenay and the Crow.

In 1855 Blood Tribe Chiefs and the other Blackfoot Confederacy Chiefs entered into what is commonly referred to as the Lambull Treaty with the U.S. Under this Treaty a legal and political relationship with the American Government came into existence and certain rights were created. After the 1855 Treaty the Bloods continued to live within their Traditional Territory north and south of the present border.

The Canada-U.S. border was surveyed in 1874 without regard to the Traditional Territory or the Blackfoot Confederacy's social, political and economic relations. There was also no regard to the Blood Tribe's Aboriginal rights to its Traditional Territory or resources, the Blood Tribe's legal and political relationship with the U.S., the treaty rights which arose from the Lambull Treaty of 1855 or the rights which stemmed from the Jay Treaty of 1794.

After the international boundary was surveyed in 1874 and Treaty 7 was made in 1877 efforts were made to keep Blood Tribe members on the north side of the Canada-U.S. border by the two Governments of Canada and United States.

As a result of the governments' practices and policies, members of the Blood Tribe have not been able to exercise their rights which stemmed from the provisions of the Lambull Treaty, not only in terms of annuities but recourse to education, agricultural assistance, land and resource rights and general access to their aboriginal territory for economic, social and cultural purposes.

The Blood Tribe, like other First Nations across the country, believes it has special standing with regards to resource sharing between Canada and the United States, based in part on the Jay Treaty of 1794, Treaty 7 and Aboriginal rights which are protected by section 35 of the *Constitution Act of 1982*.

Canada and the United States signed the Boundary Waters Treaty in 1909 without specific regard to the rights of the Blackfoot Nations to the water resources on both sides of the international border.

Article IV of the 1909 Treaty deals with how the waters of the St. Mary and Milk Rivers in Southern Alberta are to be shared between Canada and the United States. This 1909 Treaty was made without regard to the fact that the St. Mary River bounds the Blood Indian Reserve, such Reserve being established shortly after the 1877 making of Treaty 7.

Following the signing of the 1909 Treaty between Canada and the United States, it is the understanding of the Blood Tribe that the two countries could not agree on the interpretation of Article IV of the Treaty and as a result the International Joint Commission issued an Order in 1921 establishing a set of rules under which the measurement and apportionment of water from the St. Mary and Milk Rivers would be made by an Accredited Officer from each country. Once again, this Order was made without regard to the rights of the Blackfoot Nations to the water resources or to the fact that the St. Mary River bounded the Blood Indian Reserve.

BLOOD TRIBE WATER USE

The Blood Tribe is located in southern Alberta on the Blood Indian Reserve and has a membership of nearly 10,000 people. The current reserve is 2,000 square kilometres in size, with agriculture as its primary industry. Other industry includes ammonite mining, house construction, oil and gas development, as well as small business and tourism.

The Blood Tribe Agricultural Project irrigation system has the capacity to irrigate up to 25,000 acres on the Blood Indian Reserve. The water is supplied from a Main Turnout on the Alberta Environment Protection's Belly River Diversion Canal just upstream of the St. Mary Reservoir. Currently 19,000 acres of land have been developed for irrigation purposes and development plans are underway regarding 6,000 acres adjacent to the Mokowan Ridge Canal.

The Blood Tribe Agricultural Project was formed in 1991 and materialized through the joint efforts of the Tribe, Canada and Alberta which lead to a tripartite agreement referred to as the Blood Indian Irrigation Project Agreement. Pursuant to the requirements of the Agreement the Tribe enacted the *Blood Tribe Irrigation Bylaw* which regulates the control and use of water on the Reserve.

The Tribe's forage processing plant produces an output of products for export to Pacific Rim countries.

Since actual irrigation started in 1994 the lease revenue on the lands has grown from less than \$900,000 to over 2.7 million, with irrigation making the biggest difference.

The Project is administered by Blood Tribe personnel who are fully trained in high tech irrigation information systems and is designed to grow a variety of crops, including specialty crops. The Irrigation Project employs a total of 8 permanent staff, 30 operations and maintenance seasonal employees and 3 security guards. The Processing Plant employs 2 permanent staff, 40 production line employees and 3 security guards. The monthly payroll for both the Irrigation Project and Processing Plant is \$95,000.00 and all employees are Blood Tribe members.

Water is essential to the traditional and contemporary existence of the Blood Tribe. The St. Mary River, including the St. Mary Reservoir, bounds the east portion of the Blood Indian Reserve (approximately 88 miles). Primary use of the water from the St. Mary River for this area is for ranching, however there is potential future development for irrigation. The Blood Tribe recognizes the value of water and also the limitations of this natural resource. It is required for the production of food, fishing, subsistence of wildlife, transportation, production of agricultural crops and animals, domestic uses and general economic development. It is also significant for spiritual and cultural purposes. Cottonwood trees and other plants of considerable importance to the spiritual and cultural activities of the Blood Tribe are present along the St. Mary River and any changes in the flow of the River may have negative impacts upon the availability of these plants to the Blood Tribe.

The Blood Tribe is currently discussing the expansion and development of the eastern portion of the Reserve and the full potential in irrigation has not yet been reached. The Blood Tribe foresees doubling the irrigated acres to 50,000. Any changes in water flow in the St. Mary River will have an adverse affect on future developments in this area.

BLOOD TRIBE LEGAL CLAIMS TO WATER

The Blood Tribe currently is a party to several claims in the Canadian Courts which lay claim to the land and resources in the Blood Tribe's Traditional Territory and specifically is claiming the banks and beds to the Rivers which form the boundary to the Blood Indian Reserve. The Blood Tribe also claims that it never gave up the resources in its Traditional Territory at the time of Treaty 7 and specifically has not given up the right to the water in this territory.

The Blood Tribe, as owners of the banks and beds of the rivers bordering and forming a part of its Reserve, either by un-extinguished Aboriginal right, Treaty

right, or as riparian owners, have retained water rights in and to the rivers for its own use and benefit

Aboriginal Title/Right

The Blood Tribe claims that its ownership of the rivers and the banks and beds of rivers bordering the Blood Indian Reserve is an aboriginal right, un-extinguished by treaty or other legislative enactment.

The use of water was an integral part of the historic occupation and possession the Blood Tribe's Traditional Territory and the right to water is an integral part of Aboriginal title. The Supreme Court of Canada in the 1973 decision of *Calder* held that Aboriginal title is the right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams. The Blood Tribe claims Aboriginal Title and an Aboriginal Right to the water of the rivers in its Traditional Territory and specifically with respect to the rivers which bound the current Blood Indian Reserve.

Prior to the settlement of Canada by non-Indian settlers, the Blood Tribe had an economy based on hunting, trapping, fishing, food gathering and trading with other parties. At all material times the Waterton, St. Mary and Belly rivers (including their banks and their beds) have been essential to the economic, cultural and spiritual way of life of the members of the Blood Tribe.

Treaty Right

The Blood Tribe claims ownership of the rivers and the banks and beds of rivers within or bordering their Reserve, including the banks and the beds of the St. Mary's and Belly rivers as a Treaty right negotiated for and reflected in Treaty 7 and its amendments.

On or about September 22, 1887, Her Majesty the Queen in Right of Canada negotiated Treaty 7 with the Blood Tribe, along with the Siksika Nation, the Tsuu T'ina Nation, the Piikani Nation, and the Stoney Tribe.

The Blood Tribe states that it was the intention of the Blood Tribe to negotiate for; and the intention and duty of Her Majesty the Queen in Right of Canada to enter into an agreement (Treaty 7) that satisfied the needs of the Blood Tribe and fulfilled the duty and obligation of Her Majesty the Queen in Right of Canada by providing to the Blood Tribe the use and ownership of the rivers and of the banks and beds of the rivers and the use of the water within their territories as an essential part of their economic, cultural and spiritual way of life and further, to provide for the needs of the Blood Tribe to establish a new economy based on ranching and agriculture and the utilization of the water and the banks and the beds of rivers within the Reserve.

At the time of the making of Treaty 7 the Blood Tribe did not cede or surrender water or water rights attaching to lands in the Traditional Territory or lands that would be set apart as a Reserve for the Blood Tribe. There is nothing in the express wording of the Treaty that would indicate that the Crown intended to obtain a beneficial interest to the water, and the understanding of the oral terms of the Treaty is consistent with the assertion that the water and water rights were not surrendered but in fact were reserved to the Treaty 7 First Nations. The Blood Tribe was encouraged to settle on reserve lands and to engage in agricultural activities. Water is essential to these activities, to economic development and to general subsistence. There is a reserved right to water implied in the creation of the Blood Indian Reserve. This right to water includes present as well as future needs of water, allowing water to be used for all beneficial purposes.

Riparian Rights

As well, the Blood Tribe claims that it is a riparian owner of the banks of the rivers bordering the Blood Indian Reserve and therefore is the owner of banks and beds of those rivers to the middle stream of the said rivers through the doctrine of *ad medium filum aquae*.

As stated above, the St. Mary River is the eastern boundary of the current Blood Indian Reserve. As a riparian land owner the Blood Tribe has the right to have water come to the Reserve in its natural state, in flow and quantity. In addition to, or in the alternative, to Aboriginal and Treaty Rights, the Blood Tribe claims a right to the St. Mary River water as a riparian owner. No changes may be made to the flow and quantity of the water which flows through the Reserve without the consent of the Blood Tribe, notwithstanding the Province of Alberta's claim to ownership of all the water in the Province of Alberta.

CONSULTATION

Aboriginal and Treaty rights are protected under s.35(1) of the *Constitution Act, 1982*, which states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Supreme Court of Canada has developed tests whereby legislation and government activity may only interfere with the exercise of Aboriginal and Treaty rights if the infringement is justified as necessary to achieve a valid legislative objective. Consultation with potentially affected Aboriginal people is an essential component of the determination by the courts of whether government has infringed the rights in question only to the extent necessary.

Actions of the Crown, as well as actions of third parties authorized by the Crown, that are inconsistent with the First Nations' rights are invalid unless they can be justified according to fiduciary principles and the test laid down by the Supreme Court of Canada in *R. v. Sparrow*.

Justification under the *Sparrow* test requires the following:

adequate consultation in good faith, to identify and address First Nations' interests and concerns;

adequate priority to First Nations rights versus those of other stakeholders;

minimal impact on First Nations' rights;

mitigation measures to avoid impacts and to ensure that any impact that does occur is "as little as possible";

fair compensation for unavoidable infringements; and

other efforts to ensure sensitivity and respect for First Nations' rights.

These requirements can only be met through a First Nation-specific consultation process. The Blood Tribe is legally entitled to, and will insist upon, a distinct process directed to its own issues, interests, and concerns, and separate from any existing public processes.

Governments are under a positive duty to be alert to possible infringements of Treaty and Aboriginal rights that might result from the exercise of Crown authority and to be pro-active in avoiding or limiting any impacts. As noted above, the 1909 Boundary Waters Treaty and the subsequent Order of 1921 were entered into or established without consideration or regard to the fact that the St. Mary River bounds the Blood Indian Reserve, such Reserve being established shortly after the 1877 making of Treaty 7. In any review process of the Order of 1921 there must be a Blood Tribe specific consultation process and consideration must be given to any possible infringement of the Treaty and Aboriginal rights that may arise from any actions taken with respect to the Order of 1921 or the 1909 Boundary Waters Treaty.



Saskatchewan
Watershed
Authority

Head Office

REGINA, SASKATCHEWAN

JUN 8 2006

ENVIRONMENT CANADA

TO

Saskatchewan

Victoria Place

Moose Jaw, Canada

June 27, 2006

Mr. Ross Herrington, P.Eng.

Our File:

Co-Chair International St. Mary and Milk River
Administrative Measures Task Force
c/o Environmental Conservation Branch
Environment Canada
Room 330, 2365 Albert Street
REGINA SK S4P 4K1

Dear Mr. Herrington:

**Re: International St. Mary and Milk Rivers
Administrative Measures Task Force Report - 2006**

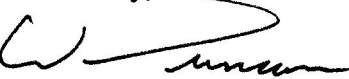
Provided with this letter is a document outlining Saskatchewan's perspective on the Task Force report released April 18, 2006.

As the water resource manager for the Province of Saskatchewan, the Saskatchewan Watershed Authority is pleased to provide this response in follow-up to the Authority's presentation during the public meeting the Task Force held in Havre, Montana on May 23, 2006.

I understand that the Task Force's next step will be to review all the responses that are received in reaction to the draft report and finalize its recommendations to the International Joint Commission (IJC). We look forward to the conclusion of this work and the direction that may be provided by the IJC.

Should you have any questions regarding the response, please contact Mr. Rob Wiebe, P.Eng., Acting-Director, Regional Operations at

Sincerely,


W. G. (Bill) Duncan, P.Eng.
Acting-Vice President
Operations Division
Saskatchewan Watershed Authority

WGD/ca
Attachment

Saskatchewan's Response

to the

International St. Mary – Milk Rivers

Administrative Task Force

Report

of

April 2006

Prepared by:

Saskatchewan Watershed Authority

June 2006

**Saskatchewan's Response
to the
International St. Mary and
Milk Rivers Administrative Task Force Report, 2006**

1.0 Background

1.1 The Issue

In 2003, the Governor of Montana requested the International Joint Commission (IJC) to reconsider the conditions of the 1921 Order and evaluate whether the United States should be entitled to a larger share of the St. Mary and Milk Rivers. To evaluate the merits of Montana's request, the IJC held a series of meetings in July of 2004 to solicit public views. The Saskatchewan Watershed Authority, as the Province of Saskatchewan's water manager, made presentations on Saskatchewan's position at the meetings as well as in a written format.

It is understood that Montana's written concerns are specific to the shared rivers between Alberta and Montana and not those between Saskatchewan and Montana. Regardless, it is noteworthy to identify that Saskatchewan's geographic area of interest lies within the area known as the Eastern Tributaries which contribute more than 40% of the USA entitlement on the Milk River.

In December 2004, the IJC established the Administrative Measures Task Force to examine whether the existing administrative procedures can be improved to ensure more beneficial use and optimal receipt by each country of its apportioned waters. The Task Force completed its report in April of 2006. Public meetings were held in Havre, Montana, and Lethbridge, Alberta in May 2006 to hear response to the report. The Saskatchewan Watershed Authority, on behalf of the Province of Saskatchewan, presented its response to the Task Force report. The remainder of this document outlines the response.

1.2 Saskatchewan' Position

The 2004 presentation by Saskatchewan identified that:

- The Eastern Tributaries may figure into any re-apportionment to obtain equity between Canada and the USA with any changes having potential for significant impacts to Canadian, and specifically Saskatchewan users.
- Inter-provincial apportionment agreements, relating to the South Saskatchewan River, are closely integrated with the requirements of the 1921 Order and those agreements rely on the stability of the Order.
- The concerns raised by Montana do not meet the threshold Saskatchewan believes are necessary to open the 1921 Order.

- The existing Order is sufficiently flexible to facilitate improved sharing through adjustments to the administrative procedures which guide apportionment.
- Saskatchewan supports a new institutional arrangement that would improve the working relationships and basin management.

1.03 Relevant Considerations

Within the Eastern Tributaries, Saskatchewan, Alberta, Montana, Canada and the USA have a proven track record of cooperation that has helped to improve water management practices. Cooperative water management practices have been developed by seeking, identifying and implementing improvements. Examples include initiatives of the Eastern Tributaries Technical Working Group (ETTWG) to:

- apply channel losses to minor uses thereby improving the computational accuracy of divisional period calculations; and
- draft a Letter of Intent which documents best management practices for dealing with minor deficits on the apportioned tributaries.

The Accredited Officers have supported the ETTWG mechanism as a means of seeking improvements to administrative procedures. The provinces and the state, otherwise, have no formal means by which to participate in apportionment decisions. Unfortunately the conclusion of the work associated with the Letter of Intent has been postponed pending the outcome of the outcome of the Task Force's work.

Saskatchewan has observed that the establishment of the International Souris River Board, which has federal, provincial and state representation, to administer the apportionment of the Souris River, has fostered an effective working relationship among the players. This arrangement has led to better management of Souris River waters within the framework of the "Apportionment Measures for the Souris River." Given a higher frequency of water shortage in the Eastern Tributaries than the Souris, and a greater dependence of the local economy on water supplies, the merits of establishing a similar board within the Eastern Tributaries would seem to be at least as compelling.

The creation of an institutional arrangement within the Eastern Tributary area of the watershed could help to implement good water management processes by reducing the potential for dependency on prior decisions in the larger watershed area.

For Saskatchewan, changes to the procedures or principles within the St. Mary and Milk River mainstem may also carry implications to inter-provincial apportionment of the South Saskatchewan River. Ultimately, any changes to international apportionment that implicate inter-provincial apportionment will need to be considered by the Prairie Provinces Water Board (PPWB). The PPWB is charged with responsibility for the administration of the "1969 Master Agreement on Apportionment" that governs apportionment between the prairie provinces.

The Task Force Report also identifies some unresolved fundamental differences between the positions of Alberta and Montana. While these differences identify an obvious stumbling block to achieving a solution, the fact that the conclusion has been cooperatively captured in the Task Force report can be considered a positive step. Capturing and documenting such fundamental differences demonstrate that a cooperative process focused on watershed issues can lead to a mutual understanding of positions.

3.0 Conclusions

Saskatchewan's conclusions from the Task Force Report identify that:

- Changes must be mutually acceptable by the affected jurisdictions requiring:
 - The evaluation of upstream and downstream jurisdictional impacts
 - The evaluation of implications on all reaches including the Eastern Tributaries and the South Saskatchewan River.
- Computational accuracy improvements can inspire confidence in moving toward mutually acceptable solutions.
- The development of working relationships aids in improving understanding
- Establishment of working groups can assist in capturing mutual interests

Unfortunately, the Task Force work did not begin to address the implications of any changes or improvements related to the Eastern Tributaries. As a result, the attention that may be required to address water management issues in the Eastern Tributaries may not occur until a considerable level of comfort is achieved for the mainstem components. More timely response to issues affecting the Eastern Tributaries is preferable.

It is Saskatchewan's position that the timely evaluation of priority issues related to the Eastern Tributaries would be more appropriately dealt with through an independent institutional arrangement, specific to the Eastern Tributaries. It is expected that the establishment of such a structure would support and improve the existing working relationships and would lead to the improved basin management opportunities.



THE CANADIAN CHAMBER OF COMMERCE
LA CHAMBRE DE COMMERCE DU CANADA

June 26, 2006

Ross Herrington
Senior Water Policy Advisor
Environment Canada
Transboundary Waters Unit

Regina, Saskatchewan,

Dear Mr. Herrington,

On behalf of the Canadian Chamber of Commerce and our 170,000 members from coast to coast to coast, we would like to express our support for the Boundary Waters Treaty and the International Joint Commission (IJC) as a means for reaching mutually beneficial decisions based on consensus.

The International St. Mary and Milk Rivers Administrative Measures Task Force was established by the IJC to examine whether the existing administrative procedures for the apportionment of water from the St. Mary and Milk rivers among Saskatchewan, Alberta and Montana can be improved to provide more beneficial use and optimal receipt by each country of its apportioned waters within the terms of the IJC's 1921 Order. The Montana government is seeking changes to the Treaty that dates back to 1909, more specifically to the 1921 Order.

The Canadian Chamber of Commerce believes that the 1921 Order provides a framework for both Montana and Alberta to efficiently maximize the quantity of water that is available to them through the treaty and supports the Canadian government's position that the 1921 Order should not be re-opened. The Canadian Chamber of Commerce also applauds the province of Alberta for its investments in its irrigation systems that are of high quality and encourages other jurisdictions to follow Alberta's lead.

We would like to take this opportunity to thank you for considering the input and the interests of the Canadian business community. If it would be helpful, we would be pleased to discuss these issues with you in further detail at a time of your convenience.

Yours sincerely,

Shirley-Ann George
Vice President, International

c.c. Taber and District Chamber of Commerce
Lethbridge Chamber of Commerce

The Voice of Canadian Business™
Le porte-parole des entreprises canadiennes^{MD}

JUL 05 2006

ARCHAEOLOGICAL SOCIETY OF ALBERTA



CALGARY
CENTRE

June 26, 2006

Mr. Ross Harrington, P. Eng, Senior Water Policy Advisor
Environmental Conservation Branch
Environment Canada

Regina, SK

Mr. Daniel Jewell, P.E., Area Manager
Montana Area Office
U.S. Bureau of Reclamation

Billings, Mt

Dear Sirs:

Re: International St. Mary-Milk River Administrative Measures Task Force Report

The operation of the existing St. Mary Canal and related storage and diversion works has had a significant impact on archaeological sites both within the diversion system and on the Milk River. This has occurred both within Montana and Alberta below the St. Mary Canal exit and above the Fresno Reservoir.

The downstream archaeological impacts have resulted from the extensive erosion of the floodplains and low terraces, particularly of the Milk River, due to the seasonal release of waters from the St. Mary Canal. Archaeological studies carried out by the Province of Alberta in the support of the proposed Milk River dam west of the town of the Milk River recorded a large number of archaeological and palaeontological sites, some as old as 10,000 years of age, many of which are rapidly being destroyed as a result of the seasonal releases and accelerated erosion of the floodplain and low terraces along the Milk River.

The proposed reconstruction of the St. Mary Canal will allow the full apportionment recommended in the Task Force Report. This increased removal will accelerate the downstream erosion and loss of archaeological sites.

We understand that the Bureau of Reclamation is undertaking, through the Blackfoot Tribe, the necessary cultural resource inventory and assessment studies of the proposed St. Mary Canal reconstruction. However this study is confined to the canal.

We would urge that the IJC require the Bureau of Reclamation to undertake the necessary cultural resource inventory and assessment studies both downstream on the Milk in Montana and Alberta, as well as upstream on the St. Mary River, Lower St. Mary Lake, Swiftcurrent Creek, and Sherburne Reservoir and downstream on the St. Mary of the diversion.

Please do not hesitate to call should you have any questions.

Regards,

A handwritten signature in cursive script, appearing to read "Brian C. Vivian".

Brian C. Vivian
Provincial President
Archaeological Society of Alberta

St. Mary River Irrigation District

Lethbridge, Alberta



June 16, 2006

File: 1-W-2

Ross Herrington, P. Eng.
Senior Water Policy Advisor
Environmental Conservation Branch
Environment Canada

Regina, SK

Dear Mr. Herrington:

Re: IJC Report

Enclosed is the St. Mary River Irrigation District response to the April 2006 Report, on the St. Mary and Milk Rivers to the IJC, by the Administrative Measures Task Force.

Yours truly,

A handwritten signature in blue ink, appearing to be "R. L. Renwick", written over a rectangular stamp area.

R. L. (Ron) Renwick, P. Eng.
General Manager

RLR/dc
Enc.



Serving over 370,000 acres of irrigation

**The St Mary River Irrigation District (SMRID) response to the April
2006 Report, on the St. Mary and Milk Rivers to the IJC, by the
Administrative Measures Task Force**

The SMRID has worked hard over the last 25 years to develop world class irrigation water distribution systems all dependent on the 1909 treaty and 1921 administrative order. This development has heavy emphasis on the conservation and efficient use of irrigation water. It includes over 780 km. of water distribution pipelines which eliminate water loss due to seepage and evaporation. Also included are approximately 400 km. of rehabilitated canals whereby water losses due to seepage are reduced or eliminated. Automated water controls throughout the SMRID further improve water management.

Some 1700 farm units within the SMRID have responded to the need for conservation by installing highly efficient on farm irrigation systems. Most of these involve low pressure center pivot irrigation systems. In fact some 270,000 acres out of 372,000 acres are irrigated using this system.

SMRID has further demonstrated respect for its water supply, which is based on the certainty of the 1909 treaty and 1921 administrative order, by sharing water during periods of shortage, even though legally not obliged to do so. Water has been shared in proportionate equal amounts among farm irrigators and all those non irrigators who receive water through the irrigation distribution system.

SMRID does support a review of water administrative procedures. These could include accounting procedures for surpluses and deficits as well as any other procedures that may produce mutual benefits to both sides.

SMRID believes the 1921 Order, as it affects the St Mary River, means balancing daily flows and reconciling them on a 15/16 day period. SMRID also believes the 1909 Treaty was based on each Country being able to make the most beneficial use of the available water during the irrigation season and sharing the water equally in the non irrigation season. A change to an annual balancing period, on the St Mary River, would require that flood flow volumes be included in calculation of annual flow volumes. It is acknowledged that these volumes do pass into Canada, however, only a portion are retained with the balance flowing to the Hudson Bay. Therefore an annual balancing period would give unfavourable treatment to the downstream country and would require that Canada receive reduced flows during the early spring and late

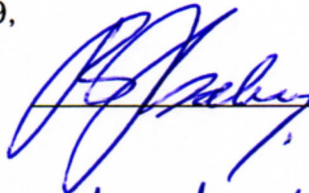
summer periods which are important periods for irrigation. Any in stream flow requirements would likely also be affected adversely. Therefore any modifications to the balancing period must be based on the concept of mutual benefits.

In summary, SMRID wishes the Canadian and United States Governments to continue with a spirit of cooperation and understanding so that mutual benefits can continue to be provided to both countries within the scope of the 1909 treaty and 1921 administrative order. Formation of a bi-national Working group would have merit. Negotiated letters of intent could result and assist the process.

**St. Mary River Irrigation District Board of Directors
as of June 15, 2006**

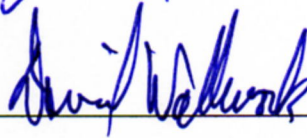
Division 2 – R. James Csabay, Chairman

Those lands within Ranges 18, 19 and 20 which are situated to the North of Highway 4 and to the South of Highway 5, but does not include those irrigators obtaining their water from the Main Canal in Twp. 9, Rge. 18, W4th.



Division 5 – David Wallwork, Vice Chairman

Those lands situated within Ranges 11 and 12, W4th.



Division 1 – Walter Genesis

Those lands situated south of Highway 4 and those lands within Range 21 lying to the north of Highway 4.



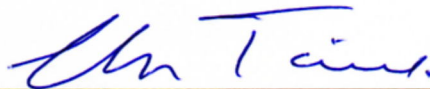
Division 3 – Blaine Takeda

Those lands within Ranges 18, 19 and 20 which are situated to the North of Highway 3 and also includes those irrigators obtaining their delivery from the Main Canal in Twp. 9 Rge. 18, W4th.



Division 4 – LeRon Torrie

Those lands situated within Ranges 13, 14, 15, 16 and 17, W4th.



Division 6 – Gary Bierback

Those lands situated within Ranges 8, 9 and 10, W4th and shall also include those lands lying within Twps. 10 and 11 of Range 7, W4th.



Division 7 – Robert Nemeth

Those lands situated within Ranges 5 and 6, W4th and shall also include those lands lying within Twps. 12 and 13 of Range 7, W4th.



*Rec'd
via e-mail
June 6/06*

**Comments on the International
St. Mary-Milk Rivers
Administrative Measures
Task Force Report
RALPH I. PENTLAND***

June 3, 2006



***Comments on the International
St. Mary-Milk Rivers
Administrative Measures
Task Force Report
RALPH I. PENTLAND****

June 3, 2006

Occasional Paper prepared on behalf of the Program On Water Issues**

**Munk Centre for International Studies
University of Toronto**

**Contact:
Adèle M. Hurley
Director, Program On Water Issues**

**Toronto, Ontario
CANADA**

***About the author**

Ralph Pentland is President of Ralbet Enterprises Inc., where he has been active in consulting on a variety of water and environmental policy issues. From 1978 to 1991, he was Director of Water Planning and Management in the Canadian Department of the Environment. In that capacity, he was responsible for overseeing numerous Canada-U.S. and Federal-Provincial agreements. He was the prime author of the Federal Water Policy that was tabled in Parliament in 1987. He has served as Canadian Co-Chairman of the International Joint Commission's Diversions and Consumptive Uses Study Board, the IJC's Great Lakes Water Uses Study Team (from 1999 - 2000), and the IJC's International Water Uses Review Task Force (from 2002 - 2003).

Author's Acknowledgements

I would like to sincerely thank Adele Hurley, Director, Program on Water Issues at the Munk Centre for International Studies at the University of Toronto, for initiating this comment document and for her support and assistance throughout its development, and for Coordinating the peer reviews. Robert Halliday of R. Halliday and Associates provided invaluable advice on historical facts, as did Dr. David Schindler of the University of Alberta on environmental considerations, and Owen Saunders and Shelly Minarik of the University of Calgary on legal aspects.

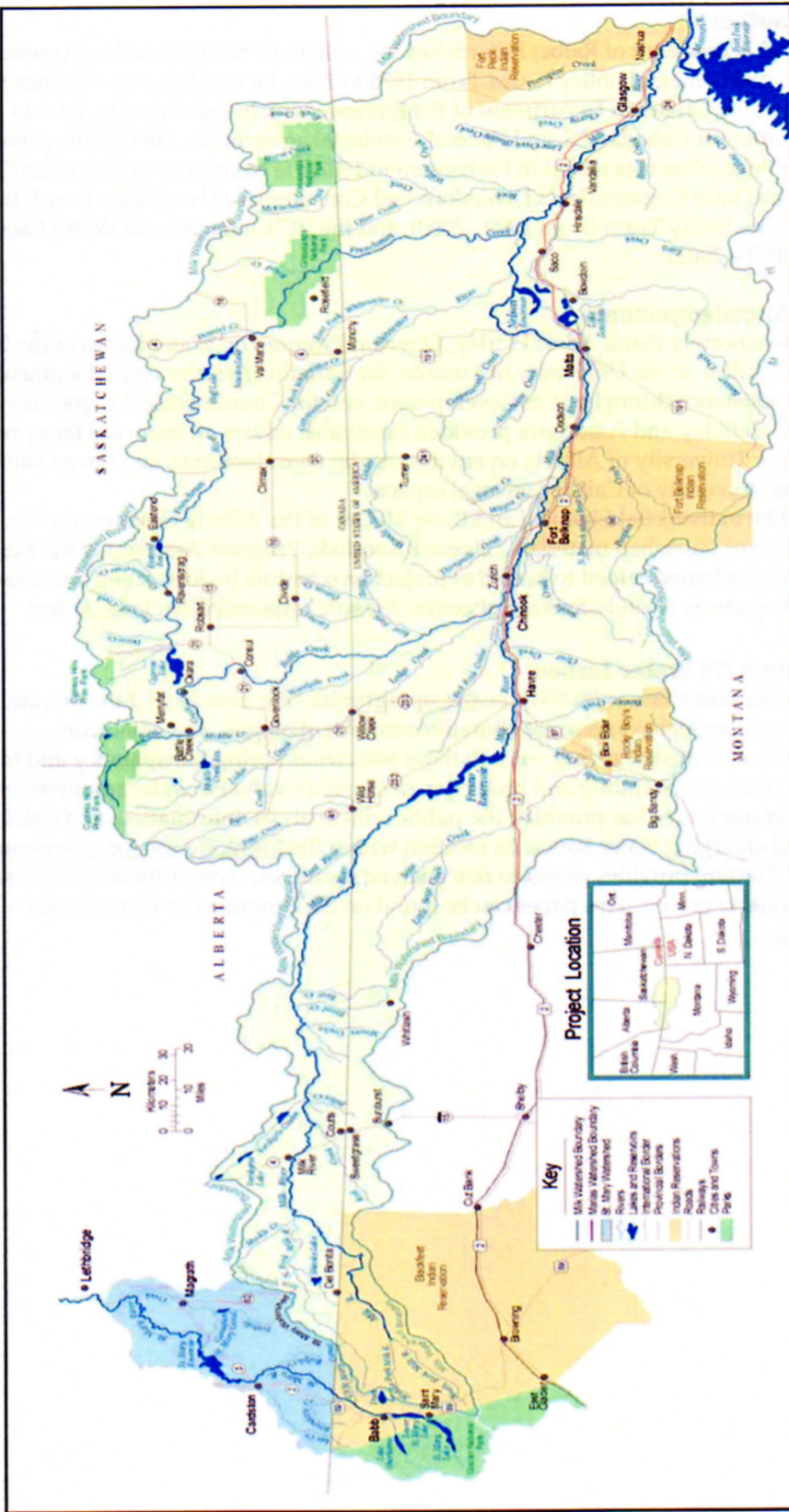
I would also like to thank Sal Figliuzzi and Dave McGee of the Alberta Government for directing me to relevant sources of published materials. Silvester Komlodi, Program Assistant at the Munk Centre's Program on Water Issues helped to keep this project on schedule by formatting and disseminating these comments. Any errors or omissions are of course the sole responsibility of the author.

****The Program On Water Issues**

The Program On Water Issues (POWI) creates opportunities for members of the private, public, academic, and not-for-profit sectors to join in collaborative research, dialogue, and education.

The Program is dedicated to giving voice to those who would bring transparency and breadth of knowledge to the understanding and protection of Canada's valuable water resources. Since 2001, The Program On Water Issues has provided the public with analysis, information, and opinion on a range of important and emerging water issues. Its location within the Munk Centre for International Studies at the University of Toronto provides access to rich analytic resources, state-of-the-art information technology, and international expertise. This paper can be found on the Program On Water Issues' website at www.powi.ca.

St. Mary and Milk Rivers Drainage Basin (source: "International St. Mary - Milk Rivers Administrative Measures Task Force "Report to the IJC, 04/2006)



Background

In April of 2003, Montana Governor Judy Martz asked the International Joint Commission (IJC) to re-evaluate their 1921 Order regarding the apportionment of the waters of the St. Mary and Milk Rivers, and associated tributaries (IJC, 1921). The state contended that the Order did not equally divide the waters of the two river basins, that circumstances today are different than they were immediately prior to 1921, and that improvements are required to the administrative procedures that implement the Order (Martz, 2003 and 2004).

The IJC subsequently held public meetings to gather information, and late in 2004 established an Administrative Measures Task Force to examine and report on “measures for improvements to existing administrative procedures of the St. Mary and Milk Rivers apportionment to ensure more beneficial use and optimal receipt by each country of its apportioned waters.” The Task Force released its draft report in April of 2006, and requested comments by the end of June, 2006 (IJC Task Force, 2006). The Task Force should be commended for advancing a common understanding of the subject, and for raising a number of issues that require further examination.

In this submission, I will argue that the best short-term outcome for both countries would be a broadening and strengthening of cooperative institutional arrangements.

1. The Fairness Debate

Although the Task Force mandate was limited to administrative matters, the report does indirectly touch on the question of the fairness of the 1921 Order. A careful reading of historical documents would suggest that the Order is in fact “fair”, if fair is defined as a reasonable interpretation of the intent of the Boundary Waters Treaty. The waters to be apportioned were dealt with essentially according to American wishes, while the matter of prior appropriation was dealt with essentially according to Canadian wishes (IJC, 1931). The Order represented the Commission’s conclusions regarding the proper interpretation of Article VI of the Treaty, after hearing arguments from both sides.

It is true that Alberta is now receiving about 59% of the flow of the two rivers combined, as determined at the international boundary crossings. However, there are quite valid historical reasons for that apparent discrepancy:

- a) It is important to note that the Treaty speaks about both equal apportionment and prior appropriation. At the time of the Treaty, Alberta was already diverting 500 cfs from the St. Mary River for irrigation in the Lethbridge area, and Montana had already developed irrigation projects that were using about 450 cfs

from the Milk River Basin, of which 359 cfs was being drawn directly from the Milk River. Therefore, a strong argument can be made that the framers of both the Treaty and the Order intended to recognize the unequal prior appropriations, and then to allocate the residual flows equally.

- b) After taking prior appropriations into account and apportioning the residual equally, the Order entitles Canada to about 55% of the combined flow and the U.S. to about 45%. In fact, Montana tends to receive about 4% less than its 45% entitlement on average, not because of the provisions of the IJC Order, but because its infrastructure is insufficient to capture and utilize its full share of the U.S. St. Mary River entitlement during winter and flood periods. It should be noted that Alberta also lacks the infrastructure to fully capture the Canadian share of the St. Mary River during wet years, let alone the surplus it receives from Montana, and that a significant portion of the flow received by Alberta during winter and flood periods flows downstream to Hudson Bay.
- c) In any event, if the waters of the lower Milk River that are entirely within Montana are considered, Montana can be shown to be receiving more than half of the natural flow at the mouth of the two rivers. That is the location and flow that Canada felt should have been apportioned.

This is a futile debate, as the IJC itself realized when it considered reopening the Order in the early 1930s. At that time, the Commission's deliberations split along national lines and the Order remained unchanged, leading to over 70 years of relatively harmonious cooperation. The Commission was therefore wise to limit the current re-examination to administrative matters.

Regardless of one's views on the fairness of the 85 year old Order, it is important to note that development in both countries has been fundamentally shaped by that mutual understanding. Any change to that understanding would therefore be much more likely to move basin-wide interests away from rather than towards an optimal condition. Instead, all parties are likely to benefit from cooperatively seeking optimality within the existing Order.

2. The Balancing Period Controversy

At the time the Treaty was negotiated, there were no significant storage reservoirs to redistribute flows throughout the year. Therefore, one must conclude that the Treaty negotiators intended to apportion unregulated, or in other words instantaneous flows. Similarly, to ensure that both countries always have access to some water in each of the streams, it set the appropriation to the jurisdiction having a prior appropriation to no more than 75% of the natural flow.

Over the years, the Accredited Officers recognized the difficulties of conducting real-time computations of natural flow and entitlements and of continuously adjusting diversion settings to ensure precise delivery of entitlements. As a practical matter, they introduced a 15/16-day balancing period to adjust for accumulated minor deviations which had occurred in the delivery of daily entitlements.

Much of the Task Force's draft report is devoted to a consideration of this so-called balancing period. **While characterized as an administrative matter, this is in reality a serious apportionment issue, because the proposed modification would deviate considerably from the historical perspective within which it has been used.** Under the use envisaged in the Task Force report, the balancing period would no longer be used to adjust for minor deviations in delivery, but rather it would be used as a tool for optimizing the ability of the upstream jurisdiction to take its entitlement without consideration of the impact on the downstream jurisdiction. Under those circumstances, any significant lengthening of the balancing period would allow the upstream jurisdiction to overutilize its entitlement during the time when water is most needed, and compensate for that overutilization when the water is much less valuable.

The Task Force seems to characterize this as a potential win-win situation. And it may well be if it is based on a broad consensus. But, if new rules were to be imposed without a sufficient understanding of the downstream implications, and without a real consensus, it could turn out to be a lose-lose proposition. The parties should continue to examine scenarios and all of their upstream and downstream implications, preferably through an enhanced watershed-wide cooperative arrangement as will be discussed later.

3. The Climate Change Factor

There is a general consensus among climate experts that, due to climate change, much of the Great Plains Region will have less runoff in the future than it has today. It is also likely that diminishing glaciers and snowpack in the upper watersheds will have a detrimental impact on the seasonal pattern of runoff (Bruce, 2006). But, there is a continuing debate in the region about the timing and magnitude of the changes, and therefore about the seriousness of the issue.

That debate is due, in part, to uncertainties in predicting the hydrological effects of climate change, and hence the implications for water management. In addition, there is a tendency among some experts to inadvertently misrepresent trends by not differentiating between natural cycles and long-term trends, or by failing to accurately separate out other man-made factors such as reservoir operation, water use, and changes in land use.

Rood et al. (2005) concluded that there is no measurable climate change effect on the mean annual runoff in the St. Mary and Milk Basins themselves. Nevertheless, one can infer that there is already a significant impact, especially on summer flows by looking at nearby streams, and by looking at diminishing glaciers and annual snowpacks which are noticeably smaller.

One can also conclude that there are both water management consequences, for example for irrigators who demand water in the summer months, and environmental consequences, for example with respect to cold stenothermic and oxygen sensitive fishes (Schindler and Donahue, 2006).

Nevertheless, the science is definitely insufficiently developed, at this time, to consider climate change implications with respect to water apportionment. Even when the science does become sufficiently well advanced, it will almost surely demonstrate that the implications will be generally similar throughout the region, and that all stakeholders will need to adapt in generally similar ways. Again, this would suggest the advisability of broadening and strengthening cooperative arrangements in order to share on-the-ground adaptation experiences.

4. The Infrastructure Issue

The Task Force notes that there are certain infrastructure constraints to both countries effectively utilizing their respective entitlements. A particular emphasis is placed on storage, diversion and conveyance facilities in Montana that are reaching the end of their design life and are in need of rehabilitation.

U.S. Geological Survey statistics for 2000 (the last year for which these data are available), indicate that over 95% of all water withdrawals in Montana were for irrigation purposes, and that the ratio of consumptive use to total irrigation withdrawals was below 30% (Cannon M.R. and Johnston D.R., 2004). That efficiency ratio was the lowest of any state in the nation. In their 1987 National Water Use Survey Report, the USGS, commenting specifically about the situation in Montana, noted that "Because flood irrigation is less efficient than sprinkler irrigation, irrigation conveyance losses are large and amount to 51.4% of the total irrigation withdrawals."

Exactly comparable figures are not available for Alberta, but that Province has clearly made much more progress in recent years. For example, on-farm irrigation efficiency increased from 36% in 1965 to 74% in 2000. The amount of water delivered to a farm in Alberta is now about 14 inches compared with about 30 inches when the IJC Order was issued in 1921 (Alberta Government, 2004).

The U.S. Bureau of Reclamation has painted the contrast in even starker terms. They have noted that, with appropriate infrastructure upgrades, Montana could apply twice as much water to their irrigated acreage as Alberta does now, with no change to the existing Order. **Clearly, Montana does not have a water shortage problem. What it does have is an infrastructure efficiency problem.** It should be noted that there is an obvious will to improve the situation. In 2003, a five year grant was received from the Bureau of Reclamation to help the eight irrigation districts in the Milk River Basin to learn about water conservation practices and to assist local irrigation districts in developing water conservation plans (Montana Department of Natural Resources and Conservation, 2003).

Experience all around the world suggests that the most promising source of “new” water in drier areas is conservation. In the agricultural sector, efforts normally focus on delivery efficiencies via canal lining and piped distribution, and irrigation application efficiencies through a greater reliance on sprinkler, trickle, drip and micro-sprayer technologies (Hydrosult, 2000). One should nevertheless insert a note of caution on this point. As efficiencies improve, return flows also diminish. So, unless increased efficiencies are accompanied by a change in allocations, in situ and environmental uses, and even downstream irrigators can in fact be detrimentally impacted (Alberta Institute of Agrologists, 2005).

It is recognized that financing capacities are very different in Alberta and Montana. Alberta, with its huge non-renewable resource revenues has a GDP per capita about 20% above the Canadian national average, while Montana’s primarily agricultural economy is less well placed to invest large sums in infrastructure renewal. Nevertheless, the promotion of more efficient infrastructure, especially in Montana, could be beneficial to both countries. In that regard, a broader-based cooperative mechanism reporting to the IJC may be able to exert more influence with the state legislature, the governor and the U.S. Congressional delegation.

5. The Way Ahead

Throughout this presentation, I have suggested that all parties would benefit from the establishment of a broader and more robust cooperative arrangement. The Task Force itself broached that possibility with the comment that “the IJC’s International Watershed Initiative may provide a future opportunity to promote the collective growth of watershed capabilities within the St. Mary-Milk watershed.”

In 2004, the IJC issued a set of principles that, among other things, promotes building capacity at the watershed level to respond to a range of transboundary water and other environmental challenges (IJC, 2004).

The Task Force has pointed to a number of specific matters that need to be investigated further, including:

- a) improvements to monitoring and reporting arrangements;
- b) alternative balancing and accounting procedures, and their downstream implications;
- c) the use of Letters of Intent to introduce administrative modifications that are of mutual benefit;
- d) the potential for additional storage and joint operations; and
- e) research on newer approaches such as water banking and tradeable permits.

There are other equally important issues that need further investigation and consensus-building, for example the sad state of wetland and riparian conservation in the basins, which are critically important for maintaining flows, groundwater resources and water quality. There is already some limited progress in this regard. For example Alberta recently took a number of steps to clean up the Oldman/St. Mary system, including changing Lethbridge's sewage system, but also introducing buffer strips on rivers, offstream watering of cattle, etc.(Oldman Watershed Council 2005).

But, just as important as specific investigations, there is a real need to more fully engage stakeholders, both to increase their understanding of scientific and management approaches, and to listen to their views with respect to future activities. Senior governments can and must provide top-down policy frameworks and transfer knowledge to citizens in an understandable way. But beyond that, the fate of the basin will be largely determined by bottom-up citizen initiative at a quite local level. The 1921 Order and the letter of intent as it evolves will provide the key policy framework. A broader-based watershed institution has the potential of creating and facilitating the two-way flow of the knowledge which will be necessary to improve the effectiveness of water and related environmental management at all levels, and to help citizens adapt to things that are beyond their control.

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THE CANADIAN
FEDERATION
OF AGRICULTURE

LA FÉDÉRATION
CANADIENNE
DE L'AGRICULTURE

May 25, 2006

Ross Herrington, P. Eng.
Senior Water Policy Advisor
Environmental Conservation Branch
Environment Canada

Regina, SK



Dear Ross Herrington

The Canadian Federation of Agriculture (CFA) is a farmer-funded, national umbrella organization representing provincial general farm organization and national commodity groups. Through its members, it represents over 200,000 Canadian farm families across Canada.

Although wary of the final outcome, Canadian Farmers are supportive of the mandate of the St. Mary-Milk Rivers Administrative measures Task Force: to examine opportunities to improve the administrative procedures for the apportionment of the St. Mary and Milk rivers to ensure more beneficial use and optimal receipt by both Canada and the United States of its apportioned water.

The CFA upholds the view of the Province of Alberta that the apportionment afforded under the 1921 Order is based on the instantaneous flow at any given point in time. This ensures that Canadian and American Farmers receive their allotted share of water when required and not when upstream users don't need it (e.g. through winter or during floods.) Montana's new interpretation of the 1921 Order which would change apportionment based on instantaneous flow to one based on flow over time, would have immense ramifications for Canadian and American Agriculture along the entire border and therefore is beyond the mandate of this Task Force.

What Canadian farmers see as an underlying issue is the need for more efficient use of the currently allotted water. Canadian producers have been keen to upgrade and modernize their irrigation systems to ensure efficient transfer of water from the rivers to their fields based on the apportionment outlined in the Treaty and 1921 Order. Canadian farmers have noted that this may not be the same across the border and that improvements in infrastructure may alleviate perceived inequalities in water allotment. In addition, with glacial headwaters rapidly shrinking, the need for further research and modeling is pressing and may help alleviate future issues.

The CFA would like to reiterate that the apportionment afforded under the 1921 Order of the International Joint Commission is based on the instantaneous flow at any given point in time. In addition, any changes to the administration procedures for apportionment must show clear improvements and benefits to farmers on both side of the border. In order to do this, the CFA supports the recommendations on improving monitoring and reporting.

For any questions please contact myself at (508) 235-1111

Sincerely,

A handwritten signature in black ink, appearing to read 'Bob Friesen', with a large, sweeping flourish above the name.

Bob Friesen
President

Response to the International Joint Commission
From a recreation user regarding the Task Force
Report 2006

Respectfully submitted by
Ken Brown, owner/operator
Milk River Raft Tours
Milk River, Alberta

May 24, 2006

I have read the report submitted by the International St. Mary/Milk Rivers Administrative Measures Task Force and offer the following submission to the International Joint Commission.

I. Introduction

I am Ken Brown and I am an outfitter and guide operating a summer raft tour and rental business along the Milk River. We have been in operation for nearly twenty years. We have the capacity to have 10,125 guests use our services every year. Our operational season is about 75 days from the third week in May to the end of August each year. However, we have not been able to realize those guest numbers because of fluctuations in river levels from late May to late August. In fact our records show that our numbers drop from 65 clients per day to less than 25 per day by the end of August each year. This is attributable to two main factors. First, there are fewer people vacationing in the latter part of August. Second, and most important, is the loss of water flow in the Milk River as summer progresses into fall and the demand for water decreases on both sides of the border. There is, I believe, another reason for fewer people using the river for recreational purposes during this peak time. In some years (the dry years) there is not enough water in the Milk River to safely operate any type of water craft on the river. In some years, the canal which carries the St. Mary portion of water through the Milk River has burst and there is virtually no extra water in the Milk River channel and its natural flow is not enough to support any recreational use along the river. Our records show that our season has been shut down as early as August 1 because of canal problems and not diverting any St. Mary water into the Milk River. Our livelihood is dependent upon a more or less constant flow in the Milk River during the peak summer months.

II. The Task Force Report

After Reading the Task Force Report (2006) I think I am even more confused than I was before. The issue seems to be whether to have an annual water account balancing period for both the St. Mary and Milk River or to maintain the current 15/16 day balancing period. It should be to no one's surprise that I support the 15/16 day balancing period because it allows us to predict that we will have enough water to operate our business for most of the peak summer months. An annual accounting period would not give us the same assurance from year to year.

Another problem I see with an annual apportionment is that the canal which carries the water from the St. Mary system into the Milk River system presently cannot handle the volumes of water needed to satisfy the agricultural needs on both sides of the border when

each side needs the water. Using a shorter accrual method, I believe, would allow more water into the Milk River during the peak irrigating season. All the tables, charts, and graphs in the report show a number of different variables for the uses of water in the Milk River watershed, but none of them account or show what the domestic use is. I would think this should be included in each calculation.

A "best scenario" for our business would be to store some of the water that flows down the Milk River during run off periods when the water is virtually unusable by any one and let it go when it can be used by everyone in the Milk River Watershed to their advantage. To this end, I will continue to lobby the Alberta Government to consider some form of storage on the Milk River in Canada. If this is done, there will be less need for one type of accounting period over another and the flow could then be regulated to allow operators like me to more fully realize the numbers of clients and the number of days we are able to operate during the peak summer months. I believe that a project like more storage on both river systems should be supported and recommended by the Commission to all of the governments involved in these two river systems.

III. Using Water along the Milk River

One of the aspects the International Joint Commission is going to have to recognize is the non agricultural uses of the water in both the St. Mary and the Milk River systems. Since the 1921 agreement, most of the communities built in both watersheds on both sides of the 49th parallel have grown and so has the need for water to supply the domestic needs of each community. We, in North America have grown accustomed to the idea that when we turn a tap on in our homes that water will come out of the tap in, seemingly, endless quantities. Most of our communities along the Milk River seem to experience water shortages almost every year with the municipal governments having to restrict water usage during the peak summer months and the added responsibility to somehow store enough water to last through most of the winter when there is virtually no water flowing in the river that is recoverable for use by the town or village. There is a fine balancing act that takes place in each of our communities nearly every summer. Some of these communities have tapped into the underground aquifers to supply their needs and these are being depleted at an alarming rate and the water can't be replaced in any short period of time. We need to find ways to use more of the water in the watershed and become less reliant on aquifers to supply our needs. Perhaps, the domestic use of water will become a more important issue than the amount of water available for

irrigation purposes in either river system. I urge the International Joint Commission members to examine the needs for domestic water as it deliberates on the other important issues.

IV. The Real Problem

As I have read this report there are a number of "other" issues that are going to have to be addressed at the same time and probably these issues will be more important to solve before much more progress can be made through the International Joint Commission. The most important other issue is a plan to deal with Treaty issues signed prior to the 1909 agreement on both sides of the border. I envision at least two different scenarios that could result from IJC action or inaction. The Native People need to be brought into full partnership as their Treaty Rights guarantee. We all know that this will take an effort on both sides to come to some agreement quickly and not let it drag out in the various courts of law for years to come. Without some agreement with all of the tribes and bands involved, there will be no progress made to satisfy water needs on both sides of the border. If there is agreement, the water will flow to both countries on some kind of apportioned deal. If this issue is not resolved, all of the water users in both watersheds could be held at ransom for all the water that flows out of the tribal lands protected by Treaty – a much more costly item than canal rehabilitation or building more storage.

V. Conclusion

The Task Force members who have submitted their report to the International joint commission have done a very credible job and need to be commended for their hard work. They were unable to find many joint solutions to a problem that grows more important each day. Neither side, it seems to me, is willing to give up what they know they have for something that they don't know will work. Perhaps we need to take the politics out of the picture and rely on the water basin residents to try to come up with what will work on both sides of the border and then have the IJC submit that agreement to the respective governments for approval and ratification. All of the facts and figures need to be on the table and all of the myths and half truths, innuendo, egos etc. left outside the meeting room to get a "what works best" agreement between the watershed residents on both sides of the border. Thank you for the opportunity to respond in this manner. I hope I have outlined what I see as problems that need to be addressed as quickly as they can be.

May 24, 2006

International St. Mary & Milk Rivers Administrative Measures Task Force
Secretary, Canadian Section

Ottawa, ON

(submitted at Public Meeting, May 24, 2006 in Lethbridge, Alberta)

Dear Task Force Members:

On behalf of the Board of Directors of Economic Development Lethbridge, I am submitting comments in support of Alberta's position on the draft report of the International Joint Commission regarding the St. Mary & Milk Rivers agreement of 1921.

There is no doubt the water flowing in these rivers is of significant economic and recreational importance to the residents of both Alberta and Montana. It is a credit to those who crafted the original agreement that it so fairly distributes this resource among those who use or need it. We support the provincial perspective that this foundation needs to remain in place as it is still reasonable, fair and balanced.

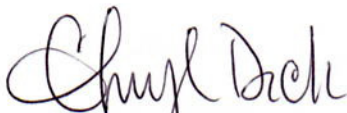
At the same time, today's technologies allow for improved monitoring, reporting and accounting, which are important for sharing information and ensuring the most effective and efficient use of this asset. Those impacted by the agreement need to be kept well-informed and engaged so they can make informed decisions...not based on political boundaries but on common sense and mutual benefit.

A proven mechanism for doing this is the use of specific letters of intent which build on the original agreement and create solutions-based directions for the stakeholders. We support this approach based on constructive public consultation practices and discussions with grassroots users, not just politicians and bureaucrats.

The parties should also be encouraged to focus on retaining and enhancing the strength of the irrigation system on both sides of the border as well as developing long-term relationships. Taking polarized positions does not serve the greater good and that should be the emphasis of any decision with the potential impact of this one.

With a positive approach, we look forward to continued enhancement of our cross-border relationships, economy and water resources.

Sincerely,



Cheryl Dick, APR, MBA
Chief Executive Officer

Cc EDL Board
Mayor Robert D. Tarleck
Mr. Dave McGee





May 23, 2006

International Joint Commission
Canadian Section
234 Laurier Avenue West, 22nd Floor
Ottawa, Ontario
K1P 6K6

Dear Sirs;

Re: International St. Mary/ Milk Rivers Administrative Measures Task Force Report

The Lethbridge Chamber of Commerce would like to comment on The Report of the International St. Mary -- Milk River's Administrative Measures Task Force.

The Chamber of Commerce represents the business community of Lethbridge and district. Our Mayor was deeply involved in the negotiation leading to the 1921 order, the original founding family of Lethbridge, the Galts and many prominent Lethbridge citizens have been committed to the development of irrigated land to attract and retain settlement to southern Alberta.

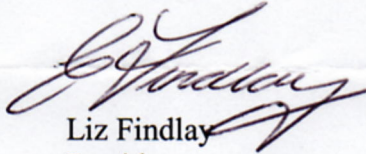
Lethbridge is currently celebrating its 100th anniversary as a city in the province of Alberta and during those 100 years our businesses have come to depend on the economy generated by the farmer's and their service industries. A significant part of that economy is generated by the irrigation sector. Many industries have established either in Lethbridge or in the surrounding area specifically to process the produce grown by irrigated farms. Without a guaranteed significant supply of water, major corporations such as McCain's, Lamb Weston, Sunrise Poultry would not recently have established plants in the area and Maple Leaf Pork, Maple Leaf Potatoes, Lucerne Foods and Frito-Lay that have been here for decades would be in jeopardy. These companies generate millions annually to the southern Alberta economy.

Much of the infrastructure in southern Alberta has been renewed in the last 30 years and we recognize that water management infrastructure requires significant ongoing maintenance as well as periodic renewal. This investment in infrastructure by the farmers in southern Alberta, the provincial government and the federal government before them has enabled continuing improvements in efficiency and reduced water losses through distribution works. During this period the farmers also invested heavily in on farm irrigation system renewals. With advancements in technology a majority of the irrigation systems in southern Alberta are now center pivot and a significant number of those are low-pressure drop tube irrigation systems to reduce evaporative losses and energy consumption.

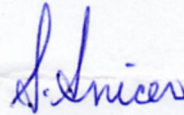
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All of this has been dependent on well understood regulations, agreements and legislation. Uncertainty in water supply prevents long-term investment that is necessary to support the irrigation systems in southern Alberta. Our position is that the 1921 Order should remain as is. The Chamber of Commerce supports the Government of Alberta in its request to continue with the existing order and measurement periods. The Chamber is well aware that measurement and management go hand-in-hand and therefore also supports increased monitoring and measurement systems which will enable better management of water.

We thank you for this opportunity to comment.



Liz Findlay
President



Sue Snicer
Executive Director

Lethbridge Chamber of Commerce



**Response to the
International Joint Commission from the
Milk River Watershed Council Canada regarding the
Task Force Report (2006)**

May 23, 2006

Introduction

The Water Supply and Management Team, on behalf of the Milk River Watershed Council Canada, has prepared this response. We are a non-profit society and registered Watershed Planning and Advisory Council under Alberta's Water for Life Strategy. Our vision is a watershed where community well being is supported by a vibrant economy and sustained by a healthy environment that will endure as our legacy for future generations. Our goals address water supply and management, water quality, and biodiversity, among others, in the Milk River watershed. We appreciate this opportunity to provide the following comments.

General

The International St. Mary – Milk Rivers Administrative Measures Task Force Report to the International Joint Commission (2006) (herein referred to as the Task Force Report) is an excellent document that has illuminated the important aspects of the issues surrounding the St. Mary and Milk River apportionment. It provides a comprehensive analysis that leads to a much better understanding of those issues so that the impacts of the recommendations can be assessed for the Milk River.

The paramount issue is how to deliver more usable water to all Milk River basin users in a dry year. The domestic, municipal, industrial, agricultural and recreational water interests in the basin share a daily common bond with a supply of water. We have assessed the issue using spreadsheets provided to us by Alberta Environment. These are the same spreadsheets that provided the foundation for the tables presented in the Task Force Report.

If one looks at the flows diverted from the St. Mary during the 5 driest years during the period 1979 to 2004 (Table 1), Montana even under its historical operations received an average of 94.1 % of its entitlement. A canal of 850 cfs capacity would deliver 94.9% of

entitlements. Some graphs show Montana receiving slightly more than its entitlement in 1988. A seasonal balance period diverts 1.5% (2400 acre-feet) more water than the current 15-16 day period for a canal capacity of 650 cfs. A capacity of 850 cfs diverts only 0.65% (1032 acre-feet) more water with a seasonal balance than 850 cfs with a 15-16 day balance period.

Table 1. Summary of scenarios from Appendix A.

Criteria	St. Mary Diversion Volume Diverted to the Milk River			
	% of Entitlement Diverted		% of 15-16 Day Volume	
	15-16 Day Balance		Seasonal Balance	
Canal Capacity	650 cfs	850 cfs	650 cfs	850 cfs
Avg. of 5 Driest Years	94.1%	94.9%	101.5%	100.65%
Avg. of 5 Median Years	90.3%	94.5%	103.3%	101.7 %

Sal Figliuzzi tells us that had the LOI been place for all the 5 driest years, Montana would have diverted 98.4% of its entitlement.

Opting for change to a seasonal balance period in dry years has virtually no merit if a canal capacity of 850 cfs were adopted for the reconstruction. In contrast, the annual balance principle requires storage and presents very difficult technical problems for the Accredited Officers. The principle and merits of an annual balance period will be addressed later in this paper.

Administrative Details

Apportionment of any kind requires daily recorded supply flows, daily diverted flows to various users, an understanding of the impact of seepage/evaporation losses and a transparent calculation methodology that is not unduly complicated. The Task Force Report deals with this issue in detail and suggests measures to comply with the above. Alberta and Montana water users must rise to the same level of diversion measurement so that accurate apportionment can be provided. Apportionment can only be as accurate as the precision, timeliness and regularity of measurements provided by Alberta and Montana officials.

Annual Apportionment

The Task Force Report addresses in detail the issue of opposing views held by Montana and Alberta regarding the meaning of the words defining apportionment in the 1921 Order. Specifically, the Report investigates whether or not the Order is based on the instantaneous delivery of flow entitlements and concludes clearly that no common ground could be reached.

If one looks back at the history and the needs of the water users on the Milk River and those who diverted their water requirements from the St. Mary at Kimball, AB., two points quite clearly and appropriately influenced the wording of the Apportionment document. First, neither side had any major storage in place until 1938 in Montana and 1953 in Alberta. Second, both sides required continuous maximum canal flow to meet demand on a daily basis for irrigation and livestock, especially during the high demand periods in the summer. Daily apportionment met the daily demand. Any other arrangement would have resulted in disorder and confusion. For example, the decision made by Montana to divert all of the St. Mary flow into the Milk River resulted in Canada's decision to construct the Spite Ditch. Its upstream end was just west of the Town of Milk River and it could divert enough water back to Magrath to supply water to the then-existing irrigators previously supplied by the Kimball diversion. The threat of unilateral diversion resulted in the establishment of the IJC to provide apportionment for the water users.

The Milk River is the primary interest of our Council. The following Table 2 outlines the major issue associated with the possible application of an annual balance period.

Table 2. Milk River apportioned volumes available to Alberta. Source: International St. Mary – Milk Rivers Administrative Measures Task Force Report to the International Joint Commission (2006), Table 2 p. 99.

Years	Milk River Apportioned Volumes Available to Alberta		
	15-16 Day Balance Plus 4000 ac-ft LOI*	Annual Balance No LOI	Alberta's Needs for 8,100 Acres
25 Year Avg.	8721 acre-feet	7566 acre-feet	10601 ac-ft
Avg. of 5 Driest Years	6700 acre-feet	5800 acre-feet	13500 ac-ft

*LOI – Letter of Intent

It is apparent that Alberta irrigators would be directly penalized by an annual balance period. Imposing an annual balance with no Letter of Intent on the Milk River results in a critical decrease in water available for Alberta diversion. The basic failure in the application of an annual balance methodology that requires recovery of credits from subsequent natural flows is the low volume of those natural flows in July and August. The credits would be derived from the natural flows, less diversions, resulting from major precipitation events stored downstream in Fresno Reservoir. Flows available for recovery of credits may be zero. Table 2 quantifies this issue. There is simply no way to recover any meaningful portion of Canada's 33,500* acre-foot 25-year average annual flow entitlement that enters Fresno Reservoir. *See Table 3, Page 24. Task Force Report

The old adage "be careful what you wish for" must be kept in mind when one thinks about the application of an annual balance period. The principle must govern both rivers and their tributaries as stated in the 1921 Order. Storage must be in place to allow credits to be accumulated. The Accredited Officers and their field staff must wade into several difficult areas of measurement. They must be able to provide accurate determinations of evaporation for the credited stored volume within a much larger stored volume for Montana in the St. Mary Reservoir and Alberta in Fresno Reservoir. They must determine the ownership of water spilled through a riparian outlet or over an FSL spillway and then determine if it is lost or will have a consumptive use and by whom. They would have to provide a number that represents the net volume to be recovered and a second number for the rate of recovery of that net credit from the natural flow of the river or tributary while still providing an appropriate residual flow. The application of the principle to actual practice is likely to result in unacceptably erratic flow patterns. Furthermore, application of the annual balance principle could mean less incentive to maintain or rebuild the St. Mary diversion because timely diversions would not be as important. Flows lost to diversion failure could be made up at any time but only if the un-diverted volume can be stored. If the failure occurred in June, that volume might be spilled over St. Mary dam, and thus unrecoverable by Montana and unusable by Alberta. Would this not be an issue? The economic benefit of that volume of water may be zero.

The Alberta water users on the Milk River are placed in a difficult position with no storage in place because very low natural flows during high demand summer months will not allow the recovery from Fresno Reservoir of substantial flood and spring flow credits. The Letter of Intent presently provides for divertible credit volumes for Alberta during the low summer flow time frame. If an annual balance was in place, and the Letter of Intent was withdrawn,

Alberta could be forced to unilaterally build and operate a storage reservoir. Consider what could arise if a storage reservoir is constructed and operated unilaterally by Alberta. Assume the daily diverted St. Mary flow is delivered through such a reservoir. If the dam has power generation capacity, the St. Mary flows could generate power throughout the diversion period. The operators of the reservoir could put excess available storage to a productive use by storing Montana's share of the Milk River all summer and then discharging that volume through its power plant after the annual St. Mary diversion is concluded. That release may be of no current season value to Montana irrigators. Balance has been achieved on an annual basis provided Montana gets its share of the Milk River by November 1, if that is the anniversary date chosen. It is the view of The Water Supply and Management Team of the Milk River Watershed Council Canada that it would be patently unwise to adopt annual apportionment because, aside from being clearly impractical, just imagine the uncertainty, confusion and disorder that could sweep through the basin.

Further issues are also likely to arise. In time, the tributaries that flow north from the Sweet Grass Hills would have to be accounted for on an annual basis, if that is the Order. Miners Coulee is a good example of one of the four main streams that would have to be addressed. There is one irrigation license near the mouth of Miners Coulee in the Alberta portion of the watershed. Montana ranchers on the same stream operate a number of irrigation and storage projects near the headwaters with enough capacity to utilize or store all the natural flow of the creek in all low and most median flow years. Alberta receives appreciable water only from major weather events, certainly not every spring. To apply apportionment, the natural flow of the basin in Montana must be measured or computed. Under an annual balance period scenario, the numbers are generated for spring runoff and any other major precipitation event. Fifty percent of the flow is assigned to Alberta. Existing storages would have to be opened to comply with the Order to deliver a stated volume to Alberta. The Montana ranchers may comply with the Order and deliver that volume to the border after September 1 with evaporation deducted. Balance has been achieved but not in a fashion that satisfies the downstream irrigation license in Alberta in a timely fashion, or in accordance with the intent of the 1921 Order, page 5 –

“It is therefore of the utmost importance, not only because of the practical benefits to accrue to the people of this western country, but still more because the St Mary and the Milk Rivers problem might easily become a source of serious irritation and misunderstanding to the people of the two countries, that every effort should be made to obtain the maximum efficiency in irrigation from these waters.”

The management of the tributary's apportionment according to the scenario outlined above is simply unacceptable. The Southern Tributaries in the Sweet Grass Hills are not mentioned in the 1921 Order. That issue will have to be addressed.

Strict adherence to Alberta's interpretation of the 1921 Order (current apportionment) precludes the possibility of the above-noted events occurring. Diversion works must be kept in good operating condition to ensure daily use. Use it or lose it. But, these events could occur if a joint storage operating agreement, signed by the most senior people in the governments of both Montana and Alberta, were to be put in place. Such an arrangement could result in more usable water being made available to water users in the whole basin. Why not store some of Montana's flood flow share in Alberta. That would free up space in Fresno for flood flows produced between the Alberta storage and Fresno. Find out if optimum storage operation in the basin would recover the 35,000 acre-feet for Montana that Alberta could ultimately use as its entitlement. The model programs are in place to do that and more. Why not use them to benefit the whole basin?

Stated Position

The Water Supply and Management Team that speaks on behalf of the Milk River Watershed Council Canada adamantly oppose the application of the principle of an annual balance to the apportioned flows of the Milk River and its tributaries.

A Way Forward Using Pragmatism and Cooperation

Considering the balanced nature of the IJC, we would anticipate that a clear decision in favor of either volume or flow apportionment is not imminent. We believe that the quiet, collaborative approach utilized by the people involved with the Eastern Tributaries should be applied to the whole basin. Toward this end, we offer the following carefully considered recommendations:

1. Abandon any further discussion surrounding an annual balance period;
2. Continue the longstanding method of calculating apportionment;
3. Adopt the administrative measures items as recommended in the Task Force Report;

4. Refine the methods used to gather diverted user flow data in both jurisdictions in order to provide an accurate base for the apportionment calculation;
5. Update the user acreages by regular site visits by accredited personnel;
6. Attach an Alberta and a Montana water user to the apportionment calculation team to remove any misunderstanding regarding accuracy of the basis for the apportionment calculations;
7. Install a joint Alberta-Montana grass-roots water user committee directed to concentrate their expertise on the following:
 - a) To examine the Milk River as one basin rather than a basin split by the 49th parallel.
 - b) To gain a working knowledge of the flow patterns of the Milk River and the St. Mary diverted volumes using readily available information already in use.
 - c) To examine the principle of increased storage and any other options that might improve the economic viability of the basin water users using models currently operational.
 - d) To consider the principles for an equitable means to share both benefits and costs.
 - e) To rank the options for further study based on (c).
 - f) To recommend that list to both Governments for joint action using a joint technical team.
 - g) To be involved in that action to increase the committee's knowledge base regarding basin flow and storage modeling.
 - h) To arrange to communicate the results to a wide circle of key players in both governments and in the basin.
 - i) To recommend action based on the most viable options.

Closing

Thank you for considering our recommendations as you move forward with your decisions regarding apportionment on the St. Mary and Milk Rivers. If you have any further questions regarding our statement, please contact Tom Gilchrist, Chair of the Milk River Watershed Council Canada at (403) 647-2245.

Submitted by:

Water Supply and Management Team of the Milk River Watershed Council Canada

Tom Gilchrist

Chair, Milk River Watershed Council Canada and the Water Supply and Management Team

Adapted from
TASK FORCE Nov. 16 Scenarios with No Release. Author - Sal Figliuzzi

Comparison of 5 Lowest Flow Years

Volume Diverted from St Mary

Year	Actual 650 cfs 15-16 day	Model			%		% of entitlement diverted	
		650 cfs seasonal	850 cfs 15-16 day	850 cfs seasonal	650 cfs annual	850 cfs annual	650 cfs 15-16 day	850 cfs 15-16day
1982-83	171979	172662	172170	172290	182053	181681	94.7	94.8
1987-88	155776	156978	156880	157441	162386	162849	95.6	96.3
1991-92	144840	146509	145520	146870	156441	156802	92.3	92.7
2000-01	134155	134155	133402	134063	139826	139734	96.0	95.5
2002-03	174096	182578	180123	182589	189522	189533	91.9	95.0
average af	156169.2	158576.4	157619	158651	166046	166120	94.1	94.9
% diff of 15-16 day		1.54%		0.65%	6.32%	6.37%		

Comparison of 5 Median Flow Years

Volume Diverted from St Mary

Year	Actual 650 cfs 15-16 day	Model			%		% of entitlement diverted	
		650 cfs seasonal	850 cfs 15-16 day	850 cfs seasonal	650 cfs 15-16 day	850 cfs 15-16 day	650 cfs 15-16 day	850 cfs 15-16 day
1979-80	219175	229030	223582	229361	94.6	96.5		
1981-82	212872	228766	228683	237823	86.7	93.1		
1984-85	207474	213385	212884	214631	91.4	93.8		
1992-93	205136	207090	205142	206936	92.8	92.8		
1999-20	196868	197475	197214	197214	86.0	96.2		
average	208305	215149.2	213501	217193	90.3	94.5		
% diff of 15-16 day		3.29%		1.73%				

Comparison of 5 Highest Flow Years

Year	Actual 650 cfs 15-16 day	Volume Diverted from St Mary Model			%		% of entitlement diverted	
		650 cfs seasonal	850 cfs 15-16 day	850 cfs seasonal	650 cfs 15-16 day	850 cfs 15-16 day	650 cfs 15-16 day	850 cfs 15-16 day
1990-91	244966	258689	272774	292696	67.2	74.8		
1994-95	248547	256602	277334	315577	74.5	83.1		
1995-96	265971	287375	292303	311688	76.1	83.7		
1996-97	252625	267002	278802	331816	73.4	81.0		
2001-02	217003	231734	244452	260045	59.0	66.4		
average	245822.4	260280.4	273133	302364	70.0	77.8		
% diff of 15-16 day		5.88%		10.70%				

Verbal Response
At
Lethbridge Meeting
Re
Task Force Report Review
May 24, 2006

Interpretation of the 1921 Order.

It is worthwhile to read this section of the Order again.

“The High contracting Parties agree that the St. Mary and the Milk rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each”.

A speaker well versed in those issues presented an excellent short discourse on International treaty law at the last meeting in Lethbridge. He said as I recall that one must read all the words in the document and not pick and choose to meet your interpretation. I would recommend that the Commissioners review that transcript.

If the agreement were opened I would predict that 20 years and \$10M would be spent reaching a new solution. But don't count your winnings on the way up the courthouse steps. It would be entirely within the realm of possibility for Alberta to be granted a larger portion of the St. Mary by virtue of demonstrating very efficient historical use of its share of water from the St. Mary.

% of Entitlement Diverted from the St. Mary to the Milk River

An examination of the spreadsheets and Appendix A provides the following information.

For an 850 cfs canal design

1. 94.9 % of entitlement is diverted in the 5 low flow years
2. 94.5% of entitlement is diverted in the 5 median flow years
3. 77.8% of entitlement is diverted in the 5 high flow years

All are averages for the 5 years assuming that the canal operates at capacity. The high flow years need some place to store water in the upper reaches of the basin; otherwise flows must be restricted because of insufficient river capacity for local high water and the diverted flow.

If one looks at Table 1. Page 96 and Table 2 page 99, one can understand the issues in applying annual apportionment to the Milk River.

1. Average annual share of the natural flow 36,468 acre-feet, -- recoverable with no LOI during the irrigation season 7566 acre-feet
2. Minimum annual share 7297 acre-feet, -- recoverable with no LOI 4785 acre-feet
3. Average of the 5 driest years is 13 486 acre-feet, -- recoverable with no LOI 5800 acre-feet

Attention to the dry years is of paramount importance. The devil lurks in a long-term average.

The annual share includes winter flows, March floods and April to June floods.

Suppose Alberta developed more acreage based on using those average net credits stored in Fresno. Those irrigators would need a water supply forecast before the 15 of April to make their cropping plans. No flood, no credit to recover, no crop.

Back to back dry years would be a disaster because credit volumes could not be transferred to the next year because Fresno storage is usually depleted for downstream uses during the season and raised just enough before the diversion period end to provide for downstream winter uses. In addition to the above noted point, the application of an annual balance period precludes a credit carry-over to following years.

Presented by Tom Gilchrist

Chair

Milk River Watershed Council Canada

(via email)

Hi Ross,

This message was intended as a response to the Task Force Report so if I forward it to you can you make sure it is entered in the system?

Thanks

Dave

-----Original Message-----

From: Barry Snow

Sent: Tuesday, May 23, 2006 1:43 PM

To: Doug Horner; Paul Hinman

Subject: Canal rehabilitation and IJC

Following is a letter that I wrote to David Hill 18 May 2006. I had intended to polish up a little before I forwarded it to you but seem to not find the time. It contains the essence of my thoughts regarding the Montana proposal that Alberta share in the expense of some of their canal infrastructure.

Sincerely,

Barry Snow

I have read that Montana would like Alberta to share in the expense of the rehabilitation of the St. Mary to Milk River canal diversion.

What seems to have been completely under the radar of the IJC and others is that Albertans pay 100% of the canal maintenance called the Milk River. This is done mostly on the backs of private individuals, many of whom do not even irrigate.

The unusual level of water has caused continual sloughing of the river banks as the engorged stream attempts to find a bed that will handle

the flow. High silt and sedimentation impact on the fish stocks. Particularly in the spring when the flow is often higher and the fish are spawning. There are few mature trees on the upper miles of the river, due largely to the unstable stream bed.

In years that the siphon is activated while there is still ice on the river, we suffer flooding, scouring of the banks, shearing of the trees and deposition of new rock piles on the flood plains which are often hay fields.

Right now, the river is running about 5 or 6 inches deeper than usual. I would say normal but don't know what that is. The rehabilitation, I suspect will increase this flow even more. There are extra problems maintaining intake screens in this high silt and sand environment. Just crossing back and forth to work in a canoe or boat is extra work.

Point bars never get a chance to rest and grow trees or brush. As they silt in during flood times and raise the bank level in the "birth of this river/canal" the opposing bank will usually erode and allow the point bar to advance yet again. I can show you where my swimming hole was forty years ago. It is more than 100 feet from the water today and the two islands that were there are also gone.

I have areas where alfalfa was planted that has since fallen into this canal. Fencing is an increased problem and many times I have seen fence parallel to the river fall in, not just the end posts that go to the river.

Maybe another hundred years of this canal will stem this erosion as it eventually reaches river status but to ignore that there are very real expenses in maintaining this canal is a disservice to all riparians through whose land it flows.

I have long felt that this should be recognized officially. I apologize for this hastily drafted note if parts are a little confusing. My reference to birth of a river is because the stream is only full for part of a year (1/3rd?) and will be many more years before the bed is stabilized enough to call it a river, regardless of its name. 100 years of being used as a canal has only given this artificial river about 30 years of development.

Thanks for your attention,

Barry Snow
Milk River, Ab., TOK1M0
(403) 647-3798

TO THE INTERNATIONAL JOINT COMMISSION

Comments on the “International St. Mary and Milk Rivers Administrative Measures Task Force” Report by M. Kent Bullock, Manager of the Taber Irrigation District

The Taber Irrigation District delivers water to 82,200 acres of irrigated land in the Taber area. Irrigated agriculture is the backbone of the economy of this area. Many specialty crops are grown because of the good soil, high number of heat units and most importantly, because of the water available for irrigation. If it wasn't for the water, there would be very little agricultural activity.

Some of the crops grown under irrigation in the Taber area are sugar beets, corn, potatoes, beans, peas, onions, oil seeds, forages and cereals. In addition to the specialty crops that are grown, there are lots of value added industries in the area, which are dependent on water, that is delivered through the irrigation system.

With more specialty crops being grown, the demand for water has increased and the timing for the water has shifted. More water is needed later in the season because of crops such as sugar beets, potatoes, corn, etc. This has made the need for water storage to capture the spring flows and hold the water for later in the season more critical. Just as critical, is the need for the later summer flows that are in the rivers. Therefore, changing the balancing period for flows diverted from the St. Mary River in the United States to longer periods, such as annually from the current 15 day period, would have a very detrimental effect on our water supply. Canada would receive spring flood flows that could not be utilized or stored because of a lack of infrastructure to store the water, and would be lost to Saskatchewan, while receiving less flow in the summer when the water could be used. Already by using a 15 day balancing period, the United States is being benefitted beyond the original intent of the 1921 Order. The 1921 Order is based on sharing the instantaneous flows and as such there was to be no balancing period. However, because of the impossibility of making infinite adjustments to the diversion rate every minute of every day, a 15 day balancing period was agreed upon from a practical point of view in order to manage the water and has been the practice for the last 85 years. With today's technology, it would probably be feasible to reduce the balancing period to weekly or perhaps even daily, which would be closer to the spirit of the 1921 Order.

Also, by going to a longer balancing period, the river flows coming into Canada would be reduced later in the season to make up for the short fall in diversions in the spring, which would negatively impact the aquatic health of the river.

I am very concerned that the International Joint Commission would consider changes to the existing 1921 Order that would negatively affect Canada and particularly the St. Mary River Irrigation Project, which includes the Taber Irrigation District. The TID feels that the existing agreement and water management practices have been fair and equitable. At the public meeting in Havre on May 23, 2006, there was continual reference made to the 1909 Boundary Waters

Treaty with respect to the equal apportionment of the water from the St. Mary and Milk Rivers. However, it was taken out of context. The next sentence states “It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourths of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow”. This was due to the existing commitments and development on each of the rivers at that point in time. This arrangement was made to give more beneficial use to each country.

To make changes to the 1921 Order on how the water is apportioned, which could reduce the usable water coming into Canada through the St. Mary River, would have a very negative impact on the economy of the Taber Area and on the current level of development that has taken place over the years. It would also create doubt on both sides of the border, that any agreement could be trusted in the future. Without confidence in the future, no one will want to make investments that depend on a predictable water supply. A change in the apportionment of water from the 1921 Order will also create stranded investment in the current level of development.

I would like to thank the Task Force for all of their work. I believe that a better understanding of the issues and concerns has been achieved and that it is essential that the 1921 Order remain in effect. I also support that the existing or preferably a shorter balancing period be used.

TO THE INTERNATIONAL JOINT COMMISSION

A Presentation on the “International St. Mary-Milk Rivers Administrative Measures Task Force” Report - by Keith Francis, Chairman of the Taber Irrigation District

I would like to thank the IJC for their determination that the “Task Force” appointed by them was to consider “measures for improvements to existing administrative procedures of the St. Mary and Milk Rivers apportionment to ensure more beneficial use and optimal receipt by each country within the terms of the 1921 Order”.

The principle of “First in Time, First in Right” used by both countries provides and shows that the existing Agreement is fair and right according to this principle and should not be changed. I thank them for the decision not to change the Agreement or the 1921 Order. I would like to submit to the Commission that the present balancing system is also fair and right, and any significant changes to it would not be fair or just.

The Province of Alberta, the Taber Irrigation District, and the farmers within that district have invested millions of dollars to develop an irrigation system dependent upon an assured supply of water provided for them through the terms of the existing agreement and Order.

Any change or interruption to that supply of water would prove devastating to the economy of the Taber area, and all of southern Alberta.

The Taber Irrigation District has 82,200 acres of irrigated land and also conveys water to the Town of Taber, Village of Barnwell, Lamb Weston Potato Plant, Rogers Sugar Beet Processing plant (the only sugar beet factory in Canada), several cattle feed lots, and Husky Oil for water injection as well as for rural and domestic needs. Other value added industries in Taber include Hostess Frito Lay Plant, Lucerne Vegetable Plant and Agricore United Dry Bean Plant. Within the Taber Irrigation District there are 5,000 acres of sugar beets grown, 10,000 acres of potatoes, 6,600 acres of corn and peas, 5,800 acres of dry beans and 600 acres of onions plus other small crops.

The investment to produce and process these crops is very significant and has occurred because of irrigation and the assurance of a dependable supply of water. To make any significant change to the “Balancing formula” would put that assured water supply at risk for the farmers and processors within the Taber Irrigation District and could result in a devastating negative affect on the economy of our area and the province as a whole.

The existing formula has served both countries well for over 84 years and should not be changed.

Montana should first rehabilitate their infrastructure before asking for a change in something that is fair and equitable and has served us both for these many years.

Once they are able to take the water allocated to them under the existing formula, they may find that there is less need for a change in what we have now.

Perhaps a dam built on the St. Mary river in Alberta near the Montana border, paid for by both countries, would allow Montana to divert their share of the water from the St. Mary river into the Milk River, and they could abandon their worn-out infrastructure.

Response by

Alberta Sugar Beet Growers

to the

**International St. Mary – Milk Rivers Administrative Measures Task
Force: Report to the International Joint Commission (April 2006)**

Submitted by

**Arie Korevaar, Director for Taber West Area
Alberta Sugar Beet Growers**

Taber, Alberta

Introduction

Southern Alberta sugar beet farmers thank the members of the Task Force for their efforts in writing the Report to the International Joint Commission and the Commissioners of the International Joint Commission for instituting the process.

The objective of the International St. Mary - Milk Rivers Administrative Measures Task Force is of supreme importance to the members of Alberta Sugar Beet Growers.

If it is possible to find "opportunities to improve the existing administrative procedures for the apportionment of the St. Mary and Milk rivers to ensure more beneficial use and optimal receipt by each country of its apportioned waters," then we must look hard for them. Managing water resources will be of greater concern in the coming years than we likely even think.

Doing nothing is not an option.

In 2004 I sat in this ballroom and heard water engineers from Canada and the United States say they have always been able to sign off on the water sharing agreement for the two rivers. The Task Force Report made no other finding.

Therefore, southern Alberta sugar beet farmers think this leads to the conclusion that the basis of water sharing is fair. Recommended changes should be consistent with an "instantaneous flow" approach.

As the glaciers supplying melt water to the St. Mary rapidly recede, grander engineering solutions may be required on one side of the international border or the other. However, any solution must respect the need for southern Alberta water users to have access to an instantaneous flow from the sharing agreement.

Our Industry

Sugar beet in Alberta is grown exclusively on irrigated land in the southern part of the province. Our farmers are major water users. A modern irrigation infrastructure system supplied by an adequate amount of water, operated by sophisticated farm managers allows beet to exist and be competitive in the open Canadian sugar market.

The domestic market we compete in has the lowest bound tariff on refined sugar in the world. The NAFTA tariff on U.S. imports of sugar into Canada is \$0.00. Other countries are subject to a modest Most Favoured Nation tariff of about \$30.00 per tonne of sugar or approximately 8-12%. Raw sugar imports generally come in also at a zero tariff.

We have no sugar policy. The Canadian whole farm safety net program does not pay out much or often to diversified southern Alberta irrigation farmers. In real terms, access to irrigation water is our primary safety net. Without a secure and predictable supply of water, there is no southern Alberta sugar beet industry.

Water Policy Development

Despite the critical necessity of water to agriculture, policy development by farmers has been slow. It was only at the Annual General Meeting in Ottawa in March 2006 that the Canadian Federation of Agriculture adopted a water policy statement. The statement is at Appendix 1 of this paper.

The CFA water policy statement is our guidance in responding to the April 2006 Report to the International Joint Commission. We reiterate the main points here:

- Canada's water resources must be protected and the Canadian government must protect Canadian water rights in all trans-boundary water treaties.
- No trans-boundary water treaties that impact agriculture should be renegotiated or amended without the clear consensus and participation from the Canadian agricultural community.
- The Canadian government must preserve agriculture as a priority user and caretaker of Canada's water resources.
- Governments must work with the agricultural industry to ensure the long term quality and quantity of water resources. Governments must provide appropriate funding to support projects that ensure the long term sustainability of water resources for the public good.

Fundamental Differences Between the Parties

Alberta Sugar Beet Growers supports the Government of Alberta subscription "to the belief that the apportionment afforded under the 1921 Order is based on the instantaneous flow at any given point in time to ensure the viable operation of downstream canals and diversions."

When the 1909 Treaty and the 1921 Order were agreed, irrigators on both sides of the border had livestock, crops, and domestic uses for the water on a year round basis. This requires an ongoing supply, every month of the year.

An interpretation using a volume-based concept of apportionment "could result in the upstream jurisdiction [being Montana or Alberta] utilizing the majority of the flow at a time when the downstream jurisdiction [being Montana or Alberta] might have a critical need for that flow, and then "passing" flows when they might be of minimal benefit to the downstream jurisdiction." The applicable situation depends

on which river we are talking about. In neither case is the scenario good news for the downstream users.

We believe that the substance of the Montana initiation of a review of the 1921 Order rests partly on evidence that Alberta did too well out of the negotiation leading to the Order because of the vigorous effort of Canadian delegate Charles Magrath. Mayor Magrath was not arguing for a volume based apportionment. He knew that at the time and so did the American delegates.

Changes in administrative methods should reflect the fact that the instantaneous flow argument is operative.

Aiming for the Task Force Objective

Getting to the Task Force's objective will be very difficult. To paraphrase the report's Executive Summary, more beneficial use and optimal receipt by either the U.S. on the St. Mary River or Canada on the Milk River is only possible if a mechanism for allowing credit for surplus deliveries is developed and implemented.

We know there are likely better ways of managing the water in Canada and the United States. Succinctly put, we do not trust each other enough to work toward a common goal. The 2003 initiation of the request for a review by Montana is based on the impression of unfair treatment for a period of decades. Southern Alberta farmers are suspicious that any change proposed will not be for overall welfare improvement of water users.

How does the International Joint Commission deal with this inertia?

The report informs us all about numerous administrative practices that need improvement. It also tells us the modeling needs more work before its accuracy or conclusions may be relied upon.

This is the work of scientists and engineers. Improving the science of the hydrology of these water basins is necessary to bring confidence to debate at the business case and political level. We encourage the IJC in this type of work.

Only when we are convinced change is for mutual benefit will we relax our guard. Scientists and engineers may be able to provide a certain comfort level. Politicians probably will not.

Other Potential Options

The Task Force identified several approaches outside its terms of reference that may be of future value. Only a cursory examination of these alternatives was

done. New approaches such as water banking and tradable permits, joint operations, and infrastructure improvements/enhancements may be among options that should be considered; perhaps not.

Though the forty-ninth parallel may only be a line on the map, it does colour the attractiveness of grander options in a very real way. Solutions requiring bi-national cooperation will take a long time to review and were properly beyond the scope of the Task Force Report.

We think it is too early for the IJC to have an opinion on the other potential options so briefly scanned.

Southern Alberta sugar beet farmers will do their part in shaping the debate. At the Canadian Federation of Agriculture and elsewhere in our country we work to help fashion water policy for agriculture.

Much work needs to be done arriving at a national consensus before international projects are considered. Until then cross border cooperation will be restricted to the type of administrative measures done in recent decades.

We do not know what business plans or political collaboration will be acceptable in the near to mid term. As in many aspects of life, it is easier to see what we do not like than in finding out what we want to do. This will not, however, prevent us from stating our piece when we hear things we are unhappy about.

Conclusion

The glaciers supplying melt water to the St. Mary River are shrinking for both U.S. and Canadian users. Scientist Richard Leakey recently wrote for *The Economist* that the glaciers in Glacier National Park may well be gone by 2030. Whether the globe is warming or cooling, the ice sheet retreats.

There will be no time off for the International Joint Commission or users in the water basins concerned. We will have to make significant changes to accommodate what is happening at the headwaters.

Adequate irrigation water to sustain the huge investment we have made on our farms in sugar beet and other crops, managed by professional farmers is our primary safety net. We have no commodity policy or Farm Bill as a fall back. We have to get water policy correct or perish.

Pursuing administrative reform according to the concept of instantaneous flow seems the correct way forward today and the only approach that down the road may give us the science to better understand grander engineering plans.

ANNEX 1

The Canadian Federation of Agriculture Standing Policy – 2006 Water Policy

14.0 Water

Water is an essential element for agriculture and food production. Ensuring food security and a productive, thriving agricultural economy is paramount for the long term health of Canada itself. With increasing development and pressure on Canada's water resources, the CFA recognizes that balance must be achieved between the social, economic and environmental uses of water. Producers in Canada achieve that balance through their food production, rural economic development and the significant contributions to the environment through soil filtering, riparian management and land stewardship. The vital links between water, the agricultural economy and the environment must be preserved. As such:

- Canada's water resources must be protected and the Canadian government must protect Canadian water rights in all trans-boundary water treaties.
- No trans-boundary water treaties that impact agriculture should be renegotiated or amended without the clear consensus and participation from the Canadian agricultural community.
- The Canadian government must preserve agriculture as a priority user and caretaker of Canada's water resources.
- Governments must work with the agricultural industry to ensure the long term quality and quantity of water resources. Governments must provide appropriate funding to support projects that ensure the long term sustainability of water resources for the public good.

Policy statement as adopted at the Canadian Federation of Agriculture Annual General Meeting , Ottawa, March 2006.