

REPORT OF THE CANADIAN SECTION OF THE
INTERNATIONAL JOINT COMMISSION TO THE GOVERNMENT
OF CANADA IN THE MATTER OF THE MILK AND ST MARY'S RIVER

By J. H. Stewart

The Treaty between His Majesty the King of the United Kingdom of Great Britain and Ireland and of the Dominions beyond the Seas, Emperor of India, dated the 11th of January, 1909, relating to boundary waters and to questions arising along the boundary between Canada and the United States contains the following Article:

"The High Contracting Parties agree that the St Mary and 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. It is further agreed that in the division of such waters during the irrigation season, between the first 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.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of waters diverted from the St Mary River. The provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance of such waters through the Milk River.

The measurement and apportionment of the water to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of His Majesty under the direction of the International Joint Commission."

This Treaty was approved of and ratified by the President and Senate of the United States and the Parliament of Canada in due course, and all necessary legislation has been enacted and steps taken by the two countries for the purpose of putting the same into operation and making it effective.

The St Mary and Milk Rivers and the question of utilizing the waters of these streams for the purpose of irrigation, had been the subject of consideration by and diplomatic correspondence between the United States and Canada for some years prior to the Treaty, and Article VI, which has been aptly described as a Treaty within a Treaty, embodies the complete record of the settlement arrived at with reference to these waters, and it will be unnecessary for the purposes of this report to refer to any other articles or provisions of the Treaty.

When the Commission proceeded to discharge the duties assigned to it under the Article in question it discovered that a difference of opinion existed between the representatives of the two countries as to the waters to be measured and apportioned; the United States contending that the waters described in said Article, viz: "the St Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan)" included only the St Mary and Milk Rivers and such of their tributaries as flowed across the international boundary either as independent streams or part of the main rivers, whereas Canada contended that the waters subject to the Treaty and described by the language quoted, were the waters of all of the two rivers and all of their tributaries.

All parties interested appeared before the Commission in the City of St Paul on the 24th, 25th, 26th, 27th and 28th of May, 1915, when the facts bearing upon the subject were presented by the officers of the two

Governments, and the views and contentions of the two countries, and of the private parties interested were represented by Counsel.

At the request of Counsel for the United States Reclamation Service the matter was reargued at the City of Detroit on the 15th and 16th of May, 1917.

Before a decision was rendered by the Commission two vacancies occurred on the Commission, one on the Canadian Section and one on the United States Section. When these vacancies were filled it was deemed proper that the case should be again argued before the whole Commission as reconstituted. This further argument took place at Ottawa on the 3rd, 4th and 5th of May, 1920.

By Article VIII of the Treaty it is provided that in case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Governments. In this case the Commission is evenly divided, and this report is made to the Canadian Government by the Canadian Section pursuant to the Article above mentioned.

Description of the Rivers

The St Mary River rises on the eastern slope of the main range of the Rocky Mountains in a region of perpetual snow and ice. It flows first into the Upper St Mary's Lake, then into Lower St Mary's Lake, thence in a northerly direction crossing the International boundary into the Province of Alberta about 13 miles from the lakes above mentioned, subsequently emptying into the Belly River, and finally finding its way into Hudson Bay as part of the waters of the Saskatchewan River. This river

receives a heavy rain and snowfall and the run-off is large. Its principal tributaries are Swift Current Creek, Kennedy Creek, Lee Creek, and Boundary Creek, all rising in Montana. A number of small tributaries rise in Canada but they are not of importance from the standpoint of irrigation or power.

The Milk River heads from springs scattered through the rolling foot-hills of the Rockies on the east side of the St Mary's River and Lakes. It does not receive a supply from permanent bodies of snow and ice and the stream is consequently subject to sudden fluctuations governed largely by precipitation over its widely extended area. Its flow is not as dependable as the St Mary's and it is consequently not so valuable a stream for the purpose of irrigation.

This river runs first in a northerly and easterly direction and crosses the International Boundary into Canada in two branches known as the North Fork and South Fork. The two branches eventually join, and from the junction the stream flows in a generally easterly course parallel to the International boundary which it finally crosses 90 miles east of the crossing generally spoken of as the Eastern Crossing. It runs gradually south for a distance of about 245 miles emptying into the Missouri River, its waters ultimately finding their way into the Gulf of Mexico. The length of this stream in Canada from the North Branch Crossing to the Eastern Crossing is 215 miles, and from the South Branch Crossing to the Eastern Crossing is 177 miles. In its course through Canada its tributaries are few and unimportant. It has however five tributaries of some moment rising in Canada that flow in a southerly direction and join the main river after they cross the international boundary. These tributaries are Frenchman's River, Battle Creek, Lodge Creek, Rock River, and White Water

Creek. Of these flow through portions of the Provinces of Alberta and Saskatchewan, and confined on the Canadian side solely to the Province of Saskatchewan. Of these streams Frenchmans River is the most important and it is fed after it crosses the international boundary by a number of streams originating entirely in the State of Montana.

Irrigable
Lands

There are no irrigable lands of any moment in the valleys of either the St Mary or Milk Rivers before the first crossing by these rivers of the international boundary. There are however considerable areas suitable for irrigation in the valley of the Milk River in Canada, and in the Canadian valleys of the tributaries of that river. There are very large areas in Canada suitable for irrigation that can be reached by waters from the St Mary River. In fact the amount of water that might be profitably used on lands in Canada suitable for irrigation that can be reached by waters from the St Mary river is far in excess of the water in this river, even if all of such water were available for irrigation purposes in Canada.

There are no irrigable lands in the valley of the Milk River before it first crosses the international boundary nor for some distance south of the international boundary, but from Havre to Hinsdale areas well suited for this purpose exist, and the scheme of the United States Reclamation Service contemplates bringing some 2,200,000 acres in this district under irrigation.

History of
Negotiations

Surveys made by the Canadian Government in 1894 and subsequent years demonstrated the possibility of irrigating considerable land in Southern Alberta from the St Mary river.

On the 8th of January, 1896, an Order-in-Council was passed by Canada requesting the British Ambassador at Washington to inform the Government of the United States that the Canadian Government would be glad to cooperate with the authorities of the United States and Mexico with the object of regulating the use, for purposes of irrigation, of the waters of streams which have their origin in one of the countries named and subsequently flow through the territory of another.

The reply of the Secretary of State of the United States to this communication, dated the 27th of March, 1896, and transmitted through the British Ambassador set forth that he did not lack interest in the important subject, but that he was ^{then} unable to give expression to the views of his Government.

By Order-in-Council of Canada dated the 21st of September, 1897, a reservation of 500 second feet from low water, and 1000 second feet of high water, was made to safeguard the future development of that country by means of irrigation.

On the 31st of January, 1899, the Alberta Irrigation Company of which the Alberta Railway and Irrigation Company is the legal successor, applied in due form under the provisions of the Irrigation Act of Canada to divert from the St Mary River the total low water flow available from that stream and a further quantity during the high water stage sufficient to make 2000 cubic feet per second during that stage, the water to be used on a tract of 500,000 acres of land described in the application.

On May 3rd, 1899, authorization was granted to the Company for the construction of its works, and a period of ten years granted for the completion of the same. As the Company's plans developed additional applications were

made for water from other sources, and finally on the 23rd of October, 1902, an amended memorial and plans were filed comprising all of these previously submitted, and authorization for construction of works as shown in amended application was granted, and a period of fifteen years fixed for the completion of the undertaking. Included in this authorization were 500 second feet of low and 1500 second feet of high water of the Milk River. Reasonable diligence has been displayed by the Company in the construction of its works and it has complied with all the requirements of the law necessary to maintain its rights in good standing, and a very large sum of money has been expended on the undertaking.

This Company, the stock of which is now owned by the Canadian Pacific Railway Company is anxious to develop its irrigation projects so far as it is possible for it so to do with the water available for it under the Treaty.

In 1904 the Alberta Railway and Irrigation Company built a canal from Milk River and demonstrated the fact that it was possible to take water from Milk River, carry it around the east end of the ridge and utilize it on a part of the same area served by the St Mary River water carried around the west end of the ridge. *(Milk River)*

In 1904 the United States Reclamation Service was given the necessary authority to carry out an extensive scheme for the irrigation of lands in the Milk River valley, and an arrangement was made for the taking over of certain irrigation works that had been constructed and were then taking water from the lower Milk River and its tributaries in Montana. This Service also took steps to appropriate under the laws of Montana any available waters of the Milk River for the purposes of their scheme.

This Service proceeded with the construction of works for the purposes of their scheme.

The Reclamation Service in the prosecution of their work made public a plan for the diversion of water from the St Mary River for irrigation in the lower valley of the Milk River, by turning the waters of the St Mary into the Milk River, and allowing these waters to flow down in the valley of the Milk River to be utilized for irrigation in Montana. This plan was apparently devised in the belief that it was not feasible to divert the waters of the Milk River for irrigation purposes in Canada.

By Order-in-Council dated 15th October, 1902, transmitted through the proper diplomatic channels, the Government of Canada objected to the proposed irrigation works and expressed the hope that the flow of the St Mary River into Canada would not be interfered with.

The reply of the United States to this protest on the part of Canada is contained in a letter from Mr John Hay, Secretary of State, to the British Ambassador, dated February 19th, 1903, in which the attitude and intentions of the United States are set forth and regret expressed that the Government of that country can see no reason for a change in position taken.

The belief of the United States engineers that it was not practicable for Canada to divert water from Milk River in Canada does not appear to have been well founded. The canal built by the Alberta Railway and Irrigation Company above referred to in 1904 demonstrated the fact that it was physically possible not only to divert in Canada any St Mary river water the United States might turn into Milk River, but also to divert in Canada the waters of Milk River itself.

When the situation became known to the owners of irrigated lands in the lower valley of the Milk River they naturally became much concerned and strong representations were made by them to the United States Government.

As a result of these representations a protest was lodged with Canada by the United States on the diversion of water from Milk River through Canadian Canal.

At this stage the attitude of the two Governments towards this matter appears to have been reversed. Up to this time Canada had been urging upon the United States an amicable adjustment of the matter, and had been protesting against threatened diversion of waters from the St Mary River, and the United States had been turning a deaf ear. Now it is the United States that makes the protest to Canada against that country's threatened diversion of Milk River water and Canada in turns seems disinclined to consider the matter.

The reply to the protest of the United States is contained in an Order-in-Council dated the 8th of July, 1904, in which it is pointed out that the Canadian North West Irrigation Company had been given authority to divert 500 cubic feet per second at low water flow, and 1500 feet during high water stages of the Milk River.

This Order-in-Council is replied to by Mr Hay by a communication dated the 30th of December, 1904, to which further reference will be made hereafter. In this communication Mr Hay suggests a conference between representatives of the two countries for the purpose of reaching an agreement in respect to the disposition of the waters of the Milk and St Mary rivers.

In reply to Mr Hay's communication an Order-in-Council was passed by the Government of Canada on the 7th of July, 1905, asking the United States Government to suggest a plan for the settlement of all questions in reference to the waters of the St Mary and Milk Rivers that would be acceptable to both countries.

No further action appears to have been taken by either country looking to a settlement of the question until the 15th of June, 1907, when certain proposals were submitted by Mr Root, then Secretary of State, to which further reference will be made hereafter.

Mr Root's proposals are dealt with by an Order-in-Council of the Government of Canada dated the 2nd of March, 1908, and the suggestion made that representatives of the two Governments be appointed to consider a basis of agreement which might be submitted to their respective Governments. In pursuance of the suggestion contained in this order, Mr P.H. Newell was appointed to represent the Government of the United States and Mr W.F. King, the Government of Canada.

After long negotiations and correspondence between these representatives and other acting on behalf of the two countries, the Treaty was settled and in due course ratified in the form quoted at the opening of this report.

Rights of the two
countries apart from the
Treaty

Before proceeding to a discussion of the meaning of the Article it is desirable to give consideration to the discussion that took place before the Commission as to the legal rights of the two countries with reference to the waters of the rivers in question.

There is the authority of an eminent writer on international law that the common law applies to a stream flowing from one country into another with all the rights and incidents to which riparian owners are entitled under that law. There does not however appear to be any conclusive authority on the point. But assuming that common law principles do not apply to the case, and

that the United States was not compelled under any rule of international law, to permit the St Mary River to flow down in its natural course into Canada without diminution of or interference with its flow, and that Canada was under no obligation to refrain from any action that might interfere with the flow in its natural course and volume of the Milk River into the State of Montana, what principles according to comity and fair dealings between these two highly civilized and friendly nations should govern their actions in connection with the use of the waters of these two streams.

The rule laid down by the United States Supreme Court in the case of rivers flowing from one state into another state, were applied the United States at least could have no cause of complaint. This was the position taken by Secretary of State Hay in his communication of the 19th of February, 1903 already referred to.

The rule laid down in the case of Kansas vs Colorado, 206 U.S.46 seems to furnish the best guide we have. This case relates to the Arkansas river which flows through the State of Colorado into the State of Kansas. Colorado claimed the right to appropriate all the waters of this stream; Kansas insisted that in accordance with the principles of common law, this river should be permitted to flow down to that State without interference by Colorado. The court held that neither contention was correct; that the benefits of the stream should be equitably apportioned between the two States. In determining what such equitable apportionment should be, the court took into consideration the benefits and advantages of the use of the water by the people of one state, and the deterrent and disadvantage to the people of the other state caused by a deprivation of water. The governing principle seems to have been beneficial use.

Applying the principles laid down in this case to the St Mary and Milk Rivers what is the result? There is little irrigable land in the valley of the St Mary River in Montana and little if any use to which its waters can be put in that country - except at all events by diverting it entirely from its own water-shed. No prior appropriations existed in Montana, while practically the whole waters of the stream are subject to valid prior appropriations under the laws of Canada. It seems that according to precedent as well as natural justice, the waters of a river can not be diverted from its watershed to the detriment of lands within that watershed. It would therefore seem that there was no rule of international law, comity or of fair dealing between two friendly countries, nor any rule or principle governing the use of water flowing through two states of the United States or otherwise by which Canada could be deprived of the use of the waters of the St Mary river that in the course of nature flows into her territory, except at all events with reference to a small and insignificant quantity.

But apart from whatever rights Canada was entitled to in the waters of the St Mary River by international law, comity, natural justice or otherwise, nature had ordained that Canada could not be deprived of the benefits of the waters of this river without her consent. The cost of carrying this water to the lower valley of the Milk River by an all American route is prohibitive. The United States was on no ground entitled to use the bed of the Milk River in Canada for a canal to carry water diverted from the St Mary River down to Montana; and if she attempted to do so a canal had already been constructed on the Canadian side by which such waters could be diverted to Canadian lands.

The situation with reference to the Milk River was to some extent the reverse of that of the St Mary River. Under the rule of common law Canada would have been compelled to permit this river to flow back into Montana at the Eastern Crossing undiminished in quantity and unimpaired in quality. Under the rule as laid down in Kansas vs Colorado, Montana would have been entitled to the greater portion of the waters of the main stream. Greater opportunities for irrigation exist in the valley of this river in Montana than in Canada, and appropriations existed on this stream in Montana prior to the appropriations in Canada. The situation with reference to what are known as the Saskatchewan tributaries of the Milk River was somewhat different. Great opportunities exist for irrigation in the valleys of these tributaries, and their waters have been applied to beneficial use.

Irrigable lands in the valleys of these streams also exist in Montana and beneficial use is being made of waters from these streams upon these lands.

The main river heads in the United States and after flowing 200 miles through Canada again returns to the United States where it receives large accretions before emptying into the Missouri. It would seem that all these things and all other features having a bearing upon the equitable distribution of the water of this river and its tributaries are proper matters for consideration under the doctrine referred to.

Meaning of
Treaty

Having traced the history of the Article in question, and outlined the facts and circumstances connected with the case, we now come to a consideration of the meaning of the treaty.

The unanimous judgment of the Canadian Section is, that the words of the Article in question are words of description, that the waters described are all the waters of the St Mary and Milk Rivers and their tributaries in the State of Montana and the Provinces of Alberta and Saskatchewan, and as the two rivers and their tributaries are situated wholly in the State and Provinces named that the waters subject to the Treaty comprise all the waters of the rivers in question and all the waters of all their tributaries.

In this view of the Article it is the duty of the Commission to direct the properly constituted reclamation officers of the United States, and the properly constituted irrigation officers of His Majesty to make the necessary measurements from time to time of the water in the two river systems for the purpose of ascertaining the total quantity to be apportioned between the two countries and to make such measurements as may be necessary to determine the amount of water to which each country is entitled to receive at different points as its share of the whole measured as aforesaid.

The Canadian Section is unable to give effect to the contention of the United States, that the words in parenthesis are words of limitation and not of description, and that the only tributaries that come within the description of the Article are those that at one and the same time are in the State of Montana and in the Provinces of Alberta and Saskatchewan. But this construction even if admitted does not meet the contention of the United States for only some of the tributaries that that country seeks to bring within the Treaty are situated in the Provinces and State named. But it is further argued on behalf of the United States that the word "and" between Alberta and Saskatchewan should be changed to "or", and that the

paranthalical words read "in the State of Montana and the Provinces of Alberta or in the State of Montana and the Province of Saskatchewan", but even if this construction be admitted it will not embrace the waters the United States claims are covered by the Treaty, for that country admits that the tributaries that flow into the main river or other tributaries before they cross the international boundary, are included, and there are a number of these situated wholly in one or both of the Provinces named in the Article.

It is however further contended on behalf of the United States that the draft treaties prepared by and the communications between those employed in negotiating the settlement of the question, presented by Counsel for the United States at the St Paul hearing, and admitted to the record subject to objection by Counsel for Canada, show that the waters intended to be covered by the Article are only waters that flow across the boundary. Counsel for Canada claims that the Article must be construed according to the plain and ordinary meaning of the words used, and that there is no absurdity, ambiguity or inconsistency in the language employed, that would justify the Commission in resorting to extraneous documents or evidence of any kind in order to ascertain the meaning of the Article.

In the judgment of the Canadian Section the language of the Article is clear and intelligible on its face, and no justification exists under the ordinary rules of evidence for the admission of documents or extraneous evidence to explain or in any way vary the meaning of the language used. The propriety of taking into consideration the documents submitted to the Commission is rendered still further doubtful by the following circumstances.

1. The documents in question are not a complete record of all that took place between the negotiators. Undoubtedly many discussions took place, and many suggestions were made orally that would be as illuminating as to the intention of the parties as the documents submitted in evidence, but we have no record of any of these. In fact we have no evidence that we have all the drafts and written negotiations before us, but on the contrary the record indicates that we have not.

2. Neither the Governments nor the Legislatures of the two countries had anything but the Article itself before them when they approved of and ratified the Treaty. If we construe the Article not as it is written in the Treaty, but in accordance with drafts, correspondence and other extraneous documents we may in effect write a new article instead of construing the only one that is binding upon the two countries, namely the one that has been approved of and ratified by them according to the meaning of the language used in it.

The Canadian Section however feels that no technical rule of law or evidence should be allowed to prevent the Commission ascertaining the true meaning and intention of the parties as expressed in the Article, and for that reason we have carefully considered all the documents in the case. We do not feel that these documents or any proper inferences that can be drawn therefrom in any way change, alter or affect the meaning of the Article as above set forth. In fact in some respects these documents negative any possibility of placing the construction on the Article contended for by the United States.

History of negotiations
as described by documents in
record

Mr John Hay, Secretary of State for the United States first laid down the basis on which the United States proposed to deal with the waters in question in a letter, above referred to, to

the British Ambassador dated February 19th, 1903, in the following words:

"In the present case the intention is clearly expressed to avoid all interference with the amount of water to which the Canadian canal on Milk River may be entitled. The engineer in charge of the work in Montana made a careful investigation of the river with a view to determining the amount of water to which claim might properly be advanced in Canada, and it is the intention of the Reclamation Service, in its recommendation to the Interior Department concerning this project, to make as full provision for the protection of any prior vested rights to water along the Milk River in Canada as it would make if the river were wholly within the boundaries of the United States and the rights of the citizens of this country only were under consideration.

It is proposed to deal with this matter in strict conformity with the laws concerning the rights to the use of water as recognized by the courts of the arid region, both on this side of the international boundary and on the other. The principle may be stated in the language of section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388):

'That the right to use of water shall be appurtenant to the lands irrigated and beneficial use shall be the basis, the measure, and limit of the right' "

In this letter Mr Hay also makes use of these words:

"Inasmuch as the position taken by the Reclamation Service in this matter in regard to the rights claimed in Canada appears to be precisely that which is taken in the case of similar rights within the United States, both being treated according to the recognized rules of law governing the diversion and appropriation of water in arid regions, Mr Hitchcock regrets that he can see no reason for a change in the position taken by this Government in the matter".

The proposal set forth in Mr Hay's letter as indicated by the extracts quoted above is that the international boundary should be eliminated and the rights of the peoples of the two countries to the waters in question as if they were the people of one country, and the rivers in question all in one country; and to apportion the water on the basis of beneficial use. This principle

appears to run through practically all the subsequent correspondence and negotiations. This principle could not be carried out without taking into consideration all the waters of the two rivers, and all the waters of all the tributaries available in either country for the purposes of irrigation.

Another letter from Mr Hay to the British Ambassador dated November 30th, 1904, contains this statement:

"The Engineers of the Reclamation Service of the Interior Department of the United States believe it possible for the two Governments to make an arrangement whereby the rights of the settlers within the domain of the United States will be preserved and at the same time the water necessary to supply the canal built by the Canadian Northwest Irrigation Company will be provided.

The engineers report that the waters of the St Marys River which flow northward into Canadian territory are now being utilized to only a small extent, and they state that it is practicable to store these waters in the United States, conduct them by a canal on the southern side of the international boundary line to the head of the Milk River, and there turn them into the Milk River, so as to increase the ordinary flow of that river and furnish a supply of water for lands in the Milk River valley within the United States. Under this arrangement the prior rights of the Canadian settlers on the St Marys river would be protected by permitting its ordinary flow to continue to pass into Canadian territory, and at the same time the great volume of flood water which passes down that river destroying property along its banks would be restrained within the United States and diverted to the head waters of the Milk River, and be put to beneficial use in the lower Milk River Valley in the United States."

In a further letter from Mr Hay the date of which is not disclosed by record, the following language occurs:

"It is proposed by the engineers of the Reclamation Service to hold the flood waters in St Mary Lake, and by so doing further destruction of property in Canada would be averted. These flood waters are not of use to the Canadian canal and can not be utilized, as the opportunities for storage are situated in the United States.

It is not proposed to take away from the Canadian canal the water needed, but on the contrary, it is known that sufficient water will reach this canal to supply its needs".

.....

"By the storage and diversion of flood waters from St Mary Lake a large area of land, aggregating, according to alternative plans, from 200,000 acres upward to 500,000 acres, could be brought under irrigation, affording homes for several thousand persons and increasing property values to a large extent beyond the mere area of lands reclaimed. To assert that the waters must always flow to waste will not only prevent the development of a large section of Montana, but will result in no benefit whatever to any person or persons in Canada.

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During May, June and July great quantities of water passed down St Mary River from these lower streams, far more than the capacity of the Canadian Canal."

It would therefore appear that the original suggestion of the United States was, that that country should be permitted to store the flood waters of the St Marys River, waters that Canada did not need and could not use, and convey same through channel of Milk River down to Montana's irrigable lands, and that Canada should have the total ordinary flow of this river. The contention of the United States that Canada would not only lose nothing by the arrangement, but on the contrary would be greatly benefited thereby inasmuch as she would be protected from damage during high floods.

The arrangement outlined by Mr Hay is more favourable to Canada than the provisions of the Treaty even on the basis contended for by Canada. This would seem to be an answer to the argument sometimes made on behalf of the United States that if Canada's contention as to the meaning of the Treaty should prevail, the result would be so unfair to the United States as to show that an interpretation had been given to that document different to what was intended by the parties negotiating the same.

The next point for consideration is what has been described as the Root Draft Treaty mentioned above. It has been much discussed by counsel on both sides as to what the real meaning of this draft is. It is admitted by all that its meaning is in some respects obscure and its practical application difficult. The plan proposed in this draft was not adopted and it is doubtful if any assistance can be gained in the interpretation of the final treaty by a consideration of its terms. The following extracts from this draft are however of interest:

"It is hereby agreed between the Governments of the United States and Great Britain that the waters of the Milk River and the St Marys River and their tributaries shall be apportioned in perpetuity for use in the two countries according to the following stipulations and agreements:

1. That for the purposes of this agreement the St Marys River and the Milk River and their tributaries, which are now separate and independent river systems, shall be treated as though they were the waterways of a single drainage system.
2. That the water available for irrigation from these two river systems throughout the period from March 1st to September 30th of each year, both dates included, shall be apportioned to each of the two countries from day to day in equal amounts.
3. That the failure of either country to fully utilize the right hereby agreed upon to one-half of the available water during the period specified in paragraph 2 shall not be regarded as adding to or diminishing the rights of the other country.
4. That during the period of each year not specified in paragraph 2 the United States may divert or hold back in storage reservoirs any portion of the natural flow of St Marys River, and Canada may divert any portion of the natural flow of Milk River, in neither case to interfere with existing rights.
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7. The amounts of water chargeable to each of the countries under the several items enumerated in paragraph 5 shall include all the waters of the two river systems whether used directly or indirectly by the two Governments or by private parties in their respective territories.
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9. The share of the United States shall in any event include so much of the available natural flow of the Milk River as shall be judicially determined as having been applied to beneficial use on or before November 1, 1905, by the canal systems taking water from the lower Milk River in Montana, the same to be measured at the intakes of said canal systems; and whenever one-half of the natural flow of Milk shall be less than such amount, measured as aforesaid, the share of Canada shall be diminished so that said country shall receive of the natural flow of the entire Milk River system only the excess, if any, beyond such amount of decreed beneficial use. It is understood that the amount of water heretofore diverted for beneficial use from lower Milk River in Montana has been in excess of 350 cubic feet per second when the same was available."

It is contended on behalf of the United States that the words in the introductory paragraph, "which flow across the forty-ninth parallel boundary between the United States and Canada" govern the whole of the Treaty, and that whenever reference is made to water it is only water flowing across the boundary that is meant. It is urged on the other hand that the words in question simply describe the waters in connection which the dispute is pending, and that in the settlement he proposes for this dispute, he deals not only with the waters mentioned crossing the boundary, about which the discussion has taken place, but outlines a plan embracing all the waters of these two rivers and all the waters of all their tributaries. It is argued that the wide language contained in paragraph 1 and paragraph 7 above quoted show conclusively that Mr Root was dealing with all the waters of the two river systems.

It is particularly pointed out that at this time that the waters of the all Montana tributaries of the Milk River were being used for irrigation purposes in the lower Milk River valley, and that Section 7 specifically provided that these waters should be a charge against the United States. Whatever force these arguments may be entitled to, one thing seems plain, that under Section 7 provision was made for the measurement

of waters in the canal system of the United States in Montana, including waters of all Montana tributaries, and that the greater the flow of the all Montana tributaries in the intakes of the United States canals in Montana, the less the United States would be entitled to receive from the main channel of the Milk River at the international crossing and the more Canada would be entitled to receive. In other words, the Montana tributaries used for irrigation in Montana were to be taken into computation and Canada's rights in Milk River waters were dependent upon the amount of waters in these tributaries.

Mr Root's draft also appears to dispose of an argument raised by counsel on behalf of the United States, that to measure these Montana tributaries for the purpose of computing the amount of water to which Canada was entitled at the international boundary would be an invasion of the sovereign rights of the United States that the Government of that country would not consent to.

Reply to Mr Root's
Proposal

The proposal contained in the Root Draft Treaty is replied to by Canada in an Order-in-Council dated March 2, 1908, in which Canada rejects Mr Root's proposal as unfair, and that in order to protect vested rights created in Canada that country "should receive considerably more water than the proposed treaty provides for apportioning to it". This Order-in-Council suggested the appointment of representatives to consider a basis of agreement between the two countries, and in due course Messrs King and Newell were appointed.

King's first
Memorandum

In a memorandum dated April 27, 1908, addressed by Mr King to Mr Newell, Mr King sets forth the object to be attained in these words "it is thought that an agreement whereby all available water shall be utilized for the conversion of the present desert wastes to the fertility of irrigated fields, to the advantage of both countries, is in the very highest degree desirable", and he points out that in his view such an agreement can best be based on the principle of equal sharing of benefits to be derived from these international waters, due regard being had to existing rights.

King's second
Memorandum

In a memorandum dated May 1, 1908, Mr King sets forth the first definite proposal of settlement from Canada, as follows:

"That the United States shall be entitled to all the water of St Marys River at the dam site of St Marys reservoir, for storage during the months of January, February, March, November, and December in each year.

That Canada shall be entitled to divert from the natural flow of St Marys River 1,400 cubic feet per second during the remaining months.

That the excess flow of St Marys River during the last-mentioned period, above 1,400 second-feet, shall be divided equally between the two countries.

That the United States shall be entitled to all the water of Milk River during the months of January, February, March, August, September, October, November and December of each year.

That Canada shall be entitled to divert from the natural flow of Milk River to the present capacity of the Canadian Milk River Canal, agreed upon as being 330 second-feet, during the months of April, May, June and July in each year, subject to the rights of appropriation from the Milk River within the territory of the United States, as existing at the date of the Canadian Co.'s appropriation on Milk River (23d Oct., 1902), and now being judicially determined by the courts of Montana.

That the natural flow in the Milk River during the months of April, May, June and July in each year in excess of the amount of 330 second-feet, together with the amount required as above by the appropriations in the lower valley, shall be divided equally between the two countries."

The Montana tributaries are not specially mentioned in Mr King's memorandum but they nevertheless are taken into account under his scheme of distribution and Canada's rights are dependent upon the amount of water in the Montana tributaries that can be applied to beneficial use by the United States.

Mr Newell's
first Memorandum

On the 15th October, 1908 Mr Newell replied to Mr King's proposal in which he uses the following language:

"The primary question which has stimulated action has been the demand of the citizens of Montana that the waters of Milk River, including its tributaries, shall not be diverted in Canada to their injury; and more than this, that the available water supply shall be increased, if possible, by local storage or by diversion of some of the stored waters of St Marys River.

Mr Newell in this Memorandum further says: "The principal feature of the plan of November 11, 1905 (the Root plan) is the equal division of the available water" and he goes on to say that it is believed that any proposal to give Canada more than half the water cannot be entertained, although the details as to how this half may be estimated are open to discussion.

Mr Newell argues that Mr King's proposition with reference to St Marys River is not fair but concedes that Mr King's proposal with reference to Milk River is fair and desirable. Mr Newell then makes the following counter proposal with reference to St Marys River:

That Canada take as a prior appropriation 400 c.f.s., the United States to take the next 400 feet, then Canada to take 200 or 400 c.f.s. more and the United States an equal amount until the available flow is absorbed.

Mr King's
Second
Proposal

On the 23rd December, 1908, Mr King replies to Mr Newell's proposal, shows the wide variance between the proposals of the parties and suggests the disadvantage of dealing with complicated details without a definite fundamental principle to guide, and makes the following suggestion:

"A principle which is free from this objection, and is, moreover a simple one, is that of equal division of water on the boundary streams (each country providing for its existing interests out of its share of the water".

It is suggested by the United States that the language above quoted was practically an acquiescence by Mr King in the proposal made by Mr Newell. There does not seem to be any valid grounds for this contention, in fact Mr King's language intimates that there was a wide variance between the parties and that no real proposal was being made. He says as "his rejection (Mr Newell's) touches a vital point of the principle of the proposal, namely, the balancing of concessions by payment in quantity of water, reconsideration of the whole proposal is necessary".

The proposal of Mr King that it is argued is an acquiescence in the offer of Mr Newell provides no method for the United States conveying St Marys River water to the lower valley of the Milk River in Montana, and provides for no prior appropriation for the Montana users of Milk River, two matters that were vital to the United States.

Mr Newell's
Second
Memorandum

On the 29th December, 1908, Mr Newell replies to Mr King's Memorandum of the 23rd of that month. Mr Newell quite readily adopts the principle of the division of the waters crossing the boundary, but he insists upon the right

to use Milk River through Canada as a canal for the conveyance of the St Mary River waters, and also for the right of prior appropriations; a prior appropriation of 400 c.f.s. in St Mary River for Canada and 359 c.f.s. in Milk River for the United States. Mr Newell's offer with reference to prior appropriations contained in this memorandum is more favourable to Canada than the Treaty and the provision for damages in connection with the conveyance of Mr Mary River water through Milk River in Canada is more generous and satisfactory than those contained in the Treaty. It is to be specially noted that had the language contained in Mr Newell's Memorandum been carried into the Treaty there would be no doubt about what waters are embraced in that document. Mr Newell states clearly and in language about which there can be no mistake, that the waters to be divided are only waters that flow across the boundary and the provisions for measurement are such as to show clearly that only waters flowing across the boundary are to be measured.

Mr Campbell's
Memorandum

Among the documents produced before the Commission is one bearing date the same day as that of Mr Newell's draft last referred to, namely 29th December, 1908.

The proposition made by Mr Campbell is contained in the following words: "In all streams which cross the international boundary, the waters of which are used for irrigation, each country shall be entitled to the use of half the total natural flow as ascertained by measurement at the point or points where such streams cross the international boundary". The offer contained in Mr Campbell's memorandum is not confined to the St Mary and Milk Rivers but to all streams wherever situated which cross the international boundary. There is no special provision for the conveyance of the St Mary River through the channel of the Milk River in

Canada but there are certain general provisions with reference to all streams in the following language:

"When water is diverted from one stream or watershed into any other stream which crosses the international boundary the country within which such diversion is made shall be responsible for the payment of the amount of such loss or damage as may be determined by the commission to have resulted from the increased flow of water in such stream, and of the amount of such expenditure as may be determined by the commission to have been made necessary to provide for the safe and convenient crossing of the stream in consequence of such increased flow, and the commission shall have authority to take such steps as may be necessary to ascertain the amount of such loss, damage, or expenditure".

This Memorandum also contains provision for damages in one country by reason of the construction or operation of works for the carriage or storage of water in the other country. No action appears to have been taken on Mr Campbell's Memorandum and so far as the record shows Mr King and Mr Campbell and Mr Newell all disappear from the negotiations at this time and the Treaty appears to have been concluded between a Mr Chandler P. Anderson representing the United States and Mr George C. Gibbons representing Canada.

Gibbons'
Draft

A draft is produced by Counsel for the United States said to have been received from Mr Gibbons with a letter of December 31, 1908, as follows:

"Article VI. It is agreed that for the use of irrigation the St Mary and Milk Rivers (in the State of Montana and the Province of Alberta) and their tributaries are to be treated as one stream, and the total amount that can be diverted from the two for such purpose is to be distributed so that each country shall have the right to one-half of the whole, but in the distribution more may be taken from one stream and less from the other by each country, so as to afford a more beneficial use to each.

It is agreed that there exists on the part of Canada the right to a prior appropriation of 360 second-feet of the flow of St Mary River during the irrigation season between the 1st of April and the 31st of October, inclusive, annually, and that there exists a similar right on the part of

the United States to a prior appropriation of 360 second feet of the flow of Milk River during the said irrigation season.

The channel of the Milk River in Canada may be used at the convenience of the United States for the conveyance, while passing through Canadian territory, of the waters of St Mary River stored in the United States. The provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance through the Milk River of the waters from the St Mary River.

The measurement of the water so to be used by each country shall from time to time be made jointly by the properly constituted reclamation officers of the United States and the properly constituted irrigation officers of Canada under the direction of the International Joint Commission of the United States and Canada."

A draft was also produced said to have been one made by Mr Anderson which reads as follows:

"Article VI. It is agreed that each country shall have the exclusive right to one-half the natural flow of the St Mary and Milk Rivers and their tributaries, the amount thereof to be determined at the points of storage and diversion and at the boundary by measurements made jointly by the properly constituted reclamation and irrigation officers on either side of the boundary; and the channel of Milk River in Canada may be used at the convenience of the United States for the conveyance, without interference, while passing through Canadian territory, of the waters of either river stored in the United States and constituting any part of its one-half share.

The provisions of Article II of this treaty shall apply to any injury resulting to property in Canada from the conveyance through the Milk River of the waters belonging to the United States.

It is further agreed that there exists on the part of the United States the right to a prior appropriation of 400 feet of the natural flow of the waters of the Milk River during the irrigation season between April 1 and September 30, annually, and that there exists during the same season a right on the part of Canada to a prior appropriation of an equal amount of the natural flow of the waters of the St Mary River, and during the period above mentioned such prior appropriations shall not be subject to reduction by the other country."

A telegram is also produced dated Ottawa, January 9, 1909 to Mr Chandler P. Anderson from Mr Gibbons in which the following language occurs:

"Article 6: Say "Provinces of Alberta and Saskatchewan"; change name of the Commission, leaving out the words "of the United States and Canada"; instead of "other rivers" say "the St Marys River".

The necessity for this telegram is apparent on reference to the Gibbons draft. In Mr Gibbons draft the waters in question are described as the St Mary and Milk Rivers (in the State of Montana and the Province of Alberta) and their tributaries". This language was a proper description of the St Mary and Milk Rivers because they are situated entirely within the State and Province named, and the words "and their tributaries" clearly referred to all the tributaries of these rivers wheresoever situated. Evidently in redrafting the treaty with the object of improving the phraseology or for some other purpose, the words "and their tributaries" were transposed so that the description of the waters in question read, "the St Mary and Milk Rivers and their tributaries in the State of Montana and the Province of Alberta". This language then became incorrect because some of the tributaries of the Milk River are situated in the Province of Saskatchewan and in order that the treaty should harmonize with the draft and cover the same waters as that covered by the draft, it was necessary to add the words "and Saskatchewan" mentioned in Mr Gibbons's telegram. The words "the St Mary and Milk Rivers (in the State of Montana and the Province of Alberta)" used in the original Gibbons draft, and the words "the St Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan)" mean identically the same thing. The Treaty describes in different words the same waters described by the draft. It seems clear that Mr Gibbons only intended by his telegram to make verbal changes and it is not reasonable to suggest that without any

request from the United States and without any discussion on the subject, Mr Gibbons would seek to bring within the waters covered by the Treaty and chargeable to Canada, the Saskatchewan tributaries of the Milk River. This would be the more unlikely when we take into consideration the fact that the waters of the Saskatchewan tributaries of the Milk River exceed in quantity at the international boundary the waters of the main Milk River by fifty per cent.

The view of the Canadian Section as to the natural and proper meaning of the Article has already been set forth and it is submitted that instead of the documents above reviewed showing that that interpretation is not correct, they furnish strong corroborative evidence to the contrary. Mr Newell's last draft written by him but a few days before the final treaty contains language that aptly and clearly describes the waters flowing across the boundary, and that too in language similar to that used in the Treaty and in the negotiations to describe waters of this character. It seems inconceivable that the negotiators would abandon the use of language clear and unmistakable for language admittedly ambiguous and obscure to express the intention of the United States unless it was the deliberate intention of the negotiators to refer to waters of an entirely different character to that referred to by Mr Anderson. Instead of Mr Root's draft being evidence that the waters covered by the Treaty are only those flowing across the boundary, it is evidence to the contrary and indicates that Mr Newell's proposition in which he clearly limits the waters to be brought under the jurisdiction of the Commission was rejected and a proposition to embrace all the waters of the two river systems adopted.