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The Right Honourable Herb Gray, P.C., C.C., Q.C.
 Chair, Canadian Section
 International Joint Commission
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The Honourable Dennis L. Schornack
 Chair, ~~United States Section~~
 International Joint Commission
 1250 23rd Street NW, Suite 100
 Washington, DC, USA
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Dear Messrs Gray and Schornack:

I want to thank the Commission for organizing public meetings in Montana, Saskatchewan and Alberta in July, to receive input on how to respond to the request from Montana to review the Commission's 1921 order regarding apportionment of water in the St. Mary and Milk rivers.

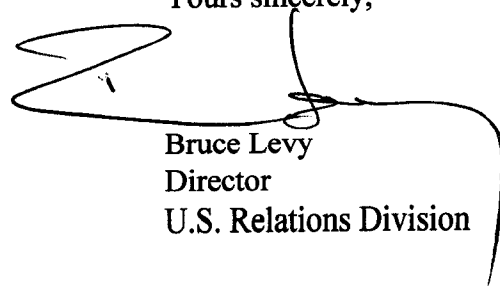
The meetings generated a great deal of interest and underlined the importance of the Boundary Waters Treaty and the 1921 Order to residents in both countries and the need for a consistent interpretation.

Attached is a submission by the Government of Canada, which concludes that there is no need to review the IJC's 1921 Order. In our view, circumstances have not changed in the region, to warrant a review. The existing Order, its procedures and cooperation between Accredited Officers, provides sufficient flexibility to address the administration of the apportionment.

Furthermore, many of the issues raised by Montana in its request for a review and the views expressed by the Governor constitute a re-interpretation of the Treaty and therefore are not within the ambit of the Order.

We are encouraged by the strong commitment of Alberta and Saskatchewan to collaboration on water apportionment of the St. Mary and Milk Rivers, to sharing their experience on making efficient use of water and to finding sustainable solutions to water management in the future.

Yours sincerely,



Bruce Levy
 Director
 U.S. Relations Division

St. Mary and Milk Rivers
Submission by the Government of Canada to the IJC
October 2004

Background

Canada and the United States share an 8,900 km international boundary of which 3,900 km is formed by international boundary waters. The balance is crossed by some 300 rivers flowing north and south and by aquifers. More than half of the Canadian population lives within drainage basins shared with the United States. Because the two countries share these boundary and transboundary waters, decisions about them are interdependent. A reliable and stable decision-making framework for these waters is, therefore, essential.

The first reported diversion of water for irrigation purposes from the St. Mary River in Canada was recorded in 1889. Five years later, the first irrigation diversion from the Milk River occurred at the Fort Belknap Canal near Harlem, Montana. As settlement of the west progressed, the importance of water to the economic viability of both southern Alberta and Montana was quickly recognized. Within a few years both Canada and the United States had investigated the feasibility of irrigating large tracts of land from both rivers and had commenced construction work on various diversion projects. Concerns naturally were expressed by both countries over these unilateral developments. Monitoring of flows in the St. Mary River at the international boundary began in 1902.

Boundary Waters Treaty and the St. Mary and Milk Rivers

Following negotiations between the United States and Great Britain, the International Waterways Commission was appointed in 1903 to investigate and report upon the conditions and uses of the water adjacent to the boundary between the United States and Canada. This Commission resulted in the creation of the Boundary Waters Treaty in 1909 which set the basic principles for guiding boundary water relations between Canada and the United States and established the International Joint Commission.

Article VI of the Treaty expressly addresses the diversion and apportionment of the St. Mary and Milk Rivers. The Treaty states that:

- The St. Mary and Milk Rivers and their tributaries will be treated as one stream for the purposes of irrigation and power;
- Waters will be apportioned equally but more than half may be taken from one river and less than half from the other by either country for more beneficial use to each;
- The division of flows will be during the irrigation season, April 1 to October 31 annually;
- The United States will have a prior appropriation of 500 cubic feet per second (cfs) (14.2 m³/s) from the Milk River, or three-fourths of its natural flow;

- Canada will have a prior appropriation of 500 cfs (14.2 m³/s) of the St. Mary River, or three-fourths of its natural flow; and
- The Milk River channel in Canada may be used by the US for the conveyance of waters diverted from the St. Mary River; and

Article VI of the Treaty explicitly recognizes the principle of equality in apportionment between the parties. The prior appropriations to the parties also recognized the developed canal capacities at the time of the Treaty. For example, in 1909, Canada had developed irrigation on the St. Mary River with an 800 cfs (22.7 m³/s) canal and could put the water to more beneficial use than could Montana, whose total canal capacity from the Milk River was 359 cfs (10.2 m³/s). It is important to note that the 359 cfs (10.2 m³/s) includes 130 cfs (3.69 m³/s) for the Fort Belknap Canal and Irrigation Company and 125 cfs (3.55 m³/s) for the Fort Belknap Indian Canal.

While Article VI of the Treaty established that the measurement and division of the waters of the St. Mary and Milk Rivers were to be under the direction of the IJC, the Treaty did not specify the points in the basin where the natural flows were to be calculated or the specific procedures for dividing the waters. These shortcomings would lead to various interpretations. The interpretation in the United States was that the natural flows were to be measured and apportioned at the international boundary between Canada and the United States. The interpretation in Canada was that the natural flows were to be measured and apportioned at the mouths of the rivers, or at the most downstream end of beneficial use. Also the United States' interpretation was that the prior appropriations of 500 cfs (14.2 m³/s) listed in the Treaty should come out of the equal shares for each country. The corresponding Canadian interpretation was that after the prior appropriation of 500 cfs (14.2 m³/s) was met, the natural flow would be divided equally between the two countries.

Public hearings were convened between 1915 and 1921 to hear the arguments from both countries. These wide-ranging and comprehensive hearings culminated in the IJC Order of 1921, an order which has subsequently provided the critical stability and predictability necessary to the parties regarding water availability.

The 1921 Order

The 1921 Order specifies that flows of the St. Mary River, the Milk River, and the eastern tributaries of the Milk River basin, are to be measured and apportioned at the international border between Canada and the United States. It also clearly states how to quantify the prior appropriations out of the natural flows. While the Order stipulates that tributaries which do not naturally cross the International Boundary will be apportioned to the country of origin, it neglects to mention the southern tributaries, which flow from the Sweetgrass Hills in Montana into the Milk River in Alberta.

Similar to the present case, in 1927 the United States asked the IJC to reopen the 1921 Order due to a perceived imbalance in the shares between the United States and Canada. The Canadian Government did not support the reopening of the Order on the basis that issues had not materially changed since the issuance of the Order, and if any subject could be reopened by either Party at any time, it would create uncertainty and endanger the integrity and usefulness of all orders. Hearings were held in 1928 and 1931 but no changes were made to the Order.

In 1986, in response to Canadian water users, the IJC instructed the Accredited Officers to investigate possible apportionment of the southern tributaries in Sweetgrass Hills, Montana. In 1994, the IJC decided that it would not act on the recommendations of the investigation at that time. In 1991, a Letter of Intent to better use the waters of the St. Mary and Milk Rivers was signed by the Accredited Officers. The Letter specified that a more beneficial use of the waters of the St. Mary and Milk Rivers could be achieved by allowing Canada to accumulate a deficit on the Milk River until the end of September of any year. In exchange, the United States would be allowed to accumulate a deficit on the St. Mary River from March through May.

In 2001, a revised Letter of Intent to better use the waters of the St. Mary and Milk Rivers was signed by the Accredited Officers. This Letter replaced the 1991 Letter of Intent and clarified the timing and quantity of allowable deficit deliveries.

In summary, the terms of the 2001 Letter of Intent are:

- The United States is permitted to accumulate a deficit on the St. Mary River of up to 4,000 cfs-days between March 1 and May 31 of each year. The deficit accumulated between March 1 and May 31 must be reduced with surplus flows to not less than 2000 cfs-days by July 15 of each year.
- Canada is allowed to accumulate a deficit on the Milk River of up to 2,000 cfs-days between June 1 and September 15 of each year.
- These deficits on the St. Mary and Milk Rivers can offset each other, and any net outstanding deficits as of September 15 are to be equalized by October 31 of each year under administration by Field Representatives of the Accredited Officers.

The 1921 Order is still in effect and has proved sufficiently flexible to allow for the evolution of the actual computational procedures undertaken, and the establishment of an effective process of cooperative consultation between the United States Geological Survey (USGS) and the Water Survey Division (WSD) of Environment Canada. In addition, the Accredited Officers have expanded the annual meeting of the two parties to include provincial and state representation as well as local water users and managers. This collaborative approach has fostered greater discussion of computational processes and procedures resulting in the presentation and development of instruments enabling the increased beneficial use of these waters for both countries.

In the present case, as in 1927, circumstances have not materially altered since the issuance of the 1921 Order. The hydrological conditions and resultant natural flows of the St. Mary and Milk Rivers have not significantly changed since the establishment of the 1921 Order. The consideration of prior rights to water has not been altered from those uses of water incorporated into the development of the 1921 Order. In addition, low levels of infrastructure investment and the continued use of low-efficiency irrigation methods in Montana would not seem to constitute the type of exogenous change necessary for contemplating reopening the Order.

Practice of Apportionment

Every year since the diversion of water from the St. Mary River to the Milk River in 1917, the natural flow of the two rivers and the apportionment between the two countries has been reported to the IJC. Since 1940 the reports have included the natural flow and apportionment of the Frenchman River and Battle Creek, two of the eastern tributaries of the Milk River basin. After 1950, Lodge Creek, another eastern tributary, also had significant upstream usage to warrant the reporting of its natural flow and apportionment. Flows in the eastern tributaries are apportioned equally between the two countries at the international boundary.

According to the terms of the 1921 Order, no deficit flows have been reported on either the St. Mary or the Milk Rivers. In three years since 1950, minor deficit flows have been reported on the combined eastern tributaries, which often run dry.

From 1950 to 1976, the Accredited Officers, as noted in the annual reports to the IJC, did not apportion flows in the Milk River; the United States was assumed to receive the entire natural flow, since diversions were small. After the very dry year of 1977 (the driest since 1917 at 26 percent of the long-term average flows from 1912 to 2003) consumptive uses (both irrigation and municipal) in the United States and Canada were noted as significant and had to be included in the determination of natural flow and the apportionment of Milk River flows. Studies commenced and in 1985, interim procedures for the determination of natural flow for the Milk River at the eastern crossing of the international boundary were established. Comparisons of the Milk River natural flow and the flows received by the US before and after 1985 are not therefore, strictly valid, as the procedures for the determination of the values differ in the reports to the IJC.

The 1921 Order, which clarifies the Treaty apportionment, considered prior use in each of the basins. As stipulated under the Boundary Waters Treaty, Canada is allotted 75 per cent of the natural flow of the St. Mary River during the irrigation season whenever it is less than 666 cfs (18.9 m³/s), amounting to 500 cfs (14.2 m³/s). Flow in excess of 666 cfs is split 50-50. Similarly the US is allotted 75 per cent of the natural flow of the Milk River whenever it is less than 666 cfs (18.9 m³/s), with the excess split 50-50. That is, whenever the flows of the two rivers at the international boundary between Canada and the United States are equal, the shares apportioned at the border are equal. As well, if the natural flow of one of the rivers is well in excess of the 500 cfs (14.2 m³/s) prior appropriation, the shares are equal. However, in most years, the St. Mary River, with headwaters in the National Glacier Park has greater natural flow than does the Milk River, which is a foothills and prairie river, with little late spring and summer contributions due to snowmelt. The greater area drained by the southern and eastern tributaries to the Milk River

would have more closely balanced the natural flows when crossing the border between Canada and the USA.

Conclusions

Canada does not support a review of the 1921 IJC Order at this time for the following reasons:

1. Prior to issuing the 1921 Order, the IJC convened extensive hearings to clarify the meaning and intent of 'prior appropriation' and 'apportionment' as outlined in Article VI of the Treaty. All arguments advanced by both the United States and Canada were considered and the subsequent Order provided, and continues to provide, a reasonable and accepted interpretation.
2. The Treaty and the Order have provided essential stability and predictability and have fostered opportunities for long-term planning, irrigation and land-use infrastructure development for both countries. The Governments of Canada, Alberta and Saskatchewan, have made substantial investments in irrigation and water management infrastructure based on provisions of the 1921 Order. Significant economic and social infrastructure exists in part because of the water resources and the Treaty/Order respecting their management. Altering the Order could undermine current and future social and economic stability within the basin, potentially resulting in near-term costs and long-term investment losses.
3. All of Canada's entitlements to the waters of the St. Mary River, as defined by the 1921 Order, have been fully allocated within Alberta and no new licenses have been issued for a number of years. Alberta experiences difficulties in providing a full water service to irrigators in the St. Mary River basin. However, Alberta has implemented comprehensive water management policies to lessen the social and economical effect of this shortage of water. Consequently, Alberta has invested significantly in irrigation infrastructure to increase irrigation efficiency and has withdrawn water licenses, under a modern water strategy.
4. The 1921 Order is adequately flexible to allow for both countries to address issues related to apportionment, including Montana's current concerns. For example, through close collaboration between the Accredited Officers of both countries, the computational procedures have evolved to ensure that the most beneficial uses are made of the waters of the St. Mary and Milk Rivers.