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September 7, 2004

The Hon. Dennis L. Schornack
The Rt. Hon. Herb Gray, P.C., Q.C.
Chairs, International Joint Commission
1250 23rd Street, NW, Suite 100
Washington, D.C. 20037

Dear Mr. Schornack and Mr. Gray,

On behalf of the Blackfeet Tribe, I am transmitting the written comments of the Tribe on the State of Montana's request to review the 1921 IJC Order Respecting the St. Mary-Milk Rivers. The Tribe would also like to express its appreciation to the members of the Commission who met with the Tribe on August 30, 2004 in Browning.

Sincerely,

Jeanne S. Whiteing
Jeanne S. Whiteing

Enclosure

International Joint Commission

ACTION:
INFORMATION: LB, JC, PS, MC, CMAS, Clarendon
FILE: 9-2-13
Blackfeet Tribe provides comments on
the St. Mary and Milk River Order



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STATEMENT OF THE BLACKFEET TRIBE TO THE INTERNATIONAL JOINT COMMISSION

Concerning the State of Montana's Request to Review the 1921 IJC Order Apportioning St. Mary and Milk River Water Between the United States and Canada

This written statement is submitted on behalf of the Blackfeet Tribe concerning the State of Montana's request to the International Joint Commission (IJC) to review the 1921 Order of the IJC Respecting the Waters of the St. Mary-Milk Rivers which addresses the measurement and apportionment of the waters of the St. Mary and Milk Rivers and their tributaries. This issue directly impacts the governmental and proprietary interests of the Blackfeet Tribe, and for this reason the Tribe expects to have a central role in any review or consideration of the 1921 Order.

The Blackfeet Tribe. The Blackfeet Tribe is a sovereign Indian Nation residing on the Blackfeet Reservation in Montana. The Tribe resided aboriginally in a large territory encompassing much of the present State of Montana and north into Canada. The present Blackfeet Reservation was originally established out of the Tribe's aboriginal territory by Treaty with the United States in October 17, 1855 (11 Stat. 657). The St. Mary and the Milk Rivers which are allocated in the 1909 Boundary Waters Treaty and are the subject of the 1921 IJC Order arise on and flow through the Blackfeet Reservation before entering into Canada. The

Tribe has both aboriginal and treaty reserved rights to water in the two rivers, and these waters have particular cultural and religious significance, as well as economic significance to the Tribe.

The role that the Blackfeet Tribe must be accorded in the present proceeding, is in contrast to what has occurred in the past. At the time the International Boundary Waters Treaty was entered into in 1909, to our knowledge, no consideration was given to the rights of the Blackfeet Tribe or other affected tribes. This oversight is particularly notable because the U.S. Supreme Court had just decided Winters v. United States, 207 U.S. 564 (1908), establishing the doctrine of reserved Indian water rights in a case arising on the Fort Belknap Reservation and involving the Milk River in Montana. The very validity of the Boundary Waters Treaty is therefore questionable in light of its failure to consider Indian reserved water rights.

The failure to take Indian water rights into account was continued when the IJC entered its Order in 1921 concerning the measurement and apportionment of the two rivers, and in the proceedings relating to the proposal to be reopen the 1921 Order in the 1930's. Neither Blackfeet water rights or the rights of any other Tribe were mentioned or considered.

This failure to take Blackfeet rights into account also extended to the U.S. Bureau of Reclamation which constructed the Milk River Project, diverting massive amounts of St. Mary water off the Reservation in a trans-basin diversion to the Milk River for use far downstream from the Reservation. To this day, the Tribe receives no benefit whatsoever from the Project, even though the extensive diversion facilities were constructed on the Blackfeet Reservation.

As this history shows, the Blackfeet Tribe has been systematically excluded from the process used to allocate the waters of the St. Mary and Milk Rivers, and its rights have been systematically ignored in the subsequent utilization of the water by the Milk River Project. This

history is especially egregious when viewed in light of the expenditures and subsidies the United States has made to take Reservation waters for use by others, while at the same time failing to protect or support any use by the Tribe. As a result, the Blackfeet Tribe is now having to deal with the consequences of these failures.

The Tribe is currently working toward a full determination of its water rights in the St. Mary and Milk Rivers and the other streams on the Reservation through a negotiated settlement with the State of Montana and the United States. The allocation of water in the Boundary Waters Treaty and the 1921 Order have a substantial impact on that process and the potential quantity of the Tribe's water rights. As well, the competing claims of the Milk River Project must be dealt with. Thus not only have the rights of the Tribe been ignored in the Boundary Waters Treaty and the 1921 IJC Order and in the construction of the Milk River Project, these circumstances and events now serve as potential barriers to a full recognition of the Tribe's rights.

It is therefore with considerable concern that the Tribe views the State of Montana's proposal to the IJC to review the 1921 Order, and the United States support of the State's request. For reasons unknown to the Tribe, this request was made without any notice to or consultation with the Tribe, and the United States support for such a review was provided without any consultation with or consideration of the rights of the Tribe. It is therefore even more imperative that the IJC, in any consideration of the State's request and in any review of the 1921 Order, acknowledges the critical role of the Tribe and implements a process that allows for the participation of the Tribe as a full party. The Tribe is not willing to stand by and allow itself to be excluded once again from the process of allocating the St. Mary and Milk Rivers, or allow its rights to be ignored in such a process.

Review of the 1921 Order. While the State of Montana has identified various problems with the 1921 Order and the administrative rules used to implement it, there has been only a vague identification of the goal to be achieved through a review of the Order, i.e. a fairer allocation of water, and no identification of how the Order or administrative rules can or should be modified to achieve that goal. Surprisingly, the request was made without any prior evaluation of the potential impacts on water users, including the Tribe, and without any discussion or consultation between the State of Montana and the Tribe as to how any modification of the Order may affect ongoing discussions concerning the water rights of the Tribe. While the Tribe understands that modification of the Order could be beneficial to the Tribe, it also understands that, depending on how the Order is modified, such modification could be detrimental to the Tribe.

Under the circumstances, the Tribe does not at this time support a reopening of the Order, and we understand that no request for such reopening has been made by the United States or Canada, the only parties that can make such a request. Instead, the Tribe supports a review of the 1921 Order through the appointment of a board, like that provided for under Rule 28 of the Rules of Procedure of the International Joint Commission. Such a Board should undertake an investigation and study of the 1921 Order for the purpose of making recommendations to the Commission. The Board should be composed of representatives of the affected governments, including the Blackfeet Tribe and other affected Tribes. A technical committee of the Board should also be appointed to undertake the necessary technical studies that would be required as part of such an investigation and study. The Tribe would also expect to have a technical representative on such a committee.

The Board, with the assistance of the technical committee, should be directed to review the 1921 Order for the following purposes:

1. Reviewing the history and circumstances and the factual and legal premises of the Order.
2. Reviewing whether there have been any changes in the factual and legal circumstances relating to the Order.
3. Reviewing how the Order has been implemented, and the impact of such implementation on affected water users.
4. Identifying and considering possible modifications to the Order and implementing administrative rules.

The Board also should be authorized conduct additional public meetings to obtain public input concerning these issues.

During this time, it is also the expectation of the Blackfeet Tribe that the United States will consult with the Tribe to insure that the rights of the Tribe are fully protected in such a process, and that the State of Montana will consult with the Tribe to ensure that the on-going negotiations of the Tribe's water rights are not jeopardized.

Conclusion. The history of the 1909 Boundary Waters Treaty and the 1921 IJC Order insofar as the rights of the Blackfeet Tribe are concerned is not a history of which the United States can be proud. The IJC has an opportunity to change that history by fully acknowledging the rights of the Blackfeet Tribe and by providing a process by which the Tribe is accorded a central role in any review of the 1921 Order. The Tribe supports such a review through the appointment of a board as described above which would include the Tribe as member, but does not support reopening of the Order at this time.