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**IJC / CMI OTTAWA**

ACTION: McCauley  
INFO: Clamen / MV / NH  
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OCT 13 2004

**FILE / DOSSIER**

3-1-4-9 (9)

Your file - Votre référence

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8650-1

FAX: (613) 993-5583

SEP 28 2004

Tom McCauley  
Project Manager  
International Joint Commission  
Canadian Section  
234 Laurier Avenue West, 22nd Floor  
OTTAWA ON K1P 6K6

Dear Mr. McCauley:

Thank you for your September 8, 2004 discussion with Alberta regional officials concerning the Kainaiwa/Blood Tribe's participation at the International Joint Commission (IJC) public hearing on July 29, 2004 in Lethbridge, Alberta with respect to the St. Mary and Milk Rivers' watershed.

While I recognize that Indian and Northern Affairs Canada (INAC) does not have an official standing in the IJC process, INAC is attempting to ensure that the Kainaiwa/Blood Tribe is engaged in the IJC process to the fullest extent possible.

Notwithstanding the Kainaiwa/Blood Tribe's oral presentation to the IJC at the public hearing forum on July 29, 2004, the Alberta Region wants to ensure that the written text of the Tribe's submission is included with the documentation that is being prepared by the Canadian Section of the IJC as supporting evidence for a Canadian position at the IJC deliberations later this Fall.

**DISTRIBUTION**

**ACTION:**

INFO: LB, JC, MC, FB, CMNS

FILE: Comments from the  
Kainaiwa/Blood Tribe  
on the St. Mary & Milk  
River Order

9-2-13

Accordingly, I am enclosing a copy of the Blood Tribe/Kainai submission to IJC with respect to the 1909 International Boundary Waters Treaty for your consideration and request that this item be introduced into the document summary supporting Canada's findings to the IJC.

Yours sincerely,



Roy H. Bird  
Regional Director General,  
Indian and Northern Affairs Canada  
Alberta Region  
630 Canada Place  
9700 Jasper Avenue  
EDMONTON AB T5J 4G2

Encl.

**COPY**

**BLOOD TRIBE/KAINAI**  
**SUBMISSION TO**  
**THE INTERNATIONAL JOINT COMMISSION**  
**WITH RESPECT TO**  
**THE 1909 BOUNDARY WATERS TREATY**

**SUBMITTED JULY 29, 2004**

## HISTORY

The Blood Tribe is a member of the Blackfoot Confederacy and shares a common territory, culture and kinships with the other Blackfoot speaking Tribes of the 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 Confederacy territory encompassed significant parts of what is 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 Assiniboine, 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 Lamebull 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 Lamebull 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 Lamebull Treaty, not only in terms of annuities but recourse to education, agricultural assistance, land and resource rights and general access to their Traditional Territory for economic, social and cultural purposes.

The Blood Tribe, like other First Nations across the country, believes it has special standing with regard to resource sharing between Canada and the United States, based in part on the Jay Treaty of 1794, Treaty 7 and its 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 Confederacy Tribes 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 is the eastern boundary of 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 Confederacy Tribes 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 over 9,400 members. 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 owner of the banks and beds of the rivers bordering and forming a part of its Reserve, either by un-extinguished Aboriginal right, Treaty

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 Tribe's Treaty and Aboriginal rights that may arise from any actions taken with respect to the Order of 1921 or the 1909 Boundary Waters Treaty.