

15 July 2004

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

E-mail: Commission@ottawa.iic.org

By e-mail

Dear Sirs/Madam,

Re. Apportionment of the St. Mary and Milk Rivers

I write in both my personal and professional capacity to convey some views on the proposed review of the International Joint Commission's 1921 order concerning the apportionment of the waters of the St. Mary and Milk Rivers.

I **am** in Lethbridge, Alberta for the entire month of July and respectfully request the opportunity to present a brief oral **summary of** my views to the Commission during its public hearing there on 29 July 2004.

My personal connections to Southern Alberta are strong and long-standing. I **am** a 1984 graduate of the Lethbridge Collegiate Institute. My family resides in Lethbridge and I **am** a frequent visitor there. I have voted in Lethbridge in every Canadian federal election since I turned eighteen in 1984.

My professional credentials are also of relevance. Until last month, I was a tenured professor of law and Director of the Center for Canadian Studies at Duke University. As of 1 July 2004, I hold a Tier 1 Canada Research Chair in Global Politics and International Law at the University of British Columbia, where I also serve as Academic Director of the Liu Institute for Global Issues. My research focuses on the dual areas **of** public international law and US-Canada relations, including on principles of law relevant to trans-boundary water apportionment (see, e.g.: Michael Byers, "Abuse of Rights: An Old Principle, A New Age," (2001-2002) 47(2) McGill Law Journal 389-431).

In this short submission, I wish to raise two issues of concern with respect to your deliberations, namely: (1) that the correct rules of international treaty interpretation are applied to Article VI of the Boundary Waters Treaty; and (2) that the current **and** future impact of climate change on the natural flows of the St. Mary and Milk Rivers is fully taken into account. There are other issues that could be raised in a longer submission, and I would be pleased to make such a submission if the Commission **so** desires.



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(I) *The Applicable Rules of Treaty Interpretation*

(a) **What are the applicable rules?**

Both the United States and Canada are bound by the customary international law rules of treaty interpretation when dealing with the provisions of the 1909 Boundary Waters Treaty. As the International Court of Justice indicated in its *Namibia Advisory Opinion*, I.C.J. Reports 1971, p. 67, these rules are accurately codified in articles 31 and 32 of the 1969 Vienna Convention of the Law of Treaties (See: 1155 United Nations Treaty Series 331).

The accuracy of the Vienna Convention as a codification of customary international law was acknowledged by President Richard Nixon in 1971, when he submitted the convention to the U.S. Senate for its advice and consent to ratification. Nixon stated that the convention—which does not, as a treaty, apply retroactively—"is an expertly designed formulation of contemporary treaty law and ... is already generally recognized as the authoritative guide to current treaty law and practice." (See: Senate Executive Document L., 92nd Congress, 1st Sess. (1971) p.1).

Articles 31 and 32 of the Vienna Convention on the Law of Treaties read as follow:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties *so* intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

The memorandum prepared by the State of Montana on 26 December 2003 does not apply the binding international rules on treaty interpretation. It cannot therefore stand as a defensible interpretation of Article VI of the Boundary Waters Treaty—which, of course, is ~~an~~ international treaty between two sovereign states that is governed by international law.

(b) Applying the rules of treaty interpretation to Article VI

Applying the provisions of the 1969 Vienna Convention, ~~as~~ a codification of the binding customary international law rules of treaty interpretation, one comes to a result that is markedly different from that advanced by the State of Montana. This is because the State of Montana focuses entirely on the ordinary meaning of the terms, without reference to the context of those terms and the object and purpose of the treaty. It also relies impermissibly on the circumstances of the conclusion of the treaty in a situation where the correct interpretative approach results in a meaning that is not ambiguous, obscure, manifestly absurd or unreasonable.

The ordinary meaning of Article VI is reasonably open to two possible interpretations, as represented by the traditional U.S. and Canadian positions. In other words, one could reasonably include the prior apportionments set out in the second sentence within the equal apportionment of the waters between the two countries required by the first sentence, or one could equally reasonably exclude those prior apportionments. It is precisely because of the inadequacy of ordinary meaning to resolve many interpretive disputes that Article 31 of the Vienna Convention requires reference to additional factors, namely the context of the terms and the object and purpose of the treaty.

Article 31(2) specifies that context includes the text of the entire treaty. It is therefore relevant to the interpretation of Article VI of the Boundary Waters Treaty that Article III recognizes a baseline principle of preserving the “natural level or flow of boundary waters” as well as “the ordinary use of such waters for domestic and sanitary purposes.” Although this principle may be departed from in specific instances, this may occur only by special agreement between the United States and Canada. And it would seem that the allocation of prior apportionments (from the Milk River to the United States, and from the St. Mary River to Canada) *in advance* of the equal apportionment comes closer to preserving the natural flow of those rivers and the ordinary use of those waters than the interpretation argued for by the State of Montana.

In addition, Article 31(3)(b) of the Vienna Convention specifies that there “shall be taken into account, together with the context”, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” The 1921 order of the International Joint Commission—and, more importantly, the long-time acceptance of that order and the annual apportionments made pursuant to it—clearly constitutes subsequent practice in the application of the treaty at the agreement of the parties. The practice **of** the last 83 years **is** therefore directly relevant, indeed possibly decisive, in determining the correct interpretation of Article VI of the Boundary Waters Treaty.

Moreover, Article 31(3)(c) stipulates that “any relevant rules of international law applicable in the relations between the parties” shall also be taken into account. Since 1909, and partly as a result of the Boundary Waters Treaty and practice under it, the principle of equitable utilization has become generally accepted as the relevant, binding rule of customary international law with respect to trans-boundary water resources. Equitable utilization does *not* require equality of apportionment. Instead, it requires that a variety of factors be taken into account including, notably, existing uses—such **as**, in this instance, the established, extensive irrigation use of the St. Mary River waters in Southern Alberta—as well as the economic and social needs of each basin state and the population dependent on the waters of the basin in each basin state (See, e.g.: The Helsinki Rules on the Uses of the Waters of International Rivers, Chapter 2, available at <http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm>). This customary law backdrop is of direct relevance, pursuant to Article 31(3)(c), and is thus yet another reason why the 1921 order of the International Joint Commission remains the correct interpretation of Article VI.

Finally, since Article 32 of the Vienna Convention precludes recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion,” except when the result of an

interpretation according to Article 31 has left the meaning “ambiguous or obscure” or led to a result which is “manifestly absurd or unreasonable”, the State of Montana is not entitled to make reference to the arguments advanced prior to the 1921 order, nor to the “description of the compromise reached in 1921”, in an attempt to reverse the interpretation of Article VI correctly arrived at by the International Joint Commission at that time.

(2) The Current and Future Impact of Climate Change

For whatever reason, it appears that the climate of Montana and Alberta is changing. Heightened average temperatures are altering the natural flows of rivers in various and sometimes unexpected ways. These differences depend in large part on the character of particular watersheds, with the St. Mary and Milk River basins differing in one particularly important respect. The St. Mary River is glacial fed, with a significant portion of its flow—particularly in late summer and fall—coming from the Red Eagle, Logan, Blackfoot, Jackson, Piegan and Sexton glaciers in Glacier National Park. The Milk River basin, in contrast, contains no glaciers, which means that the Milk River is largely dependent on spring run-off or summer precipitation for its natural flow. This explains why *so* much of the summer and fall flow **of** the Milk River is dependent on water transfers from the St. Mary system.

The immediate effect of climate change on the flow of these rivers seems to involve a decreased natural flow in the Milk River as shorter winters, longer summers, and higher overall average temperatures reduce the snow pack and increase the amount and duration of evaporation. It might also involve a temporarily *increased* natural flow in the St. Mary River, as the source-glaciers melt at increased rates and for longer periods **of** time each summer. As a result of one or both of these two possible developments, the current situation seems to be one where the effects of climate change on these rivers works to the advantage of Canada and the disadvantage of the United States.

In the somewhat longer term, however, there is a very real possibility that the glaciers of northern Montana will disappear completely. This could conceivably happen within the space of a decade—to provide a relevant comparison, the Bow Glacier, which feeds the Bow River to the west of Calgary, has retreated more than 1000 meters in the last two decades alone. And the Glacier Park glaciers are relatively small, and may thus disappear even more quickly.

The effect of disappearing glaciers on the natural flow of the St. Mary River would be dramatic. Essentially, the St. Mary would become much like the Milk River, in that it would be largely dependent on spring run-off and would not have a consistent and reliable summer and fall flow.

I am not a hydrologist or climatologist. Yet it is clear to me that any equitable revision of the 1921 order would have to take into account both the current and possible future effects of climate change on both rivers. These effects would have to be determined and predicted by careful scientific analysis, including a comparison of the current and historical melt-rate of the glaciers. Any revision that did not carefully take into account the science could quickly become out-of-date and seriously inequitable.

Conclusions

The memorandum of the State of Montana fails **to** apply the legally binding international rules on treaty interpretation. Those rules, when correctly applied, affirm that the 1921 order of the International Joint Commission was and remains the legally required interpretation of Article VI of the Boundary Waters Treaty.

Climate change may already have had a significant impact on the natural flows of both the St. Mary and Milk Rivers. It could soon significantly decrease the natural flow **of** the St. Mary River, if and when the glaciers **of** Glacier National Park disappear. Any revision of the 1921 order of the International Joint Commission must take into account careful scientific analysis and prediction of the present and future effects of climate change on the two rivers, in order to avoid becoming quickly out-of-date and seriously inequitable.

Respectfully yours,

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& Academic Director, Liu Institute for Global Issues
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