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KAINAIWA

## Chief and Council

July 28, 2004

International Joint Commission  
234 Laurier Avenue West, 22<sup>nd</sup> Floor  
Ottawa, Ontario  
K1P 6K6

**Attention: Secretary, Canadian Section**

Dear Sir/Madam:

**RE: 1909 Water Boundaries Treaty  
St. Mary and Milk River Apportionment**

On behalf of the Blood Tribe please find enclosed a copy of the Submission to the International Joint Commission with respect to the St. Mary and Milk River Apportionment.

It is our understanding that public consultation sessions are being held with respect to the apportionment of water between the United States and Canada from the St. Mary and Milk Rivers. For the record we wish to state that although we are participating through making representations at these public hearings it is our position that this is not to be considered consultation if our Aboriginal and/or Treaty rights are affected in any manner.

We note that we were not consulted prior to the making of the 1909 Water Boundaries Treaty or with respect to the 1921 IJC Order which set out the procedures used to apportion the flow of the St. Mary and Milk Rivers between Canada and the United States. Prior to any changes to the 1909 Treaty or the manner in which it is implemented that may affect the Blood Tribe or the Blood Indian Reserve there must first be consultations that are Blood Tribe specific and follow the guidelines as sets out by the Supreme Court of Canada.

We further note that we have not been given sufficient notice to provide a completely informed technical or legal submission and therefore again state that we expect that our interests will be fully protected and information provided to us on a timely basis that will allow further and complete submissions prior to any substantive changes or alterations being made that will negatively impact our rights.

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 for approximately 88 miles and clearly any changes to the flow or allocation of these waters will impact the Blood Tribe significantly.

We trust that our interests will be given due consideration by the International Joint Commission and that Canada will fulfill its duties to protect those same interests. We look forward to speaking with you further on these issues.

**Yours truly,**

**Blood Tribe/Kainai**

*Chris Shade*  
for  
**Chief Chris Shade**

Enclosure

**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

right, or as riparian owners, has retained water rights in and to the rivers for its own use and benefit.

### **Aboriginal Title/Right**

The Blood Tribe claims that its ownership of the rivers and the banks and beds of rivers bordering the Blood Indian Reserve is an aboriginal right, un-extinguished by treaty or other legislative enactment.

The use of water was an integral part of the historic occupation and possession the Blood Tribe's Traditional Territory and the right to water is an integral part of Aboriginal title. The Supreme Court of Canada in the 1973 decision of *Calder* held that Aboriginal title is the right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams. The Blood Tribe claims Aboriginal Title and an Aboriginal Right to the water of the rivers in its Traditional Territory and specifically with respect to the rivers which bound the current Blood Indian Reserve.

Prior to the settlement of Canada by non-Indian settlers, the Blood Tribe had an economy based on hunting, trapping, fishing, food gathering and trading with other parties. At all material times the Waterton, St. Mary and Belly rivers (including their banks and their beds) have been essential to the economic, cultural and spiritual way of life of the members of the Blood Tribe.

### **Treaty Right**

The Blood Tribe claims ownership of the rivers and the banks and beds of rivers within or bordering their Reserve, including the banks and the beds of the St. Mary and Belly rivers, as a Treaty right negotiated for and reflected in Treaty 7 and its amendments.

On or about September 22, 1887, Her Majesty the Queen in Right of Canada negotiated Treaty 7 with the Blood Tribe, along with the Siksika Nation, the Tsuu T'ina Nation, the Piikani Nation, and the Stoney Tribe.

The Blood Tribe states that it was the intention of the Blood Tribe to negotiate for; and the intention and duty of Her Majesty the Queen in Right of Canada to enter into an agreement (Treaty 7), that satisfied the needs of the Blood Tribe and fulfilled the duty and obligation of Her Majesty the Queen in Right of Canada by providing to the Blood Tribe the use and ownership of the rivers and of the banks and beds of the rivers and the use of the water within their territories as an essential part of their economic, cultural and spiritual way of life and further, to provide for the needs of the Blood Tribe to establish a new economy based on ranching and agriculture and the utilization of the water and the banks and the beds of rivers within the Reserve.

At the time of the making of Treaty 7 the Blood Tribe did not cede or surrender water or water rights attaching to lands in the Traditional Territory or lands that would be set apart as a Reserve for the Blood Tribe. There is nothing in the express wording of the Treaty that would indicate that the Crown intended to obtain a beneficial interest to the water, and the understanding of the oral terms of the Treaty is consistent with the assertion that the water and water rights were not surrendered but in fact were reserved to the Treaty 7 First Nations. The Blood Tribe was encouraged to settle on reserve lands and to engage in agricultural activities. Water is essential to these activities, to economic development and to general subsistence. There is a reserved right to water implied in the creation of the Blood Indian Reserve. This right to water includes present as well as future needs of water, allowing water to be used for all beneficial purposes.

### **Riparian Rights**

In addition, or in the alternative, the Blood Tribe claims that it is a riparian owner of the banks of the rivers bordering the Blood Indian Reserve and therefore is the owner of banks and beds of those rivers to the middle stream of the said rivers through the doctrine of *ad medium filum aquae*.

As stated above, the St. Mary River is the eastern boundary of the current Blood Indian Reserve. As a riparian landowner the Blood Tribe has the right to have water come to the Reserve in its natural state, in flow and quantity. In addition to, or in the alternative, to Aboriginal and Treaty Rights the Blood Tribe claims a right to the St. Mary River water as a riparian owner. No changes may be made to the flow and quantity of the water which flows through the Reserve without the consent of the Blood Tribe, notwithstanding the Province of Alberta's claim to ownership of all the water in the Province of Alberta.

### **CONSULTATION**

Aboriginal and Treaty rights are protected under s.35(1) of the *Constitution Act, 1982*, which states:

*The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

The Supreme Court of Canada has developed tests whereby legislation and government activity may only interfere with the exercise of Aboriginal and Treaty rights if the infringement is justified as necessary to achieve a valid legislative objective. Consultation with potentially affected Aboriginal people is an essential component of the determination by the courts of whether government has infringed the rights in question only to the extent necessary.

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.