

Comment on "The St. Mary and Milk Rivers: The 1921 Order Revisited" by R. Halliday and G. Faveri, *Canadian Water Resources Journal*, 32(1): 75-92

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Montana's Primary Reason for Requesting a Review of the 1921 Order

I don't think that the authors have properly presented the State of Montana's fundamental reason for requesting the International Joint Commission (IJC) review of the 1921 Order, as stated in the first paragraph of Montana's then Governor Martz's April 10, 2003 letter. Montana requested that the IJC assess if the Order, after 82 years of actual application, is meeting the intent of the *Boundary Waters Treaty* of 1909. Montana believed that this was an appropriate time to check the performance of the Order because the State has been pursuing legislation and funding to rehabilitate the St. Mary Canal, is negotiating federal reserved water rights with Native American Tribes in the basin, and because Alberta has been evaluating a new Milk River reservoir. Also, Montana was reviewing the flow data and finding that the Order did not appear to be meeting the equal apportionment provisions of Article 6 of the 1909 *Boundary Waters Treaty*.

Montana provided evidence to support its contention in its January 2004 submittal, describing an imbalance in the historic flow divisions and how it was greatest during dry years, when the water was most needed. Figure 1, although not an actual reproduction from the initial correspondence, depicts graphically Montana's primary concern. During the driest years, it appears that Canada received about 50 percent more of the combined flow of the two rivers at the International Boundary than the United States did.

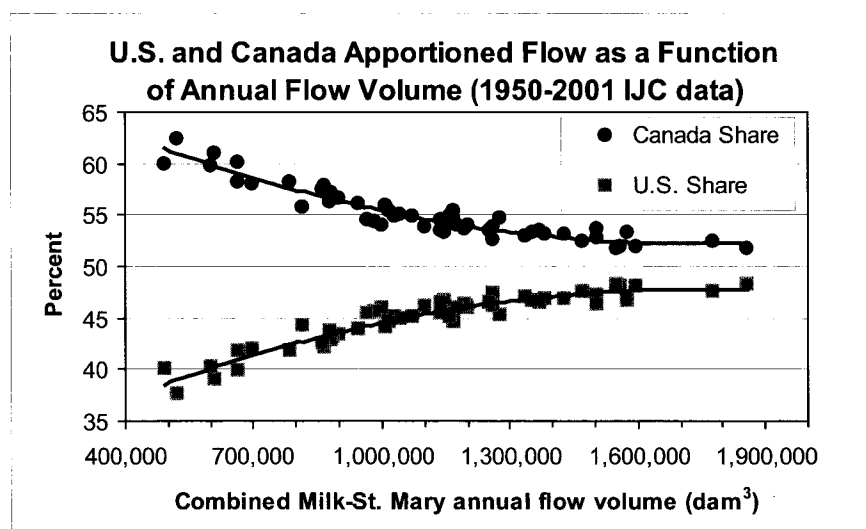


Figure 1. Percent of total flow volumes of the St. Mary River at the International Boundary and the Milk River and Tributaries at the International Boundary apportioned to the United States and Canada by the 1921 Order during the 1950-2001 period.

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Existing Rights at the Time of Treaty

On page 79 (column 2, paragraph 1) the authors imply that the prior appropriation provisions of the Treaty were overly generous to the United States, while insufficient for Canada. The trouble here is that they compare two different things: what was beneficially used at the time by the Americans from the Milk River, to an unperfected appropriation that was granted on the St. Mary River by Canada. From the record of the early IJC hearings, it is difficult to get a clear figure on the amount of St. Mary River water that had actually been used for irrigation in Canada at the time of the Treaty but it appears that the amount was about 10.9 m³/s (IJC, 1915, p. 85). This is similar to the amount that the United States was using for irrigation on the Milk River at the time. Although the record is again confusing, the Canadian Northwest Irrigation Company in a 1902 authorization memorandum from the Department of Interior in Ottawa was given rights to "all of the total low-water flow of the St. Mary River and a further amount of water during high-water states of the stream sufficient to make 2,000 cubic feet per second during that stage". The Canadian government likely authorized such a large water right in order to stake a claim to as much St. Mary River water as possible. While the United States council did not object to allowing Canada priority to water that it had actually diverted and beneficially used, it was troubled by Canada's unperfected claim to all but the highest flows (IJC, 1915, p. 89).

Administrative Measures Task Force and Balancing Periods

Following the hearings on Montana's request, the IJC established a Task Force to review the administrative measures that implement the 1921 Order. Although the authors refer to the Administrative Measures Task Force some, they make little reference to its findings. This leads to a confusion by the authors regarding some of the important issues which the Task Force addressed. For instance, on page 87 (column 2, first paragraph) the authors discuss balancing periods and argue that a longer balancing period will "... increase the likelihood of the stream channel drying out" or "With a very long balancing period there is a possibility of there being no riparian flow for much of the irrigation season." The

Task Force spent a lot of time on the balancing period question, and it modelled and evaluated the potential impacts of balancing periods ranging from weekly to annually. The Task Force report also concluded that, under longer balancing periods, the U.S. could divert a greater volume of its entitlement in the St. Mary River and that Canada could receive a greater volume of its entitlement from the Milk River. The authors concerns with riparian flows under longer balancing periods are unsupported; the Task Force was well aware of these concerns and only analyzed balancing period scenarios that would maintain minimum flows in the St. Mary River. These minimum flows were similar to those that occur under current operations.

Native American Rights

On page 88, the authors state that Montana's contention that federal reserved water rights at the time of the Treaty were known but not defined was "clearly incorrect". In 1908, the *Winters* decision established water rights for Indian Tribes on the Fort Belknap Reservation of about 3.5 m³/s from the Milk River for irrigation. The implications of the *Winters* decision were that similar federal reserved rights existed for Tribes on other Indian reservations as well. While the *Winters* case recognized the existence of these tribal rights and provided a baseline water right for the Ft. Belknap Tribes, it did not fully quantify them. Indeed, there were still many outstanding issues associated with application of the *Winters* doctrine and it wasn't until the aftermath of U.S. Supreme Court decisions in the 1970s that procedures for better quantifying reserved water rights were developed. The quantification process has taken time. A compact that more comprehensively quantified reserved water rights for the Fort Belknap Reservation was not ratified by the State of Montana until 2001 and is still waiting federal approval, and this compact allows the Tribe substantially more water including the use of up to 14.7 m³/s of additional Milk River flow. Furthermore, the reserved water rights for the other Tribes in the basins were far from quantified at the time of the Treaty or 1921 Order. A compact with the Chippewa Cree Tribe of the Rocky Boys Reservation was ratified in 1997. Compact negotiations to quantify the substantial reserved rights for the Blackfeet Tribe, whose Reservation encompasses the

headwaters of the Milk River and much of the St. Mary River, are ongoing.

Use of the Milk River Channel in Alberta

The authors contend on page 79 that Canada was given a larger share of the more reliable St. Mary River as a trade-off for the United States' use of the Milk River channel to convey St. Mary River water through southern Alberta. This contention is not well supported by the record and the use of the Milk River channel was specifically addressed in the Treaty.

Canada has provided the United States with a tremendous benefit by allowing it to use the Milk River channel to convey St. Mary River flows to Montana irrigators. But, over time, Canada has found ways to benefit from the conveyance of the St. Mary River water. The Milk River in Alberta now supports about 2,800 hectares of full-service sprinkler irrigation that would not be tenable without the U.S. St. Mary Canal diversions. Further, due to the St. Mary diversions, the Milk River has become one of the most popular canoeing rivers in southern Alberta.

The Proposed Alberta Storage Project

The authors discuss the proposed Alberta storage project in their article but do not correctly describe its potential implications and why it is such a concern to the State of Montana. Alberta has been analyzing options for reservoirs on the Milk River that might have the capacity to store from 157,800 to 299,900 dam³ (Alberta Environment, 2003). On average, the 1921 Order entitles Canada to about 45,000 dam³ of water that now passes unused into Montana. Much of this water is now captured in Fresno or Nelson Reservoirs, or is directly captured and used by Montana irrigators. Montana could not simply mitigate the loss of this much water.

While the authors are confident of the security of water rights for a new reservoir on the Milk River in Canada (first paragraph, page 89), even though the water that would be stored has never been used by Canada, they hold a different view on the security of the United States' rights to St. Mary River water. On page 89 (second paragraph), the authors warn that St. Mary River water supplies for Montana could be reduced if

the IJC were to reopen the 1921 Order because the capacity of the St. Mary Canal has been allowed to decline. In stating this, the authors do not seem to fully understand how the decline in canal capacity has affected the United State's ability to use St. Mary River water. Due to the way the water is apportioned, the peaked nature of the St. Mary River hydrograph, and because some of the U.S. share is stored in Sherburne Reservoir, during most years the decline in canal capacity only reduces the amount of water that the U.S. can divert down the canal for a relatively short time during peak runoff. Daily modelling of the upper St. Mary system by the Montana DNRC for the 1959-2003 period suggests that, on average, the United States' ability to divert water down the canal has been reduced by about 13,000 dam³ per year, or by about five percent of the average total annual diversion.

The Case of Mr. Sands

The authors have been a bit selective when drawing information from the records of the early IJC hearings. An example is their use of this 1915 quote from the American attorney for the Milk River irrigators, W.B. Sands: "By the terms of this treaty we give to the Canadians 58 percent, which ought to be fair and ought to be all that they could possibly ask". The authors use this quote to support their view that Americans at the time believed that the Treaty could not produce an equal apportionment. I examined the record and found that, almost immediately following this statement, the American IJC Commissioner James Tawney broke in and began an open discourse with Mr. Sands concerning his prior statements. Mr. Tawney soon adds that: "Both countries are entitled under this treaty to an equal division of waters, whatever they are, that are included in the treaty." (IJC, 1915; p. 225).

Still, it is unfortunate that the authors did not include more dialogue from Mr. Sands because his down-to-earth wit colours what is otherwise an often long, dry record of legal testimony. The authors describe the Canadian perspective at the time—and apparently still held by some today—that the apportionment computations should include waters from the non-international Milk River tributaries which are downstream of the Eastern Crossing and entirely within the U.S. The American perspective on this could have been captured by reference to this 1915

quote by Mr. Sands: "... if the construction contended for by the Canadians is true, we will have to turn the Milk River and run it up hill and back into Canada." (IJC, 1915; p. 258).

Summary

In the Discussion section of their article, the authors seem eager to offer their opinions concerning the merits of Montana's request to review the 1921 Order. It becomes clear that the authors are not sympathetic to Montana's request. I don't think it would be productive to contradict the authors point-by-point here because Montana's request is still pending before the IJC and its merits are not for the authors or for myself to decide. It is curious though that, while I've read most of the same information as the authors, I've so often arrived at entirely different conclusions than them. This must be a common type of enigma; in their conclusions section (paragraph 1, second sentence) the authors describe how the public (interveners) exhibit a similar behaviour.

References

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