

The State of Montana's Comments and Recommendations on  
**The International St. Mary–Milk Rivers  
Administrative Measures Task Force Report**

June 2008



St. Mary Canal



Montana Department of Natural Resources and Conservation



# The International St. Mary–Milk Rivers Administrative Measures Task Force Report

## Introduction

In April 2003, Montana Governor Judy Martz requested the International Joint Commission (IJC) to review the 1921 IJC Order that sets out procedures for implementing Article VI of the 1909 Boundary Waters Treaty between the United States and Canada. The Order had not been reviewed in the previous 82 years. Montana questioned whether the first paragraph of Article VI of the Treaty was being met. The paragraph states:

“The High Contracting parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each. It is further agreed that in the division of such waters during the irrigation season, between the 1st of April and 31st of October, inclusive of each year, annually, the United States is entitled to a prior appropriation of 500 cubic feet per second of the waters of the Milk River, or so much of such amount as constitutes three-fourth of its natural flow, and that Canada is entitled to a prior appropriation of 500 cubic feet per second of the flow of St. Mary River, or so much of such amount as constitutes three-fourths of its natural flow.”

The IJC’s first action on Montana’s request was to hold four public meetings in Montana, Alberta and Saskatchewan. Following these meetings, the IJC created the eight-member Administrative Measures Task Force consisting of a representative from: the United States Geological Survey; the State of Montana; the Blackfeet Tribe of Montana; United States Bureau of Reclamation; the Province of Alberta; the Province of Saskatchewan; the Water Resource Survey of Canada; and Environment Canada. The IJC then issued a directive to the International St. Mary Milk Rivers Administrative Measures Task Force in November 30, 2004 “to examine and report to the IJC on measures for improvements to existing administrative procedures of the St. Mary and Milk Rivers apportionment to ensure more beneficial use and optimal receipt by each country of its apportioned waters. This will include examining these administrative procedures, such as accounting procedures, surpluses and deficits, accounting periods, and any other administrative measures the group may find pertinent to its task.”

The Task Force began meeting in February 2005 and completed its work with the publication of the April 2006 draft report entitled, *International St. Mary – Milk Rivers Administrative Measures Task Force: Report to the International Joint Commission*.

In June 2006, Montana Governor Brian Schweitzer submitted the state’s comments and recommendations on the draft Task Force report to the IJC. The Governor’s original comments and recommendations have been edited and reformatted for this report.

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St. Mary Siphon



USGS Gauging Station on St. Mary Canal

**T**he State of Montana (Montana) appreciates the opportunity to present written testimony on the International St. Mary – Milk Rivers Administrative Measures Task Force Report dated April 2006, (Task Force Report). Montana also thanks the IJC for establishing the Task Force to address the concerns initially raised by Montana. Montana feels the Task Force Report clearly indicates disparities in entitlements and flows received that are contrary to the intent and spirit of the 1909 Boundary Waters Treaty (Treaty) – an equal sharing of the flows to benefit both countries. Montana urges the IJC to take further action as explained herein, to address the disparities to the mutual benefit of all parties involved.

According to the United States Bureau of Reclamation, irrigation water shortages occur in 6 out of every 10 years in the Milk River Basin of Montana, and virtually all the Milk River irrigators in Montana receive on average about one-half of a full-service water supply. The mainstem of the Milk River has essentially been closed to new appropriations for over twenty years. In dry years, about 90% of the flow in the Milk River is water diverted from the St. Mary River through the St. Mary Canal. The Bureau testified in the 1920s that it could irrigate 220,000 acres in the Milk River Basin, yet today Montana irrigates about 140,000 acres. Montana only desires its fair shares of Milk River and St. Mary River water as defined under the Treaty.

The following are Montana’s comments on the draft Task Force Report and 1921 IJC Order.

**(1) The Task Force’s Report confirms that the United States is entitled to considerably less water under the existing 1921 IJC Order than Canada, especially during drought.**

The Boundary Water Treaty requires that the combined flows of the Milk and St. Mary Rivers be divided equally between the United States and Canada. When the IJC created the 1921 Order over 85 years ago, the Commission did not know the actual effects of its decision on the apportioning of flows between the United States and Canada. At that time, there was a lack of hydrologic data. Today, we have more data and understand the hydrology of the two river systems much better. Based on the last 50 years of data, there are significant inequities created by the 1921 Order as shown in figure 1 on the following page. The language of the first paragraph of Article VI of the Boundary Waters Treaty states twice in the first sentence the need for “equal apportionment” of the flows of the St. Mary and Milk Rivers between the United States and Canada. That is not happening today.

The United States receives far less water than Canada under the 1921 Order. Figure 1 shows the percentages of the combined flows of the St. Mary River, Milk River and Eastern tributaries that the United States and Canada were entitled to under the 1921 Order between 1950 and 2001. In the dry years when water

is most needed, the United States is entitled to less than 40 percent of the combined flows while Canada is entitled to more than 60 percent. This disparity occurs because Canada receives a much larger percentage of St. Mary River water, while the United States combined share is never equalized by the erratic and more drought-prone flow of the Milk River. Based on the Task Force Report (pg. 24), the United States entitlement averaged 45% of the combined flows and Canada entitlement averaged 55%. However, the key difference as the figure below shows is in drought years where the United States entitlement is typically about 38% to 40% and Canada is entitled to 60 to 62%. The data for this figure were taken directly from the annual reports submitted to the IJC by its Accredited Officers. (*The United States Geological Survey and Water Resource Survey of Canada*)

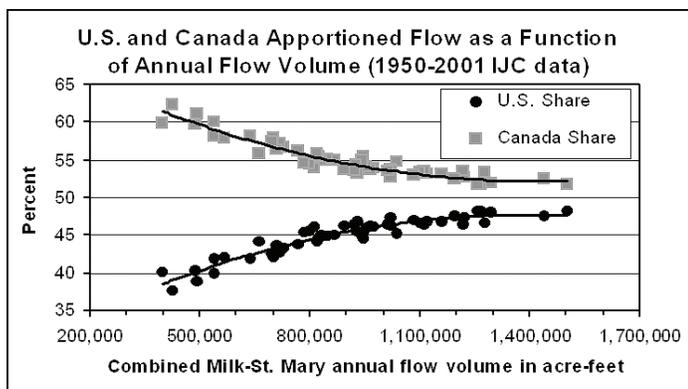


Figure 1

Furthermore, the United States is allocated much less water by the 1921 Order during the times of the year when it is most needed for irrigation. Figure 2 shows how the combined flow of the two rivers, including the Eastern Tributaries, were allocated by month

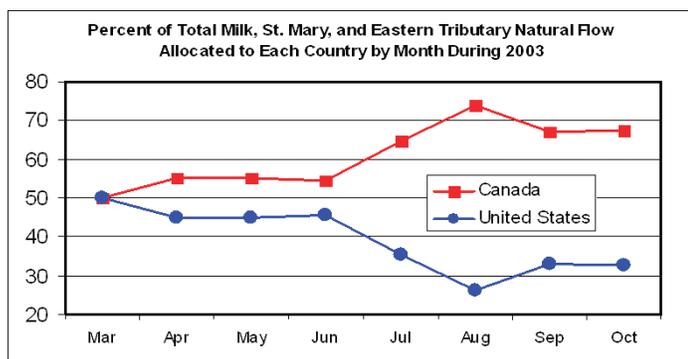


Figure 2

during 2003, a relatively dry year. During the heat of the irrigation season, the United States was only entitled to 35 percent of the combined flow in July, and 26 percent during August. In contrast, Canada was entitled to 65 percent of the combined flow in July and 74 percent in August.

**(2) The Task Force's Report confirms that in almost all years, the United States receives less than its already unequal entitlement under the 1921 Order because of constraints placed on the United States by the existing Administrative Procedures.**

Table 1 below illustrates the percentages of water to which the United States and Canada were entitled to under the 1921 Order and the percentages that they actually received over a reasonably dry five-year period from 1997 to 2002. In all five years, the United States received less than its entitlement of the combined flows of the St. Mary River, Milk River and Eastern Tributaries. The five-year average shows that the United States was entitled to 43.4%, but received only 36.8% of the combined flow. Canada was entitled to 56.6% and received 63.7% of the combined flow. Canada received 26.5% more water than the United States.

	United States		Canada	
Years	Entitlement	Received	Entitlement	Received
1997-98	44.2%	40.8%	55.8%	59.2%
1998-99	43.9%	43.3%	56.1%	56.7%
1999-00	41.9%	29.9%	58.1%	70.1%
2000-01	40.1%	35.7%	59.9%	64.3%
2001-02	46.9%	34.1%	53.1%	65.9%
Average	43.4%	36.8%	56.6%	63.2%

*Data from Accredited Officers annual reports to the IJC*

Table 1

The primary reason for this large discrepancy is the constraint placed on the United States by the existing Administrative Procedures. According to the Task Force Report (pg. 24), the United States combined entitlement averaged 45%, but only received an average of 41% of the combined flows; whereas, the Canadian entitlement averaged 55% and received an average of 59% of the combined flow. Again the situation is dramatically worse for the United States during dry years. This disparity is the reason that the United States has had a difficult time investing in infrastructure.

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(3) A major reason there is such a large disparity in the entitlements of the two countries under the existing administrative procedures is the far less and more erratic flows of the Milk River as compared to the St. Mary River.

Figure 3 shows the average monthly natural streamflows for the Milk and St. Mary Rivers at the International Borders (pg. 16 of Task Force Report). The Milk River produces significantly less water than the St. Mary River during the April to October irrigation season.



North Fork of Milk River

St. Mary River flow is more reliable because the flow originates from snowmelt in Glacier National Park, whereas, the Milk River flow is erratic and originates from foothills, prairie or lowland runoff. It is well known that the Milk River frequently goes dry during the summer without the St. Mary

River water transported to the Milk River through the St. Mary Canal. The St. Mary River has never gone dry. During the dry years, the flow of the St. Mary River can be ten times higher than that of the Milk River.

The timing of spring runoff is also different in these two rivers, and this timing difference was not addressed in the 1921 Order. St. Mary River runoff generally starts during May, peaks in June, and extends well into July and even August when Canada is entitled to the first 500 cfs or three quarters of the flow. In contrast, much of the runoff in the Milk River can occur as early as March, prior to the irrigation season and when the flow must be shared equally between the two countries. The Milk River seldom provides reliable natural flow during the peak of the irrigation season in July and August.

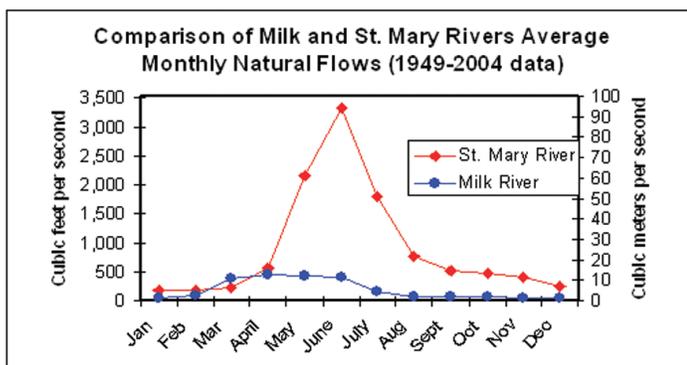


Figure 3



Milk River Eastern Crossing

(4) The first sentence in Article VI of the Boundary Waters Treaty combined with section VIII (b) of the 1921 Order indicate that the Administrative Procedures are to optimize each country's entitlement based on existing infrastructure.

The Accredited Officers should have developed Administrative Procedures that took into account each country's existing infrastructure or irrigation works to best utilize each country's entitlement and to ensure an equal apportionment as required under the Treaty and 1921 Order. The last phrase in the first sentence of Article VI of the Treaty states "but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each" and Section (VIII b) of the 1921 Order further states "To operate the irrigation works of either country in such a manner as to facilitate the use by the other country of its share of the said waters and subject hereto to secure to the two countries the greatest beneficial use thereof."

The existing Administrative Procedures do not do this. In fact, the Procedures work against the United States and Montana. The arbitrarily set 15/16-day balancing period does not provide the United States with the flexibility that it needs to maximize the beneficial use from its existing infrastructure. Further, the requirement that the United States must make up a deficit created in one 15/16-day period in the next 15/16-day period in the St. Mary River makes it difficult for us to use our full entitlement. Canada has no infrastructure to make up deficits in the Milk River.



During the hearings on the 1921 Order, Alberta testified that it needed St. Mary River water for irrigation development as reported on page 36 of the Task Force Report, but had little use for Milk River water at that time. For this reason and the fact that a large imbalance in the entitlements of the United States and Canada exists, it can be argued that Montana is entitled to most, if not all, of the Milk River water to achieve the equal sharing requirement under the Treaty.

**(5) If we focus on the facts and data in the Task Force's report, it is clear that the best way for each country to optimize receipt of its share of 1921 Order-apportioned water is to revise the Administrative Procedures and use an annual balancing period.**

The only way for the United States to receive its 45% entitlement under the 1921 Order and with its existing infrastructure is to go to an annual balancing or apportionment period, rather than the existing 15/16-day or another balancing period. It is the simplest and most cost-effective approach. This should not impact Alberta because the Province has stated that it only allocates its entitlement and does not issue licenses or permits for United States surplus deliveries to Canada.

You will hear arguments by Alberta that the United States lacks infrastructure in the St. Mary Basin to take its entitlement. We respectfully disagree. With our existing infrastructure and the canal rehabilitated to its original capacity of 850 cfs, the United States can take almost its full 1921 Order entitlement with an annual balancing period.

Even though over 90% of the St. Mary River flow originates in Montana, most of the United States portion of the watershed is within Glacier National Park or on the Blackfeet reservation where there are no feasible or permissible storage sites. At the time of the 1921 Order, it was anticipated that water would be stored at lower St. Mary Lake. However, investigations showed that the site was not feasible for a dam. Montana could expand the St. Mary Canal and diversion works to a capacity higher than 850 cfs, but Canada has indicated it might oppose such an endeavor because of impacts to the Milk River channel. Again, the most cost-effective and simplest solution would be to go to an annual balancing period.



St. Mary Headgates

**(6) Under an annual balancing period, the United States can increase the amount of its 1921 Order apportioned share that it can use from 62% to 92% from the St. Mary River.**

Historically, the United States has been able to divert 167,400 acre-feet of its 269,600 acre-feet/year entitlement from the St. Mary River or 62% (pg. 24 of Task Force Report) with the 15/16-day balancing period. With an annual balancing period, the United States would be able to divert on average between 40,000 and 52,000 acre-feet/year more St. Mary River water with a 650 cfs canal bringing the percentage of the United States entitlement delivered up to 92% (pg. 36 of Task Force Report).

Even though the modeling effort (pg. 36 of Task Force Report) suggests that the Bureau of Reclamation can divert 202,000 acre-feet with a 15/16-day period; it cannot. The model assumed that the Bureau could turn the St. Mary Canal and diversion works on and off like a faucet; that it has perfect forecasting capability; and that there is no downtime for canal maintenance. As noted above, the true volume of water that the Bureau has diverted from the St. Mary River into the Milk River drainage is between 167,400 to 174,400 acre-feet/year depending on the period of historical record used in modelling (pg. 24 & 36 of Task Force Report).

**(7) Results of the Task Force Report show that both Canada and the U.S. would benefit from an annual balancing period.**

Table 2 (pg. 39 of the Task Force Report) is the modeled gains and losses (by the United States on the St. Mary River and by Canada on the Milk River) in acre-feet/year and percentage under various balancing periods as compared to the modeled 15/16-day balancing period (the current Administrative Procedures scenario) and with the existing 650 cfs St. Mary Canal. We focused on the percent changes rather than volume changes of water because the Milk River produces considerably less water than the St. Mary River and because the IJC directed the Task Force to find ways to optimize the receipt by each country of its apportioned waters. The results in Table 2 show that Canada would receive a significantly

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larger percentage increase of its share from the Milk River than the United States would receive from the St. Mary River. Canada would receive an average of 61.7% increase in the Milk River as compared to a 12.4% increase for the United States in the St. Mary River under an annual accounting period. In dry years, Canada would receive an even greater benefit from the Milk River than the United States from the St. Mary River (114.8% for Canada versus 10.7% for the United States). The seasonal balancing period would provide the United States with less benefit averaging 4.7%, whereas, Canada would receive a significant benefit averaging 55.3%. It should be noted that the following table underestimates the United States benefit from

Balancing Period	Average Year		5 Wettest Years		5 Driest Years	
	Milk River	St. Mary River	Milk River	St. Mary River	Milk River	St. Mary River
7-day balancing	-300 -6.4%	-1,000 -0.5%	-500 -8.5%	-1,000 -0.4%	-200 -7.4%	-500 -0.3%
Monthly balancing	400 8.5%	2,000 1.0%	400 6.8%	2,000 0.8%	400 14.8%	1,000 0.7%
Seasonal balancing	2,600 55.3%	9,500 4.7%	2,200 37.3%	15,000 6.3%	2,300 85.2%	2,000 1.3%
Annual balancing	2,900 61.7%	25,000 12.4%	2,200 37.3%	25,000 10.4%	3,100 114.8%	16,000 10.7%

Table 2

the seasonal and annual balancing period for the reasons described in the above sections. That is, in the model it is assumed the Bureau of Reclamation can divert an average of 202,000 acre-feet/year of St. Mary River water into the canal, whereas, historically the United States diverted an average of 167,400 acre-feet per year (pg. 24 of Task Force Report). Going to an annual balancing period is a viable option for both countries as each country could benefit from downstream storage to optimize beneficial uses of surplus deliveries and entitlements. Canada can store and use surplus United States deliveries of St. Mary River water in its St. Mary Reservoir. The United States can store and use surplus Canadian deliveries of Milk River water in its Fresno Reservoir.

**(8) Under the annual accounting period, the United States would have the ability to maintain a daily instream flow at the International Border in the St. Mary River, which would be very close to the river's historical flow.**

Montana has long recognized instream flows as a beneficial use and is committed on behalf of the United States to providing a continuous flow in the St. Mary River at the International Border to protect fish and aquatic life for channel maintenance. Figure 4 below (pg. 107 of the Task Force Report) shows the average historical hydrograph at the International Border under the existing Administrative Procedures

as compared to the hydrograph that would occur at the International Boundary for the same period of record under an annual accounting period and with the instream flow criteria offered by Montana. These two hydrographs are very similar. In contrast, the lower hydrograph in figure 4 is the actual recorded flow that Alberta has provided on the Lower St. Mary River near Lethbridge, Alberta for the same period of record. Under Montana's proposed criteria, Canada would continue to receive the same deliveries of late irrigation season flows during drought years as in the past because the basis for the criteria used in the modeling effort is the lesser of: the daily Canadian entitlement, ½ the average annual flow or ½ the average monthly flow (based on the historical St. Mary River flow at the International Border.)

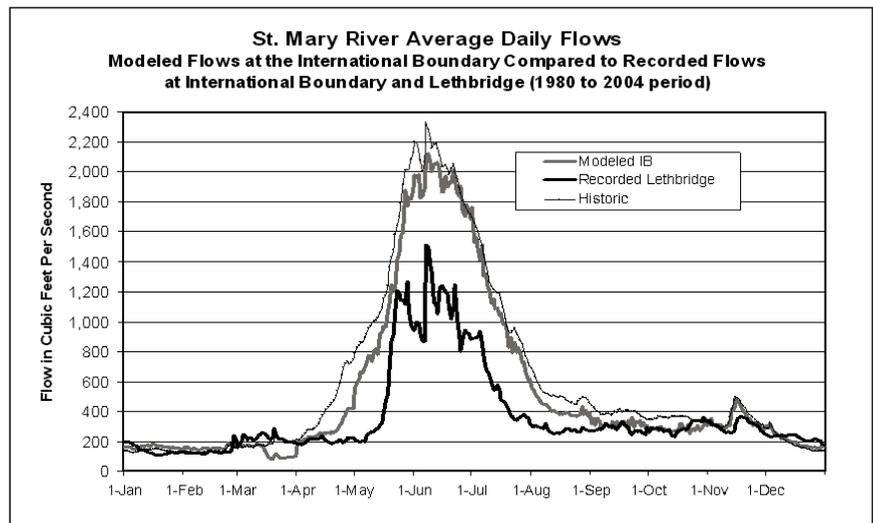
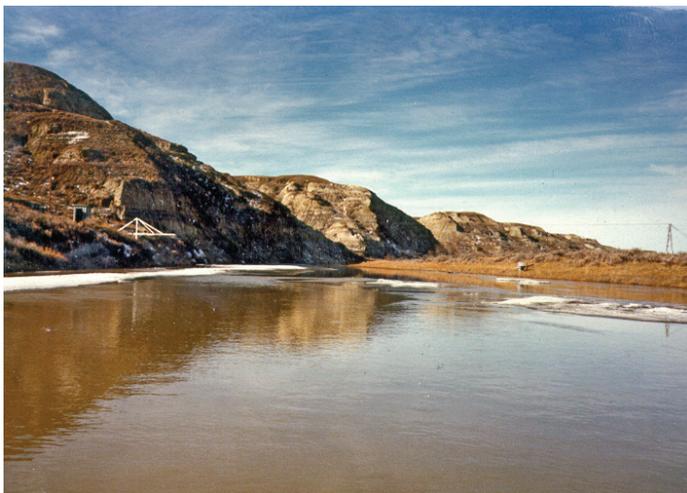


Figure 4

It is important to note that the annual balancing period is the only balancing period that would allow the United States to provide both for an instream flow in the St. Mary River at the International Border and a 25 cfs instream flow downstream of Sherburne Reservoir without the United States losing more of its entitlement to Canada than it does today.

Under the Montana proposal, Canada would not have to maintain an instream flow at the Eastern Crossing on the Milk River because it is being provided by the United States St. Mary River water in the Milk River channel, unless Alberta builds a storage reservoir on the Milk River in Alberta. If this were to happen, Canada would need to bypass United States St. Mary and Milk River entitlements to the United States, account for evaporation from the reservoir and release an instream flow at the Eastern Crossing of the Milk River with the same criteria as suggested by Montana for the St. Mary River.



Milk River

**(9) Annual apportionment is consistent with the apportionment required by the language of the Treaty “from time to time”.**

The language in Article VI of the Boundary Waters Treaty is consistent with the annual apportionment. Article VI states “[T]he measurement and apportionment of the water to be used by each country shall from time to time [emphasis added] be made jointly by the properly constituted .....” The word “daily” is not mentioned in the Treaty and only once in the 1921 Order where it requires the Accredited Officers to measure “daily” flows. If the interpretation were for a daily apportionment, the United States

would indeed need to build additional infrastructure, as suggested by Canada. Importantly, until recently, Canada did not support an instantaneous or daily apportionment as it stated in 2004 “*the Order for sharing the waters are based on flow volumes and seasons*” (from: Sharing the Waters, Alberta’s Perspective on the 1909 Boundary Waters Treaty, Summer, 2004)

**(10) Under an annual balancing period, the only time Canada should not be able to build a credit on the Milk River and the United States on the St. Mary River is when high unanticipated flood flow or rainfall events occur and water spills over the emergency spillways at Fresno or St. Mary reservoirs that cannot be beneficially used downstream.**

Surpluses and deficits are not defined in the Treaty or 1921 Order. They were created by the Accredited Officers as part of the Administrative Procedures. If the United States diverts more than its entitlement of St. Mary River water and creates a deficit in one 15/16 balancing period, it is required to make up the deficit in the next 15/16 balancing period by passing an equal portion of its entitlement to Canada that it took in the previous 15/16 day period. In contrast, Canada has no infrastructure for releasing water to make up deficits when it has taken more than its entitlement from the Milk River.

Under an annual balancing period, Alberta has stated that the United States can only build a credit of St. Mary River water when water is being stored or used for Alberta irrigation. The Treaty clearly states that both “irrigation and power” are beneficial uses. Montana believes that it should be able to build a credit when water is released by Alberta at its St. Mary Reservoir to generate hydroelectricity, to maintain an instream flow in the lower St. Mary River, and to meet compact obligations with Saskatchewan. These are all beneficial uses. Water spilled at the St. Mary reservoir and not put to the above beneficial uses would not be counted as a credit. Montana believes Alberta should be allowed to build a credit of water for the same beneficial uses described above in the Milk River. In the Milk River Basin, unusable flows would only occur when unanticipated flood or high rainfall events occur causing spills at Fresno Reservoir that can not be used beneficially or captured by Nelson Reservoir located downstream.



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**(11) The Letter of Intent is being used as a band-aid to correct inequities with the Administrative Procedures. Montana would prefer correcting the problems with the Administrative Procedures and then determine whether there is a further need outside of the 1921 Order and Administrative Procedures for a Letter of Intent.**

When the Letter of Intent was renegotiated in 2000 Montana did not know that Alberta was actually irrigating more than twice the number of acres in the Milk River Basin of Alberta than was accounted for in the Administrative Procedures. Montana assumed, and was never told differently during the negotiation process, that the number of acres being irrigated by Alberta was 2,900 acres of full-service from the Milk River mainstem. The Accredited Officers have been using the 2,900 acres in the calculations of the natural flow of the Milk River, rather than the 8,100 or more acres that were actually being irrigated, and would be irrigated with the Letter of Intent.

The Letter of Intent gives the United States water that it is already entitled to and would receive under an annual balancing period. It is interesting to note that because of St. Mary Canal water, Alberta can sustain over 8,100 acres of full service irrigation from the Milk River without any infrastructure in the basin; even during years when the river would naturally go dry in July and August. In the past, Alberta has used the Letter of Intent to justify diverting and using its share of the Milk River, the United States' share of the Milk River, and the United States' St. Mary River water under the Letter of Intent, and additional United States St. Mary River water.

The Accredited Officers use the Letter of Intent to give Alberta the right to divert United States St. Mary River water for free from the Milk River channel. In the June 20, 2000 meeting minutes on developing the Letter of Intent, Sal Figliuzzi and Ron Bothe of Alberta stated the reason for the Letter of Intent is to allow Canada the ability to reduce deficits in the Milk River. The minutes stated further: "*Canada would annually request that a portion of its Canadian St. Mary River share be added to the St Mary canal for delivery to the Canadian water users in the Milk River system.*" This has not happened. At no time during the negotiations of the Letter of Intent was it ever discussed to give Canada United States St. Mary River water in the Milk River channel, nor is this right given in the language of the Letter. No one has authority to give away United



St. Mary Canal

States St. Mary River water that belongs to the Milk River irrigators of Montana without their approval.

**(12) The United States would benefit from an annual balancing period on the Eastern Tributaries.**

The Eastern Tributaries of Lodge, Battle and Frenchman are apportioned equally between the United States and Canada. An annual balancing period on the Eastern Tributaries should not harm the United States for the following reasons.

1. A continuous instream flow at the International Border on the Eastern tributaries would be stipulated, similar to the instream flow being proposed by Montana for the St. Mary River at the International Border. This would mean that during most years, Canada would need to provide the United States with at least its daily entitlement for instream purposes.
2. Much of the higher flows on the Eastern Tributaries would likely be considered unusable because they would occur prior to the irrigation season and because the United States does not have the infrastructure to capture these flows. The United States has no storage on Battle and Lodge creeks and only a relatively small storage reservoir on the Frenchman River. Because of this, the large amounts of high runoff flows that cannot be captured by either country should be considered unusable, and therefore, not be charged against either country's entitlement. This is due to the very high variability or range of high flows (from the median) on the Frenchman River (605%), Battle Creek (518%) and

Lodge Creek (628%) as compared to the St. Mary River, which is very reliable with low variability of 106% of the median (pg. 14 of Task Force Report).

3. The Treaty and 1921 Order require the use of existing infrastructure or irrigation works to optimize each country's entitlement. This would mean that the Administrative Procedures would need to be tailored based on the location and use of the existing infrastructure in both countries. Before a review of the Administrative Procedures is accomplished for these three tributaries, Montana would like a joint Saskatchewan/Montana assessment of water supplies, irrigated acres, and irrigation efficiencies in each county and water quality at the International Boundary for each tributary (pg. 51 of Task Force Report). With a good understanding of the above information, better Administrative Procedures could be developed to optimize each country's entitlement without harm to Montana water users on the Eastern Tributaries.



Sherburne Reservoir

**(13) In the future, the Accredited Officers will need to update the Administrative Procedures on a timely basis.**

In its computation procedures during the past, the Accredited Officers improperly zeroed out all flows that were mathematically computed as being below zero for the Milk River. The negative flows are primarily due to Alberta irrigating over 8,100 acres from the Milk River and not the 2,900 acres that have been used in the existing Administrative Procedures. Not until Montana documented this increase in irrigation, did

Alberta and the Accredited Officer acknowledge it. Even though all parties acknowledged this increased irrigation in Alberta in the winter of 2004, the Accredited Officers to date still use the 2,900 full service acres of Alberta irrigation in the Administrative Procedures, causing the United States to release 1,700 acre-feet of storage from Sherburne Reservoir last fall (October 2005) based on the Letter of Intent. If the true 8,100 acres were used and associated depletions in the calculations of natural flow, the United States should not have had to release stored water from Sherburne Reservoir into Canada.

**(14) While the “Other Potential Options” Section of the Task Force Report on water banking, tradable permits and joint operations may have merit, the IJC Directive needs to focus on optimizing each country's entitlement under the 1921 Order.**

As stated above and in the Task Force Report, the United States is not able to receive its entitlement. The focus of the Directive should be on what changes are needed to the Administrative Procedures to allow the United States to divert and use its 40% entitlement during drought years and 45% during average flow conditions. After the issues with the Administrative Procedures and 1921 IJC Order are resolved, Montana is more than willing to consider other ideas for improving cross border water management.

Canada and Alberta have suggested that the water users in the Milk River Basin of Montana and Alberta should create a binational watershed group and collaborate together on joint management. Montana supports such an endeavor after the issues of fairness are resolved with the 1921 Order and Administrative Procedures and as long as Alberta is willing to share shortages equally with Montana in the St. Mary and Milk Rivers.

**(15) New Canadian uses in the Milk River Basin associated with the construction of the proposed Alberta storage project will only exacerbate the existing shortages in the United States portion of the Milk River basin.**

Alberta testified in the early 1900s that water from the St. Mary River was very important to the Province for irrigation, but not water from the Milk River where it did not foresee extensive irrigation development. Today, Alberta irrigates over 8,100 acres in the Milk River Basin. If Alberta built a storage reservoir on the Milk River and proposes to develop even more water,

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the imbalance would be larger, with the United States receiving an even smaller share of the combined flows of the Milk and St. Mary River than it currently does. This in itself is a reason for reviewing and modifying the 1921 IJC Order because Alberta's ambitions for the Milk River will cause United States shortages to only worsen.

It makes better sense for Montana and the United States to increase storage in Fresno Reservoir that it owns and controls, rather than leasing stored water from an Alberta reservoir where we have no control.

Montana has twice evaluated leasing storage space from the proposed Alberta reservoir on the Milk River and both times (1987-90 and 2005) the hydrologic data indicated that it would not benefit Montana to participate. For example, a 1989 study showed that leasing 50,000 acre-feet from the proposed Alberta Milk River storage project would provide the United States with a firm yield of only 200 acre-feet in dry years assuming a rehabilitated St. Mary Canal of 850 cfs and the existing 15/16-day balancing period. Montana and the Bureau of Reclamation determined that participating in the Canadian storage project was the least effective solution of 11 options evaluated in resolving existing water shortages in Montana. Accordingly, the Bureau of Reclamation and DNRC reported that the most viable solution was a three-phase strategy that included rehabilitating the St. Mary Canal, constructing the Virgelle Diversion from the Missouri River and increasing basinwide water efficiencies (*Milk River Basin at a Crossroads, 1989*).

An Alberta Milk River storage project would result in even less water for the United States as Alberta would develop new irrigation that would consume more water and only exasperate the existing shortages in the Montana portion of the Milk River Basin by as much as 25,000 acre-feet per year. If Montana cannot fill Fresno Reservoir during drought years, there is no need for an additional 50,000 acre-feet of storage space in an Alberta Reservoir on the Milk River. A recent analysis by DNRC showed that the United States would only be able to store water in the Alberta Milk

River Reservoir in 4 out of 25 years (1980-2004) with a 650 cfs canal and in 5 out of 25 years with a 850 cfs canal. During the seven consecutive years between 1998 and 2004, the United States would not be able to store any of its water in the Alberta reservoir. In the other 19 and 20 years, the United States would have a difficult time filling Fresno Reservoir. These results support the 1989 conclusion by the Bureau of Reclamation and DNRC that the Canadian storage project was not a viable option for Montana.

**(16) Montana still supports our request to have the IJC open up the 1921 IJC Order for the following reasons.**



Fresno Dam and Spillway

1. The three primary provisions of the first sentence of the first paragraph of Article VI of the Treaty are ignored in the 1921 Order.

It states: "...the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) [1] are to be treated as one stream for the purpose of irrigation and power, [2] and the waters therefore shall be apportioned equally between the two countries, [3] but

*in making such equal apportionment more than half may be taken from one river and less than half from the other river by either country so as to afford a more beneficial use to each."*

- The two rivers are not treated as one stream; they are apportioned separately.
- The waters are not apportioned equally as the 1921 Order gives United States considerable less water than it is entitled to in all years and especially during dry years.
- No attempt was made to implement the third provision of the first sentence. That is, to give more than half of the water from one river to one country and less than half from the other by either country so as to afford a more beneficial use to each.

2. Under the 1921 Order, the United States entitlement of the combined flow of the Milk and St. Mary Rivers and Eastern Tributaries does not meet the above language of the Treaty. Based on the Task Force Report, the United States entitlement averaged 45% of the combined flow of the Milk and St. Mary Rivers and Eastern tributaries, which decreased to 38% to 40% during drought years for the 1950-2004 period of record (pg. 24 of Task Force Report). The Canadian entitlement averaged 55% and increased to 60% to 62% during drought years.
3. The 1921 Order has not been reviewed in 85 years. The United States tried to have the Order reviewed in 1930, but was unsuccessful. At that time, the IJC said not enough time had elapsed. The current review is timely as the flow data in the Task Force report indicated that the 1921 Order did not divide the flows of the two rivers fairly.



St. Mary Canal

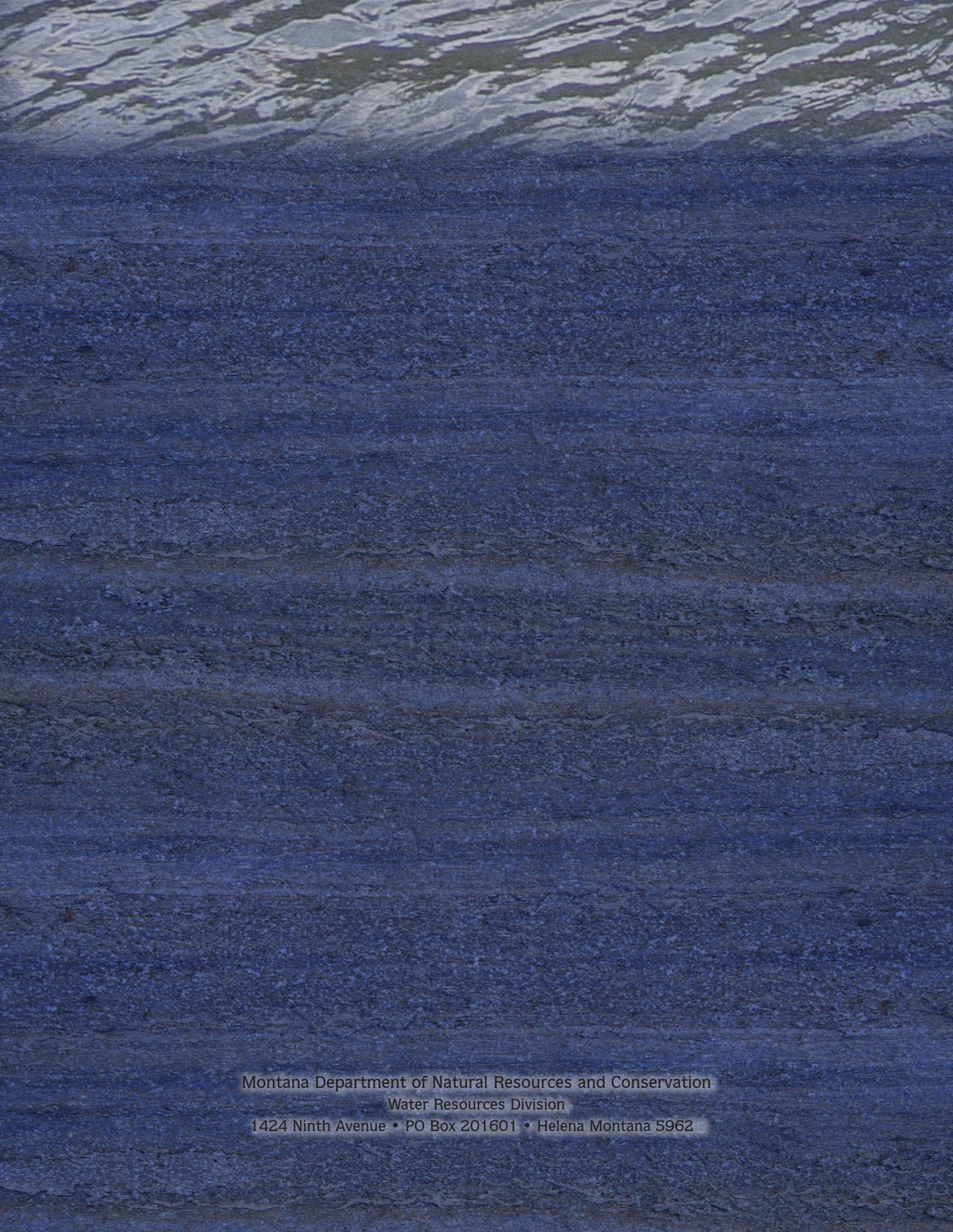
Milk River. As important, the St. Mary River flows highest during May, June and July when irrigation demands are high when Canada is entitled to the first 500 cfs or 3/4 of the flow whereas, the highest flows in the Milk River can occur as early as March when the flows must be shared equally with Canada.



Milk River

4. United States water shortages are getting worse and Canada continues to use more Milk and St. Mary River water for new irrigation. The 1921 Order was negotiated during a time when hydrological conditions may have been wetter than they are today and the information was less accurate than today.
5. Lee and Rolph creeks are international tributaries to the St. Mary River and are excluded from the Order. The flow of these streams should be included in the apportionment calculations.
6. The Milk River, a prairie stream, frequently goes dry during the summer while the St. Mary River never goes dry. During drought years, the flow of the St. Mary River can be 10 times greater than that of the

7. We believe a review of the 1921 Order should include:
  - a. An evaluation of the existing Order in light of the past 80 years of hydrologic records and apportionment information. In the Task Force Report, the Task Force agreed on the last 25 years of historical record.
  - b. A determination on how to better meet the language of the two apportionment sentences of Article VI in light of the evaluation of the historic record. That is, how to divide the waters equally between Canada and the United States, but still provide a prior right to each country from a different river.
  - c. An assessment to determine the best method for each country to fully utilize their entitlements including the use of surplus flows and the maintenance of instream flows in the St. Mary River at the International Border (A large portion of this analysis has been completed in the Task Force Report).
  - d. An assessment on how to better address water rights of Native Americans and First Nations.
  - e. An assessment on how to address the water needs of endangered species, critical habitats, recreation, and water quality.
  - f. An assessment on how to better address the differences in the natural hydrographs of the Milk and St. Mary Rivers in light of projected climatic change in these river basins.



Montana Department of Natural Resources and Conservation  
Water Resources Division  
1424 Ninth Avenue • PO Box 201601 • Helena Montana 5962