

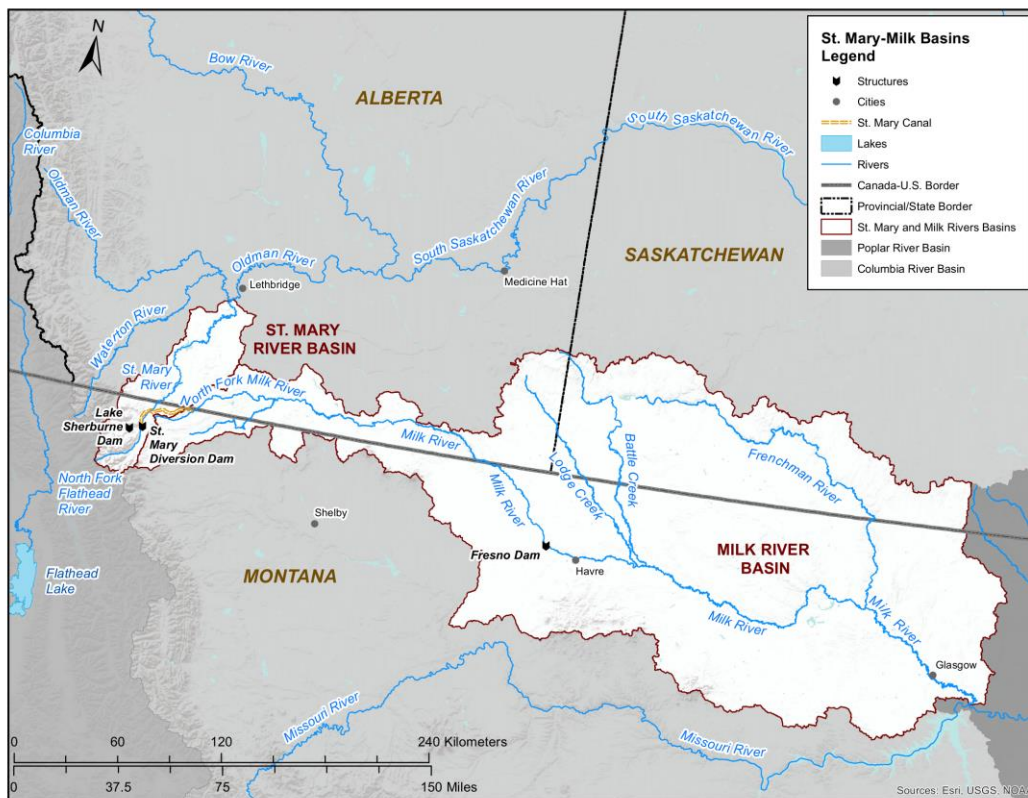
The Milk and St. Mary Apportionment: A Next Step?

By: Nigel Bankes

Matter commented on: [International St Mary-Milk Rivers Study Board, Work Plan for the International St Mary-Milk Rivers Study](#), June 2022, [released July 28, 2022](#)

This post examines the most recent development in efforts to improve the ability of both Canada and the United States to access its water entitlement to each of the Milk and St. Mary Rivers under the terms of an apportionment order made by the International Joint Commission (IJC) under the Boundary Waters Treaty more than a century ago.

The apportionment of the Milk and St. Mary Rivers has a long and contested history. The Milk River is part of the Mississippi Basin. It rises in Montana, flows north and east into Alberta, and then crosses the border again heading south and east into Montana where it receives additional flows from the so-called eastern tributaries, principally arising in Saskatchewan and flowing south.



Source: website of the International Joint Commission: <https://www.ijc.org/en/aosmmr>

The Milk and its tributaries are typical “flashy” prairie streams, and under natural flow conditions there would be very little water in the mainstem of the Milk River by this time of year (August).

The St. Mary River also arises in Montana and flows north into Alberta along with the other two southern tributaries of the Oldman River – the Belly and Waterton Rivers. The St. Mary’s flow is supported by snowpack and is more consistent than the Milk’s flow. Unlike the Milk, the St. Mary is part of the Hudson Bay drainage system.

Internal disputes as to water rights on the Milk River between settlers and the tribes in the United States led to the precedent setting Indian water rights decision of the US Supreme Court in 1908 (*Winters v US*, 207 US 564) holding that Congress could not have intended to set aside a reserve without affording the reserve senior water rights adequate to support agricultural settlement.

As between the two countries, the dispute about the division of the waters of the Milk and St. Mary was ripe enough by the beginning of the twentieth century that it was one of only two disputes (the other being the Niagara River) to be specifically addressed in the 1909 [Boundary Waters Treaty](#) (BWT) between the UK (for Canada) and the US.

Article VI of the BWT did four things.

First, it stipulated that the two rivers were “to be treated as one stream for the purposes of irrigation and power”.

Second, it provided that the waters of the two rivers were to 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.” In furtherance of that qualification, the treaty contemplated that the US would have prior appropriation rights on the Milk, while Canada would have prior appropriation rights on the St. Mary.

Third, Article VI allowed the US to use the Canadian section of the Milk to convey its share of St. Mary waters to downstream irrigators in the US. The treaty thus approved what must be a very early international inter-basin transfer.

Fourth, Article VI acknowledged that detailed measurement and apportionment would have to be the responsibility of technical officials in both countries; such officials have long been referred to as the Accredited Officers (AOs).

While Article VI laid out the basic ideas for apportionment, it was hardly self-implementing and thus, following extensive hearings (for which there is a printed verbatim record), the International Joint Commission (the IJC established by the BWT) in 1921 provided the detailed rules to give effect to Article VI ([the 1921 Order](#)). In addition to the 1921 Order, the Accredited Officers have adopted a set of “Administrative Procedures”. The current version of the Administrative Procedures (2018) (a document of some 330 pages) is available [here](#). Among other things, these Procedures include “letters of intent” that provide operational flexibility and facilitate the borrowing and return of each country’s entitlement so as to allow each country additional opportunities to receive its share of the apportionment.

Underlying this rule system is one basic reality. Neither the 1921 Order nor the Administrative Procedures can guarantee the actual physical apportionment of these waters. Actual physical apportionment requires that a party have the physical infrastructure (storage and conveyance facilities) to realize its apportionment. This means that each state needs to have the physical infrastructure in place to take advantage of its apportionment *as and when it is available*. For example, absent storage in the upstream state, gravity will simply take over and “deliver” all volumes of the upstream state’s “entitlement” that it has not been able to make beneficial use of. This was exemplified most dramatically in 2020 when, after years of under investment, the US St. Mary diversion canal failed, with the result that the US was not able to divert its share of St. Mary waters to the Milk for most of the irrigation season.



Photo credit: US Bureau of Reclamation/[Lethbridge Herald](#)

The canal failed on May 17 and it was not back in operation until October 8, see [Report of Accredited Officers for 2020](#).

Even before the complete failure, the canal was forced to operate well below its design capacity. By the same token, the absence of built storage in Canada on the Milk system makes it difficult for Canada to take its share of the Milk apportionment when it is available early in the irrigation season.

This is not the place to explore the details of the 1921 Order or the Administrative Procedures, but Montana has long felt aggrieved by both the terms of the Order and its implementation. An early attempt by Montana (in 1927) to overturn the Order failed, and the IJC also resisted another application for reconsideration from Montana in 2003. In response to the last request the IJC did however establish an Administrative Measures Task Force with a [mandate](#) to examine and report on the existing administrative procedures “to ensure more beneficial use and optimal receipt by each country of its apportioned waters.” The Task Force Report (2006) is available [here](#) and for

commentary see Nigel Bankes and Elizabeth Bourget, “Apportionment of the St. Mary and Milk Rivers” in Emma S. Norman, Alice Cohen, and Karen Bakker, eds, *Water without Borders?*, (Toronto: University of Toronto Press, 2013) 159 ([view online here](#), behind a pay wall). The Task Force Report in turn led Alberta and Montana to establish a Water Management Initiative (WMI) in 2009 (terms of reference [here](#)) to further these discussions. This led to some concrete proposals for improvements (see discussion in Bankes and Bourget, and joint status reports [here](#)) but the Initiative seems to have fizzled out with a final (11th) [joint status report in January 2010](#).

The current Work Plan describes the gap between the WMI or Joint Initiative (JI) and the current study proposal as follows:

The Joint Initiative produced some excellent background reports and modelled the effect of many changes in procedures and infrastructure on water apportionment. Like the earlier Administrative Measures Task Force, Montana and Alberta were unable to mutually agree on options that significantly improved each country’s ability to use its water entitlement. The Joint Initiative was formally ended in June of 2022 (Work Plan at 5).

With the effective collapse of the Joint Initiative the leadership for any further improvements returned to Accredited Officers (who had been not included in the JI process). To quote again from the Work Plan:

... the AOs began [2017] a review of their administrative procedures to identify potential changes that might improve each country’s ability to access its water entitlements. As part of this review, the AOs reviewed the modelling of the Joint Initiative which included both administrative, procedural, and water infrastructure changes. This work was summarized by the AOs in a white paper discussing the possible procedural and infrastructure changes and the potential benefits and drawbacks for each. The white paper was provided to Alberta, Montana, Saskatchewan, and the United States Bureau of Reclamation for comment. The final white paper was provided to the IJC in June 2019 along with a letter noting that the best opportunity to improve water access in these basins was likely a yet unidentified combination of changes in infrastructure and administrative procedures. The AOs noted the need for further investigation, the need for meaningful engagement with the public, rights holders and basin stakeholders (all with basin water interests), and their own lack of resources, and subsequently requested the IJC provide funds to undertake a comprehensive study to accomplish the tasks discussed in the white paper. The IJC endorsed this request and asked the AOs to provide a study plan and cost estimate. The IJC also asked that the study plan include an assessment of the socio-economic effects of any proposed changes and requested that extensive Indigenous engagement be undertaken as part of the study. The AOs provided a preliminary study plan and cost estimate to the IJC in November 2019 and this plan was endorsed by the IJC and both governments. On November 10, 2021 the IJC issued a Directive to the International St. Mary -Milk Rivers Study Board to conduct the study described by the AOs. (Work Plan at 5)

The IJC approved the formation and membership of the [International St. Mary and Milk Rivers Study](#) in November 2021 “to explore options to improve access to apportioned waters by each country, in recognition of climate change and challenges to apportionment since the original 1921 Order was issued.” The [press release](#) announcing the study indicated that the study “was

based on a desire to achieve long-term resiliency in accessing the shared waters of the St. Mary and Milk Rivers.” The press release indicated that:

The study will consider different options, including non-structural solutions (such as modified balancing periods and deficit trading) as well as structural options such as new (or improvements to existing) structures. The study is expected to last approximately four years. Recommendations from the Study Board will be presented to the IJC for consideration. The IJC will then report the study findings and its recommendations to governments.

A central feature of the Work Plan is an evaluation of a series of structural and non-structural (or administrative) options that might improve each country’s ability to access its water entitlement. The four structural options are: (1) improvements to the US St. Mary Canal, (2) improvements to the US Lower St. Mary Lake Storage, (3) storage in Canada for Milk River flows, and (4) a mechanism for conveying St. Mary flows to the Milk to increase Milk flows for Canadian interests (but perhaps also a “[p]otential alternate route to move US St. Mary water to the Milk” (at 16)). The four administrative options are to: (1) revisit the 1921 Order in light of Article VI of the BWT, (2) consider the effect of modifications to the balancing periods, (3) examine deficit trading, and (4) consider adoption of a capped credit system.

I will not attempt to summarize the balance of this 26-page work plan and instead offer three observations.

First, at various places the Work Plan commits to transparency and ensuring that all material generated will be posted on the www for all to access. This is an important commitment, and it was therefore surprising to see references in the Work Plan to background documents that are not readily available (specifically the two versions of the AO’s white paper noted above). However, I understand from Canada’s accredited officer that this material will soon be posted to the web. I think that this is a welcome development, as it will provide additional context for interested parties and will facilitate comment on the Work Plan.

Second, while most of the administrative options fall within the range of issues that have historically been considered to fall within the remit of the Accredited Officers, this is clearly not the case for the option identified as “1921 Order Revisited” at 17. In my opinion, the inclusion of this option within the terms of reference for the Study Board is likely unlawful, and, even if lawful, unwise since it risks derailing the entire process. My reasons are as follows.

The 1921 Order is an order of the IJC itself. Only the IJC on its own motion, or on an application from either federal government, can reconsider that Order. Montana attempted to have the original Order reconsidered in 1927 and again in 2003. There is nothing in the BWT that authorizes the IJC to delegate to anybody the authority to revisit its own historic Orders. But aside from the legality of including this item within the work plan, I suspect that the spectre of possible changes to the 1921 Order will make it very difficult, if not impossible, to make progress on any of the three other administrative/non-structural options, precisely because of the uncertainty that this engenders. In other words, this issue needs to be resolved (or dismissed) before consideration of the other administrative options. The 1921 Order provides a rule structure around which the Accredited Officers (informed by state and provincial interests) can “bargain” at the margin for

incremental, mutually beneficial improvements (win/win solutions) such as those encompassed by the letters of intent included in the Administrative Procedures of the AOs. I predict that if there is no certainty around the basic sharing rules (currently represented by the 1921 Order) it will be difficult, if not impossible, to make progress on these other options.

Third, I find it surprising that all of the focus of the Work Plan is on the St. Mary and Milk rivers with only passing mention of the eastern tributaries. The only rationale provided for this focus that I can see is that it is consistent with “past efforts” (at 6). I think that this is unfortunate. One of the goals of the Work Plan is to undertake “an historical analysis of water availability, apportionment and irrigation within the watershed” (at 7). In my view, this inquiry could usefully be extended to the eastern tributaries so that we can garner the full range of experience in dealing with transboundary flows and the role of infrastructure and cooperative arrangements in facilitating the sharing of available flows.

Conclusion

Equitable apportionment of an international watercourse (or multiple watercourses) requires not only an equitable apportionment rule but also the infrastructure to take advantage of that rule.

Article VI of the BWT establishes the equitable apportionment rule (“apportioned equally”) for present purposes. The 1921 Order provides an authoritative interpretation of that rule even though some parties question the legitimacy of that interpretation.

Neither Canada nor the United States has adequate infrastructure facilities to make best use of their entitlement: the US on the St. Mary, Canada on the Milk.

The possible solutions to allow each part the opportunity to make most effective use of its apportionment include physical infrastructure solutions *and* administrative or rule-based solutions. Each may have environmental implications (although this is perhaps most obviously the case for the physical infrastructure solutions). Both need to take account of climate change.

The current IJC initiative is the third in the last two decades to tackle these issues. It is not clear to me that it is set up for success. In my view the process needs to recognize and grapple with the lexical priority of the Article VI of the Treaty and the 1921 Order. The Study Board will only be able to make progress when the IJC itself confirms (or varies) the 1921 Order as the premise for further analysis and discussion.

The Study Board is [inviting comment](#) until August 29 on its work plan.

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