

POPLAR RIVER: MONTANA OBJECTIVES AND
OPTIONS FOR ACHIEVING THEM

by
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PREFACE

In 1982, I served an internship with the Montana Environmental Quality Council (EQC) to assist in preparing its annual report on the quality of Montana's environment. Shortly thereafter, the 49th Parallel Institute commissioned me to prepare a case study of the Poplar River dispute as part of a handbook for Montana state officials on U.S./Canadian relations. That paper was later incorporated into the EQC report as well.

My study of the Poplar River began from no knowledge of the issues in contention. But my interest was piqued as I delved into this case. Poplar River was, at one time, a cause celebre among the highest level policy makers in this state. The Governor's Office, Montana's Congressional delegation, state lawmakers, and powerful public interest groups were united against a common foreign opponent.

In the last few years Poplar River has, in the words of a State Department official, been "orphaned" as a serious policy issue. There has been no resolution and there is only modest interest in pursuing one. This paper tries to redirect attention to positive policy outcomes from the stagnant status quo. It was requested by mid-level officials in the Montana Department of Natural Resources and Conservation to explain to higher level officials the need to pursue a definitive, long-term solution to the Poplar River dispute.

Realizing that a long narrative would not likely receive the kind of attention the subject deserves from high-ranking officials, this

paper is quickly to the point. It is intended not only to satisfy my scholastic curiosity and curriculum obligations, but also to accomplish real policy changes.

I am grateful to my graduate committee for its insightful contribution to this work, especially the chairman for suggesting the format. The Montana Department of Natural Resources and Conservation, the Montana Environmental Quality Council, and the Montana State Library provided most of the space and resources necessary to complete this report. I am particularly grateful to my family, especially my wife, who invested so much patient, loving assistance in my work. I hope this paper will help make good that investment.

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ABSTRACT

This paper explores Montana's role in the dispute over the Poplar River project, a coal-fired power plant proposed for development north of the state's border in Saskatchewan in 1974. The cross-border dispute, its temporary abatement, and the prospects for final resolution provide important lessons in international conflict resolution at the state or provincial level.

The paper includes an exhaustive literature search in the areas of international law (particularly as it pertains to transboundary waters and agreement-making), similar disputes occurring elsewhere along the U.S./Canadian border, the factors influencing international political cooperation, intergovernmental relations within the Canadian federal system and among Canadian provinces and American states, and the economic aspects of international environmental pollution. Interviews and written correspondence were taken from individuals previously involved in the Poplar River dispute, as well as those likely to figure in its resolution.

The history of the project and the present working arrangement that all parties abide by are discussed. The paper then looks at the consequences should Saskatchewan opt to discontinue its voluntary compliance with that arrangement. It considers the options for achieving a permanent, formal solution to the cross-border dispute. The author examines the particular difficulties in dealing with international negotiations at the state level throughout this paper. It concludes by suggesting a strategy that optimizes the desire for state and provincial involvement with the need for official recognition by the national governments.

I.

INTRODUCTION

Late in 1974, the Saskatchewan Power Corporation (SPC), a government-controlled business, announced plans to construct a major coal-fired thermal power plant a few miles north of its border with Montana. Since then, the project has been a subject of some significance in U.S.-Canadian relations.

Prior to its public announcement, the SPC had shared its plans for the project with only a few provincial agencies. Just eight months later, project construction began with government approval. Montanans were suspicious that Saskatchewan silence amounted to premeditated concealment of a project that could cause serious environmental impacts in their state. Montanans treated the issue as a question of fairness, expressing little concern for Saskatchewan's future economic development. Saskatchewan regarded Montana's reaction as another in a long line of wearisome examples of the U.S. meddling in Canadian affairs, and its responses to Montana concerns were less than cooperative. The ensuing border dispute was emotionally charged and blown out of proportion to the eventual environmental impacts resulting from construction and operation of the facility.

The Project

SPC's Poplar River Project was initially planned as a 1,200-MW (megawatt) generating facility, constructed in four-300 MW phases. The first two units have been completed as of 1984.

Integral to the project is an impoundment, now known as Cooksen Reservoir, on the East Fork of the Poplar River two and one-half miles north of the international boundary. This impoundment serves as a source of cooling and circulation water for the power units. The plant is located on the west bank of Cooksen Reservoir approximately one mile upstream from the dam.

Fuel is supplied by a lignite strip mine six to twelve miles northwest of the plant site. Each 300-MW unit requires the disturbance of 160 to 320 acres per year. Coal reserves underlie 21,000 acres, but only half of this amount would be needed over the thirty-five year life of a 1,200-MW facility (190 to 200 million tons). Transportation of the lignite to the plant site is accomplished by unit train over a seven mile rail line.

Dry weight coal, under laboratory conditions, was found to have a heating capacity of 7,200 to 8,960-British thermal units (Btu) per pound. Under operating conditions the heating content averages closer to 5,500 to 6,000-Btus per pound. Dry coal averages twenty-five percent ash and .8 percent sulphur by weight.

In situ lignite averages between thirty-five and forty percent water by weight. Wells have been drilled into the coal seam aquifer and water is being pumped at the long term average rate of 1.6 cubic feet per second. This water is discharged into Girard Creek, which flows

into Cooksen Reservoir. Cooksen Reservoir covers about 1,600 acres and stores up to 33,000 acre-feet. A 1,200-MW power facility, if completed, would require 11,000 acre-feet of water per year in natural and induced evaporation, not including cooling and circulation water. This amount is roughly equivalent to the mean annual flow of the East Fork of the Poplar River at the international boundary. Development of the third and fourth power units would have required an interbasin transfer of water. Diverted but unevaporated water was initially planned to be returned to Cooksen Reservoir through a series of ditches and lagoons. Circulation water would transport bottom ash to a polishing lagoon, where the ash would be precipitated. Water returned to Cooksen Reservoir was to have been no warmer than eighty degrees Fahrenheit.

Air pollution control was planned to consist of dust precipitators rated at ninety-six percent collection efficiency, but the system would not include gas conditioning or coal additives to abate gaseous emissions. A 400-foot smokestack serves two 300-MW units.

Transboundary Impact Concerns

Downstream water users in Montana feared that the completed project would jeopardize flows for their present and future uses (irrigation, domestic consumption, and recreation). Groundwater users also feared aquifer disruption and dewatering from the mine operations.

Natural evaporation from Cooksen Reservoir increases concentrations of native boron, total dissolved solids (TDS), and other undesirable compounds. Mine dewatering, stockpile and mine runoff, and imperfect ash precipitation could each further degrade surface waters. Seepage

from the ash lagoons might also pollute groundwater that flows into Montana.

Mine operations, coal crushing and transport, and coal burning at the plant site would increase the amount of particulate in the air, which often blows toward the U.S. Untreated oxides of sulphur and nitrogen released through the smokestack could damage human health, crops, and other property. The mine's lignite is also fairly radioactive. The Poplar River Project emits greater than average amounts of uranium and strontium into the atmosphere.

The East Fork had been a good warmwater fishery for walleye and northern pike in Montana, but flows in Canada had not been sufficient for these fish before the project. The consumption of water by the power plant would decrease flows entering Montana, and construction of the dam would eliminate the irregular spring freshets that allowed the fish to survive by flushing out accumulated sediment. Waterfowl habitat on the stream was adversely affected nine to ten miles below the dam, but total habitat in the basin increased with the addition of Cooksen Reservoir.

The loss of crops from polluted air and irrigation water was the major economic concern of the people in Montana, although some also expressed concern over the potential human health hazards from sulphur dioxide in the air and contamination of domestic water supplies. The potential for lost profits to area farmers and the influx of construction workers created concern over possible changes in the way of life preferred by the Montana portion of the basin's human population.

IJC Involvement and Bilateral Negotiations

To assist in addressing these concerns, Montana's governor requested that the U.S. State Department involve the International Joint Commission (IJC). Created by the U.S./Canadian Boundary Waters Treaty of 1909, the IJC is empowered to investigate and make recommendations for resolution of border disputes if summoned by national governments to do so. The IJC took up the questions of water apportionment and air pollution based on broad, pre-Poplar River dispute references.

Air Pollution

The governments of Canada, the United States, Saskatchewan, and Montana achieved a Memorandum of Understanding on air pollution controls for the Poplar River Project in 1976. In general, this agreement exchanges U.S. acquiescence to the plant's operating without gaseous emission controls for a Canadian concession to increase the plant's efficiency of particulate emissions control to ninety-nine percent. This issue was engulfed by the much larger and separate negotiations for a treaty regulating air quality along the entire length of the border, and will not be treated further in this paper.

Apportionment

In 1978, the IJC recommended a formula for a basinwide 50/50 apportionment. This apportionment would entitle the United States to sixty percent of the waters of all streams in the basin crossing the border, except the East Fork. Depending on the flows at a point on the project-unaffected Middle Fork during March, April and May of each year, Canada would retain rights to seventy to eighty percent of natural

annual flows of the East Fork at the border. This apportionment would allow Saskatchewan enough water for a 600-MW power plant without depriving Montanans of their existing water uses. The IJC formally recommended that this apportionment be the subject of an international agreement in 1978. As of 1984, this recommendation has not been implemented, although it has been voluntarily complied with during the past several years.

The IJC's International Poplar River Water Quality Board recommended that a two day release occur five out of every ten years.¹ The rate of release was suggested at 700 cubic feet per second (cfs) and its purpose was to help preserve fish habitat downstream. The IJC did not include such releases among its final recommendations. Now, the only such releases occur from spillage resulting from extremely high spring flows.

The walleye fishery is disappearing in the East Fork, according to a Montana Department of Fish, Wildlife, and Parks official.² These fish have not had good reproduction years because of low stream flows. This outcome is not directly attributable to the Poplar River Project because a similar but less severe problem is occurring in the Middle Fork. Northern Pike are faring better than the walleye in both streams.

Groundwater would be another important consideration in an apportionment agreement. If Montana's purpose in seeking an apportionment is to make it more difficult to build additional units at the Poplar River site, it should certainly be interested in determining if cooling and circulation water needs could be met by using groundwater. Saskatchewan has never discussed the possibility of using

groundwater supplies to meet those needs. Nor did the IJC give this possibility any consideration.

Coal seam aquifer dewatering is taking place to facilitate strip mining, and the SPC is indirectly making use of this water in its power plant. Groundwater will continue to be pumped out of this aquifer for the thirty-five year life of the mine into Girard Creek, which flows into Cooksen Reservoir. The IJC predicted coal seam aquifer dewatering will lower the groundwater level by .7 meters at the international border after thirty-five years.³ Given the minor significance of this impact compared with the complexity of including groundwater in the apportionment, it might be best not to complicate an apportionment by including groundwater as part of it.

Water Quality

Canada agreed to a new reference to the IJC on Poplar River water quality in 1978. One of the most significant results of this reference was a change in the design of the project's ash lagoon system. A 1979 interim IJC report noted problems with the planned system, so SPC redesigned the system so that water would not be allowed back into Cooksen Reservoir. Furthermore, lagoons were lined with two feet of compacted till.

In 1981, the IJC recommended that border water quality objectives be established for boron and total dissolved solids (TDS) to ensure that existing water users in Montana would not be significantly affected. Determining exactly what those objectives should be consumed a great deal of the IJC's time in this dispute, and of all the IJC recommendations, most observers agree that this is the area where

Montanans fared the worst. The primary problem was the lack of data on background surface water quality. Monitoring on the Montana side of the border did not begin in earnest until 1975--about the same time construction of the dam began. Data therefore may have been distorted. Much of the information on background water quality was extrapolated on the basis of these and other samples taken from elsewhere in the basin.

The toxicity of boron in irrigation water for certain crops was at that time a hotly debated issue. The experts who were called in seemed to contradict one another. Because barley (a crop particularly sensitive to boron) had never been irrigated in any appreciable quantity in the basin, and because background data indicated that natural water quality might have violated standards imposed for the protection of that crop, the IJC did not feel it could justify more stringent objectives than the following:

- a) for boron during the March to October period, the long-term average of the flow-weighted concentrations should be 2.5 milligrams per liter or less in the East Fork at the international boundary, with a maximum flow-weighted concentration not to exceed 3.5 milligrams per liter for any three consecutive months during this period; and
- b) for TDS during the March to October period, the long-term average of the flow-weighted concentrations should be 1000 milligrams per liter or less in the East Fork at the international boundary, with a maximum flow-weighted concentration not to exceed 1500 milligrams per liter for any three consecutive months during this period.⁴

Long-term concentrations are recommended to be calculated as five-year rolling averages based on mean monthly flows. To know if these objectives are being met, water samples must be taken at intervals of not more than thirty-one days during the March to October

period. Sampling under the bilateral monitoring arrangement has not always met this requirement. Available results to date indicate that water quality has been safely within these objectives.

Bilateral Claims Commission

Another recommendation was included for the creation of a bilateral claims commission to consider damage claims and award compensation for substantial, demonstrable injuries should they occur. This recommendation was made largely because the IJC viewed proposed mitigation measures as economically unjustified, but a contingency for compensation of unforeseen damages as wise. The IJC declared that the SPC should accept that paying compensation for such damages is a necessary cost of doing business in this border area.

Years from now, ash lagoon seepage extremely high in boron and TDS will flow toward and with the East Fork, perhaps as far as the Scobey, Montana municipal water supply. While the rate of seepage is expected to be lower than two liters per second, the potential still exists for long-term surface and groundwater contamination downstream. If monitoring piezometers indicate that seepage is exceeding that rate, SPC must submit a mitigation plan to the Department of Environment under terms of the provincial license granted for ash lagoon operation.

The other major fear of damages is from air pollution. Any future Poplar River agreement should avoid directly addressing the air quality question, as this issue has been subsumed by the separate and much larger negotiations for a comprehensive U.S.-Canadian air quality treaty. A bilateral claims commission or its equivalent should have the mandate to consider damages from air pollution.

It might prove too difficult to work out a special legal regime for such a commission. Saskatchewan responded coldly to the idea. One official indicated that the commission might pay more to its members than for damages.⁵ The IJC suggested that the term of this commission should be temporary, perhaps five years. But environmental damages might not accrue until well after this period.

A potential alternative is to persuade Saskatchewan to adopt the Uniform Transboundary Pollution Reciprocal Access Act,⁶ (UTBPRAA) as Montana did in its 1983 legislative session. This act allows access to foreign courts for damages resulting from pollution emanating from those jurisdictions. It does this by entitling persons suffering damages from pollution from foreign jurisdictions to the same rights to civil remedies as residents of that jurisdiction. For example, persons suffering property damages in Montana as a result of the Poplar River Project would gain the right of Saskatchewan citizens to bring suit in Saskatchewan courts.

In effect, Saskatchewan enactment of the UTBPRAA would have the advantage of being permanent and enfranchising a greater number of U.S. citizens. It might have the disadvantage of providing fewer substantive rights of access to adjudication for compensation of damages than would a bilateral claims commission.

Whether or not assumption of these Canadian rights is a meaningful endowment is a good question. Without these rights, successful civil action to recover compensation for such damages is virtually impossible. With them, the chance of successful private legal action is still

unlikely. The rights of court access in Canada are not equivalent to those of U.S. citizens in their country.

The issue of standing in environmental law cases has not been resolved to the advantage of public interest groups in Canada as in the United States.⁷ Nor do Canadian courts allow class action suits to the extent prevalent in the U.S.⁸ Furthermore, environmental pollution standards are considered "criteria" in Saskatchewan, and are not enforceable through private civil action.⁹

Individuals might still be successful under the UTBPRAA at bringing individual private nuisance suits against the SPC for demonstrable damages. The difficulties of the nuisance approach to environmental protection, with issues likely to be made of causation, remoteness, and the extent of liability, are well documented.¹⁰ Thus, chances are really only slim at best, but slim chances are better than none at all.

Saskatchewan has noted that Montana citizens suffering damage already have rights under Article II of the Boundary Waters Treaty.¹¹ The fact is that no lawsuit has ever been attempted under this article in its seventy-five year history. Questions of sovereign immunity have precluded its use because, in a case like Poplar River, a plaintiff would have to sue the Canadian federal government and not the SPC. The very fact that the IJC included a recommendation for a bilateral claims commission raises a question as to the usefulness of Article II rights. In other studies of the issue of transboundary access for adjudication of pollution damages, the Organization for Economic Cooperation and Development¹² and the Joint Committee of the American and Canadian Bar Associations¹³ have recognized deficiencies in the

present U.S.-Canadian transboundary pollution private legal regime. Saskatchewan, by following Montana's lead, could initiate a series of state and provincial enactments of the UTBPRAA thus circumventing existing legal impediments.

Monitoring, Administration, and Miscellaneous Concerns

A comprehensive bilateral monitoring arrangement was adopted in 1980 to measure precisely the impacts that occurred from the project. Data are taken and exchanged on a quarterly basis, with federal, state, and provincial governments participating. This arrangement has no force as law, but has been very useful in alleviating fears. To the present, these data indicate that impacts have been no worse than anticipated, but some discrepancies with projections have been noted and are being closely watched.

The IJC apportionment report recommended that a Board of Control be established to administer the apportionment. The 1981 IJC water quality recommendations called for creation of a bilateral group to monitor water quality and review water quality objectives. Saskatchewan has expressed an aversion to creating large or complex administrative entities as part of the agreement.¹⁴ The Bilateral Monitoring Committee is already performing some of these functions, and could assume a role in computing required releases from Cooksen Reservoir. This would seem to be the obvious solution.

Each party to negotiation of an international agreement seeks to have it as binding on the other as possible while allowing as much flexibility as possible for itself. In future negotiations over Poplar River, Montana will likely seek an obligation as enduring and

unchangeable as possible. Saskatchewan will probably pursue a more flexible, open-ended type of arrangement. Typically, international agreements are amendable only if the process required to create them can be repeated to amend them.

Another common ingredient in these kinds of agreements is a mechanism for dispute settlement. One alternative is to automatically refer disputes for arbitration to the IJC under Article X of the Boundary Waters Treaty. Another alternative is to require mediation or arbitration by a neutral third party.

A final factor that Montana should be aware of is that if Saskatchewan expresses firm intentions of considering additional units at Poplar River, the IJC would automatically reactivate its studies under terms of the 1978 Poplar River Water Quality Reference. Thus, any new agreement need not contain similar contingency clauses.

The Status Quo

The Poplar River has now been the subject of international attention for nine years. The project has undergone significant changes since its initial design, including improvements in the ash lagoon and particulate air pollution controls. Most important, the project appears likely to remain a 600-MW facility through the near future, half the size initially planned.

Montana's Position

There is no doubt some Montanans are being injured, however slightly, by the Poplar River Project. The walleye fishery has all but disappeared on the East Fork. Plans to expand irrigation downstream

from Cooksen Reservoir have been set aside. Legally, this is not a recoverable damage, since no investments have been lost. Still, a severe opportunity cost has been incurred. Air pollution is an unmitigated concern. The Poplar River Project's smokestack continues to belch out extremely opaque smoke plumes and unabated gaseous sulphur emissions.

Some Montana citizens persist in their virulent bitterness toward Saskatchewan. Nothing will apparently satisfy some of these people short of the disappearance of the facility, an outcome which even they will admit is not going to happen. It may simply be too difficult to concede the tremendous effort and emotional investment spent in a battle they did not realize they had almost no chance of winning. Despite their feelings about the relatively minor value of the protections gained in comparison to the damages they allege are being done, their accomplishments are a remarkable achievement in the face of overwhelming odds. Instead of continuing to decry the inevitable, they should be shoring up the defense of what gains they have made by pursuing formal implementation of the IJC recommendations.

Saskatchewan's Position

Undisputably, this project is better because of international public scrutiny. Not all of the factors that contributed toward making this project acceptable are attributable to Montana's political influence, however. The most important of those factors are Saskatchewan's current electricity surplus and the costs of interbasin water transfer.

SPC's 1982 Rated Generating Capacity was 2,261 MW, and that system generated a net 9,755 million kilowatt-hours (KW.H).¹⁵ Those figures do not include the net 296-MW net capacity of the second Poplar River unit, which came on line in 1983, or the 252-MW capacity Nipawin Hydro Project on the Saskatchewan River scheduled to come on line in 1986. That will bring the total SPC generating capacity to 2,809 MW. Over 800 MW will be produced from hydro, 100 MW from internal combustion, and the remaining 1,900 MW from thermal. By SPC's power accounting, this system will be adequate to meet provincial needs into the early to mid-1990s.¹⁶

SPC's 1983 electricity demand forecast predicts a moderate rate of growth for the next twenty years. The compound annual percentage increase in electrical demand for the period 1983-2003 is predicted to be 2.49 percent, and for peak demand 2.6 percent.¹⁷ The following table illustrates the SPC forecast.¹⁸

Table 1. SPC electrical demand forecasts

	<u>1982</u>	<u>1988</u>	<u>1993</u>	<u>1998</u>	<u>2003</u>
Energy Requirement (million KW.H)	9,680	11,383	12,966	14,609	16,222
Peak Demand (MW)	1,800	2,165	2,473	2,779	3,086

In a discussion of confidence in these projections, SPC concedes a greater chance that these predictions are high than low.¹⁹

Table 2. Upside/Downside Risk of SPC Projections

	<u>1988</u>	<u>1993</u>	<u>2003</u>
Upside Risk (Chance forecast is low)	49%	33%	30%
Downside Risk (Chance forecast is high)	51%	67%	70%

It takes less time for SPC in Saskatchewan than Montana Power Company in Montana to build new electricity generating facilities. Assuming its forecasts are correct and using SPC's estimated necessary lead time of seven years, it will probably seek licensure of another 250 to 300-MW facility by 1986-87.

Field studies have been conducted for a potential lignite-fired generating facility near Lake Diefenbaker and near Gravelbourg or Courval in the Wood River Basin. Preliminary studies have also been completed for a new thermal station at Regina. According to the 1982 SPC Financial Report, adding units to the Poplar River Project is also considered an option. Preliminary assessments carried out in the Estevan area concluded that further development of thermal generation there is feasible, and more detailed studies are currently being undertaken.

At present, Estevan appears to be the most likely candidate for immediate development. If an inexpensive source of water were considered available at the Poplar River site, it would be more economical. Water sources that have been mentioned include interbasin transfers from Lake Diefenbaker, the Wood River, and the Middle Fork of the Poplar. Interbasin transfers from the latter would be antithetical to the IJC recommended apportionment. Getting additional water from outside the Poplar River Basin might increase flows into Montana, but this benefit would have to be weighed against further degradation of water and air quality from a larger facility.

There may never be a better time to seek agreement from Saskatchewan on implementation of the IJC apportionment. The province

has identified several potential alternatives to Poplar River units. The urgency Saskatchewan expressed in the past for constructing new facilities has dissipated, as evidenced by the slow growth in electrical demand SPC has projected. Given the costs of interbasin transfer and the likelihood of another international dispute over appropriation of Middle Fork water, Saskatchewan may be discouraged from further development of the Poplar River Project. Still, the province remains concerned over the apportionment recommended by the IJC.

Discussions with Saskatchewan Department of the Environment officials indicate that they are formulating a position on the apportionment, although this objective has not been made a staff priority. Some renegotiation of the apportionment formula may be requested, based on two concerns.²⁰

First, they feel that there is some question as to whether or not water levels in Cooksen Reservoir would be sufficient for operation of both 300-MW units under conditions in which a dry summer follows by a large freshet that required the maximum demand release. Based on the record of historical flows, the Poplar River Task Force concluded that the recommended apportionment would allow one 300-MW unit to operate at all times and a second unit to operate ninety-seven percent of the time.²¹ The IJC recognized that there could be rare instances of inadequate water levels in Cooksen Reservoir for continuous operation of a 600-MW facility, but felt that this concession was tolerable, given the fact that these power plants are not engineered to operate on a continuous basis. SPC could schedule maintenance downtime during periods of water conservation in dry years.

During hearings on the IJC apportionment report, Saskatchewan made a counterproposal for calculating base flows and demand releases based on the average flows of the East Fork of the five previous years instead of the spring flow of the Middle Fork of the current year. As the IJC pointed out, averaging flows distorts the reality of the Poplar River Basin. In fact, annual flows approximating the average are anomalies. Typically, annual flows fluctuate between several fairly dry years and an occasional extremely wet year. The IJC rejected this proposal because it would essentially eliminate the largest demand releases and work to the advantage of Saskatchewan. In response to this question, the IJC's subsidiary International Souris-Red Rivers Engineering Board found that if the Saskatchewan counterproposal had been employed over the historical record of annual boundary flows, Saskatchewan would have been entitled to fifty-nine percent of the total basinwide flows.²² Montana should be aware of the problems with using averages as indicators of the nature of flows in the Poplar River Basin. Further stabilization of flows would be detrimental to the fishery downstream and, under this proposal, decrease flows to irrigators over the long term.

A second Saskatchewan concern emerged in the winter of 1982, when for a short time Saskatchewan was unable to deliver the required base flow on the East Poplar River. The reason given was that severe icing did not allow released flows to immediately reach the boundary. Icing also poses a recurring hazard to Canadian bridges and roads. Saskatchewan may request that the agreement allow temporary cessation of base flows if similar circumstances occur. Saskatchewan

officials will likely argue that the water is not needed downstream under those circumstances anyway.

According to provisions in the federal license issued for the East Poplar River Dam, its operation must comply with any findings of the IJC endorsed by governments. This license may give Montana some bargaining leverage, in that Saskatchewan has at least considered and tacitly accepted its ability to abide by the IJC apportionment. Whether or not the Canadian government would actually revoke this license for failure to comply with an agreement is questionable.

The Issue at Present

The IJC recommendations have not been formally implemented and they carry no legal authority. No one seriously argues that new negotiations will result in suggestions any better than those already made. People with experience in U.S.-Canadian environmental relations feel that the IJC recommendations are the best deal that the U.S. can expect and represent the greatest accommodation that Canada is likely to consider. Persistence in continuing to resist this conclusion will only adversely affect future relations between Saskatchewan and Montana.

As the aggrieved party, Montana bears the responsibility for proposing a settlement. Saskatchewan certainly feels no compulsion to foreclose its options. The province has lignite coal reserves in this area far in excess of that likely to be consumed in the thirty-five year life of the existing facility. Saskatchewan is currently experiencing an electricity glut, so its willingness to negotiate may never be higher. But without legal barriers, the province could again become enticed by the possibility of producing cheap electricity in this remote

area. It could choose to carry out its initial plans for a 1,200-MW facility, ignoring Montana concerns. Given the relative aloofness of federal officials when confronted by this potentiality (a minor problem when compared with other bilateral issues), the likelihood for unilateral action by the U.S. federal government is minimal. Montana's failure to initiate action toward a definitive solution to the Poplar issue would allow the opportunity to inhibit Saskatchewan development of the third and fourth units to lapse, and the potential for more serious damages to Montana residents of the basin to remain.

Montana should seek from the Canadian and Saskatchewan governments their commitment to continue to abide by the IJC recommendations. Specifically, Montana's objectives should be (1) an equitable apportionment; (2) acceptance of water quality objectives; (3) a mechanism for compensation of damages; and (4) administration and oversight mechanisms for the agreement.

As matters now stand, water management in the basin cannot move forward nor can water uses downstream of the international boundary be adequately protected. This paper next considers the ways to achieve a Canadian obligation on the utilization of Poplar River waters in which both sides receive some guarantees.

II.

PROFILE OF OPTIONS

The four general methods by which Poplar River objectives could be achieved are by treaty, exchange of diplomatic notes, state-provincial compact, and reciprocal legislation. Each has advantages and disadvantages. These options are described and compared below according to their relative costs, benefits, and risks associated with (1) intergovernmental considerations; (2) precedent for this agreement; (3) duration and complexity of the alternative processes; (4) binding force; (5) administration and funding; and (6) suitability for securing Montana's objectives. From this comparison, the state government may come to a decision based on the criteria it considers most important.

Treaty

A treaty is the most formal, most binding, and most symbolic method of securing an agreement between Canada and the U.S. In the United States, the treaty would be negotiated by the State Department on behalf of the executive branch; in Canada it would be negotiated by the Ministry of External Affairs on behalf of the government. In the U.S., a treaty would require confirmation by the Senate, representing the legislative branch. In Canada, no subsequent legislative approval would be required because of the parliamentary nature of the government system. Prior approval may be required from provincial governments, however.

Intergovernmental Considerations

Montana is completely dependent on political means to influence the substance of a treaty. These means include securing the good graces of the State Department and Montana's Senate delegation. There is the risk that, given their relative autonomy, the State Department and its counterpart agency, Canada's Department of External Affairs, will engage in some horse trading or "linkage," in which the Poplar River issue is resolved or held hostage based on actions taken on other bilateral issues. The State Department has superior expertise in formulating international agreements, but Montana may better understand what is important to U.S. citizens of the basin. Saskatchewan has greater influence in Canada on the treaty-making process than Montana exercises in the U.S.²³

Precedent

All permanent boundary and transboundary waters apportionment agreements the U.S. has engaged in have been treaties or articles of treaties. Precedent is a very important consideration for the State Department in choosing the form of agreement it will use.²⁴

Duration and Complexity of Process

Typically, U.S. treaty making is a very time-consuming and complex process, owing to the need for compliance with both the U.S. Constitution and international customary law. The Canadian process requires Saskatchewan approval in this case. There are several points at which the U.S.-Canadian treaty-making process can be disrupted by political controversy.

Binding Force

Treaties are the most solemn, most sacrosanct form of international agreement. Each side hopes the treaty will be more binding on the other party than itself, but each will probably have to settle for some compromise in which binding force and flexibility are equal for both sides. Canadian law requires treaties to be statutorily implemented if they are to be considered domestically enforceable. A Poplar River apportionment and water quality agreement would be enforced under existing Canadian water management and quality protection statutory regimes, but a vehicle for compensation of damages from transboundary pollution would require new legislative action.

Administration and Funding

Treaty administration is generally a federal responsibility. In boundary water treaties, a Board of Control typically is created as an adjunct of the IJC to provide administration. Such a board would be composed of U.S. and Canadian officials, and be funded by the federal governments. If preferred, the Bilateral Monitoring Committee could be designated as the entity responsible for administration of the agreement, thus maintaining Montana's present level of participation and funding responsibilities.

Securing Montana Objectives

A treaty would be the most suitable form of agreement for a permanent apportionment. It is also an appropriate vehicle for creation of a bilateral claims commission. The State Department considers treaties ill-suited for attainment of water quality objectives.

Exchange of Notes

An exchange of notes is similar to a treaty in several respects. The process is carried out by the State Department and External Affairs and binds the federal governments on behalf of the states and provinces. It may be as legally binding as a treaty, although it does not require Senate confirmation in the U.S. This modification makes it less symbolic, less publicized, and less or open to public scrutiny than a treaty. The choice between a treaty and an exchange of notes is sometimes a political decision by the State Department. If the State Department considers the proposed agreement to be a relatively routine matter, an exchange of notes may be preferable to a treaty. In other instances, the exchange of notes allows the Executive Branch to avoid potential roadblocks in Congress. If an agreement is fairly controversial, Congress may request the that agreement take the form of a treaty so that, whatever the results, the U.S. Government will have adequately considered its potential obligations. An exchange of notes can be substituted for the treaty as long as the subject of the exchange of notes falls under powers granted the president by the Constitution, or if the Congress has previously or will presumably grant the executive carte blanche powers to make the agreement.

Intergovernmental Considerations

The State Department maintains the same procedural control over exchange of notes agreements as treaties but, because it is a less formal mechanism, greater flexibility exists for more significant Montana involvement compared with a treaty. There is still the risk of linkage but, because there is less official inspection, Montana is more

apt to assume a status in the U.S. equivalent to that of Saskatchewan in Canada in relation to influencing the substance of the agreement.

Precedent

Exchange of notes agreements have been utilized to declare boundary water quality objectives and initiate surveillance activities. Diplomatic channels are frequently used by one country to persuade another to improve domestic water quality controls.²⁵

Duration and Complexity of Process

Once informal agreement is secured, implementation is fairly easy. Congressional approval is sometimes deemed necessary, but it is not likely to prove to be an impediment and usually it is secured after the agreement is well understood. The negotiation process is very similar to that for treaties.

Binding Force

Scholars disagree as to whether or not exchange of notes carry less obligation than treaties in international law. Both the U.S. and Canada treat them with equivalent weight as domestic law. Still, there is a pervasive feeling in both countries that treaties are more politically binding than exchange of notes agreements.

Administration and Funding

The exchange of notes alternative is more flexible in terms of allowing explicit participation by states and provinces. Of course, such participation carries with it a greater responsibility for funding.

Securing Montana Objectives

Past practice indicates that this option is best suited for agreement on water quality objectives. Exchange of notes may also accompany treaties by specifying dates and locations of ratification.

State-Provincial Compact

Only the federal government can enter into treaties but, under the Constitution, a state is allowed to enter into compacts or agreements with foreign governments. The compact is subject to the consent of Congress, however, and the process is far less certain of reaching a successful conclusion. On the Canadian side, provinces have been much more aggressive in asserting their claims to exercise joint authority with the federal government in international relations dealing with aspects of policy that fall under provincial jurisdiction. This is an intriguing but nebulous option.

Intergovernmental Considerations

Given the positive experience in both countries with the use of interstate and interprovincial water compacts, this option is worth considering as a method for finally resolving the Poplar River issue. It would allow Saskatchewan and Montana, with the guidance of federal governments, to move to the forefront of negotiations. Another benefit of demonstrating an interest in this option would be the potential for improving the state's overall quality of relations with its northern neighbors. The risk of this alternative is that the State Department might reject the state's attempt to reach such an agreement in a subject area traditionally governed by treaties. The State Department would

probably have greater clout before Congress on this issue than would Montana. Furthermore, Saskatchewan understands its advantage over Montana in respect to international agreements made by the federal governments. The province might also want to avoid a conflict with External Affairs on this issue. Montana would need enthusiastic support from Saskatchewan and at least tacit approval by the State Department and External Affairs for this to be a viable political alternative.

Precedent

There is precedent for interstate and interprovincial water compacts, but not for state-provincial river compacts. Informal state-provincial agreements on other subject areas are common, and provinces have received U.S. and Canadian permission to join some U.S. interstate compacts. A Poplar River apportionment compact would be unprecedented, although a good practical and legal argument can be made.²⁶

Duration and Complexity of Process

On one hand, a compact would allow for the most direct negotiation and, therefore, be less time consuming and complex than federal level options. On the other hand, it requires the most legislative enactment (Congressional, State, and Provincial) and, as the most controversial option, would require significant effort by the state to defend against challenges from either federal government.

Binding Force

Once enacted by the Montana Legislature and Saskatchewan Legislative Assembly, the compact would be as enforceable as any other

state or provincial statute. The compact also assumes the stature of U.S. federal law when consented to by Congress.

Administration and Funding

Montana and Saskatchewan could assume greater control over administration and funding of a compact. They could also maintain the present Bilateral Monitoring Committee, with federal representation, as a sign of deference to the federal governments and as a means of avoiding full funding responsibilities.

Securing Montana Objectives

A compact could obtain the same objectives as a treaty and, perhaps, additional water quality objectives. The benefit of removing the possibility of linkage must be weighed against the risk of incurring the State Department's opposition.

Reciprocal Legislation

Montana and Saskatchewan could negotiate a settlement incorporating some of the IJC recommendation without explicit federal approval. However, these negotiations could address only matters under their competence within their respective federal systems. For example, no agreement on water quality or air quality could preclude the U.S. Environmental Protection Agency's jurisdiction. The best example of a subject for reciprocal legislation is in the area of compensation of transboundary pollution damages. Specifically, this section considers the possibility of Saskatchewan choosing to enact the UTBPRAA.

Intergovernmental Considerations

Saskatchewan has expressed opposition to the IJC recommendation for a bilateral claims commission to consider damage claims arising out of pollution from the Poplar River Project. Montana could accede to the province in its opposition to such a commission in exchange for Saskatchewan enactment of the UTBPRAA. Obviously, the State Department plays no role in Montana's or Saskatchewan's legislative processes. It would be up to Montana to convince the province to pass this legislation.

Precedent

Montana is the only state that has passed the UTBPRAA. But other uniform acts are common to states and provinces. Saskatchewan may be interested in setting this precedent as a means for improving its image as a progressive government in the field of transboundary pollution.

Duration and Complexity of Process

This act needs only the endorsement of the Saskatchewan Cabinet. Saskatchewan's legislature meets annually.

Binding Force

This option transfers the question of enforcement of damage claims under the agreement from administrative agencies to the courts of competent jurisdiction.

Administration and Funding

Montana court officials could conceivably argue the need for budget

increases to compensate for increased case loads. Otherwise, there are no administrative costs after enactment.

Securing Montana Objectives

The UTBPRAA best meets the Montana objective for compensation of damages. It would be permanent, and apply to the length of the Saskatchewan boundary. A bilateral claims commission, according to the IJC recommendations, would be temporary and apply only to the Poplar River Basin. Bargaining for creation of a bilateral claims commission might be perceived as a push for punitive measures, while requesting passage of the UTBPRAA might more accurately be considered as a plea for fairness.

III.

SUGGESTED STRATEGY

None of the options may look very appealing on the surface. The treaty's greatest drawback is that the state and province are removed from much of the substantive decision-making. They become alienated from each other, and tend to assume more hostile, adversarial positions. This is a serious problem because Saskatchewan has the power to block an agreement. Also, the potential for linkage to stall or even wreck the agreement exists because federal governments, who bear responsibilities for such a large number of border issues, may not be able to isolate Poplar River from the rest of the agenda.

The compact alternative's weakness is the risk of political opposition (or at least intransigence) to an innovative and dramatic break with tradition. The State Department and External Affairs are likely to oppose efforts by Montana and Saskatchewan to implement a binding international agreement. The foreign relations agencies of the two federal governments tolerate state-provincial discussions only as long as encroachment into the legal mechanics of implementing agreements is avoided. This function lies at the core of the livelihood of each agency. Infringing on this responsibility might prompt severe protest. On the other hand, the State Department and External Affairs have been pragmatic in recognizing that they cannot forbid states and provinces from communicating with one another.

In view of these circumstances, a strategy is suggested which tries to integrate the best features of both options in the hope of avoiding their worst. The best aspect of the treaty option is its official status as binding law. The best feature of the compact option is that it brings the most affected parties into the forefront of negotiations. Montana should take advantage of the latitude allowed by the State Department to discuss and come to some informal agreement on the Poplar River with Saskatchewan. Then Montana can notify the State Department of the points of agreement and defer to its expertise to make the agreement "official."

The first step would be for Montana's governor to convey interest to Saskatchewan's premier in initiating informal, discreet discussions among key officials on the potential for a permanent Poplar River agreement. These should be unpublicized discussions until both sides get some better idea of the potential for agreement. The reasons for pursuing an agreement should be explained, as well as initial bargaining positions.

Montana's the initial negotiating position should be taken from the IJC recommendations, although some indication of flexibility should be conveyed. Montana should propose trading its desire for the bilateral claims commission for enactment of the UTBPRAA by Saskatchewan. While water quality protection is a federal responsibility in Canada, Saskatchewan should be persuaded to discuss those objectives proposed by the IJC. Use of the Bilateral Monitoring Committee to administer the agreement is also should be a point of discussion. Taken together, this

package should be seen as protecting the interests of U.S. citizens and as reasonable to expect from a responsible government entity.

After these discussions have taken place (successful or otherwise), Montana should request that the State Department conclude an agreement with Canada on the apportionment and its administration. It should also seek establishment of the water quality objectives by the Canadian federal government through diplomatic channels. The form of such a request should be a letter from the governor to the U.S. Secretary of State. If Montana-Saskatchewan discussions have been successful, the province may agree to present the same request to External Affairs. If the province rejects discussions, or if they seem to be leading nowhere, Montana can always fall back on the traditional treaty process and the State Department. There is no reason why this attempt should interfere with future State Department efforts in any way.

At this point, political support should be sought, particularly from citizens' organizations and legislators, at least those from the northeastern part of the state. A joint resolution by the Montana Legislature in support of a treaty would be appropriate. Montana's congressional delegation must also be enlisted early in this effort. In-state citizen support is very important when viewed from the federal level. The governor's office should do everything possible to get citizen support; presenting a united Montana position is crucial. Correspondence with some of these citizens indicates they would support implementation of the IJC recommendations.²⁷ This kind of support will help assure a quick State Department response to the governor's letter. In-state support can be strengthened by keeping interested parties

abreast of the State Department's actions and encouraging public pressure to be brought to bear. If Montana-Saskatchewan agreement has already been reached, External Affairs and the State Department are constrained from practicing linkage.

Montana's choice of either an exchange of notes or a treaty depends on the relative merits of quickly implementing an agreement versus the desirability of a more formal, solemn agreement. Perhaps Montana should simply defer this decision to the State Department as a sign of good will. Indications are that the State Department would go along with tradition and seek a treaty on Poplar River water apportionment.²⁸ This process may take longer but, given Saskatchewan's present electricity surplus, a year or two is available before time becomes a major concern.

The critical point in this strategy is the discussion with Saskatchewan. There are two ways Saskatchewan approval can be secured for any Poplar River agreement. The first, envisioned in this strategy, entails persuasion and bargaining by the parties primarily affected. The second is through coercion by higher level Canadian and U.S. powers. If presented with these options, Saskatchewan will likely choose to talk with Montana. Provincial reaction to federal coercion would be stronger resistance than that given to Montana persuasion. If this persuasion fails, Montana should be prepared to request the State Department to assume negotiating responsibilities. In any event, the state should take advantage of Saskatchewan's short-term energy situation by attempting to protect Montana's long-term interests.

APPENDICES

APPENDIX A

FEDERAL AGREEMENT-MAKING PROCESSES

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United States

The choice between a treaty or an exchange of notes legally resides with the U.S. State Department and the Canadian Ministry of External Affairs. Montana may approach the State Department with strong arguments for its preference, however. Because of Montana's preponderance of interest and given sufficient political gravity, the State Department would probably accede to Montana wishes unless it felt constrained by its own guidelines to do otherwise. In choosing between a treaty and exchange of notes, the State Department is to consider:

- a) the extent to which the agreement involves commitments or risks to the nation as a whole;
- b) whether the agreement is intended to affect state laws;
- c) whether the agreement can be given effect without the enactment of subsequent legislation by Congress;
- d) past U.S. practice with respect to similar agreements;
- e) the preference of Congress with respect to the particular type of agreement;
- f) the degree of formality desired for the agreement;
- g) the proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- h) the general international practice with respect to similar agreements.

The State Department's decision is discussed in a legal memorandum prepared by its Assistant Legal Advisor for Treaty Affairs. If there is any question about what form the agreement should take, consultations may be held with the Secretary of State and Congressional leaders. This legal memorandum also describes the reasons for seeking the agreement.

Once a decision on the form of agreement is made, the process for negotiation and signature--known as the Circular 175 procedure--is initiated. Prior to negotiation of any agreement on matters of substance, authorization must be received from the Secretary of State or his designate. A request for this authorization is known as an action memorandum. It may seek 1) authority to negotiate, 2) authority to sign, or 3) both. Action memoranda for treaties commonly seek separate authorizations for signature and negotiation, while exchange of notes commonly seek both at once. Action memoranda are cleared by the Office of Legal Advisor, Office of the Assistant Secretary for Treaty Affairs, and any other agencies that may have an interest in the subject. Action memoranda must indicate what plans are made for congressional consultations and public comment, and are accompanied through their rounds by the aforementioned legal memoranda.

Treaties

Treaties typically request separate authorizations for negotiation and signature. The formal document conferring authority to sign treaties is known as an "instrument of full powers" and the officer so designated is a "plenipotentiary." Before the agreement is signed, plenipotentiaries formally exchange their instruments of full powers.

Then, the treaty is signed and forwarded in the United States to the Assistant Legal Advisor's Office for safe keeping.

Signature by plenipotentiaries does not end the process of treaty creation, but merely recognizes a kind of preliminary gentlemen's agreement. Treaties must be ratified before they take effect and, in the U.S. they must be approved by two-thirds of the U.S. Senate before they can be ratified.

Treaties are accompanied to the Senate with a statement by the president and a report by the Secretary of State. They are referred to the Foreign Relations Committee, which holds hearings and, if the treaty is approved, submits a report. Once successfully past the committee, stage, a treaty is placed on the executive, not the legislative, calendar for Senate consideration.

Senate consideration of treaties is governed by Rule 37 of the Senate Rules of Procedure. This rule requires the Senate to first convene as a committee of the whole to consider amendments to the treaty article by article. The more common practice of the past forty years, however, has been to bypass the committee of the whole procedure by adopting a motion for suspension of this rule (which requires unanimous consent), and to proceed immediately to consideration of the resolution of ratification. At this stage, reservations or understandings may be attached to the end of the treaty. A simple majority is all that is needed to adopt such an amendment. The final vote affirming the resolution of ratification is the only vote requiring a two-thirds majority of those senators in attendance.

Reservations are intended to clarify the terms of a treaty or to reserve certain powers or subject areas from it. If reservations are amended to treaties, the foreign government must assent to their inclusion or the U.S. cannot ratify the treaty. Reservations have been rare since World War II.

Contrary to popular belief, the Senate does not "ratify" treaties. It merely grants consent to a treaty's ratification. Ratification takes place at a time and place provided for in the treaty or by an accompanying exchange of notes agreement. The president prepares an instrument of ratification, which is exchanged for a similar instrument prepared by the head of the foreign government. With this exchange and documentation of the authenticity of the instruments, a treaty is ratified. Then the president issues a Proclamation, similar to an executive order, and the treaty takes effect. Treaties are then published in a number of government documents and registered with the United Nations.

In this country, treaties are self-executing as supreme law of the land.³⁰ Unless a treaty contains a clause to the contrary, is inconsistent with the U.S. Constitution, or requires a specific obligation of the U.S. Treasury, no domestic legislation is necessary to give it legal effect. If the treaty requires no specific dollar obligations, funding for programs created by the treaty can be provided in regular program budgets, thereby avoiding the need for a special appropriations bill.

Exchange of Notes

Exchange of notes agreements typically request authorization for negotiation and signature in the same action memorandum. Once authority to negotiate and sign an exchange of notes agreement is conferred, the exchange takes place. The diplomatic notes contain simply a description of the understood agreement and notification of its acceptance. Typically, the resulting agreement takes effect on the receipt of the second note, or at a time specified in the agreement. The agreement is then reported to Congress as required by the Case Act,³¹ recorded in the Treaty and other International Agreement Series (TIAS), and registered with the United Nations.

Unless the subject of an exchange of notes agreement is within the constitutionally expressed foreign relations or national defense powers of the president, Congress must approve the agreement if it creates an obligation on the part of the United States. This is ritually accomplished by passage of a joint resolution, either before or after the agreement is made.

Summation

The treaty-making process is more complex than the exchange of notes process because of the need for compliance with both international custom and the U.S. Constitution. The exchange of notes process was originally employed only for agreements within the exclusive constitutional powers of the president. It is now commonly employed to circumvent the more rigid and time-consuming treaty process. The use of exchange of notes agreements has become an accepted procedure for those international transactions the Senate might find mundane. The exchange

of notes can be a much easier process, especially if it does not require the sanction of Congress. But treaties are still used for traditional subject areas and on agreements of the greatest international importance or requiring the highest degree of formality.

Canada

Canada recognizes no legal distinction between exchange of notes agreements and treaties. They imply equivalent obligations and differ only in terms of solemnity or formality. Exchange of notes agreements are frequently called "treaties in simplified form" or "informal treaties." The process of exchanging notes, designating plenipotentiaries, exchanging diplomatic instruments, etc., is the same as that of the United States. In Canada, the Minister of External Affairs, with approval of the Governor General, is vested with authority to attend to such responsibilities. International agreements do not require Parliament's consideration prior to ratification, but are ritually submitted to Parliament's scrutiny if they are deemed politically important. Approval of Parliament can be presumed if an agreement is submitted by the Cabinet.

There is a distinction in Canada between treaty-making and treaty implementation. Concluded agreements do not change domestic Canadian law unless implemented by statute. This situation might be further complicated by the dominion/provincial constitutional division of powers. If the subject area of an international agreement made by Canada since she assumed full sovereignty falls within the constitutional domain of the provinces, provincial legislation may be required to implement domestic treaty obligations.

Provincial involvement if not provincial legislation is required for transboundary waters agreements. Saskatchewan has a clear proprietary interest in the waters within its boundaries under the British North America Act (Canadian Constitution). The provinces have developed their own concepts of water law. Major water uses in Saskatchewan require a license from the Saskatchewan Minister of the Environment pursuant to the Saskatchewan Water Rights Act.³² These licenses may be cancelled at any time subject to a decision that the water can be put to a higher use (different uses are given rankings in the law), but any license cancellation requires compensation by the province.

The federal government has asserted primary responsibility over boundary and other waters as they apply to the Boundary Waters Treaty. Sec. 132 of the British North America Act grants the federal government the power to implement "obligations of Canada or any Province arising under Treaties between the Empire and foreign countries." This provision applies only to treaties made by Great Britain for Canada, and not to treaties made in Canada's own sovereign right. The latter was an eventuality the British North America Act of 1867 simply did not foresee. Thus, the Canadian constitution is silent about domestic responsibilities for implementing Canadian treaties. The famous Labour Conventions Case of 1937 declared that implementation of Canadian treaties is the responsibility of the governmental entity that otherwise has responsibility over the subject area of the treaty.³³ This decision has been abided by in Canada, although there have been frequent calls for revision.

The 1909 Boundary Waters Treaty is one of the few remaining empire treaties in Canada. An important question is whether or not an agreement on Poplar River water utilization would be considered a separate agreement made in Canada's own right, or if the Boundary Waters Treaty, as an empire treaty, grants the federal government preemptive powers to implement international agreements pertaining to boundary and transboundary waters. The general question of conflicting provincial and federal jurisdiction over international waters was referred by a 1929 Order in Council to the Canada Supreme Court.³⁴ The court firmly established the federal government's power to implement the Boundary Waters Treaty, but refused to answer specific questions over the relationship of federal and provincial authority as applied generically to boundary and transboundary waters. Instead, it declared that this relationship can be determined only after disclosure of the facts touching the terms of the treaty, the nature of the development, as well as the rights of the dominion and the province in regard to the particular waters.

The Boundary Waters Treaty does not prescribe or require the making of apportionment agreements, and clearly states that recommendations of the IJC under investigatory references are not to be considered enforceable unless the governments agree to make them so. A Poplar River agreement would therefore seem to be subject to the rules of treaty implementation laid down by the Labour Conventions Case. The federal government, however, appears to claim preemption in this field with the International River Improvements Act and the Canada Water Act.

The International River Improvements Act was passed in 1955,³⁵ when British Columbia began considering development alternatives on the Columbia River contrary to the preferences of the federal government.³⁶ It requires that improvements such as dams, locks, or canals associated with international rivers obtain a federal license before they can be constructed and operated. When this act was before Parliament, British Columbia argued that it was a serious threat to provincial water rights, but B.C. ultimately accepted the federal government's claim to a right to regulate works on international rivers that could affect property beyond national borders. This act eventually won easy approval and has never been challenged since. Neither, however, has a license applied for under this act ever been denied. It is conceivable that a dispute over the constitutionality of this act could reemerge.

The Poplar River Project was awarded a thirty-five year International River Improvement Act License for operation of Morrison Dam in 1980. Conditions of this license may be modified, but currently it requires Saskatchewan compliance with any future internationally agreed upon apportionment or water quality objectives.

Still, the major interests of the Province must be reckoned. There was a delay of three and one-half years in the ratification of the Columbia River Treaty as a result of British Columbia's insistence on more favorable terms (which it ultimately received). The Columbia River controversy resolved affirmatively the need for provincial/dominion accord before any international agreement is likely. Concerning developments on rivers that are international, Swainson states that the dominion and province, ". . . each have a share of competence within

which . . . [one] can checkmate the other."³⁷ Neither the federal government nor the province can force the other to accept a policy on development of such a river.

The Canada Water Act³⁸ contains a mechanism for achieving federal/provincial agreements on international water resource management. This act authorizes the Canada Minister of the Environment to enter into agreements with the provinces to create basin plans for international water utilization and water quality protection. These plans do not exist on all international streams and, in fact, have been attempted only after some obvious need has developed. Agreement to such a plan by a province allows the federal government to accept faithfully international obligations concerning such waters. The Saskatchewan Water Resources Act³⁹ authorizes the Saskatchewan Minister of the Environment to participate in such plans.

The Canada Water Act allows the Minister of the Environment to formulate a water management plan if the Governor General can be convinced that all reasonable efforts to reach an agreement with the province have failed and there is a significant national interest in the creation of such a plan. This provision is more a threat than a real possibility as the federal government is not likely to take such drastic action, especially on the Poplar River.

Saskatchewan could argue that there is no constitutionally assigned national interest in the Poplar River Basin. There is no significant question of Canadian navigation, fisheries, federal finance, or interprovincial or international commerce at stake here. These have been the traditional vehicles for federal intervention in international

waters disputes. Lacking these issues, the federal government is extremely unlikely to try to force an agreement on Saskatchewan. Instead, Canada will probably try to accommodate Saskatchewan as far as possible and, if necessary, take a fairly hard line bargaining position with the U.S. State Department.

The apportionment and water quality objectives of the international agreement would not require domestic legislation for implementation, but would be enforced administratively under the International River Improvements Act or the Canada Water Act. A bilateral claims commission, on the other hand, would require legislative enactment. As has been mentioned, Saskatchewan's response to questions about the creation of such a commission have not been favorable.

APPENDIX B

POTENTIAL FOR STATE-PROVINCIAL COMPACTS

POTENTIAL FOR STATE-PROVINCIAL COMPACTS

Montana and Saskatchewan have the alternative of directly seeking agreement on the Poplar River without the involvement of the federal governments. There are several good reasons for doing so, and others why the federal governments should let them. Unfortunately, this alternative also has some potentially serious drawbacks, primarily because it is innovative.

The U.S. Constitution forbids the states from concluding treaties,⁴⁰ but allows them to enter into compacts or agreements with foreign powers with Congressional consent.⁴¹ Provincial powers in foreign agreement-making are neither precluded nor sanctioned in Canadian law. Provincial powers in this regard have been strongly debated but remain undefined. Some provinces claim full treaty-making power.⁴² Most have chosen to defer formal treaty-making to the federal government, but commonly practice foreign agreement-making on subject areas that fall clearly within their sphere of jurisdiction. The possibility, exists, therefore, for a state-provincial river basin compact to the extent the state and province are competent to assume control over the issues that arise under it. Circumstances are such in the Poplar River case that the state and province are more competent than in most other transboundary waters cases.

The avoidance of linkage is one of the most important reasons that Montana and Saskatchewan have for pursuing this option. The Poplar River should not be allowed to become part of an elaborate deal

involving a broad range of problems, but instead resolved on the merits of its alternative solutions. Both Saskatchewan and Montana should prefer to conduct their own negotiations as the entities most directly affected and knowledgeable about what issues are most important in this particular basin. Face-to-face discussion between the directly interested parties will be far more efficient than working through the cumbersome lines of communication interconnecting Saskatchewan with External Affairs, External Affairs with the State Department, and the State Department with Montana. Given the already solid framework for agreement provided by the IJC recommendations, Montana and Saskatchewan positions should no longer be so far apart that they require insulation by federal intermediaries.

For instance, U.S. negotiators might see that continuing to allow Saskatchewan its freedom to determine the use of the Poplar River is one way to partially offset Canadian protests about acid rain. Or Canada might insist that it will do nothing about the Poplar River until something is done about acid rain by the United States. What might seem to be a fair exchange at the national level might not be fair to people closely involved in only one of the issues. The potential for linkage is an unknown variable. The State Department is at no time likely to freely divulge or publicly anticipate the possibility of linkage. Linkage may become inevitable, however, with the need for timely resolution of a myriad of border issues.

Federal governments should not feel threatened by allowing Montana and Saskatchewan to hold these negotiations. It gives them the opportunity to concentrate on issues more truly involving the national

interest. Federal governments will retain significant control over the outcome of these negotiations and, if no progress is made at the state-provincial level, negotiations can revert to the federal experts. Montana may also desire the advice and utilize the expertise of the State Department on tactics and strategy in negotiations with Canadians.

Federal responsibility for negotiations should not be presumed on the basis of the usual legal constitutional justifications in Canada. In the United States, the case for federal primacy has resulted from broad interpretation of the Commerce and Supremacy Clauses, as well as the treaty power. In the Poplar River Basin, Indian water rights to the Poplar River are also at stake. But the greatest roadblock to state-provincial settlement is tradition.

As already discussed, Saskatchewan has an especially good case for arguing that Canadian federal authority is limited. Montana's case depends on a favorable interpretation of the reasons why the forefathers included the possibility of a state-foreign power compact, the paucity of international commerce involved, and perhaps a favorable interpretation of the recent Adsit court decisions affirming state competence for adjudicating Indian water rights.

As a political matter, a state-provincial assumption of primary responsibility is in keeping with "New Federalism" in the United States and not out of line with "Cooperative Federalism" in Canada. Federal governments would retain their ability to assist with, oversee, and approve of any state-provincial agreement. The government of Canada exercises this authority under the Canada Water Act and its licensing authority under the International Rivers Improvements Act. The United

States government exercises this authority through congressional consent to the agreement, as well as a practical reliance on State Department expertise. Furthermore, Canada would probably insist upon an exchange of notes to verify national recognition of the agreement.

If the compact option is to be resurrected, is there more a likely candidate to use it than Montana, a state which borders on three provinces? The obvious answer is no. This approach would be a good way for Montana and Saskatchewan to repair any damage in their relationship that has resulted from the Poplar River Project.

Compact Procedure in the United States

The procedure for Montana to negotiate a compact is fairly open. The critical points are approval by Congress, recognition by the State Department, and implementation by Montana (although not necessarily in that order). Approval by Congress may be conferred either before or after the agreement is achieved but, in this case, Montana should first test the likelihood of that approval being given. It would be political suicide to announce that Montana had already achieved an agreement with Saskatchewan and now would like federal consent. As long as congressional consent is a potential impediment, any Montana actions taken beforehand might be a waste of time. Saskatchewan might consider this a reason not to take Montana seriously. The compact would require a majority vote in both houses, compared to the two-thirds vote of the Senate required for a treaty.

The State Department might not be very receptive to a state-provincial apportionment agreement. In response to inquiries on this subject, State Department officials simply did not address the

possibility and chose instead to assume that a federal agreement was the only option.⁴³ However, the arguments for the compact form of agreement were not refuted. Apparently, the question was considered too academic by the State Department officials for them to take the time needed to answer. Inquiries by the governor's office might prove more effective in provoking a response on the compact question.

The Montana Legislature must adopt the agreement if it is to assume the status of state law. While nothing can be presumed about the inclinations of that body, legislative approval should pose few problems, especially if Poplar River area legislators assist the governor's office in leading the initiatives.

Compact Process in Canada

The Saskatchewan Department of Intergovernmental Affairs Act allows agreements to be made with foreign governments on any subject of provincial interest.⁴⁴ The compact agreement would be the formal responsibility of the Saskatchewan Department of Intergovernmental Affairs, but the premier's office would initiate action.

In correspondence with Saskatchewan officials, it became apparent that they have not given much thought to this alternative. Saskatchewan appears ready to defer to the federal government's authority. The reason may be that the province wants to avoid a conflict over this relatively minor issue, or it could understand that it has a tactical advantage over Montana in going the more customary route of a treaty.

If the Canadian federal government becomes aware of foreign agreements made by provinces in areas of shared authority, it usually insists upon federal sanction for the agreement. This is

ritually accomplished through an exchange of notes agreement with its counterpart agency (here, the State Department) in the foreign government.

If Montana decides that it is truly interested in concluding a compact with Saskatchewan on the Poplar River, the governor should formally present the state's interest to the premier in a letter that includes the legal arguments and an outline of a proposed negotiating procedure. This should certainly prompt Saskatchewan to take its own hard look at this alternative. The roadblocks to a state-provincial compact are more political than legal in both countries. But while no major legal impediment to this option exists, attitudinal impediments may be just as important in precluding the compact procedure.

APPENDIX C

PRECEDENTS IN U.S.-CANADIAN AGREEMENT-MAKING

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Treaty

Treaties are the prevailing form of agreements on boundary and transboundary waters. Good examples are Article VI of the 1909 Boundary Waters Treaty pertaining to an apportionment of the Milk and St. Mary Rivers,⁴⁵ a 1925 Convention Regulating Levels of the Lake of the Woods,⁴⁶ a 1938 Convention Regulating the Levels of Rainy Lake,⁴⁷ the 1950 Niagara River Treaty,⁴⁸ and the 1964 Columbia River Treaty.⁴⁹ Also, a comprehensive transboundary waters treaty was concluded with Mexico containing provisions regulating international deliveries of water in the Rio Grande, Colorado, and Tijuana Rivers.⁵⁰ A treaty has been deemed necessary to implement an agreement between Seattle and British Columbia on the Skagit River pertaining to a dam potentially backing water into B.C.⁵¹ This precedent might be useful to Montana as recent agreement implemented by the federal governments.

None of these have much in common with the Poplar River. The Columbia and Colorado are transboundary rivers, but they contain much more water and portray more easily recognizable national interests. Most of the others pertain to boundary waters. The Milk-St. Mary apportionment is seventy-five years old and it is only a minor part of the Boundary Waters Treaty. These precedents need not logically dictate a treaty in the Poplar River case, especially if significant differences in amounts and circumstances of flows are considered important. There

boundary with Canada. A good argument can be made that a treaty should not be required if it becomes necessary to conclude binding agreements on a greater number of these. Some less formal, less complex system for international agreement seems warranted where the water interests at stake are more "local" than "national."

Exchange of Notes

Protection of freshwater quality in basins shared by Canada and the United States has usually been attempted with non-binding agreements or by exerting political pressure through diplomatic channels to improve water quality regulation within that country's normal domestic procedures. Examples of non-binding agreements are the 1972⁵² and 1978 Great Lakes Water Quality Agreements⁵³ and the 1972 Agreement for Creation of a Committee on Water Quality in the St. John River Basin.⁵⁴ The Great Lakes Water Quality Agreements were very formal and much publicized. In fact, the 1972 agreement was signed by President Nixon and Prime Minister Trudeau. The 1978 agreement superseded the 1972 agreement and extended coverage to the Upper Lakes. The focus of both of these agreements was to create special committees to conduct research, monitor water quality, and recommend water quality objectives and general policy to governments. These recommendations carry no legal imperative, however. Affected state governments and the province of Ontario perform consultative functions within the agreements and are represented on an advisory board. What has been accomplished in cleaning up the Great Lakes has been the result of political response and not the creation of a special legal regime.

The St. John's River agreement was accomplished through an exchange of notes. The committee created by this agreement is composed of federal, state, provincial, and regional planning commission officials. It serves primarily for the exchange of information and coordination of planning, and reports annually to relevant authorities on both sides of the boundary.

State-Provincial Compact

There have been cases of state-provincial compacts and other less formal types of agreements. None of these has been a water apportionment agreement, however.

A fisheries agreement pertaining to Lake Ontario among Michigan, Pennsylvania, Ohio and Ontario was in force between 1930 and 1937.⁵⁵ A compact for the St. Lawrence Seaway Project was proposed in the early 1950s and it was seen by many as the event which finally forced federal action on this matter.⁵⁶ A recent Michigan-Ontario arrangement established integrated air pollution control in the Detroit, Windsor, Sarnia and Port Huron area.⁵⁷ Agreements for construction of bridges and roads in isolated border areas are almost commonplace.⁵⁸

In 1970, Congress consented to Quebec and New Brunswick joining as members of the Northeastern Interstate Forest Fire Protection Compact, an organization formerly consisting only of states.⁵⁹ The Canadian federal government expressed its recognition in an exchange of notes. U.S. compacts on vehicle registration have also had the participation of some provinces.⁶⁰

State-provincial agreements are not novel in and of themselves, but a river apportionment has not been the subject of such an agreement.

The federal governments have not presented a credible legal reason why this cannot happen. They simply have not been pushed into this kind of legal inquiry. In fact, it seems that the Poplar River case might be just the kind of situation the U.S. Constitution's framers had in mind when they included foreign powers as prospective participants in compacts.

NOTES

1. International Poplar River Water Quality Board, International Poplar River Water Quality Study, Main Report, p. xi.
2. Telephone Conversation with Phil Stewart, Fisheries Biologist with the Montana Department of Fish, Wildlife, and Parks, 12/15/83.
3. U.S Environmental Protection Agency, Impact of Canadian Power Plant Development and Flow Apportionment on the Poplar River Basin, Final EIS, June 1981, p. 12.
4. International Joint Commission, Report to Governments on Water Quality in the Poplar River Basin, January 1981, p. xvi.
5. Letter from Alan Carr, Deputy Minister, Saskatchewan Department of the Environment, March 2, 1984.
6. 75-16-101 through 109, MCA (1983).
7. Roman, Andrew J., "Locus Standi: A Cure in Search of a Disease," in Environmental Rights in Canada (John Swaigen, ed.), Toronto: Butterworth's, 1981.
8. Chester, Simon, "Class Actions to Protect the Environment: A Real Weapon or Another Lawyer's Word Game," in Environmental Rights in Canada, loc. cit.
9. Carroll, John E., "Differences in the Environmental Regulatory Climate of Canada and the United States," 4 Canadian Water Resources Journal (1979), p. 16.
10. Mingst, Karen A., "Evaluating Public and Private Approaches to International Solutions to acid Rain Pollution," 22 Natural Resources Journal (January 1982), p. 5.
11. The cited section of Art. II reads:

" . . . it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs;"

In implementing this article of the treaty, jurisdiction over this article was assigned to the Exchequer Court of Canada. This court was subsequently reorganized as the Federal Court of Canada, and hears claims only against the federal purse. In other words, any suit filed under Art. II must be brought against the federal government and not the actual perpetrator.

12. Organization for Economic Cooperation and Development, "Recommendation of the Council for Implementation of a Regime of Equal Rights of Access and Non-Discrimination in Relation to Trans-Frontier Pollution," May, 1977.
13. ABA-Can. BA, "Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution," Settlement of International Disputes Between Canada and the USA, Washington, D.C., 1979.
14. Carr letter, Supra at 5.
15. SPC 1982 Annual Financial Report, p. 21.
16. Ibid. at 29.
17. The figures are from "Electrical Energy and Natural Gas Requirements 1983-2003," Unpublished SPC Document, February 1983, p. 1.
18. Ibid. at Table 18 on p. 44.
19. Ibid. at Table 19 on p. 45.
20. Telephone conversation with Dave Richards, Hydrology Branch, Saskatchewan Department of the Environment, November 7, 1983.
21. International Joint Commission, Report to Governments on Water Apportionment in the Poplar River Basin, 1978, p. 67.
22. Ibid. at 50.
23. See pp. 42-46, Appendix A.
24. See text accompanying note 29.
25. See pp. 57-58, Appendix C.
26. See pp. 49-52, Appendix B.
27. Discussion with Ken Lee, DVM, Scobey, MT; Bill Tande, Daniels County Commissioner; Phil Robeson, Three Corners Boundary Association Staff; and Dennis Unsworth, Northern Plains Resource Council Staff, Helena.
28. Letter from Timothy Wirth, Assistant Legal Advisor, U.S. Department of State, Feb. 27, 1984.

29. 11 Foreign Affairs Manual 721.3.
30. Art. II, Sec. 2, U.S. Constitution.
31. The Case Act is 1 USC 112(b), and regulations implementing it are 22 CFS 181.1 through 181.7.
32. Statutes of Saskatchewan, Chap. W-7.
33. Attorney General of Canada v. Attorney General of Ontario, Appeal Case 326, 1937. It was in this case that Lord Atkin coined the "watertight compartments in the ship of state" metaphor to describe Canadian federalism.
34. Reference Re Waters and Water Powers, Supreme Court of Canada (1929), SCR 200.
35. Revised Statutes of Canada (RSC), 1970, Chap. I-22.
36. The best historical account of the Columbia River Treaty is by Neil Swainson, Conflict Over the Columbia, Montreal: McGill-Queen's U. Press, 1979.
37. Ibid. at 27.
38. RSC, c. 5 (1st Supplement).
39. Statutes of Saskatchewan, Chap. W-6.
40. Art. 10(a), U.S. Constitution.
41. Art. 10(b), U.S. Constitution.
42. In particular Quebec. See Jacomy-Millette, Treaty Law in Canada, Ottawa: University of Ottawa Press, 1975.
43. Wirth letter, Supra at 24.
44. Statutes of Saskatchewan, Chap. D-18.
45. Article VI, Treaty Series no. 548.
46. Treaty Series No. 721.
47. Treaty Series No. 961.
48. Treaty and other International Agreements Series (TIAS) No. 2130.
49. TIAS No. 5638
50. Treaty Series No. 994.

51. Paul Marshall Parker, "High Ross Dam: The International Joint Commission Takes a Hard Look at the Environmental Consequences of Hydroelectric Power Generation-The 1982 Supplementary Order," 58 Washington Law Review 457 (1983).
52. TIAS No. 7312.
53. TIAS No. 9257.
54. TIAS No. 7470.
55. Gottlieb, Allan E., Canadian Treaty-Making, Toronto: Butterworth's, 1968.
56. Council of State Governments, Interstate Compacts 1783-1977 (a Revised Compilation), Lexington, KY: CSG, 1977.
57. Bothe, Michael, "Local Cooperation on Transfrontier Environmental Problems," in Environmental Protection in Frontier Regions, Paris: Organization for Economic Cooperation and Development, 1979.
58. Atkey, Roland, "The Role of the Provinces in International Affairs," 26 International Journal (1970), p. 249. In fact, the 1972 International Bridge Act specifically gives consent to a state or subdivision thereof to "enter into agreements with the Government of Canada, a Canadian Province, or a subdivision or instrumentality of either, in the case of a bridge connecting the United States and Canada." Public Law 92-434, Section 3.
59. TIAS No. 6825.
60. Council of State Governments, *Supra* at 56.

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